

# **DIRECTORS AND OFFICERS** **LIABILITY INSURANCE** **AND ITS VARIATIONS**

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***Director's Liability  
Non-Statutory Guidelines  
on Director's Duties  
– Companies Registry***

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- Duty to act in good faith for the benefit of the company as a whole
- Duty to use powers for a proper purpose for the benefit of members as a whole
- Duty not to delegate powers except with proper authorization and duty to exercise independent judgment



- Duty to exercise care, skill and diligence
- Duty to avoid conflicts between personal interests and interests of the company
- Duty not to enter into transactions in which the directors have an interest except in compliance with the requirements of the law



- Duty not to gain advantage from use of position as a director
- Duty not to make unauthorised use of company's property or information
- Duty not to accept personal benefit from third parties conferred because of position as a director



- Duty to observe the company's memorandum and articles of association and resolutions
- Duty to keep proper books of account

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## *Claims Coming From Whom?*

- ✓ Shareholders
- ✓ Employees
- ✓ Customers
- ✓ Competitors
- ✓ Members of the public
- ✓ Regulatory bodies
- ✓ Liquidator



## Against the Director

- Employee
- Shareholder
- Regulatory body (IP, EOC, etc.)
- Liquidator
- Indirectly, all of the above

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## Against the Company

- Employee
- Customer
- Competitor
- Member of the public
- Regulatory body

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## *Flow of Claims*

Employee  
Customer  
Government } — Company — Company suffers

Pay Compensation (fine) — Shareholder suffers

Shareholder sues director



# *Claims (against the Director) on What?*

1. Breach of trust  
Breach of duty
2. Negligence  
Default



## Breach of Trust

### **Case law: Bishopgate Investment Management Ltd (in liq) v Maxwell (No. 2) (1993) UK**

The director of BIM, M, transferred BIM's shares held by BIM as trustee to another company, M Co, for no consideration. M was also a director of M. Co. The transfer of shares was made in breach of the company's articles requirement in relation to share transfer.

The Court of Appeal held that M breached his duty by giving away company assets for no consideration to another company, in particular, a company that he acts as a director.



## Negligence

### **Case Law: Re City Equitable Fire Insurance Co Ltd (1925)**

In this case, the company lost over 1million pounds, due partly to the failure of certain investments but mainly to the frauds of the chairman of the directors. The liquidator sought to make the other directors liable for the losses on the ground of negligence.



## *Directors Personal Liabilities*

(Non-listed Companies)

- Regulatory
1. CO
  2. SFO
  3. IRO
  4. EOC
  5. PDPO
  6. Copy Right Ord.
  7. EO
  8. Factions and Industrial Undertaking Ord.

Cost of defence, if successful.



# *Directors Personal Liabilities*

Civil - Damages

- Legal Costs

- winning parties costs

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# *Directors & Officers Liability Insurance*

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## **S165(1) Companies Ordinance**

Exemption of liability of D&O or indemnity for them against liability to the company in respect of

- (a) negligence
- (b) default
- (c) breach of duty
- (d) breach of trust

are **VOID** unless the liability is for defending any proceeding (civil/ criminal) and D&O win the case or court so orders.



## S165(3)

A company may purchase insurance for its D&O:-

- (a) against any liability to the company itself in respect of negligence, default, breach of duty, breach of trust (except fraud) for which D&O may be guilty in relation to the company.

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## S165(3) (Con't)

(b) against any liability incurred by D&O in defending any proceeding (civil/criminal) taken against him for negligence, default, breach of duty, breach of trust (including fraud).



## Policy Coverage

- On claim made basis (usually)
- Claim made during the period of insurance
- Problem? (Claim made in 2003; wrongful act committed 1997)



## The Traditional D & O

### Limited by S.165 Companies Ord.

- crime, fraud
- legal expense in case of losing
- fine/compensation
- liability of company as well as D & O



## Insured Persons

Cover usually applies to:

- All Directors of the Insured Organisation including non-executive
- All Officers of the Insured Organisation including managers or company secretary
- Past Directors
- New positions created after inception of the policy



## Exclusions

- Fines and penalties
- Deliberate dishonesty or fraud by any D&O
- However, coverage is provided for defence costs even where dishonesty is alleged

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# Variations to Directors & Officers Policies

## Management Liability

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# *Q & A Session*



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## **PLEASE NOTE**

The law and procedure on this subject are very specialised. This article is a general explanation for your reference only and should not be relied on as legal advice for any specific case. If legal advice is needed, please contact our solicitors.

## **請注意**

本題目之法律及程序十分專門。此文章只屬一般性之解釋，供你參考，而不應被依賴為關於任何特定事件之法律意見。如需法律意見，請與我所律師聯絡。

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