

An introduction to directors' duties and liabilities in Guernsey and Jersey

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Guernsey and Jersey have a rich and interesting legal and political identity. This is the result of their complex history, having been subject to the dominion of both the Duchy of Normandy and the United Kingdom at one time or another. The Guernsey and Jersey company law legal regimes derive from English law sources, both legislative and in terms of English decisions. As a result, contemporary English legislation and jurisprudence are persuasive when dealing with Guernsey and Jersey company law issues. Equally, the jurisprudence of Guernsey is persuasive in Jersey and vice versa.

This is particularly true in respect of directors' duties and liabilities. These are largely based on the English law approach. As a result, although there are some differences, the Guernsey and Jersey approach to company law and directors' duties and liability is generally familiar to the English lawyer.

Directors' duties in Guernsey and Jersey arise from customary law and legislation. In Guernsey, the Companies (Guernsey) Law 2008, as amended (**Guernsey Companies Law**), is the principal piece of company legislation; but it does not codify all of these duties. They are drawn from the English common law duties which were in place prior to the introduction of the English Companies Act of 2006. *Carlyle Capital Corporation Limited (in Liquidation) v Conway* (Guernsey Judgment 38/2017) confirmed that, as the Guernsey legislation relating to companies was modelled on the English legislation, it is appropriate to look to English law decisions to assist with the solution of Guernsey company law problems when these are not covered by Guernsey statutes or customary law. In Jersey, the Companies (Jersey) Law 1991, as amended (**Jersey Companies Law**) is the principal piece of company legislation, but similarly does not codify all of these duties. In Jersey, the recent decision of the Royal Court in *Financial Technology Ventures II (Q), LP v ETFS Capital Limited* [2021] JRC025 confirmed that English law decisions on directors' duties are persuasive in Jersey. Furthermore, English law decisions are persuasive in interpreting Guernsey and Jersey law where this has been modelled on an English statute's wording.

In addition to the Guernsey Companies Law, Guernsey has a suite of regulatory laws which impose a range of additional duties on directors where they are conducting certain regulated activities (which tend to be within the financial services sphere). These include, among others:

- the Protection of Investors (Bailiwick of Guernsey) Law, 2020
- the Regulation of Fiduciaries, Administration Businesses and Company Directors, etc (Bailiwick of Guernsey) Law, 2020
- the Banking Supervision (Bailiwick of Guernsey) Law 2020

These regulatory laws are administered primarily by the Guernsey Financial Services Commission (GFSC), which has powers to enforce these laws pursuant to the Financial Services Business (Enforcement Powers) (Bailiwick of Guernsey) Law, 2020 (**Enforcement Law**). In defined instances, the GFSC has the power to remand cases to His Majesty's procureur (Guernsey's equivalent of the UK attorney general) to determine whether criminal prosecutions are required.

Under these laws, and after consultation with the necessary legislative body (or any person it deems appropriate), the GFSC has the power to issue codes of practice and guidance to those undertaking regulated activities in order to clarify and provide guidance on the duties, requirements and standards to be complied with. [1]

While the recent updates have not significantly expanded the scope of directors' duties and liabilities, there is a noticeable underlying trend, when they are read with the Enforcement Law, towards more rigorous oversight of directors of regulated entities by the GFSC.

Similarly, in addition to the Jersey Companies Law, Jersey has a suite of regulatory laws which impose additional duties on directors who are conducting certain regulated activities. These include, for example, the Financial Services (Jersey) Law 1998, as well as numerous associated laws, regulations and orders. On top of the legislative landscape are the Codes of Practice issued by the Jersey Financial Services Commission (JFSC), which also impose additional duties and requirements on directors who are conducting regulated activities.

Guernsey and Jersey are responsible and cooperative offshore jurisdictions, and are receptive to regulatory initiatives which further enhance their reputation as mature financial and legal jurisdictions. An example of this is the adoption of the Data Protection (Bailiwick of Guernsey) Law, 2017 in Guernsey and the Data Protection (Jersey) Law 2018 in Jersey, which provide rights to the public in relation their personal data. Directors in Guernsey and Jersey are under significant obligations pursuant to these regimes to ensure that any personal data is lawfully processed; if they fail to do so proactively, they may be held to be in breach of their duties to the company.

Furthermore, Guernsey is focused on leading the way on environmental, social and governance

(ESG) issues within its financial services industry. On 10 June 2021, the GFSC issued an updated Financial Sector Code of Corporate Governance [2] applicable to directors and licensees which requests boards of companies to consider the impact of climate change on their strategy and risk profile and, where they judge it appropriate, to make climate change-related disclosures. While strictly this guidance does not change the law on directors' liabilities, it is arguably indicative of future trends. The Financial Sector Code of Corporate Governance also provides a useful summary of:

- duties of the board of directors and individual directors
- business conduct and ethics
- accountability
- risk management
- disclosure and reporting duties
- directors' remuneration
- shareholder relations

Similarly, in Jersey, in July 2021 the JFSC implemented a series of updated codes of practice following a consultation relating to sustainable investments.

[1] Please see www.gfsc.gg/commission/legislation-and-guidance for all current GFSC codes of proactive and guidance.

[2] Finance Sector Code of Corporate Governance, 10 June 2021.

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