

# DIRECTORS LAW AND COMPLIANCE CERTIFICATE SESSION II

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— ADVOCATES —

# GENERAL FUNCTIONS AND RESPONSIBILITIES OF DIRECTORS.

## 1 | Statutory Provisions

- 1.1 Company Registers
- 1.2 Changes in Share Capital
- 1.3 Changes to the MAs
- 1.4 Annual and Periodic Duties

## 2 | Meetings

- 2.1 The Annual General Meeting
- 2.2 Extraordinary General Meetings
- 2.3 Board Meetings

# 1

## **Duties Imposed by Statutory Provisions**

# GENERAL FUNCTIONS AND RESPONSIBILITIES OF DIRECTORS

## **1 | Statutory Provisions**

1.1 Company Registers

# 1.1 Register of members

The company is required to maintain a register of members, a register of debenture holders, and a beneficial owners register.

Details to be included:

- \_ Personal Details (name / address / identity or registration number/ and date at which each person is to be entered in the register as a member)
- \_ Notice of Pledges
- \_ Statement of Holdings
- \_ Statement of Transfers
- \_ Consideration Amount

# GENERAL FUNCTIONS AND RESPONSIBILITIES OF DIRECTORS

## **1 | Statutory Provisions**

1.1 Company Registers

1.2 Changes in Share Capital

# 1.2 Duties in relation to changes in share capital

## Issue of Shares for a consideration other than cash

Report (Sec.73 Report) to be drawn up before the shares are issued by one or more experts independent of the company and is to be delivered to Registrar for approval before shares are issued.

## Increase in Issued Share Capital

Generally decided by ordinary resolution of the company, unless the MAs require a higher percentage than that normally required for an ordinary resolution. The MAs may permit the general meeting to authorise, by ordinary resolution, the Board of Directors to issue shares up to a maximum amount as specified in the MAs. If this power is not conferred to the general meeting in the MAs, it may still be executed by the same general meeting by means of an extraordinary resolution.

# Duties in relation to changes in share capital

## Offering Shares on a Pre-Emptive basis

Whenever shares of a public company are proposed to be allotted for consideration in cash, those shares are to be offered on a pre-emptive basis to shareholders in proportion to the SC held by them. Copy of any offer of subscription on a pre-emptive basis indicating the period within which the right is to be exercised to be delivered to Registrar for registration.

## Return of Allotments

Whenever a company makes any allotment of shares, it is obliged to deliver a **Form H** to the Registrar within one month, stating the number and nominal amount of the shares comprised in the allotment, the names and addresses of the allottees and the amount paid and due on each share, whether on account of the nominal value or by way of premiums.



## Form H

**No. of Company**      <No of Company>

**Companies Act (CAP. 386)**

Return of allotments of shares <sup>(a)</sup>

Pursuant to Article 103 (1)(a)(b)

**Name of Company**      <Name of Company>

**Delivered By**      <Delivered By>

To the Registrar of Companies:

Date/s on which the shares were allotted (complete (a) or (b) as applicable

a) on <Day> day of <Month> of the year <Year> or

b) from <Day> day of <Month> of the year <Year> to <Day> day of <Month> of the year <Year>

A. This section must be completed for allotments made for cash

Description of shares (ordinary/preference/others)	<Desc>	<Desc>	<Desc>
Number of shares allotted	<Number>	<Number>	<Number>
Nominal value of each share and Premium (if any) on each share	<Value>	<Value>	<Value>
Total amount paid on each share on account of nominal value/premium	<Amount>	<Amount>	<Amount>
Amount due and payable (if any) on account of nominal value/premium	<Amount>	<Amount>	<Amount>

B. This section must be completed for allotments made other than for cash

Description of shares (ordinary/preference/others)	<Desc>	<Desc>	<Desc>
Number of shares allotted	<Number>	<Number>	<Number>
Nominal value of each share and Premium (if any) on each share	<Value>	<Value>	<Value>
Extent to which each share is to be treated as paid up on account of nominal value/premium	<Amount>	<Amount>	<Amount>
Consideration for which the shares have been allotted	<Amount>	<Amount>	<Amount>

Signature

<Name>  
Director/Secretary/Manager

Dated this <Day> day of <Month> of the year <Year>.

This form must be completed in typed form.  
(a) To be delivered within one month.  
\* Delete as necessary.

# Duties in relation to changes in share capital

## Redemption of Preference Shares

Whenever preference shares are redeemed, a notice of redemption should be delivered by the company to the Registrar for registration within 14 days after the date of redemption – **Form T1**.

## Delivery of Notice of Transfer or Transmission of Shares

In the case of a transfer/transmission causa mortis of shares, within 14 days from the date on which a transfer of any shares is registered with the company, a notice needs to be transmitted to the Registrar – **Form T**.

Delivery of Notice of change of Beneficial Ownership – **Form B02**.

**Form T**

No. of Company .....

**COMPANIES ACT, 1995**

**Notice of transfer or transmission of shares**

**Pursuant to Section 120 (3)**

Name of Company .....

Delivered by .....

To the *Registrar of Companies*:

(a) .....  
 hereby gives notice in accordance with Section 120 (3) of the Companies Act, 1995 that (b) ..... shares having a nominal value of ..... per share have been transferred/transmitted causa mortis\* as indicated hereunder.

Name and Address of transferor / deceased*	Name and Address of transferee/ person entitled to shares transmitted	No. of shares transferred / transmitted	Type and Class of shares

The above transfer/transmission causa mortis\* of shares has been registered with the company/in the name of the person entitled to be the registered holder \*on the .....

Signature .....  
**Director/Secretary/Manager\***

**Form T (1)**

Name of Company .....

**COMPANIES ACT, 1995**

**Notice of redemption of preference shares**

**Pursuant to Section 115 (5)**

No. .... of ..... Company  
 .....

Delivered ..... by  
 .....

To the *Registrar of Companies*:

(a) .....  
 hereby gives notice in accordance with Section 115 (5) of the Companies Act, 1995 that (b) ..... fully paid preference shares have been redeemed and the price of redemption has been paid in full.

Names and address of holders of redeemed preference shares

Name	Address	No of shares redeemed	Class
TOTAL			

Signature .....  
**Director/Secretary/Manager\***

# Duties in relation to changes in share capital

## Pledging of Securities

Whenever securities in a company are pledged, notice of the pledge should be delivered by the pledgor or the pledgee to the Registrar for registration within 14 days from the granting of the pledge.

## Single Member Companies

When a company becomes a single member company through the inter vivos acquisition or causa mortis transmission of all its shares to one person, the company must deliver a notice to the Registrar within 14 days – Form I. When a company ceases to be a single member company, a **Form I (1)** is to be delivered to the Registrar within 14 days.

## Issue of Share Certificates

Share certificates are to be delivered to the entitled person:

- \_ Within 2 months from the allotment of any of its shares or debentures; or
- \_ Within 2 months from the date on which a transfer of any such shares or debentures is registered with the company; or
- \_ Within 1 month from the date of transmission causa mortis.

# Form I

**No. of Company** <No of Company>

## Companies Act (CAP. 386)

Notice that a company has become a Single-Member Company

Pursuant to Section 212(4)

Notice that a company has become a Single-Member Company

**Name of Company** <Name of Company>

**Delivered By** <Delivered By>

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To the Registrar of Companies:

(a) <Name of Company> hereby gives notice in accordance with 212(4) of the Companies Act, 1995 that with effect from <Day> day of <Month> of the year <Year>, it has become a single member company through the acquisition of all its shares by <sup>(b)</sup> <Name of Member>, <Member's Residence>, <Member's ID Card>, as a result of transfer inter vivos/transmission causa mortis\*, and that the provisions of Section 212(1) have been complied with.



Signature

<Name>

Director/Secretary/Manager \*

Dated this <Day> day of <Month> of the year <Year>.

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**This form must be completed in typed form.**

**(a) State company name.**

**(b) State name, residence and identification document number.**

**\* Delete as necessary.**

# GENERAL FUNCTIONS AND RESPONSIBILITIES OF DIRECTORS

## **1 | Statutory Provisions**

1.1 Company Registers

1.2 Changes in Share Capital

1.3 Changes to the MAs

## 1.3 Duties in relation to amendments to the Memorandum or Articles of Association

Duty of directors and company secretary to deliver a copy of the resolution effecting the change to the Registrar within 14 days.

Along with this, there should be delivered a revised and updated copy of the memorandum and articles, as amended by the resolution, and incorporating any other changes that have been made to date where official Registry forms were used - ex. changes to directors, registered office, or transmission of shares.

No amendments will take place until the documents are delivered.

Change in registered office – **Form Q**



Form Q

No. of Company .....

COMPANIES ACT  
(CAP. 386)

Notification of change in registered office of a company

Pursuant to Article 79 (2)

Name of Company .....

Delivered by .....

To the *Registrar of Companies*:

(a) .....

hereby gives notice in accordance with Article 79(2) of the Companies Act, 1995 that the company has changed its registered office to: .....

Effective Date of Change .....

Name and signature.....  
*Director/Secretary/Manager\**

Dated this ..... day of ..... of the year .....

*This form must be completed in typed form.*

(a) State company name.

\* Delete as necessary.



# Changes in the officers of the company

Where there is a change of directors or company secretary or persons vested with representation, the **Form K** must be sent to the Registrar for Registration.

**Form K**

No. of Company .....

**COMPANIES ACT, 1995**

**Notification of changes among directors or company secretary or in the representation of a company**

**Pusuant to Section 146 (1)**

Name of Company .....

Delivered by .....

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To the *Registrar of Companies*:

(a) .....

hereby gives notice in accordance with Section 146 (1) of the Companies Act, 1995 that:-

.....

.....

.....

Effective Date of Change .....

# GENERAL FUNCTIONS AND RESPONSIBILITIES OF DIRECTORS

## **1 | Statutory Provisions**

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1.4 Annual and Periodic Duties

# 1.4 Annual and periodic duties

## Accounts

Profit and loss account, balance sheet and notes to the accounts

## Directors' Report

To be prepared in respect of each accounting period. Should be approved by the board of directors and signed on behalf of the board by two directors of the company. A copy should be circulated to every member and debenture holder and to every person entitled to receive notice of a general meetings.

# Annual and periodic duties

## Listed companies

### 1. Annual financial report

- annual financial statements with auditor's report and director's report;
- statement of responsibility;
- report by the directors and the auditors on the compliance with the Code of Good Corporate Governance;
- details of material contracts

# Annual and periodic duties

## 2. **Half-yearly report** (covers the first 6 months of each financial year)

- \_ condensed set of financial statements;
- \_ interim director's report;
- \_ If the half-yearly report is not audited, a statement to that effect must be included.

*\*the obligation to publish the half-yearly report does not apply to credit institutions which do not have shares admitted on the Malta Stock Exchange.*

# Annual and periodic duties

## Annual Return

- \_ To be signed by at least one director or the company secretary
- \_ Delivered within 42 days of every anniversary of the company's registration
- \_ Filed with Registrar on a yearly basis
- \_ Form is set out in Seventh Schedule to Companies Act



**SEVENTH SCHEDULE**  
(Article 184)

*Substituted by:  
IV. 2003.167;  
L.N. 425 of 2007.*

Company No: .....

**CONTENTS AND FORM OF ANNUAL RETURN**

ANNUAL RETURN of .....  
..... (name of the company)

Date to which this return is made up: .....  
(being the anniversary of the company's date of registration)

**1. Address**

(Address of the registered office of the company)

*This form must be completed in BOLD TYPE FORM*

**2. Summary of Share Capital**

All euro amounts are to be preceded by the symbol €. Symbols used for other currencies are to be indicated (where applicable).

Currency	Symbol
.....	.....
.....	.....
.....	.....
.....	.....

(a) **Nominal Share Capital**

Nominal Share Capital	divided into:
(Insert number and class)	shares of ..... each
.....	shares of ..... each
.....	shares of ..... each
.....	shares of ..... each

(b) **Issued Share Capital**

Number	Class
Number of shares of each class taken up to the date of this return (which number must agree with the total shown on the list as held by existing members).	shares
.....	shares
.....	shares
.....	shares

Number of shares of each class issued as partly paid up and extent to which each such share is so paid up.	issued as paid up to the extent of ..... per share ..... shares
.....	issued as paid up to the extent of ..... per share ..... shares
.....	issued as paid up to the extent of ..... per share ..... shares
.....	issued as paid up to the extent of ..... per share ..... shares

Total number of shares of each class forfeited.	Number	Class
.....	.....	shares
.....	.....	shares
.....	.....	shares
.....	.....	shares

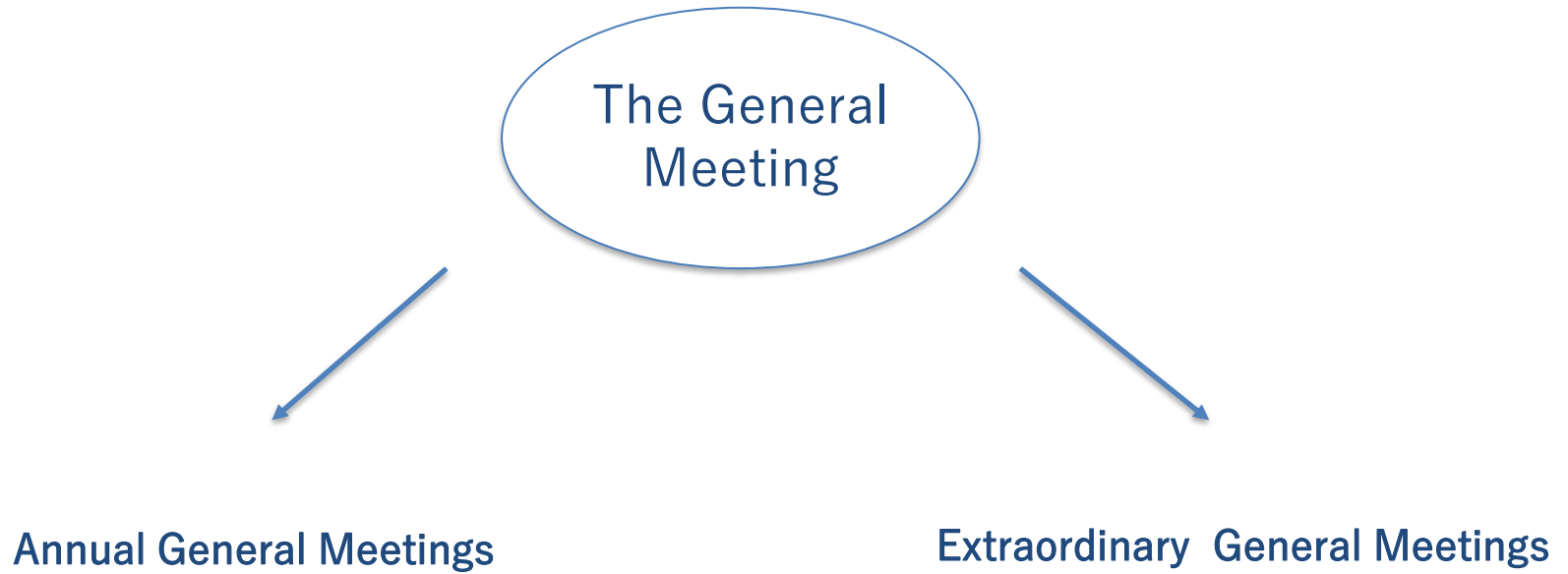
Total amount paid, if any, on shares forfeited. ....

# 2

## **Duties in relation to Meetings**



# MEETINGS



# GENERAL FUNCTIONS AND RESPONSIBILITIES OF DIRECTORS

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- 2.1 The Annual General Meeting

# THE AGM

Article 128 Companies Act - every company is required to hold an AGM; this is the only mandatory meeting.

Provides the Opportunity:

- To discuss affairs of the company; and
- For directors to be accountable to shareholders by presenting companies' accounts, directors' report and the annual audit.

# Business Transacted at the AGM

Unless the AoA otherwise provide, the ordinary business of an annual general meetings is to:

1. declare dividends;
2. consider the accounts, balance sheets and the reports of directors and auditors;
3. elect directors in place of those retiring; and
4. appoint and fix the remuneration of auditors.

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- 2.2 Extraordinary General Meetings

# Extraordinary general meetings (EGMs)

- The CA provides that general meetings other than the AGMs are EGMs.
- Several matters which require consideration and decision at an EGM, (or alternatively at an AGM as special business). These matters include:
  1. alterations to the M&As;
  2. the conversion, amalgamation or division of the company;
  3. the dissolution of the company;
  4. the filing of a company recovery application and
  5. any matter which the Board may, in terms of law or in terms of the memorandum and articles of association, refer to the meeting, amongst others.

# Who convenes an EGM?

1. **Directors** (at any time but they must do so on serious loss of capital);
2. The Court (on its own motion or on demand of a director or member);
3. At the request of the resigning auditor for the purposes of explaining the reason for his resignation; or
4. On requisition by the members

# GENERAL FUNCTIONS AND RESPONSIBILITIES OF DIRECTORS

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- 2.2 Extraordinary General Meetings
- 2.3 Board Meetings



# Board Meetings

## Convening of board meeting

No rule in the CA. The model articles provide that the directors may summon a board meeting at any time. The company secretary must summon a board meeting on the requisition of directors. Meetings may also take place through audio visual conference.

## Addressee of notice

Notice must be given to all directors.

# Board Meetings

## Documents to be circulated

All documents pertaining to the business to be transacted should be circulated within a reasonable time prior to the meeting in order to allow for proper preparation.

## Quorum

A quorum must be present. This is determined by the AoA. The model articles provide that the quorum is 2 directors, unless the company has only one director.

# Board Meetings

## Voting

No rule in the CA. The AoA would typically state that this is by majority vote.

## Chairman

Chairman (either appointed as chairman of the board or for a specific meeting) typically has a casting vote. This prevents situations of deadlock.

## Minutes

Minutes must be taken for each board meeting. They need not be signed by all the directors – the signature of the chairman is evidence that the proceedings took place in accordance with the minutes.

# ROLES AND RESPONSIBILITIES OF DIRECTORS DURING INSOLVENCY

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# When is a company deemed insolvent?

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A company is deemed to be insolvent at law when it has failed either the “cash-flow” test or the “balance sheet” test.

However director duties also arise prior to insolvency in a number of scenarios:

- (i) where the company is “doubtfully solvent”, where the company is “nearly insolvent” and if a contemplated payment or other course of action would jeopardise the company’s solvency;
- (ii) where the company is imminently likely to become insolvent;
- (iii) where there is no reasonable prospect that the company could avoid going into insolvent liquidation;

# Cash-Flow Test vs. Balance-Sheet Test

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Out of all the previous scenarios, only these two tests are defined in the CA.

1. **Cash-Flow test:** where a debt due by the company has remained unsatisfied in whole or in part after twenty-four weeks from the enforcement of an executive title;
2. **Balance-Sheet test:** where it is shown to the satisfaction of the court that the company is unable to pay its debts, account being taken also of contingent and prospective liabilities of the company.

# Special Duties in the context of Insolvency

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1. Duty to convene a general meeting of the company whenever (i) the company is unable to pay its debts and (ii) where there is a serious loss of capital of public companies;
2. Duty to consider creditor's interests;
3. The general duty of care and skill;
4. Duty of listed companies to issue a company announcement.

# INSTANCES OF PERSONAL LIABILITY

1. Breach of general duties under the CA;
2. Liability for administrative fines under the CA;
3. Liability for administrative fines under specific legislation other than the Companies Act;
4. Liability in a company insolvency scenario;
5. Criminal liability.



# PERSONAL LIABILITY AND INDEMNIFICATION OF DIRECTORS

## ARTICLE 147 OF THE COMPANIES ACT

- Establishes the personal liability of directors which shall be joint and several.
- However provides that where a particular duty has been entrusted to one or more of the directors, only such director or directors shall be liable in damages.

... such Person and its Subsidiaries, taken as a whole, shall be liable for their debts as if they were the sole proprietor, taking into account the assets of such Person and amount of such Person's liability on a "credit" basis, giving effect to the provisions of credit extension, with the exception of the proceeds of such extension of credit. In this definition, (i) "debt" means liability on a "credit" basis, whether or not it is a judgment, liquidated, unliquidated, fixed...



# DEFENCES

A director shall not be liable for the acts of his co-directors if he proves either:

- that *he did not know* of the breach of duty before or at the time of its occurrence and that on becoming aware of it after its occurrence he signified forthwith to the co-directors his dissent in writing; or
- that, knowing that the co-directors intended to commit a breach of duty, he *took all reasonable steps to prevent it*.

# Article 148

Any provision, whether contained in the memorandum or articles of a company or in any contract with a company or otherwise for exempting any officer of the company or any person engaged by the company as auditor from, or indemnifying him against, any liability which by virtue of any rule of law would in the absence thereof have been attached to him in respect of negligence, default or breach of duty or otherwise of which he may be guilty in relation to the company shall be void

# Breach of Administrative Duties

Failure to comply with administrative duties previously mentioned may lead to the imposition of fines both on the company and the directors personally.

Liability emanates from article 427(4) of the Companies Act which explicitly states that directors and the company are jointly and severally liable for payment of any administrative penalty.

Justification / rationale for liability is based on article 150 of the Companies Act which states that anything liable to be done by the company is liable to be done by its officers.

Arkitett Mariello Spiteri vs Registrar of Companies

# LIABILITY IN THE EVENT OF INSOLVENCY

Of particular importance are the offences of:

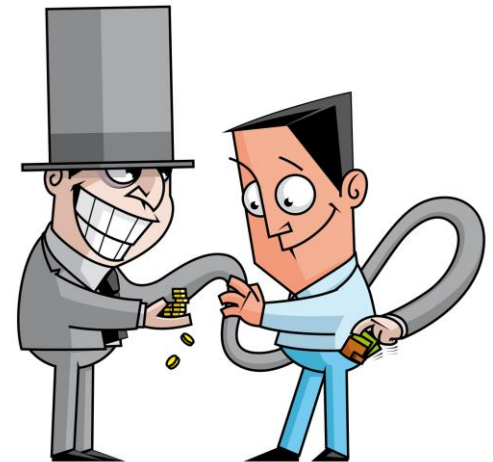
- i. Wrongful trading
- ii. Fraudulent trading



# FRAUDULENT TRADING

## Article 315 of the Companies Act

Defines fraudulent trading as acts carried out during the winding up of a company with the intent to defraud the creditors of the company. This renders any persons who were aware of such actions personally liable, without any limitation of liability for any of the debts and liabilities of the company.



# WRONGFUL TRADING

## Article 316 of the Companies Act

Applies where a company has been dissolved and is insolvent and it appears that a person who was a director of the company knew, or ought to have known prior to the dissolution of the company that there was no reasonable prospect that the company would avoid being dissolved due to its insolvency.

# INSTANCES OF PERSONAL LIABILITY

## Criminal Offences under the Companies Act

1. Misapplication or retention of company's property;
2. Concealing company's property and falsifying records;
3. Fraud by officers of companies being wound up;
4. Fraud by officers of companies subsequently wound up;
5. Failure by an insolvent company to keep proper accounting records.

**Other Criminal Offences apply under the Criminal Code and other legislation.**



# MITIGATING THE RISK OF PERSONAL LIABILITY: SUGGESTED WAY FORWARD

- I. Consider carefully whether you should accept the appointment as a director;
- II. a director should insist that the board is made up individuals with a variety of skills;
- III. Avoid being a 'rubber-stamp';
- IV. Seek professional advice where required;
- V. Engage full-time legal in-house counsel especially in large companies;
- VI. Organise regular training on relevant subject-matters.
- VII. Make sure that any dissent is noted in the minutes

# LIABILITY OF NEDS

No distinction is legally made between non-executive and executive directors. Therefore, prima facie they do have equal chances of liability as other directors.

Taking the law as it is, one concludes that their duties and liabilities are the same regardless of whether they have a managerial or a supervisory role, and be they independent or otherwise.

## IL-PULIZIJA V XUEREB, BUSUTTIL, ELLUL VINCENTI AND GAUCI [2001]

***Facts:*** Xuereb was an executive director whilst others were all NEDS and were charged with involuntary homicide of a worker on a construction site.

***Decide:*** Court held that there must be a link between the way the director acted on the board and the involuntary homicide they were being accused of. The NEDS could not be held liable within the given circumstances.

# THE PRICE CLUB CASE



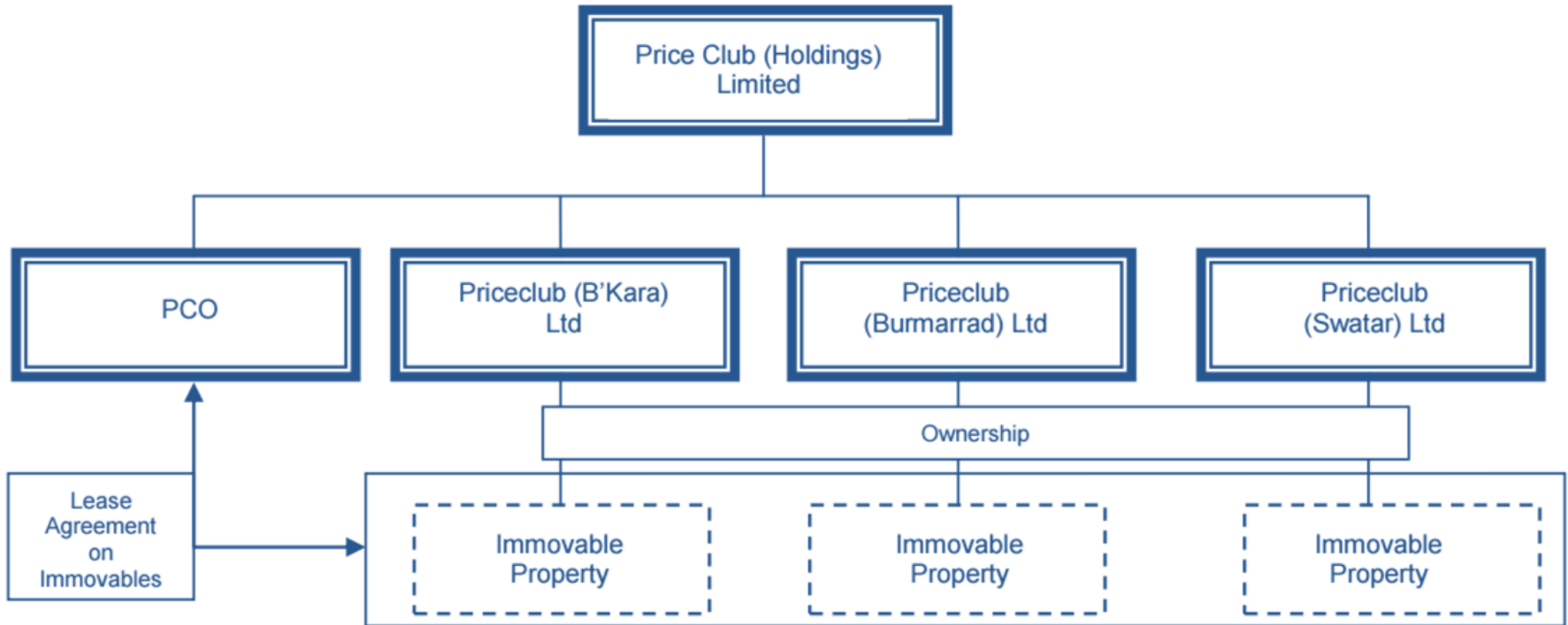
## BORG CARDONA AS LIQUIDATOR OF PRICELUB OPERATORS LTD VS ZAMMIT, GAUCI AND FINO

This case was one of the several cases filed in the Price Club saga, where the liquidator of Priceclub Operators Ltd (PCO) filed legal proceedings against ex-directors of PCO Mr Zammit, Mr Gauci and Mr Fino – for wrongful and/or fraudulent trading under the Companies Act provisions. Priceclub operated eight supermarkets and stopped trading in 2001.

The issue was whether the ex-directors should be held personally and unlimitedly responsible for all PCO's debts in solidum.

Court ruled for the plaintiff.

# PRICE CLUB STRUCTURE



## Thinly capitalised company

- Company commenced business with an operating deficit and without sufficient capital base.
- The initial capital of PCO was that of LM101,000 which was never increased over time.
- Given the considerable debts inherited by the company, the lack of realisable assets held by the company and its projected ongoing expenditure, it can be said that the company commenced its business on the brink of insolvency.
- On the basis of the above, the court inferred intention to have company financed by its trade creditors.

## Manner in which company was managed

- Did not act prudently or honestly and did not have the necessary competence.
- Serious short comings in IT and operational aspects.
- Given their lack of expertise and knowledge of the difficulties of the company, directors should have ensured that the company be built on stronger financial foundations.
- Notwithstanding that a loss was being made for the purchase of Priceclub, and notwithstanding that the capital was not sufficient, they continued to make further investments at the expense of creditors.



## Dishonesty towards creditors

- Creditors were not given a true picture of the financial position of the company
- The directors made positive statements about the group in the accounts which were not correct. Creditors were assured that there was a temporary cash flow problem which was remediable.
- In the meantime, the directors negotiated longer credit terms with trade suppliers instead of funding it through additional share capital.

# *Considerations*

## Responsibility of Directors

- A director could not avoid responsibility on the pretext that he did not appreciate the true situation of the company or that he relied on advice of others.
- It was not excusable for a director to plead that he was a ‘non-executive director’ and/or a minority shareholder.
- Fraudulent trading test – extends to situation whereby a person realised or could have realised at the time the debts were incurred that there was no good reason for thinking that funds would be available to pay the debt in question when it became due or shortly thereafter.

## FIRST HALL

Declared that all three defendants acted with the intention to defraud PCO's creditors and were thus jointly and severally liable for all PCO's debts and obligations without limitation, as a result of fraudulent trading.

## COURT OF APPEAL

Confirmed the decision of the First Hall and said that the directors were obliged to provide the operating company, PCO with tangible assets, as security for its creditors to ensure that the company had a chance to succeed. The directors did not safeguard the interests of PCO's creditors.

## CONCLUDING REMARKS

- \_ The key to good corporate governance is to perceive it as something more than a simple compliance-driven exercise of a tick-box nature, but one that can really add value to the organisation.
- \_ It is about creating a robust system of management that is built on trust and clarity of the expectations of the management and the functions of the board – a system which secures the adequate supply of information in a timely manner to the decision-makers that would enable them to make the right decision at the right time.

# ANY QUESTIONS?

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