Directors’ duties and responsibilities in Ireland
What leaders need to know

Overview

The duties and liabilities attaching to directors of Irish companies, and in particular Irish limited companies are a broad and complex area. The information inside describes the directors duties and responsibilities as they currently exist including those set out in the Companies Acts 1963 to 2013 (the “Acts”). However your attention is drawn to the changes to be introduced by the recently enacted, but not yet commenced Companies Act 2014 (the “2014 Act”). The 2014 Act is due to commence on 1 June 2015 and we have also set out the changes which will become effective upon commencement of the 2014 Act.
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1 DUTIES OWED TO THE COMPANY

Under Irish law, the fiduciary relationship between a director and his company gives rise to various duties on the part of the director. These duties may be broadly summarised as follows:

1.1 Good Faith
A director must act “bona fide” or in other words, in what he believes to be in the best interests of the company. This is a subjective standard, so the crucial factor is what the director himself considers to be in the best interests of the company.

1.2 Proper Purposes
A director must exercise his powers for the particular purpose for which they were conferred and not for some extraneous purpose. If a director does not exercise his granted powers within their intended scope, he is said to have exceeded his authority and may be personally liable to the company for any resulting damage caused.

1.3 Unfettered Discretion
The company is entitled to have each director make a decision without prior bias or obligation. Consequently, in general, directors may not contract amongst themselves or with third parties as to how they will cast their votes in the future.

1.4 Conflict of Interest
A director is obliged to avoid situations whereby his own personal interests are in conflict with his duty to the company. This duty to avoid conflicts of interests comprises the following duties:

1.4.1 Disclosure of Interest
Where a director, whether directly or indirectly has a personal interest in a contract entered into or proposed to be entered into by the company, the director must disclose the fact and the nature of his interest to the board.

1.4.2 Secret Profit
A director may not make a secret profit from his position and must account for any benefit so obtained, save where full disclosure has been made to the members of the company and their consent obtained.

1.5 Confidentiality
A director must not disclose any confidential information obtained in his capacity as a director.

1.6 Skill and Care
In addition, a director owes a duty of skill and care in the performance of his functions. The courts have over time clarified that this general principle can be considered in a number of sub-propositions as follows:

1.6.1 Standard of Care
The degree of skill and care required of a director is dependent upon the abilities of the particular director. The standard of care required from a director will be the standard which may reasonably be expected from a person of their background, knowledge and experience.

1.6.2 Genuine Mistake
A director cannot be held responsible for genuine errors of judgment. If a director makes a decision which he genuinely believes to be in the best interests of the company, the fact that it is subsequently proved that he was mistaken will not in itself give rise to any liability.

1.6.3 Continuous Attention
A director is not bound to give continuous attention to the affairs of his company. While a director is not under a duty to attend every board meeting, persistent failure to attend board meetings is likely to breach the required duty of care.

1.6.4 Delegation
A director is, in general, justified in leaving duties to be performed by another officer or an employee or of the company where such duties may properly be left to such an officer or employee having regard to the provisions of the articles of association of the company and the needs of business.
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2 DUTIES OWED TO OTHER PERSONS

2.1 Duties to Creditors
The courts have developed a line of authority to the effect that in the event of a company being insolvent or on the verge of insolvency the directors of the company will owe a duty to the company’s creditors.

2.2 Duties to Employees and Members
Directors are also obliged to have regard to the interests of the company’s employees and members when carrying out their duties. However, this duty is enforceable only by the company. In general, directors do not owe a duty to individual members, though where aggrieved members can use sufficient voting power in a general meeting to compel the directors to have regard to them, such a duty may be vindicated.

The Acts state that the directors must call an Extraordinary General Meeting of the company if the members of the company representing not less than one-tenth of the total voting rights of all the members having a right to vote at general meetings of the company, request an EGM.

Should a conflict arise between the interests of the company and the interests of the employees or members, the director’s primary responsibility is to the company.

3 STATUTORY DUTIES

The Acts impose a range of statutory duties on directors (both direct and indirect), the underlying rationale behind these duties is the disclosure of relevant information to creditors and members.

3.1 Disclosure
A number of duties of disclosure are imposed on directors under the Acts For example, directors are obliged to disclose personal information to be recorded in the statutory books of the company. In addition, directors are under a duty to disclose their interest in contracts or proposed contracts of the company, to disclose and register their interest in shares of any related companies (including any interests in options or employee share schemes) and to disclose any payments to be made to the directors in connection with share transfers of any related companies.

3.2 Compliance
There is a general duty to comply with all provisions of the Acts. In relation to the management of the company, directors are obliged to keep minutes of all meetings of the members, directors or committees of the directors. They are also under a duty to convene an EGM of the members of the company where the requirements for such are satisfied. Where the company suffers a serious loss of capital, the directors are also under a direct duty to convene an EGM.

3.3 Dealings with Corporate Assets
Apart from the above, the Acts contain numerous safeguards aimed at preventing the unlawful dissipation of corporate assets. As a result, directors who engage in substantial property transactions with the company should bring this to the attention of the members of the company. Similarly, directors are also under a duty not to enter into transactions which are beyond the capacity of the company.
4 DIRECTORS’ LIABILITIES

In addition to liability arising from a breach of the duties outlined above, directors may be liable to the company and to third parties under the following headings:

4.1 Agency
When a director fails to make a third party aware of the fact that he is acting as the agent of the company, he himself may be liable as principal to the contract with that other party. This means that it is important to make clear in all dealings in the capacity of director that one is acting in that capacity and not in a personal capacity.

4.2 Failure to Correctly State Company’s Name
Where a director fails to use the name or the full name of the company when signing a negotiable instrument or order on the company’s behalf or has used a seal which does not show the name of the company in legible characters thereon, liability may be incurred. In such a situation, if the company refused to honour the negotiable instrument or order, the director is liable to a fine and may also be personally liable to the holder of the instrument.

4.3 Civil Wrongs
A director will be liable to outside parties for any fraudulent acts or for the commission by the director of any tort. For example, if, by order of the directors, a trespass is committed, a patent infringed or another wrongful act committed, the directors who are party to it may be personally liable thereon.

THERE IS A GENERAL DUTY TO COMPLY WITH ALL PROVISIONS OF THE COMPANIES ACTS.
5 LIABILITY UNDER STATUTE

There are a number of provisions in the Acts which provide for personal liability and other civil and criminal sanctions to be imposed on individual company directors in certain circumstances. Personal liability may, in certain cases, include a liability for some or all of the company’s debts, including those pre-existing the director’s appointment as a director.

Examples of those circumstances in which directors may face statutory consequences or penalties, including personal liability for the debts of the company, include the following:

5.1 Fraudulent & Reckless Trading
An officer of a company who is knowingly party to the carrying on of business in a fraudulent or reckless manner may be held personally liable for the debts of that company.

Although this is not an exhaustive list, an officer may be deemed guilty of reckless trading if:

(i) he was a party to the carrying on of such business and, having regard to the general knowledge, skill and experience that may reasonably be expected of a person in his position, he ought to have known that his actions or those of the company would cause loss to the creditors of the company, or any of them, or

(ii) he was a party to the contracting of a debt by the company and did not honestly believe on reasonable grounds that the company would be able to pay the debt when it fell due for payment as well as all its other debts (taking into account the contingent and prospective liabilities).

Reckless trading requires a high degree of carelessness on the part of the director. The director must have been a party to the carrying on of the business in a manner which he knew, or could be deemed to have known, involved an obvious and serious risk of loss or damage to creditors. If a director held an honest and reasonable belief that the company could trade out of insolvency and thereby improve the situation of the creditors, he is unlikely to be liable for reckless trading.

A director may be found guilty of fraudulent trading where he “was knowingly a party to the carrying on of any business of the company with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose”. A director found guilty of fraudulent trading may be convicted of a criminal offence.

Liability for fraudulent trading is difficult to establish and requires actual dishonesty on the part of the director and that the directors continued to incur debts whilst knowing that there was no reasonable chance that those creditors would be paid.

5.2 Acquisition of Shares in Holding Company
Where a company acquires shares in its holding company and within six months goes into liquidation as a result of its inability to pay its debts, the court may, declare that the directors of the insolvent company are jointly and severally liable to repay that company the total amount paid by that company for the shares in its holding company.

5.3 Substantial Property Transactions
The Acts require that certain property transactions (i.e. the sale or purchase of significant non-cash assets) entered into between a company and a director of that company or a person connected with such a director must be approved by a resolution of the shareholders. The effect of breaching these provisions is to make the contract voidable at the option of the company. A director, any person connected with him and any director, who authorised the transaction, may be liable to account to the company for any profit and to indemnify the company for any loss. These provisions do not apply to any intra-group transactions.

5.4 Loans to Directors
A company may not:

(i) make a loan or quasi-loan to;
(ii) enter into a credit transaction for or
(iii) enter into a guarantee or grant security to another person

for a director or a person connected with a director, save for in certain limited circumstances. Any such transaction is voidable at the option of the company. In addition, the benefitting director, any person connected with the director and any director who authorised the transaction will be liable to account to the company for any gain made and to indemnify the company for any loss or damage suffered by the company. Criminal penalties may also apply. Furthermore, if in the course of the winding-up of the company, the court is of the opinion that any loan or financial arrangement with a director has contributed materially to the company’s insolvency or substantially impeded the orderly winding-up of the company, the director in question may be made personally liable for the company’s debts without limitation of liability. Again, these provisions do not apply to any intra-group transactions.
5.5 False Information
It is a criminal offence for any person, in purported compliance with any provisions of the Acts, to answer a question, provide an explanation, make a statement or produce, lodge or deliver any return, report, certificate, balance sheet or other document which is false in a material particular, or knowing it to be false, or to recklessly answer a question, provide an explanation, make a statement or produce, lodge or deliver any such document which is false in a material particular.

5.6 Misapplication of Assets
If it appears in the course of winding up of a company that a director has (i) misapplied or wrongfully retained or become liable or accountable for any money or property of the company or (ii) been guilty of misfeasance or breach of duty or trust in relation to the company, the court may order the repayment of such money or property or order the payment of a sum of money to the company by way of compensation.

5.7 Failure to Keep Proper Books of Account
The Acts entitle the court on the winding up of an insolvent company to impose personal liability for all or part of the company’s debts where a company fails to keep proper books of account. Criminal penalties may also be imposed under this section.

It should be noted that it is a defence to such an action if the director concerned took all reasonable steps to secure compliance with the Acts or had reasonable grounds for believing and did believe that a competent and reliable person acting under the supervision or control of a director of the company had been formally allocated the duty of ensuring that proper books of account were kept.

5.8 Declaration of Solvency in a Voluntary Liquidation
Where it is proposed to wind up a company voluntarily by the members, the directors must make a statutory declaration as to the company’s solvency. The Acts impose additional personal liability on the directors who make the declaration of solvency if it subsequently transpires that the company was insolvent at the time of the declaration and it cannot be shown that the directors had reasonable grounds for their opinion. The personal liability in this instance is without limitation and is in relation to all the debts of the company.

5.9 Restriction and Disqualification
Liquidators are obliged, unless excused by the Director of Corporate Enforcement, to bring an action against the former directors of a company in insolvent liquidation to seek to restrict those directors from acting as directors for a five year period. The intention behind this process is to ensure that a person who has acted as a director of an insolvent company cannot avail of the protection of limited liability and become a director of another company unless that company meets certain minimum capital criteria.

It is a defence for a director to show that he acted honestly and responsibly in relation to the conduct of the affairs of the company and that there is no other reason why it would be just and equitable that the director should be subject to the restriction.

Disqualification is a more severe penalty. A person against whom a disqualification order has been made can have no involvement whatsoever in the promotion, formation or management of another company for the disqualification period. Where a person is convicted of an indictable offence in relation to a company, or an offence involving fraud or dishonesty, disqualification for a period of five years is automatic. The courts also have discretion to disqualify a person for such period as the courts see fit where a person’s behaviour falls within certain grounds set out in the Acts.

If a person acts as a director while the subject of a restriction or disqualification order and the company of which he/she is a director becomes insolvent, he/she may be made liable for the debts of that company incurred during the period when he/she was so restricted or disqualified.
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6 INDEMNITY

Irish companies are restricted under the Acts in respect of the indemnities that they can give in favour of their officers against liability which, by virtue of any rule of law would otherwise attach in respect of any negligence, default, breach of duty or breach of trust. However this would not prevent a company from indemnifying a director against any liability incurred by him in defending civil or criminal proceeding of which he is later acquitted.

A company may purchase and maintain insurance to cover such liabilities of its officers.

THE COMPANIES ACT 2014

The Companies Act 2014 (the “2014 Act”) was signed into law on 23 December 2014 and it is expected that it will come into effect on 1 June 2015. The 2014 Act will introduce significant reforms in company law in Ireland.

The 2014 Act incorporates much of the previous law concerning directors’ duties but with some important changes briefly summarised below.

Under the 2014 Act Directors’ duties and requirements will apply whether Directors are formally appointed or are de facto or shadow Directors. It should also be noted that the 2014 Act, similar to previous law, does not recognise any distinction between executive directors and non-executive directors, except in relation to membership of audit committee mentioned below.

The 2014 Act continues to recognise that it is the duty of each director to ensure that the company complies with the 2014 Act; indeed, every director is required to make a statement to this effect, and in respect of compliance with all other legal obligations, when taking office.

Fiduciary Duties of Directors

The new codified fiduciary duties of Directors are outlined in Part 5 of the 2014 Act and are as follows:

• act in good faith, in what the director considers to be the best interests of the company;
• act honestly and responsibly in relation to the conduct of the affairs of the company;
• act in accordance with the company’s constitution and exercise his or her powers only for the purposes allowed by law;
• not use the company’s property, information or opportunities for his or her own or anyone else’s benefit unless; (i) this is expressly permitted by the company’s constitution; or (ii) the use has been approved by a resolution of the company in general meeting;
• not agree to restrict the Director’s power to exercise an independent judgment unless this is permitted by the company’s constitution or entered into the company’s interests;
• avoid any conflict between the Director’s duties to the company and the Director’s other interests;
• to exercise care, skill and diligence;
• to have regard to the interests of the company’s members.
Other Duties Owed by Directors
Also contained in Part 5 there are other certain duties that a Director owes to a company. They can be summarised as follows:

- Ensure that the Company Secretary has the necessary skills to undertake the role required by the 2014 Act.
- Directors must disclose any interests he or she has in any contracts made by the company.
- Acknowledge the existence of their duties by signing a declaration to that effect.
- Directors are to take into account the interests of the members and employees of the company.
- Ensure the requirements of the 2014 Act are complied with.
- Directors of large companies will be required to confirm adherence with tax laws, acknowledge their responsibilities and confirm no occurrence of category 1 and 2 offences in the Directors Compliance Statement.

Compliance Statement
The requirement for the directors of certain companies to include a directors’ compliance statement in their Directors’ Report was previously included in the Companies (Auditing & Accounting) Act 2003 but was never commenced. The 2014 Act provides for a more measured requirement for directors’ compliance statements.

The requirement to produce a compliance statement applies to directors of every public limited company (“PLC”), regardless of the company’s turnover or balance sheet total for the relevant year.

The requirement also applies to every company limited by shares and having a share capital (“LTD”), designated activity company (“DAC”), and guarantee company (“CLG”) which, in respect of the financial year of the company to which the directors’ report relates, has:

a) a balance sheet total for the year that exceeds €12.5m, and

b) turnover for the year exceeds €25m.

The obligation to prepare a compliance statement does not apply to investment companies or to certain other companies that are subject to an exemption given by ministerial regulations.

Directors’ Interests in Shares / Debentures of the Company
As regards disclosure of a director’s interest in the shares and debentures of the company, a director is not obliged to disclose certain interests of that director or of a connected person, including those that:

- are held through a UCITS or an authorised unit trust fund;
- are held in the capacity of an attorney or a proxy;
- in aggregate, do not represent more than one per cent (1%) in nominal value of the company’s issued share capital.

The 2014 Act also expands the disclosures that must be made in respect of transactions with a director, requiring transparency in respect of the total amounts of such transactions.

Audit Committees
The directors of a “large company” have to either form an audit committee, with at least one independent non-executive director as a member who has competence in accounting or auditing as a member, or state in their annual statutory directors’ report that they have not done so and why not. This is separate from the current, similar obligation in respect of companies in certain sectors (such as credit institutions) to do so in any event.
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A Breach of Directors Duty

A breach of a Directors duty will require the relevant Director to account to their company for any gains made by them and compensate their company for any loss that occurred as a result of a breach of their duties.

A Director will be subject to an objective standard of care, skill and diligence. The test measures what can reasonably be expected of any Director in the particular role, and will allow for a higher standard to be expected of those with greater knowledge and experience. In other words, the more expertise a person has the more that will be expected of them.

The court may grant relief from the liability that resulted from a Directors breach of duty if it is satisfied that the Director has acted honestly and reasonably.

Next Steps

All directors should become familiar with the 2014 Act as it relates to directors’ duties and in particular, their legal obligation to ensure that the company complies with the 2014 Act.

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