

# A Comparative Analysis of Directors' Duty of Care, Skill and Diligence in Sri Lanka, Australia and UK

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**Abstract**— *The Companies Act No. 07 of 2007 made considerable changes to numerous areas of corporate law in Sri Lanka including the codification of the common law duties of directors which are set forth in the Sections 187 – 200. This was an attempt to make the duties of directors clear, accessible and better known and understood. Section 189 which codifies the common law duty of skill and care of company directors seems to impose a statutory burden on directors in exercising their powers and in decision making. The exact scope and dimensions of the duty are vague as the judiciary in Sri Lanka has not yet interpreted the provisions in the Companies Act relating to duties of directors. The aim of this study is to first summarize the directors' common law duty of skill and care. This will be followed by an examination of the statutory provisions on directors' statutory duty of standard of care, skill and diligence. Next, a comparison with the jurisdictions of UK and Australia is done with particular emphasis on the interpretation of the statutory provisions by the judiciaries in those jurisdictions. A light insight in to Business judgment rule is also provided. The study adopts qualitative approach, using comparative study design. The materials used in the study include statutes and a range of case laws as well as published works. The research will provide a useful and easy-to-read, important and impartial source of information for academics, lawyers, directors, shareholders and other interested parties to gain an understanding of directors' duty of skill and care.*

**Keywords:** Directors' Duties, Duty of Care, Skill and Diligence, Business Judgment Rule

## I. INTRODUCTION

The Companies Act No. 07 of 2007 made considerable changes to numerous areas of corporate law in Sri Lanka including the codification of the common law duties of directors which are set forth in sections 187 – 200. This was an attempt 'to make legal provisions more consistent, certain, comprehensible and accessible to the general public at large and to the commercial community

in particular, which will not only facilitate the practitioners but also directors themselves.'<sup>1</sup> Section 189 which imposes a statutory burden on directors in exercising their powers and in decision making to 'not act in a manner reckless or grossly negligent and to exercise the degree of skill and care that may reasonably be expected from a person of his knowledge and experience', is a codification of the common law duty of care and skill.

Over the years this common law duty has undergone profound changes due to the changes in the standard of care required of a director in the commercial world. This led many states to codify the common law duty to a statutory provision. Sri Lanka also followed suit. The exact scope and dimensions of the duty are vague as the judiciary in Sri Lanka has not yet interpreted the provision (section 189) in the Companies Act.

In this study, the authors aim to first summarize the directors' common law duty of care, skill and diligence. This will be followed by an examination of the statutory provisions on directors and the new statutory duty of standard of care. Next, a comparison with the jurisdictions of UK and Australia is done with particular emphasis on the interpretation of the statutory provisions by the judiciaries in those jurisdictions. A light insight in to Business judgment rule is also provided.

## II. METHODOLOGY

The study adopts qualitative approach, using comparative study design. The material used in the study include legislations, judicial decisions, books, electronic/internet sources, journal articles. The study is principally an analysis and comparison of the legal provisions (both statutory and common law) relating to directors' duty of care, skill and diligence. All conclusions are based on careful comparison between the corporate law in Sri Lanka, Australia and UK.

### III. DISCUSSION

#### A. *Directors and their duties under the Companies Act No. 07 of 2007*

##### 1) *Directors*

According to section 529 of the Companies Act the expression “director” includes any person occupying the position of director by whatever name called.<sup>ii</sup> Wikramanayake A.R. (2007) states the Companies Act brings a wide group of persons within the definition of director, focusing on the substantive functions performed by each within and in respect of companyB. rather than mere designation.<sup>iii</sup> The definition of aC. director is considered to include executive directors, non-executive directors and de facto directors.<sup>iv</sup> Another type of director is ‘shadow director’ which is defined in the Act as “a person in accordance with whose directions or instructions a director or the board of the company may be required or is accustomed to act.”<sup>v</sup> All companies in Sri Lanka must have at least one director except a public company which should have at least two directors.<sup>vi</sup> In addition, all companies must appoint directors who are not disqualified.<sup>vii</sup> Such appointed board of directors are vested with “all the powers necessary for managing and for directing and supervising the management of, the business and affairs of a company.<sup>viii</sup> The board is thus vested with extensive power except in certain instances such as major transactions.<sup>ix</sup>

##### 2) *Directors’ Duties*

An important feature of the Companies Act No. 07 of 2007 is for the first time, duties of directors have been catalogued in statutory form. Sections 187-200 provide for the duties of directors. Accordingly, directors are required to act in good faith, and in the interests of the company.<sup>x</sup> A director must not contravene the provisions in the Act or the Articles.<sup>xi</sup> A director must not be reckless or grossly negligent and they must exercise the degree of skill and care that is expected of a person of his knowledge and experience.<sup>xii</sup> A director can rely on reports, statements, financial data and other information prepared or supplied, or on professional or expert advice given by employees, professional adviser or expert within their professional or expert competence, or by other directors or committee of directors within their designated authority.<sup>xiii</sup> When a director of a company becomes aware that he is interested<sup>xiv</sup> in a transaction or proposed transaction with the company he has to cause it to be entered in the interests register. If the company has more than one director it has to be disclosed to the board of directors the nature and extent of that

interest.<sup>xv</sup> When director of a company obtains information as a director or an employee of the company, which would not otherwise be available to him, he must not disclose it or use it except for the purposes of the company or as required by law.<sup>xvi</sup> A director who has a relevant interest<sup>xvii</sup> in the company’s shares must disclose the number, class and nature of the interest in shares to the Board of directors.<sup>xviii</sup> Such details must also be entered in the interest register.<sup>xix</sup>

##### *The Duty of Care, Skill and Diligence*

The general principle is that directors are liable for damages which emanate from negligence in the performance of their duties.<sup>xx</sup> As a result they need to exercise their duties and functions with care and skill. The duty of care owed by a director of the company arises from “the fact that he has assumed responsibility for the property or affairs of others” as was stated by House of Lords in *Henderson v. Merrett Syndicates Ltd*<sup>xxi</sup>.

Historically, in contrast to the rigorous enforcement of fiduciary duties,<sup>xxii</sup> the courts formulated the duty in largely subjective terms. In explaining the duties of directors, *Romer J in Re City Equitable Fire Insurance Company Ltd.* stated that “in discharging the duties, a director must act honestly; and must exercise such degree of skill and diligence as would amount to the reasonable care which an ordinary man might be expected to take, in the circumstances, on his own behalf.” The judgment allowed the directors the benefit of any doubt about their competence. It was only expected from them what they could give given their individual level of skill and experience.<sup>xxiii</sup> This approach reflected the view that directors were chosen by shareholders and thus their choices were the shareholders’ business.

However, this subjective approach to duty of care and skill has been changed due to the more demanding nature of modern business. The mainly subjective test in *Re City Equitable Fire Insurance Co Ltd* case has been replaced by a more objective standard approximating to ‘a reasonable director’. In *Norman v Theodore Goddard*<sup>xxiv</sup> the court held “the degree of care which a director of a company owes when carrying out functions in relation to the company is the care that would be taken by a reasonably diligent person having both: (a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried out by that director in relation to the company (the objective test), and (b) the

general knowledge, skill and experience that the director has (the subjective test). The standard mentioned by Hoffman J can be considered as a dual, hybrid subjective/objective one for expert directors. The law now is stringent when concerning an expert director.”

A company director is not, per se, treated as an expert, either in the task of general management or specific area of finance, personnel or legal services.<sup>xxv</sup> However, a director specifically appointed because he professes and is required to display some special skill will be liable in negligence for failing to meet the objective standard of care set by the notional reasonably competent member of such profession. Yet, such professional may not necessarily be liable to exhibit other higher skills of management or diligence than his non-qualified fellow director, although this remains controversial.<sup>xxvi</sup>

The board of directors acts as a whole and although some of its members may be given additional powers by the articles or by resolution, the general duties and responsibilities are the same for all. As was held in *Re Lands Allotment Co*<sup>xxvii</sup> there is no distinction between the position of executive and non-executive directors. If a breach of duty is to be attributed to a board on the basis that all of its members were present at a meeting which had approved a wrongful act, then the liability of each director is joint and several and no allowance is made for the fact that some are part-timers and may have acquiesced in a situation which they did not fully understand.

In summary, in common law duty of care, skill and diligence, a distinction exists between skill and care. For the standard of care, an objective test is set, namely, that to be expected of ‘a reasonable man’ by virtue of the position of trust that they occupy over company property which they are empowered to manage. However, in assessing the duty skill in common law a director is only required to exercise that degree of skill which may be reasonably expected of a person of his knowledge and experience, i.e. ‘ordinary prudence’.<sup>xxviii</sup> On this basis, the standard of skill is a subjective one.<sup>xxix</sup> The duty of care and skill thus is a dual/ hybrid one.

The directors are also under a duty to exercise due diligence in the performance of their duties. “Diligence” as was stated in *Dorchester Finance Company v. Stebbing*<sup>xxx</sup> means “care as an ordinary man might be expected to take on his own behalf.” In comparison to

the duty of care and skill the duty of diligence is definitely an objective one.

#### D. Other Jurisdictions

##### 1) Australia

Section 180 of the Corporations Act of 2001 of Australia provides for the duty of care, skill and diligence; “A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:

- (a) Were a director or officer of a corporation in the corporation’s circumstances: and
- (b) Occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.

In Australia, the original subjective test for the duty of care has been replaced with an objective standard both at common law and statute law. In *AWA case (Daniels v. Anderson)*<sup>xxxi</sup> the court considered the four major aspects of duty of care: the nature of the duty, the ability for directors to delegate, the need for directors to keep informed about the company’s business, and the standard of care for both executive and non-executive directors. Clarke and Sheller JJA recognised that directors can and should have ‘varied commercial backgrounds’; but irrespective of the background they have a ‘duty greater than that of simply representing a particular field of experience.’ Further, the contention that non-executive directors ought to be able to rely on a low standard and one of more subjective nature was also rejected by the NSW Appeal Court. It was emphasised that objective duty of care apply to both executive and non-executive directors.

Sri Lanka can use a similar approach in assessing the duty of care, skill and diligence provided in section 189 of the Companies Act. It must first be ensured that the duty is objectively applied and assessed. Second that it must be applied in equal force to all directors whether state or private, executive or non-executive in nature.

A multi-coloured array of breach of duties<sup>xxxii</sup> was revealed in *ASIC v. Adler*.<sup>xxxiii</sup> Most importantly, the court found that there was a conflict between the director’s interests and the director’s duties and the duty of care requires a standard that demonstrates some diligence. *Santow J* outlined a number of considerations that form the cornerstone of the duty of care of directors and it

shows the depth of the Australian law regarding directors duty of care. The case offers the key requirements for the duty of care from which Sri Lanka can take guidance:

- (1) A duty of care, diligence and skill;
- (2) A standard of care that is commensurate with the skill and diligence of a director in that company at that time;
- (3) The standard of care that is at worst that of the ordinary prudent person;
- (4) The standard of care that requires the director to appropriately inform him/herself of all aspects of the company's affairs that one would reasonably expect of a director in that company at that time;
- (5) Any delegation of duties should reflect all the qualities of care, skill and diligence of a director in that company at that time;
- (6) The director's care, skill and diligence reflects a rational belief of a reasonable person in that company at that time that their decisions were in the best short and long term interests of the company.

In the case of *ASIC v. Healey*<sup>xxxiv</sup> the Australian Federal Court of Appeal held that directors of a company were liable for a breach of their duty of care and diligence by not noticing that the company's financial records incorrectly classified a large number of current liabilities as non-current liabilities. Middleton J held that "the directors failed to take all reasonable steps required of them, and acted in the performance of their duties as directors without exercising the degree of care and diligence the law requires from them." The case highlights the importance of directors making 'informed decisions' and the need to apply themselves diligently and with an inquiring mind so that they can form their own opinions.

According to the views expressed by Australian judiciary the principle regarding the duty of care and skill can be summarized as follows: the minimum standard of care of directors is the care of an ordinary prudent person. A higher standard applies where the case merits it. Where a higher standard is applied it is up to the directors to prove why such a standard does not apply to him.

The provision in the Companies Act in Sri Lanka is worded "a director ... shall exercise the degree of skill and care that may reasonably be expected of a person of his knowledge and experience' and therefore is susceptible to subjective interpretation as Australian

provision has been in the past. It is unclear how it would be interpreted by courts. Does the education level of a director influence the standard of care? Would the courts tolerate the breaches by a younger, less experienced director? Is the care, skill and diligence expected of a director in a small company same as a of a multinational company? In comparison the Australian provision outlines an objective test that is determined by considering the corporation's circumstances, the office held and the responsibilities the office carried within the company. Sri Lanka can benefit from taking guidance from both Australian statute law and case law in determining a standard of care, skill and diligence of directors.

The view of the Australian judiciary is that what is in the best interest of the company should be decided by the directors of the company.<sup>xxxv</sup> Therefore, they are reluctant to review or second guess the business decisions of directors, particularly when they are made in good faith and for a proper purpose.<sup>xxxvi</sup> A decision of directors will be subjected to scrutiny by the courts only if no reasonable board would have made it.<sup>xxxvii</sup> The common law principles which are termed as the "**Business Judgment Rule**" apply to decisions of directors in Australia. As was decided in the case of *ASIC v. Rich*<sup>xxxviii</sup> the onus of proof of to show that directors have complied with the elements of the business judgement rule is with the directors.<sup>xxxix</sup>

Section 180(2)<sup>xl</sup> of the Corporations Act provides a statutory version of the business judgment rule that applies to the duty of care, skill and diligence. Section 180(2) of the Corporations Act of 2001 of Australia provides "A director or other officer of a corporation who makes a business judgment is taken to meet the requirements statutory duty of care, skill and diligence and their equivalent duties at common law and in equity, in respect of the judgment if they: (a) make the judgment in good faith for a proper purpose; and (b) do not have a material personal interest in the subject matter of the judgment; and (c) inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and (d) rationally believe that the judgment is in the best interests of the corporation." Therefore, in Australia breach of directors' duty of care and skill is decided in the backdrop of the business judgment rule.

The business judgment rule is a corporate law doctrine originated in the United States as a common law rule

relating to directors' duty of care, skill and diligence.<sup>xii</sup> The rule applies to the process of directors' decision-making, and consists of a rebuttable presumption that in making business decisions, the directors of a company have acted on an informed basis, in good faith, and in the honest belief that the business decision taken was in the best interests of the company.<sup>xiii</sup> The aim of the rule is to protect innocent and honest company directors from attracting personal liability for breach of their duties of care, skill and diligence or from claims of negligence against.

Sri Lankan law must appreciate the complexities involved and the developments witnessed by Australia in directors' duty of care, skill and diligence. The business judgement rule assist the entrepreneurial essence of the company to thrive without overly intrusive laws, while at the same time providing essential corporate governance to protect the company from negligent or incompetent directors.<sup>xiii</sup>

This balance is essential to encourage reasonable and calculated 'risk taking', while ensuring the proper observance of directors' duties. Sri Lanka Companies Act is light on protection of the interests of the honest and diligent directors and does not provide for a business judgment rule. The statutory burden imposed by section 189 therefore, can adversely affect the performance of a company as the directors will be unwilling to take any risks or do anything innovative. Hence, In application of the duty of care, skill and diligence in Sri Lanka, special attention must be paid to the business judgment rule.

## 2) *United Kingdom*

The UK was one of the first nations to establish rules governing the operation of companies. Over several centuries UK has had a host of legislations relating to companies.<sup>xiv</sup> However, these statutes did not contain a detailed provision describing the fiduciary duty of directors until the Companies Act of 2006 was enacted. The common law concept of fiduciary duty of directors on the other hand was developed by the UK courts through numerous cases.<sup>xv</sup>

Section 174 of the Companies Act of 2006 provides "A director of a company must exercise reasonable care, skill and diligence. This means the care, skill and diligence that would be exercised by a reasonably diligent person with—the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in

relation to the company, and the general knowledge, skill and experience that the director has."

Unlike Australia, and like Sri Lanka, business judgement rule is not provided in the UK Companies Act. However, it is taken up by courts. Like the Australian Courts, the courts in UK now appreciate there is a distinction between oversight and management which means the nature and extent of the duty of skill, care and diligence will depend on factors such as the size, location and complexity of a company's business and urgency of any decision. The formulations in section 174 take account of the special background, qualifications and management responsibilities of a particular director.<sup>xvi</sup>

## IV. CONCLUSION

The directors' duties are not merely 'lawyers' law' but as Lady Arden argues, they clearly bring the law more within the reach of individual directors, guiding them toward higher standards, playing a meaningful role in 'making positive improvements in corporate governance.'<sup>xvii</sup> The codification of scattered common law on duty of care, skill and diligence has led to awareness of directors which must definitely increase their impact. They can prepare and take precaution for the challenge head of them. Obviously, reading twelve pages<sup>xviii</sup> of the Companies Act is something a director could do, and those unwilling to do so should not be directors in the first place.

The law is moving towards expecting an objective test of care, skill and diligence from both executive and non-executive directors. The standard expected in decision making of a director is what is reasonably required of a person having the knowledge and skill and experience required in that position. Sri Lanka needs to develop its approach to duty of care to reflect an appropriate balance between protections on interests of shareholders on the one hand and promotion of entrepreneurial endeavours on the other. Such a balance will boost the corporate financial success in Sri Lanka.

## V. REFERENCES

- Australian Securities and Investments Commission (ASIC) v. Adler (2002) NSWSC 483
- Australian Securities and Investments Commission (ASIC) v. Healey (2011) FCA 717
- Australian Securities and Investments Commission (ASIC) v. Rich (2009) NSWSC 1229
- AWA case (Daniels v. Anderson) (1995) 37 NSWLR 438

Cabral Harsha, (2007), Companies Act No. 7 of 2007 and The Corporate Law of Sri Lanka  
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Wickramanayake Arittha R. (2007), Company Law in Sri Lanka, Deal Place, Colombo 3  
<sup>1</sup> Position Paper No 8 of the Advisory Commission on Company Law

<sup>1</sup> Section 529 of the Companies Act No. 07 of 2007

Section 529 further provides the definition of director includes-

- for the purposes of sections 187, 188, 189, 190, 197,<sup>1</sup> 374 and 377 a person in accordance with whose directions or instructions a director or the board of the company may be required or is accustomed to act.
- a person who exercises or who is entitled to exercise or who controls or who is entitled to control the exercise of powers which, apart from the articles of the company, would be required to be exercised by the board.
- For the purposes of sections 187 to195 (both inclusive), 197, 374 and 377 a person to whom a power or duty of the board has been directly delegated by the board with that person's consent or acquiescence, or who exercises the power or duty with the consent or acquiescence of the board.

The section exempts a person who acts only in a professional capacity from being identified as a director.

<sup>1</sup> Wikramanayake A.R. (2007), Company law in Sri Lanka at page 170

<sup>1</sup> A de facto director is a person who has not properly been appointed even though he assumes the status and functions of a director.

<sup>1</sup> Section 529 of the Companies Act No. 07 of 2007

<sup>1</sup> Section 201 of the Companies Act No. 07 of 2007

<sup>1</sup> Section 202(2) of the Companies Act, No. 07 of 2007 provides, "the following persons shall be disqualified

from being appointed or holding office as director of a company—(a) a person who is under eighteen years of age; (b) a person who is an undischarged insolvent; (c) a person who is or would be prohibited from being a director of or being concerned or taking part in the promotion, formation or management of a company, under the Companies Act, No. 17 of 1982, but for the repeal of that Act; (d) a person who is prohibited from being a director or promoter of or being concerned or taking part in the management of a company under section 213 or section 214 of this Act; (e) a person who has been adjudged to be of unsound mind; (f) a person that is not a natural person; (g) in relation to any particular company, a person who does not comply with any qualifications for directors contained in the articles of that company."

<sup>1</sup> Section 184 of the Companies Act No. 07 of 2007

<sup>1</sup>The meaning of a Major Transaction is provided in Section 185 of the Companies Act. Accordingly, a major transaction means -the acquisition or disposal of assets or agreement to acquire or dispose of assets (whether contingent or otherwise) that are greater than half the value of the assets of the company before the acquisition or the disposal; or a transaction which cause or is likely to cause the company to acquire rights or interests or incur obligations or liabilities exceeding half the value of the assets before the acquisition; or a transaction or series of related transactions which have the purpose or effect of substantially altering the nature of the business carried on by the company.

<sup>1</sup> Section 187 of the Companies Act

<sup>1</sup> Section 188 of the Companies Act

<sup>1</sup> Section 189 of the Companies Act

<sup>1</sup> Section 190 of the Companies Act

<sup>1</sup> The circumstances in which a director can be treated as interested is defined in the Companies Act. Section 191 of the Act provides a director is interested in a transaction if he is a party to it, or will or may derive a material financial benefit from it, or he has a material financial interest in another party to it. A director will also be considered interested if he is a director, officer or trustee of another party to the transaction, or a person who will or may derive a material financial benefit from the transaction provided that such party is not the company's wholly owning holding company, a wholly-owned subsidiary, or another wholly-owned subsidiary of the holding company. If the director is a parent, child, or spouse of another party to the transaction, or person who will or may derive a material financial benefit from the transaction, he too will be within scope of the definition. A director who otherwise has a direct or indirect material interest in the transaction would also be deemed to have an interest in a transaction in which the company has an interest in the transaction. According to Section 191(2) a director is not deemed to have an interest in a transaction to which the company is a party, if it merely consist of the company giving security to a third party which has no connection to the director, at that third party's request, on a debt or

obligation for which the director or another person has personally assumed responsibility, whether in whole or in part, under a guarantee, indemnity or by the deposit of a security.

<sup>1</sup> Section 192

<sup>1</sup> Section 197 of the Act

<sup>1</sup> Meaning of relevant interest is defined in the Companies Act. According to Section 198 relevant interest means, if the director is a beneficial owner of the share, has the power to exercise or control the exercise of any right to vote attached to the share, or acquire or dispose of the share, or the power to control the acquisition or disposition of the share by another person. Interest is also deemed to exist if the director has right to exercise such powers under any trust, agreement, arrangement or understanding relating to the share, whether or not that person is a party to it. This applies regardless of whether the power is expressed or implied, direct or indirect, legally enforceable or not, related to a particular share or not, subject to or capable of being subject to a restraint or restriction exercisable presently or in the future, subject to conditions precedent, or exercisable alone or jointly. (section 200(3)). The reference to power which form the criteria for a relevant interest, includes powers that arise from or are capable of being exercised as a result of a breach of any trust, agreement, arrangement or understanding, whether or not it is legally enforceable. (Section 200(5)).

<sup>1</sup> Section 200 of the Companies Act

<sup>1</sup> Ibid

<sup>1</sup> *Dorchester Finance Co Ltd v. Stebbing* (1989) BCLC 498 (Ch)

<sup>1</sup> (1994) 3 All E.R. 506

<sup>1</sup> of good faith, honesty and avoidance of conflicting interests

<sup>1</sup> Romer J held that “directors were expected to provide reasonable attention to the affairs of the company although they could delegate their duties to appropriate officers of the company; that is, to management.” Also he held that “it was not necessary for directors to attend every meeting”. This particular view has now been clearly seen as too lax because of the more recent developments.

<sup>1</sup> [1991] BCLC 1028

<sup>1</sup> *Re Brazilian Rubber Plantations and Estates Ltd* [1911] 1 Ch 425 at 437; *Re Macro (Ipswich) Ltd* [1994] 2 BCLC 354, [1994] BCC 781

<sup>1</sup> *Dorchester Finance Co Ltd v Stebbing* (1977) [1989] BCLC 498

<sup>1</sup> [1894] 1 Ch 616

<sup>1</sup> *Overend, Gurney & Co v Gibb* (1872) LR 5 HL 480 [2]

<sup>1</sup> If a director of a small private company were expected to exhibit the skill normally exercised by the chief executive of a multinational corporation the two persons would in theory be able to change places without difficulty. It is clear that such a juxtaposition is far-fetched.

<sup>1</sup> (1989) BCLC 498

<sup>1</sup> (1995) 37 NSWLR 438

<sup>1</sup> Santow J stated: “So far as Adler is concerned, the findings indicate not only that he contravened the *Corporations Law* in many respects but also that he did so with knowledge of the impropriety of his conduct and for the purpose of advancing his own personal interests at the expense of the companies of which he was a director or officer. His conduct thus amounted to a most serious dishonesty, occurring not as an isolated act but as a pattern of conduct over a number of months. This conduct was coupled with persistent lies and deceptions designed to conceal his conduct and/or its impropriety.

<sup>1</sup> *Australian Securities and Investments Commission (ASIC) v. Adler* (2002) NSWSC 483

<sup>1</sup> *Australian Securities and Investments Commission (ASIC) v. Healey* (2011) FCA 717

<sup>1</sup> *Smith v. Fwsett* (1942) Ch 304, *Howard Smith Ltd v. Ampol Petroleum* (1974) AC 821

<sup>1</sup> *Howard Smith Ltd v. Ampol Petroleum* (1974) AC 821, *Harlowe’s Nominees Pty Ltd v. Woodside (Lake Entrance) Oil Co NL* (1968) 121 CLR 483

<sup>1</sup> *Hutton v. West Cork Railway Co* (1883) 23 Ch D 654, *Shuttleworth v. Cox Bros (Maidenhead Ltd)* (1927) 2 KB 9

<sup>1</sup> *Australian Securities and Investments Commission (ASIC) v. Rich* (2009) NSWSC 1229

<sup>1</sup> The judiciary also stated that factors such as ‘the importance of the decision, the time available to obtain information, the costs relating to obtain information, the state of the company’s business at the time and the nature of competing demands on the boards’ attention’ must be considered in deciding whether a director has taken an ‘informed decision’.

<sup>1</sup> Section 180(2) of the Corporations Act of 2001 of Australia provides “A director or other officer of a corporation who makes a business judgment is taken to meet the requirements of subsection (1), and their equivalent duties at common law and in equity, in respect of the judgment if they: (a) make the judgment in good faith for a proper purpose; and (b) do not have a material personal interest in the subject matter of the judgment; and (c) inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and (d) rationally believe that the judgment is in the best interests of the corporation.

<sup>1</sup> Jones E (2007) Directors' Duties: Negligence and the Business Judgment Rule. In 2007 SA Merc LJ 326 at p, 326.

<sup>1</sup> Ibid

<sup>1</sup> Pearce Jeremy, (2010), "Directors' duties of Care, Skill and Diligence in Vietnam", <http://epublications.bond.edu.au/cgej/17>

<sup>1</sup> The first legislation for incorporation of companies was the Joint Stock Companies Act 1844. There have been several other statutes such as Joint Stock Companies Act of 1856, Companies Act of 1862, Companies (Consolidation) Act of 1908, Companies Act of 1948, Companies Act of 1967, Companies Act of 1980

<sup>1</sup> Regal (Hastings) v. Gulliver (1942) 1 All E.R. 378, Phipps v. Boardman (1967) 2 A.C. 46, Industriail Development Consultants Ltd. V. Cooley (1972) 1 W.L.R. 443

<sup>1</sup> The Right Honourable Lady Justice M Arden DBE, "The Companies Act 2006 (UK): A new approach to Directors' Duties" (2007) 8 The Judicial Review 145

<sup>1</sup> Lady Justice Arden DBE, "Companies Act 2006 (UK) : New Approach to directors' duties" (2007) 81 ALJ 164

<sup>1</sup> Pages 151-162 of the Companies Act No. 07 of 2007