Module 03 – Company Law Fundamentals

Lecture Title: Officers of the company (Part 2)

Lecturer: Nicola Jaccarini

Date: Thursday 20th November 2025

21 ACADEMY

Diploma in Law (Malta)

CAMILLERI PREZIOSI
ADVOCATES

Overview

1. Powers and duties of the Board of Directors
2. Liability of directors
3. Duties and responsibilities of the company secretary

Powers of directors

The directors of the company are required to exercise their general powers to manage, supervise and monitor the affairs of the company in accordance with the terms of the Companies Act and the Memorandum and Articles of Association of the company.

The principle of 'Reserved Powers'

The directors may exercise all powers of the company which are not required to be exercised by the shareholders in general meeting by the Companies Act or by the Memorandum and Articles of Association.

NB. Reserved powers may also be stipulated in side agreements, such as shareholders' agreements or joint venture agreements.

Limits on directors' powers

- Limits are those imposed in the M&As or anything contained in the Companies Act which requires a shareholders' resolution at a general meeting
- Another restraint on potential abuse is the set of duties which the Companies Act imposes on directors
- However, anything done by a director which is beyond his powers shall be binding on the company unless that act exceeds the limits of the director's authority by virtue of the Companies Act
- Any limitation on the powers of the directors cannot be relied on as against a third party even if it arises from the company's M&A

Duties of directors

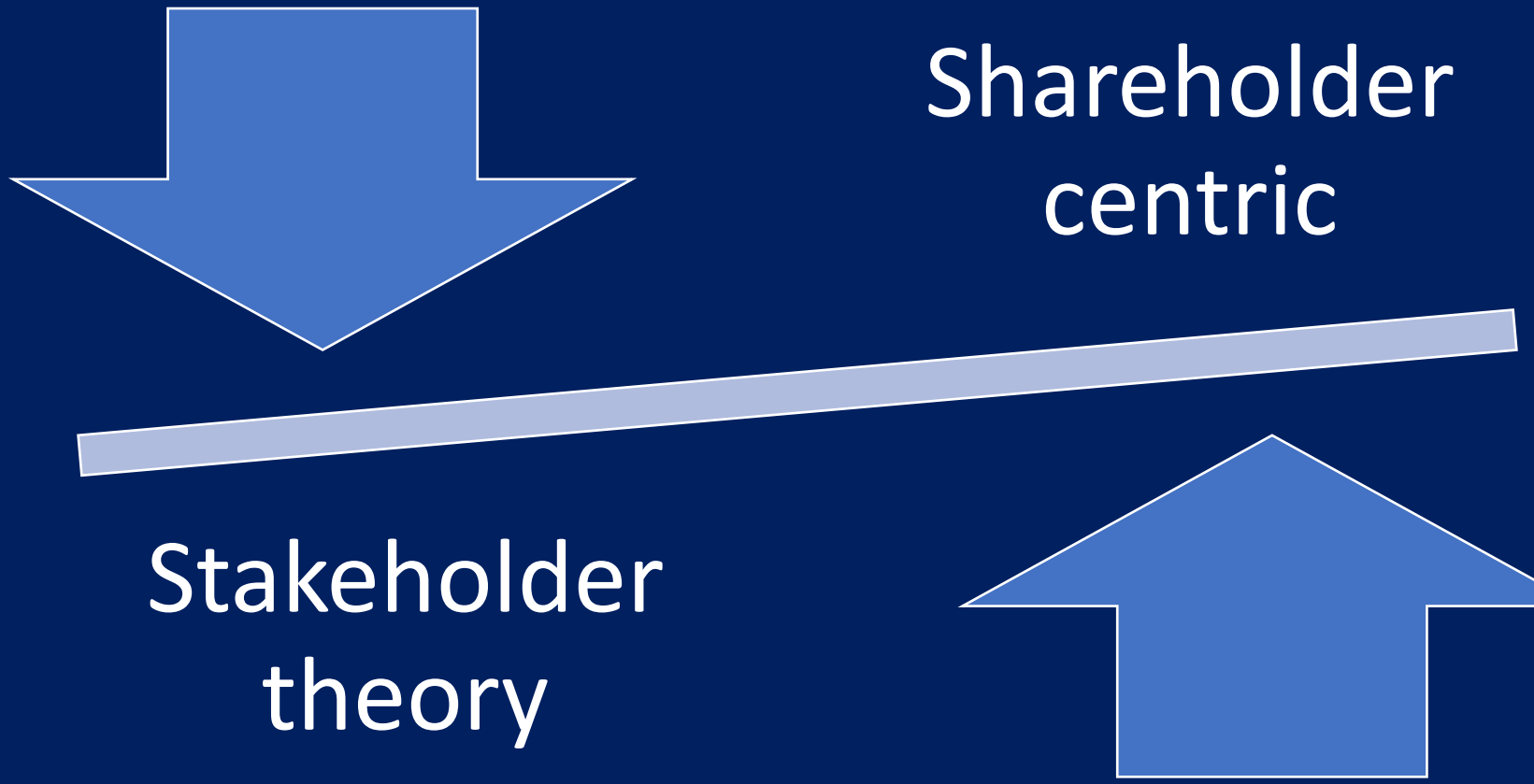
Article 136A of the Companies Act provides that:

"*A director shall be bound to act honestly and in good faith in the best interests of the company.*"

In addition, the directors of a company shall promote the well being of the company and shall be responsible for:

- ✓The general governance of the company and its proper administration and management; and
- ✓The general supervision of its affairs

For whose benefit is a company run?



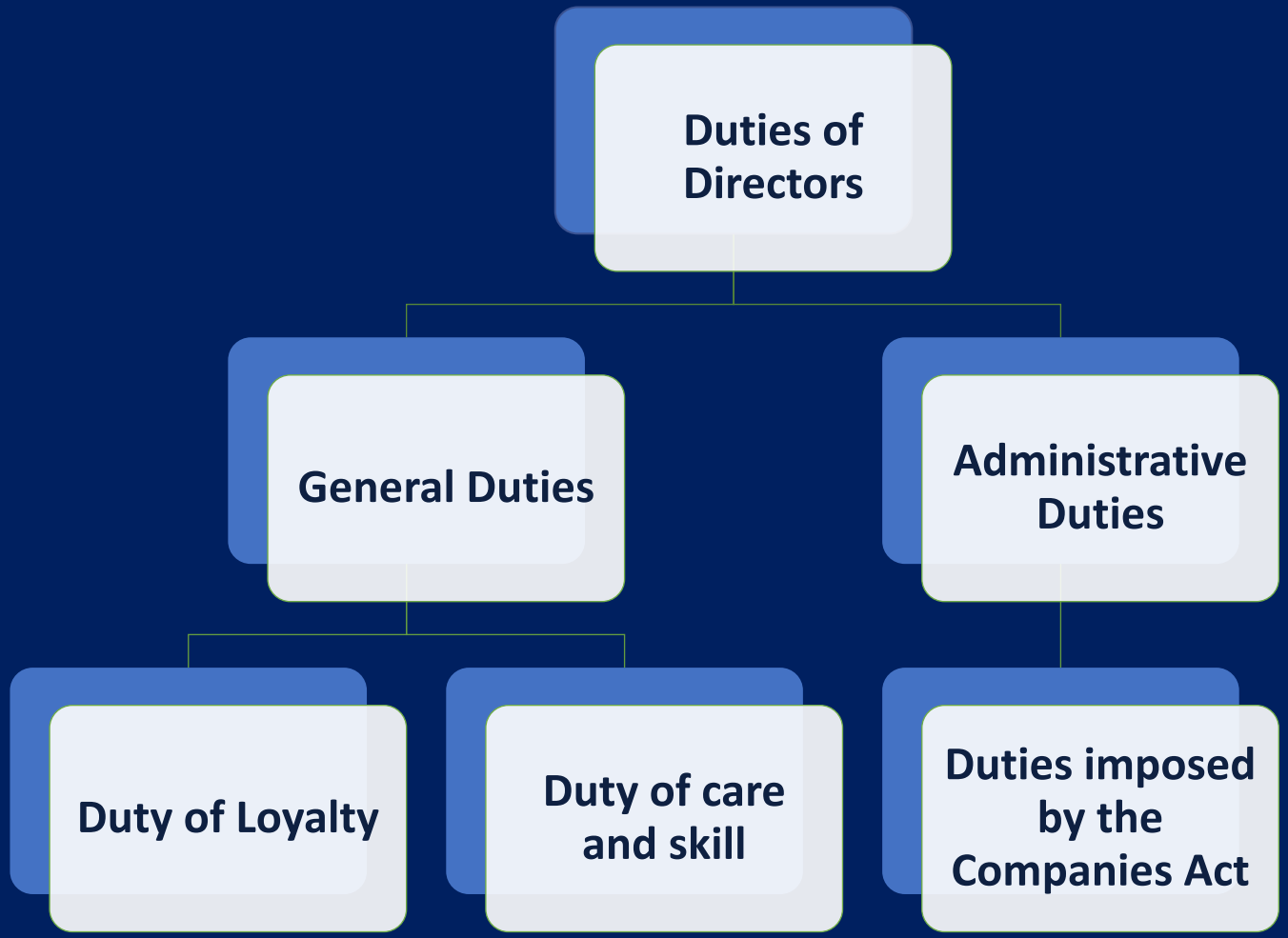
Duties of directors

- Under Maltese law, directors owe legal and fiduciary duties to the company for the duration of his / her appointment. This principle is based on the rationale that a director acts as the mandatary, agent and fiduciary of the company.
- The term 'company' can here be taken to be a synonym for the shareholders, and so the directors' primary constituency is considered to be the shareholders in general (not a specific group or class of shareholders), while keeping a balance between the interests of both present and future shareholders.
- Upon the onset of insolvency, or if insolvency is imminent, there is a shift: the directors now owe their duties to the general body of creditors.

Duties of directors: groups of companies

- At law, each company within a group is a separate entity, it follows that the directors of a company must act in the interests of the company of which they are directors.
- The fact that a company is a member of a group has no bearing on the directors' constituency: the directors of a group company are not entitled to sacrifice the interests of that company in the interests of another company within the group.

Directors' duties: checklist



Directors' duties: duties of loyalty

- Duty to act honestly, in good faith and in the best interests of the company
- Proper use of powers and to remain within powers
- Equal treatment of all shareholders
- No conflict rule
- No personal profit
- No competition

Duty to act honestly and in good faith in the best interests of the company

- This core duty is found in Article 136A(1) of the Companies Act.
- Compliance with the rule is tested in 'common sense' principles.
- *Re Smith & Fawcett Ltd:* Directors are require to act *bona fide* in what they consider, and not what a court may consider, is in the best interests of the company
- *Re W & M Roith Ltd:* There need not be actual dishonesty for there to be a breach of this duty. It is sufficient that the board did not direct their minds to the questions as to whether the proposed transaction is in the best interests of the company.

Duty to treat all shareholders equally

- *Scottish Cooperative Wholesale Society Limited v Meyer:* Nominee directors owe their duties to the company as a whole and not to the shareholder who appointed such director.

- *Mutual Life Insurance Co of New York v Rank Organisation Limited:* The court considered that the decision of the directors not to issue shares in favour of all the ordinary shareholders (excluding Canadian and American shareholders) was not to have been in breach of the equality of treatment principle, in view of the onerous requirements which the Securities and Exchange Commission (SEC) and the equivalent Canadian commission imposes.

Duty to use powers properly / not for improper purposes

Directors should act within the limits of their powers:

1) They should not act, or enter into transactions, which go beyond the company's objects or powers, i.e. *ultra vires* the company
2) They should not act, or enter into transactions, which go beyond their powers as conferred upon them in terms of the M&A
3) They should not act, or enter into transactions, which go beyond any instructions properly issued by the company

Even if the directors act honestly for what they believed to be in the best interests of the company, they may still be liable for breach of duty if they exercise their powers for a different purpose than that for which they were conferred. This is an objective test.

Duty to use powers properly / not for improper purposes – third party reliance

Article 137(4) of the Companies Act:

Notwithstanding anything contained in the M&A relating to the manner in which the representation of the company is to be exercised, anything done by the board which exceeds the limit of its authority or by any director which is beyond his powers is binding on the company unless that act exceeds the powers granted to the board or to a director, as the case may be, by virtue of the Companies Act.

Article 137(5) of the Companies Act:

Any limitation on the powers of the board or of any director of the company cannot be relied on as against third parties independently of whether that limitation, published or not, arises from the M&A or from any resolution of the general meeting or from a decision of the board of directors.

Duty to use powers properly / not for improper purposes – third party reliance

Article 137(6) of the Companies Act:

Where an act of the company falls outside the company's objects the company is not bound if it proves that, when the act was done, the third party knew that it was outside the company's objects or the third party could not, in view of the circumstances, have been unaware thereof:

Provided that the publication of the M&A of the company is not in itself sufficient to prove that the third party knew, or could not have been unaware, that the act was outside the company's objects.

Duty to use powers properly / not for improper purposes

Howard Smith Ltd v Ampol Petroleum Ltd:

- ✓The directors had the power to issue shares in W Millers, which was subject to a hostile takeover bid by Ampol Petroleum Ltd. Ampol Petroleum Ltd already controlled 55% of the shares in the company
- ✓Another company, Howard Smith Ltd, had offered to better the directors' employment terms in the future and therefore, the directors did not want Ampol Petroleum Ltd to complete the takeover bid
- ✓The directors issued new shares to Howard Smith Ltd preventing Ampol Petroleum Ltd from taking over the company

The court held that it was not improper for the directors to issue shares to a large compa to secure the financial stability of the company, however if the purpose was solely to dilute the majority voting power to obtain some personal advantage, then the issu shares would be improper and not in the best interests of the company.

Duty to avoid conflicts of interest

Directors have a positive duty to ensure that their personal interests do not conflict with the interests of the company.

A director that has a continuing material interest that conflicts with the interests of the company should take effective steps to eliminate the grounds for conflict.

Conflicts of interest can be managed, as set out in Article 145 of the Companies Act, through the requirement for the director to declare the nature of his interest to the other directors at the first possibility.

No profit rule

The ‘no profit’ rule prohibits directors from:

- ✓Making secret or personal profits from their position without the consent of the company;
- ✓Making personal gain from confidential information; and
- ✓Using any property, information or opportunity for their own benefit or anyone else’s benefit.

Duty not to compete with the company

Article 143(1) of the Companies Act provides that a director may not carry out business which is in competition with that of the company on whose board he sits, unless shareholder approval is obtained.

A breach of this article may give the company an option of either:

- ✓ instituting an action for damages and interest against the director; or
- ✓ demanding payment of any of the profits made by him in contravention of Article 143(1).

Fiduciary duties of directors

The concept of fiduciaries was introduced into our Civil Code in 2004. To an extent, these duties overlap with and supplement those already shouldered by directors by virtue of the Companies Act.

'*Fiduciary*' refers to a person who *'owes a duty to protect the interests of another person'* and '*holds, exercises control or powers of disposition over property for the benefit of other persons.'* A fiduciary is also someone who *received information subject to the duty of confidentiality and is aware that such information is intended to be confidential.*

Fiduciary duties of directors

The central tenet of these fiduciary duties is that the director (as a fiduciary of the company) is bound to carry out his obligations with the highest level of good faith and honesty, which includes the duties to:

- ✓Segregate personal and company property
- ✓Keep suitable and proper records
- ✓Render account of one's administration.

Administrative duties of directors

- Drawing up the Annual Financial Statements and the Directors' Report

The directors must ensure that the accounts give a true and fair view of the company's assets, liabilities, its financial position and profit or loss.

- Duties relating to board and general meetings
- Keeping of statutory registers and minute books
- Filing of returns and other documents with the Malta Business Registry
- The duty to monitor emails

NB. The latter three duties are shared with the company secretary

21 ACADEMY

Diploma in Law (Malta)

CAMILLERI PREZIOSI
ADVOCATES

Diploma in Law (Malta)

CAMILLERI PREZIOSI

ADVOCATES

Special duties: companies in financial difficulty

A director has additional duties where the company is unable to pay its debts, or is imminently likely to become unable to pay its debts. In such a situation:

'[The directors] shall forthwith … duly convene a general meeting of the company … for the purpose of reviewing the company's position and of determining what steps should be taken to deal with the situation, including consideration as to whether the company should be dissolved' (Art. 329A, Companies Act)

A similar duty arises in the case of a serious loss of capital.

Companies in financial difficulty

In terms of our Companies Act, a company is unable to pay its debts if:

1) A creditor of the company obtains and enforces an executive title (such as a final court judgment with all possibilities of appeal exhausted) by an executive act (such as a garnishee order or an executive warrant of seizure), and the debt due by the company remains unsatisfied in whole or in part after 24 weeks from the enforcement of the executive title (the Cash Flow Solvency Test);
2) If it is proved to the satisfaction of the court that the company is unable to pay its debts, account being taken also of the contingent and prospective liabilities of the company (the Balance Sheet Solvency Test).

The tests are alternative and non-cumulative.

Duties of care and skill

In carrying out his / her duties as a director, a director is obliged to exercise the degree of care, diligence and skill which would be exercised by a reasonably diligent person having both:

1) The knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried out by or entrusted to that director in relation to the company (objective element); and

2) The knowledge, skill and experience that the director has (subjecti element).

Duties of care and skill

Re City Equitable Fire and Insurance Co Ltd: A director need not exhibit in the performance for his duties a greater skill than may reasonably be expected of a person of his knowledge and experience.

Dorchester Finance Co v Stebbing: A subjective test was applied to the skill of that particular director, but he was nevertheless required to exercise the diligence that an 'ordinary man may be expected to take'.

Duties of directors of listed companies

A director sitting on a board of a company that has its securities admitted to listing and trading on a regulated market has a number of additional obligations to comply with. Principally, a director of a listed company must ensure compliance by the company with continuing disclosure requirements, including:

- ✓Company announcements
- ✓Related party transactions
- ✓Dealing in securities
- ✓Financial market abuse (inside dealing, unlawful disclosure of inside information and market manipulation)

21 ACADEMY

Diploma in Law (Malta)

CAMILLERI PREZIOSI
ADVOCATES

Liability of directors

- Article 13 of the Interpretation Act states that:

"Where any offence under or against any provision contained in any Act, [...] is committed by a body or other association of persons, be it corporate or unincorporate, every person who, at the time of the commission of the offence, was a director, manager, secretary or other similar officer of such body or association, or was purporting to act in any such capacity, shall be guilty of that offence unless he proves that the offence was committed without his knowledge and that he exercised all due diligence to prevent the commission of the offence"

Liability of directors

- The cardinal rule is found in Article 147 of the Companies Act:

"The personal liability of the directors in damages for any breach of duty shall be joint and several:

Provided that where a particular duty has been entrusted to one or more of the directors, only one such director shall be liable in damages."

Liability of directors

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

(a) 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 his co-directors his *dissent in writing*; or

(b) That, knowing that the co-directors intended to commit a breach of duty, he *took all reasonable steps to prevent it.*

Liability of non-executive directors

Legally, no distinction is made between non-executive and executive directors. Therefore, *prima facie,* they have equal chances of liability as other directors.

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

Liability of non-executive directors

Il-Pulizija v Xuereb, Busuttil, Ellul Vincenti and Gauci (2001):

- ✓Xuereb was an executive director, while the others were all NEDs They were all charged with the involuntary homicide of a worker on a construction site.
- ✓The Court held that there must be a link between the way the director acted on the board and the charge of involuntary homicide they were facing. The NEDs could not be held liable within the given circumstances.

Instances of personal liability

Criminal offences under the Companies Act

- Misapplication or retention of company property
- Concealing company property and falsifying records
- Fraud by officers of company being wound up
- Fraud by officers of company in anticipation of winding up
- Failure by an insolvent company to keep proper accounting records
- Fraudulent and wrongful trading
- Liability for administrative fines

Instances of personal liability

Criminal offences under other Acts, including:

- VAT Act
- Social Security Act
- Prevention of Money Laundering Act
- Criminal Code

A person who occupied the office of director in the past remains liable for any breach of duty committed during the period he held office.

Mitigating the risk of personal liability

- ✓Consider carefully whether to accept the appointment as a director in the first place
- ✓Insist that the board is made up of individuals with a variety of skills
- ✓Avoid being a 'rubber stamp'
- ✓Follow rules on conflict of interest
- ✓Record his reservations on particular resolutions proposed by fellow directors
- ✓Seek professional advice where required
- ✓Organise / attend regular training on relevant subject matters

(Non) limitation of liability & indemnification

A fundamental rule is found in Article 148 of the Companies Act, as a result of which:

- ✓Any provision exempting or indemnifying any officer or auditor of the company from 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 of which he may be guilty in relation to the company shall be void;
- ✓PROVIDED THAT the company may indemnify such officer or auditor against any liability incurred by him in defending any proceedings in which judgment is given in his favour o in which he is acquitted.

Case law

Il-Pulizija v Dr George Cassar (Court of Criminal Appeal, 1998)

The COCA held that once a director, then one is duty bound to exercise the due diligence required by law and in order to escape liability he must prove that he was not aware of the fact or took all necessary measures to prevent the commission of the offence.

The non-executive director in the case in question could not avoid liability by remaining passive in his actions:

"mhux bizzejjed li direttur jibqa' passiv bla ma jiehu interess, jew bla ma jiehu interess bizzejjed, f'dak li jkun qed isir mil-kumpannija.."

Case law

Dr Andrew Borg Cardona (qua liquidator of Priceclub Operators Ltd v W. Fino, V. Zammit & C. Gauci (qua former directors of Priceclub Operators Ltd) (Court of Appeal, 2010) (the 'Price Club Case')

"Id-diretturi ma jistghux jaharbu mir-responabbilta' taghhom billi jghidu li huma ma kinux jafu x'kienet il-vera sitwazzjoni tal-kumpannija jew li ma jifhmux jew li huma joqghodu fuq dak li jghidulhom il-konsulenti mqabbda minnhom.

Lanqas ma jista' direttur jahrab mir-responsabbilta' tieghu bl-iskuza li hu kien [...] non-executive director. Direttur, anke jekk non-executive [...] ghandu l-istess responsabbilta' bhad-diretturi l-ohra u ghandu l-obbligu li jkun jaf u jimpenja ruhu li jwettaq id-doveri mposti fuqu mil-ligi."

Case law

Dr Andrew Borg Cardona (qua liquidator of Priceclub Operators Ltd v W. Fino, V. Zammit & C. Gauci (qua former directors of Priceclub Operators Ltd) (Court of Appeal, 2010) (the 'Price Club Case')

The CoA also quoted Professor Andrew Keay: "Today it is very difficult for a director to argue that he was not a party to the carrying on of the business of the company (unless such director registers a dissenting opinion), especially since it is one of the duties of directors to actually participate in the business of the company."

21 ACADEMY

Diploma in Law (Malta)

CAMILLERI PREZIOSI
ADVOCATES

Functions and duties of the company secretary

The directors are duty bound to take all reasonable steps to ensure that the company secretary is an individual who appears to them to have the requisite knowledge and experience to discharge the functions of the company secretary, or is a body corporate which is registered as a CSP (*or is not required to be so registered*)

The functions and duties of the company secretary may broadly be categorised into two headings:

✓Functions and responsibilities imposed in terms of law;

✓Functions and duties relating to board and general mee

Functions and duties of the company secretary

✓Functions and responsibilities imposed in terms of law:

- Keeping, maintaining and updating statutory registers and minute books
- Making the necessary returns and filings with the MBR
- Authenticating documents
- Issuing share certificates
- Liaising with and providing information to auditors

Functions and duties of the company secretary

✓Functions and duties relating to board and general meetings:

- Issuing the proper notice and agenda for board and general meetings
- Determining whether a quorum is present and ensuring the meeting proceeds in accordance with the agenda
- Taking minutes of meetings
- Recording any resolutions put to vote and counting of votes cast

21 ACADEMY

Diploma in Law (Malta)

CAMILLERI PREZIOSI
ADVOCATES