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DIRECTORS' DUTIES

Debra Thompson

Much has been made in recent times about appointments of directors, resignations of directors and changes to various boards. A director, in relation to a Company, can be an individual or a body corporate and includes a person occupying the position of a director by whatever title he is called.

What then are the duties of a director?

The Companies Act Ch 81:01 dictates that in discharging his fiduciary duties every director must act honestly and in good faith with a view to the best interest of the Company.

That duty must be exercised with the diligence and skill that a reasonably prudent person would exercise in comparable circumstances. As such, a director doing something which he is entitled to do but doing it without being prudent, diligent or without exercising appropriate skill could very well constitute a breach of duty for a job not well done.

In determining what are the best interests of a Company, a director must have regard to both the interests of the employees in general and to the interests of its shareholders. A director must also ensure compliance with the Company's Articles of Incorporation, Bye-Laws and any unanimous shareholders agreement (which may in whole or part restrict the powers of the directors to manage the business and affairs of the Company), save that no provision in a contract, Articles of the company, Bye-Laws or any resolution relieves a director from his/ her duty to act in accordance with the legislation.

Being present at a meeting of the directors in which any resolution is passed or taken will be attributable to a director who was present at the meeting unless he requests that his dissent be or is entered in the minutes of the meeting, sends a written dissent to the secretary of the meeting before the meeting is adjourned or sends his dissent by registered post or delivers it to the registered office of the Company immediately after the meeting is adjourned.

Moreover, a director who was not present at a meeting at which a resolution was adopted, or action taken is also presumed to have consented thereto unless within 21 days after he becomes aware of the resolution, he causes a dissent to be placed in the minutes of the meeting or sends his dissent by registered mail or delivers it to the registered office of the Company.

The duties of a director include (subject to the Articles or Bye-Laws or any unanimous shareholders agreement) fixing the remuneration of the officers and employees of the company and requires directors to call an annual meeting of shareholders not later than 18 months after the company comes into existence and subsequently not later than 15 months after holding the last preceding annual meeting.

It is the duty of the directors of a Company to place comparative financial statements before the shareholders at each annual meeting and to approve a copy of the financial statements of each of its subsidiary bodies corporate, the accounts of which are consolidated in the financial statement of the Company. Nonetheless, in doing so a director is not liable if he relies upon the financial statements of the

(cont'd on page 3)

CONTENTS

DATA IS RISKY BUSINESS

Beware of Rogue Employees

Mukta Balroop

In the recent UK case of *WM Morrison Supermarkets plc v Various Claimants [2018] EWCA Civ 2339* an employer was found legally liable after the personal and confidential data of thousands of its employees leaked online. What made this case particularly noteworthy was that the data was deliberately leaked by a disgruntled employee with the sole intention of causing harm to the employer. While our data protection laws are not yet as advanced as those in the UK, the Morrison case should be viewed as a serious wake up call for all employers when it comes to their responsibilities, risks and potential liabilities for data protection and security.

The Morrison Case

Mr. Skelton was employed with Morrison as a senior IT internal auditor. He had recently received a warning from the company for a disciplinary offence and, to put it mildly, was not happy with the company. As part of his job, Mr. Skelton had access to the payroll data for all of Morrison's employees, including their names, addresses, salaries, national insurance numbers and bank account information. He copied that data onto a personal USB stick and took it home, where he then posted it on a file sharing website. Morrison discovered the data breach and took immediate steps to take the website down. However, significant damage had already been done. The employees whose data had been leaked were understandably concerned that it could be used for identity theft or to access their bank accounts. They brought a class action suit against Morrison for breach of the UK Data Protection Act (DPA), breach of confidence and misuse of private information. One of the main issues that the Court had to decide was whether Morrison should be held to be 'vicariously' liable for the actions of Mr. Skelton.

The Court found that Morrison was liable. There was a sufficient connection between Mr. Skelton's position as senior IT internal auditor and his wrongful conduct. The fact that his intention was to cause deliberate harm to Morrison was irrelevant. As a 'data controller' within the meaning of the DPA, Morrison had a responsibility to take reasonable steps to ensure that they had adequate and appropriate technical and organisational measures in place to guard against unauthorised or unlawful disclosures of personal data. The Court found that Morrison failed in that it did not have an organised system for managing the deletion of data, i.e. the employee data which Mr. Skelton had downloaded for legitimate work purposes was never erased, allowing him to copy it unto his personal USB stick at a later date.

Morrison was recently given permission to appeal this decision at the UK Supreme Court, and it remains to be seen what the final outcome will be. Nevertheless, if the decision is upheld, it will have serious ramifications for all employers in the UK.

Takeaways for Employers

The Morrison case is not binding in T&T and our data protection laws are not on par with those in the UK. Whilst we have a Data Protection Act in T&T, only certain provisions of it are currently passed as law. Moreover, the Regulator provided for in the legislation to enforce the T&T DPA has not been established. As such, data protection rights for citizens exist primarily in principle.

However, that is unlikely to remain the case indefinitely. Sooner or later T&T will be forced to catch up with the rest of the world when it comes to data protection legislation. Until then, redress for data breaches may be achieved by other means, including actions for breach of confidence and misuse of private information.

Hence, it would be in all employers' interests to create a culture change, by implementing in the workplace an approach based on privacy by design and default for the various processes and systems used. This would also make it easier to adapt when the time arrives to comply with the T&T DPA. Additionally, people are reportedly more trusting of a company, if they know that their data is not used in unauthorised ways and that reasonable steps are taken to prevent its theft or loss. Therefore, having protective measures could be a marketing tool to enhance a business' goodwill.

Employers can:

- Implement (or increase) technical and organizational security measures to secure their data. Such measures include: encryption software, folder access control (e.g. access to certain persons only), data minimization (deleting data after a certain time, having backed it up in an offline location), physical security (e.g. vaults, gated premises, locked filing cabinets), privacy and IT security training for staff, amongst other things.
- Consider obtaining insurance against data breaches especially those caused by dishonest or malicious employees. This was one of the suggestions made by the Court in the Morrison case.

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DIRECTORS' DUTIES

Debra Thompson *(cont'd from page 1)*

Company represented to him by an officer of the Company or of an Attorney, Accountant or other person whose profession lends credibility to a statement made to him.

Subject to the Articles and any unanimous shareholders agreement, a director must exercise the powers of the Company directly or indirectly through its employees and direct the management of the business and affairs of the Company.

If a director of a Company votes for or consents to any resolution authorising the issue of a share for consideration other than money, he is jointly and severally liable (with any other directors who so voted) to the Company to make good the amount by which the consideration received is less than the fair equivalent of the money that the Company would have received if the share had been issued for money on the date of the resolution. The director would be liable in such a case unless he did not know, and could not have reasonably known, that the share was issued for a consideration less than the fair equivalent of the money that the Company would have received if it had been issued for money.

What then can a Director do to protect his position?

First and foremost, he must at all times act honestly and in good faith in the best interest of the Company with prudence and reasonable skill. This specifically includes disclosing the nature and extent of any interest he has, directly or indirectly, in any material contracts with the Company and, subject to exceptions, not forming part of a quorum or voting on any resolution to approve such a contract.

In discharging his duty, a director may seek an indemnity from the Company to provide protection in respect of costs, charges and expenses including any amount paid to settle an action brought or to satisfy a judgement in any civil action in which he is made a party by reason of the fact of his directorship. Likewise, in respect of a criminal or administrative action or proceedings that are enforced by a monetary penalty in circumstances where a director had reasonable grounds for believing his conduct was lawful, a Company providing such an indemnity will only offer protection in circumstances where a director acted honestly and in good faith with a view to the best interest of the Company.

A director may also seek insurance cover for protection in circumstances where he acted in good faith where an indemnity may not provide cover, for example where a Company that has given an indemnity is insolvent and, irrespective of the indemnity, may not be in a position to indemnify the director.

In approving the financial statements of a Company, a director should ensure that the financial statements are represented by an officer of the company or a report of an Attorney at Law, Accountant, Engineer, appraiser or other person whose profession lends credibility to the statement made to him so as to provide a layer of protection in respect of an approval made in good faith.

Removal of Directors

A director of a Company ceases to hold office when he dies, resigns, is removed or is disqualified. The resignation becomes effective at the time that a written resignation is served on the Company or at the time specified in the resignation. The shareholders of a Company may also remove any director from office by ordinary resolution at a special meeting, or where a director is elected for a term exceeding one year and is not up for re-election, remove such a director by ordinary resolution at an annual meeting.

Any director who resigns may, if he wishes, submit to the company a written statement giving the reasons for his resignation or the reasons he opposes any proposed action or resolution.

Can the number of Directors be increased? The shareholders of a company have the power to amend the articles of a Company to increase or decrease the number of directors or the minimum or maximum number of directors save that a company must have at least two directors and a public Company must have no fewer than three, at least two of whom are not officers or employees of the Company or its affiliates.

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TESTING THE BOUNDARIES

DISCRIMINATION AND THE RIGHT TO REFUSE SERVICE

Catherine Ramnarine

"We reserve the right to refuse service to anyone." We have all seen signs like these at restaurants and other establishments. But do businesses really have an unfettered right to refuse service? Some might argue that private business owners should have the right to run their businesses as they see fit, including the right to pick and choose their own customers. However, such a right can be used as a cloak for discrimination. It is worth looking back at one of the landmark cases on discrimination and the right to refuse service - *Constantine v Imperial Hotels Ltd (1944) KB 693*.

Constantine v Imperial Hotels Ltd

Learie Constantine is perhaps best remembered as a legendary West Indies cricket player. In fact, he took West Indies' very first wicket in test cricket. By 1943, he was living and working in England and in August of that year he travelled to London to play a charity match at Lords Cricket Ground. He booked himself and his family to stay at the Imperial Hotel. However, when he arrived, he was told that that he couldn't stay there. White servicemen from America - where segregation was in full swing - were staying at the Hotel and had objected to his presence. The Hotel manager insisted that Constantine and his family leave and used a racial slur to refer to him.

Constantine brought a legal claim against the Hotel. At the time, there were no laws expressly prohibiting private businesses from racial discrimination in the provision of their services. As a general rule, businesses were allowed to pick and choose their customers. However, Constantine based his claim on an old common law rule that prohibited innkeepers from refusing accommodation to guests without just cause. His claim was successful and, although he was only awarded the nominal sum of 5 guineas, he also achieved a significant moral victory by winning public opinion to his side.

Constantine went on to pursue careers in both law and politics and eventually became the first black peer admitted into the House of Lords. The UK eventually passed the Race Relations Act, which prevented discrimination on the grounds of race. That Act was later superseded by the UK Equality Act, which prevents discrimination on the grounds of several 'protected characteristics' including sex, race, religion, disability, age and sexual orientation.

The Legal Position Today

In Trinidad and Tobago today, the general rule remains that private businesses are allowed to pick and choose their customers. This rule is, however, limited by the *Equal Opportunity Act*.

The *Equal Opportunity Act* prohibits discrimination on the grounds of certain protected categories including **Sex**, **Race**, **Ethnicity**, **Origin** (including geographical origin), **Religion**, **Marital Status** and **Disability**. The Act prohibits any person concerned with the provision of goods, facilities or services to the public from refusing to serve a customer because they fall within one of these protected categories. It also prohibits businesses from discriminating in the terms and/or manner in which they provide their services. In other words, a business is not entitled to refuse to serve someone just because of their sex, race, religion, disability or other protected category.

The Act provides a non-exhaustive list of types of businesses to which it applies, including:

Hotels, guest houses and other similar establishments;
Banking, insurance, loans, credit and finance;
Entertainment, recreation and refreshment;
Transport and travel; and
Any profession or trade.

Age, sexual orientation and political affiliation are not currently protected categories under the Act, though the Equal Opportunity Commission has recommended that the Act be amended to extend protection to at least some of these categories.

The Act does not prohibit private business from refusing service on other non-discriminatory grounds, such as disruptive or unruly behaviour. However, it is important to note that refusing service on certain grounds that don't appear to be discriminatory at first glance could in practice result in indirect discrimination. For example, dress code requirements could disproportionately impact one sex over another, or persons belonging to certain religious groups.

It is inevitable that tensions will arise between the right of a private business to choose its customers and the right of an individual not to be unfairly discriminated against. However, as *Constantine v Imperial Hotels* illustrates, society is always changing, and those tensions will inevitably be tested.

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