



## Attorney General's Guidance

### Applications under Article 78 of the Companies (Jersey) Law 1991

#### Interpretation

- 1) The following definitions apply:

“the 1990 Law” means the [Bankruptcy \(Désastre\) \(Jersey\) Law 1990](#) Bankruptcy (Désastre) (Jersey) Law 1990;

“the 1991 Law” means the [Companies \(Jersey\) Law 1991](#);

“the Commission” means the Jersey Financial Services Commission;

“company” means a company registered under the [1991 Law](#);

“director of a company” means not only a company director but any persons concerned or taking part in the management of a company (whether directly or indirectly) as well as members of the council of a foundation and those in any other way concerned or taking part in the management of a foundation (whether directly or indirectly); and

“the Minister” means the Minister for External Relations and Financial Services.

#### Introduction and General Principles

- 2) This Guidance is issued by HM Attorney General for the purposes of setting out matters which may lead the Attorney General to apply under Article 78 of the [1991 Law](#) to the Court to disqualify any person from being the director of a company.
- 3) The Minister, Commission and Viscount have been consulted on this Guidance in draft and support the issuing of this Guidance.
- 4) This Guidance does not exhaust the factors which may cause the Attorney General to bring such an application nor should it be taken in any way to fetter the discretion of the Attorney General (nor indeed the Minister or Commission) in determining whether to bring an application under Article 78 of the [1991 Law](#), or the discretion of the Viscount in determining whether to bring an application under Article 24(7) of the [1990 Law](#). The Viscount is, however, likely to apply similar considerations in making any decision regarding an application under Article 24(7) of the [1990 Law](#).

- 5) This Guidance also does not fetter the Court's discretion generally, including in relation to interpreting or applying the test under Article 78(2) of the [1991 Law](#).
- 6) This Guidance applies to every director of a company, including non-professional directors of charitable and other voluntary organisations. It also applies to shadow directors, being persons occupying the position of director even if not called by that name.
- 7) The Attorney General recognises the value that many Islanders contribute to society through being directors of certain companies such as charitable and voluntary organisations or sport and other interest societies. This Guidance should not deter persons from continuing to take on such roles but serves to remind them that as a director of a company they have duties like any other director, not only to the company they serve but the persons whose money they handle and creditors.
- 8) To protect the public and public interests, and to maintain the Island's reputation as a well-regulated international finance centre, it is important that poor quality, negligent, incompetent or dishonest directorial conduct is addressed – whether through criminal sanctions where appropriate, civil action such as disqualification orders, or both.

### **Matters which may lead to an application under Article 78**

- 9) The test is whether a person's conduct makes him or her unfit to be concerned in the management of a company. The following are factors which may trigger an application under Article 78 of the [1991 Law](#) by the Attorney General. It is re-emphasised that this is a non-exhaustive list.
  - a) Any criminal conviction arising out of or in the context of a person's directorial/corporate managerial activities, or which otherwise calls into question their suitability to be a director of a company, (for example, offences of dishonesty);
  - b) Where the Court makes an order under Article 177 of the [1991 Law](#) or Article 44 of the [1990 Law](#) (Wrongful Trading) in respect of the director (i.e. where the Court makes a director personally liable for the company's debts and liabilities, where a director knew there was no reasonable prospect that the company would avoid a creditors' winding up or the making of a declaration under the [1990 Law](#) or on the facts known to him or her was reckless as to whether the

company would avoid either, and did not take reasonable steps with a view to minimising the potential loss to the company's creditors);

- c) Where the Court makes an order under Article 178 of the [1991 Law](#) or Article 45 of the [1990 Law](#) (Fraudulent Trading) in respect of the director (where it appears that any business of the company has been carried on with intent to defraud creditors or for a fraudulent purpose, the court may order persons knowingly party to the same to be liable to make contributions to the company's assets);
- d) Corporate Governance breaches such as:
  - i) Poor or non-existent statutory records kept by the company;
  - ii) Poor or non-existent records of board meetings kept by the company;
  - iii) Poor or non-existent financial records kept by the company;
  - iv) The director failing to take professional advice when reasonably necessary or failing to encourage his or her fellow directors to do the same;
  - v) A failure by the director to understand and/or provide for contingent liabilities;
  - vi) A director acquiescing and/or failing to appropriately challenge other directors and/or company management on one or more of the factors included in this list;
  - vii) A director delegating or acquiescing in the delegation of duties to persons with inadequate scrutiny or control (regardless of residency);
  - viii) A director delegating or acquiescing in the delegation of duties to persons who are incompetent and/or failure to ensure the board has appropriate skills
- e) Failure by the director to co-operate with any liquidator or the Viscount where the company is subject to winding-up or bankruptcy process (and, in particular, in breach of Article 18 of the [1990 Law](#));
- f) Failure by the director to account for company property or to deliver the same to any liquidator or the Viscount where required to do so;
- g) Negligent completion by the director of a statement of solvency;
- h) Where the court makes an order under the [1991 Law](#) or the [1990 Law](#) that there has been (i) a transaction(s) at an undervalue (ii) the giving of a preference(s), or (iii) extortionate credit transaction(s) and the director was directly involved in such a transaction or reckless as to his or her fellow directors being involved in the same;

- i) The company trading on consumer pre-payments and the director having knowledge or being reckless;
  - j) A director being personally culpable for a serious breach by the company of Codes of Practice issued by the Commission;
  - k) A director failing to declare or act appropriately as regards conflicts of interest; or
  - l) The commission by the company, with the acquiescence of the director, of an offence under the [1990 Law](#) or any equivalent offence under the [1991 Law](#).
- 10) The most common instance in which the above will become known to the Attorney General is through a Viscount/liquidator's report under Article 43 of the [1990 Law](#) or Article 184 of the [1991 Law](#). However, the Attorney General may become aware of such matters through disclosures made to the Attorney General or for example through the Law Officers' Department or States of Jersey Police investigations into criminal matters.
- 11) Matters which may be considered aggravating factors include:
- a) Where a matter referred to at (9) has been committed by a professionally qualified/experienced person;
  - b) Where there is loss to investors or creditors. The quantum of the loss may be a significant factor, but the effect of the loss will differ depending on the injured party's circumstances;
  - c) Where there is repeated offending;
  - d) Where there are wider public interest considerations.
- 12) Where the Attorney General considers that the issue is minor, or does not necessitate an application under Article 78 of the [1991 Law](#), the Attorney General may resolve the matter informally with a written warning.

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