

A photograph of three business professionals (two men and one woman) sitting around a table in a modern office or cafe at night. They are looking at laptops and talking. The scene is lit with warm indoor lights, and the background shows a city view through large windows. The word 'geldards' is overlaid in the top right corner.

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Companies and Local Authority Involvement

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Agenda

- Establishment and use of companies by local authorities
- Governance arrangements
- Managing the role of company director and local authority officer or member
- Code of conduct
- Decision making
- Access to and use of information
- Directors Duties

Why use companies

- Limited liability
- Access to resources
- Separate entity
- Collaborating with other local authorities and other persons
- Familiar model for service delivery

Establishing a company - issues to consider

- Appreciation of risks involved
- Understanding of company's financial position
- Sector and general commercial expertise
- Strength of governance arrangements
- Roles of members and officers
- Need for training
- Importance of effective monitoring

Importance of addressing the issues

- Public interest report on a local authority's governance arrangements for involvement in a company:
 - “A successful relationship between a local authority and its subsidiary companies relies on achieving an appropriate balance between the authority on the one hand being sufficiently involved to hold the company to account and on the other hand giving it freedom to manage itself.”
 - “As with all the legal powers which local authorities are given, the power to invest in companies needs to be exercised reasonably, balancing the costs and risks against the benefits to local people and the local area.”

Governance

- Company governance structure depends on how formed: Companies Acts/Royal Charter/Statutory corporations
- Day-to-day management vested in board of directors
- Delegation to employees
- Shareholder residual powers under Companies Acts, articles and any agreements

Governance – the Council's involvement

- What level of control or influence does your authority have over the company?
- Is this understood and accepted within the authority?
- Is the company complying with requirements associated with local authority control or influence?
- Is the local authority well informed about the activities of the company?

Managing roles

- Director's duties
- Public law duties
- Is there potential for tension between them?
- Do you understand sector specific issues relevant to the company?
- Will you find it difficult to promote the success of the company if you think its actions do not promote your local authority's priorities?

Codes of Conduct

- Member Code of Conduct
- Officer Code of Conduct

Potential areas of difficulty

- Interests
- Decision Making
- Access to information

Interests

- Disclosable pecuniary interests
- Other Interests
- Restrictions on participation in business of the local authority

Decision Making

- Decision makers must have open minds
- Conflicts of interests
 - Separation of functions
- Need to take account of all relevant matters
 - Risk of excessive focus on issues of importance to a company
- Bias or predetermination

Access to and use of information

- Council's transparency obligations
- Public access to meetings and documents
- Public right to request information
- Public right to request accounts

Capacity in which information is received

- Important for officers and members to be clear about the capacity in which they receive information
- Imposing practical conditions on availability of information can help to maintain confidentiality
- Information available to officers and members to enable them to discharge functions is not available for other purposes

Directors Duties

- Statutory code of duties
 - Companies Act 2006
- Fiduciary duties and responsibilities
- Other responsibilities
 - Tort
 - Contract

Companies Act 2006

- Seven general duties
- Duty to act within powers – Section 171
- Duty to promote the success of the company – Section 172
- Duty to exercise independent judgement – Section 173
- Duty to exercise reasonable care, skill and diligence – Section 174

Companies Act 2006

- Duty to avoid conflicts of interest – Section 175
- Duty not to accept benefits from third parties – Section 176
- Duty to declare interest in proposed transaction or arrangement – Section 177

Nature of duties

- Owed by all directors, whether executive or non-executive, de jure or de facto, and (where capable of applying) shadow directors
- Owed to the company (and enforceable by the company), not to shareholders directly
- Duration – some duties continue to apply after resignation

Nature of duties

- Duties are cumulative, so more than one duty may apply in a given situation
- Can be extended by company's constitution, e.g. shareholder consent matters

Duty to act within powers

- Act within powers
- Exercise powers for proper purpose
- Acts outside powers are not capable of authorisation by shareholders
- Acts within powers but potentially for improper purposes can be authorised

Duty to promote success of company

- Subject to creditors' interests in insolvency
- Applies to all director decisions, not just formal board meetings
- Factors are not exhaustive
- What does “success” mean?
- Usually judged subjectively, unless (objectively) a reasonable director could not have concluded that it would promote success
- Does this include the future shareholders?
- Documenting compliance

Duty to promote success of company

Authorisation by shareholders is possible if:

- Full disclosure has been made
- Conduct is lawful
- Company is solvent

Duty to exercise independent judgement

- Directors must not fetter their decision-making
- The duty will not be breached where authorised by articles of association or is in accordance with an agreement between company and third party

Authorisation by shareholders is possible if:

- Full disclosure has been made
- Conduct is lawful

Duty to act with reasonable care, skill and diligence

- Objective element expected of all directors
- Subjective element where director has special skill or knowledge
- Authorisation possible in theory, but unusual and also unhelpful in any future disqualification proceedings

Duty to avoid conflicts of interest

- Continues to apply post-termination – often the most contentious point
- Does not extend to transactions or arrangements with the company
- Authorisation by directors may be possible
- Authorisation by shareholders if there has been full disclosure
- Sometimes addressed up-front in articles of association, so that certain types of conflict are approved

Duty not to accept benefits from third parties

- Continues to apply post-termination
- Authorisation by shareholders if there has been full disclosure

Duty to declare interest in transaction

- Duty to declare interests in transactions or arrangements with the company
- The director may be “interested” even if not be a party to the arrangement
- Specific declaration or general declaration
- Authorisation possible but unusual – bad governance not to declare interests

Fiduciary duty of confidentiality

- Requirement to keep company information confidential
- The duty can be modified or controlled by:
 - agreement between the company and the director, e.g. in the articles, employment contract, appointment letter
 - disclosure to the board and consent

Remedies for breach of duty

- Damages
- Injunction
- Setting aside the transaction
- Account of profits
- Restoration of company property
- Director disqualification

Relief from liability

- Ratification by shareholders
- Power of court to grant relief
- Indemnity from company or shareholder
- Director and officer liability insurance

Complying with directors duties – practical actions

- Ensure you understand directors' duties
- Ensure you understand the company's articles of association
- Ensure you have relevant knowledge and expertise for the activities of the company
- Recognise potential for conflicts of interest and avoid them
- Monitor your compliance

Questions

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Thank You

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