



Directors Responsibilities

Non-executive directors must show they supervised and controlled the affairs of the company in order to avoid restriction.

In the recent case of *In re Tralee Beef & Lamb Limited (in liquidation)* the High Court restricted all four directors of the company pursuant to section 150 of the Companies Act 1990, on the basis that they had not acted responsibly in relation to the conduct of the affairs of the company.

Tralee Beef & Lamb Limited is a company which was involved in the meat processing business. It went into liquidation in 2001 with liabilities of €3.5million. The company had one executive director and three non-executive directors. Despite the fact that one of the non-executive directors of the company was appointed to the position by a fund management company involved in business expansion schemes, the court held that he had failed to establish, to the court's satisfaction, that he acted responsibly in his capacity as a non-executive director of Tralee Beef & Lamb Ltd.

It was submitted to the court that consideration must be given to the fact that he was a non-executive director appointed pursuant to a B.E.S. scheme. The court accepted this submission but found no provision in the relevant legislation that prevented him from discharging the normal duties and obligations of a non-executive director. The court stated that he was under an obligation to participate with fellow directors in collectively supervising

and controlling the affairs of the company, or at the very least, to place himself in a position to guide and monitor the management of the company and the court found that he had failed to do this. This decision is presently under appeal to the Supreme Court.

Comment

It is clear from this judgment that the court focused on the level of knowledge of each director regarding the affairs of the company. Therefore, it would appear prudent for non-executive directors to review their level of involvement in companies to which they stand appointed. The court held that for a non-executive director to merely seek financial information is insufficient. The executive directors must bring to the board meetings sufficient information in relation to the affairs of the company so that the non-executive directors can inform themselves and thereby supervise the affairs of the company. However, non-executive directors must not follow such information blindly.

The court had no difficulty with directors delegating particular functions and trusting the competence and integrity of those individuals to whom they have delegated such functions, however this must only be to a reasonable extent. Delegation does not absolve a director from the duty to supervise the discharge of those delegated functions. The court accepted that non-executive directors are a part of commercial life. However, it is clear that a non-executive director who does not actively supervise and control the affairs of the company may fail to establish that they acted responsibly in their role as a director of the company.





The following are some suggestions for non-executive directors who wish to ensure they would be able to show they adequately supervised and controlled the affairs of the company:

- ¥ Attend all board meetings and ensure that attendance and any contribution to the meeting is duly noted;
- ¥ Ensure board packs are received in advance of the meetings;
- ¥ Ensure that regular board meetings are held;
- ¥ Maintain and document all contact with both executive and non-executive fellow directors on an ongoing basis;
- ¥ Ensure up-to-date and accurate financial information is being received on a regular basis;
- ¥ Ensure there is adequate supervision of those individuals to whom functions of the board have been delegated;
- ¥ If on the board to give the benefit of a certain skill or expertise ensure that any contributions in this regard are duly noted in minutes of relevant meetings;
- ¥ Upon resignation, ensure it is duly noted in the company records and in the Companies Registration Office as soon as possible.

This decision is relevant to non-executive directors who sit on the boards of several companies. Whilst only having an advisory and non executive role, it may be appropriate for such directors to review their level of engagement with the company and their fellow directors to ensure that they may be seen to have adequately supervised and controlled the affairs of the company.

Voluntary Liquidation v Court Liquidation

Court exercises its discretion to convert a voluntary liquidation into a court liquidation.

In the recent High Court case of *In Re Hayes Homes Limited (in voluntary liquidation)*, the court had to consider two issues following the appointment of a liquidator in a creditors voluntary winding up.

At the creditors meeting the proxy of the largest creditor, the Revenue Commissioners (the petitioner in the case before the court) was excluded from voting on the basis that the Revenue Commissioners proxy form had not been received at the registered office of the company.

The Revenue Commissioners subsequently petitioned for a winding up order.

The first issue was whether the exclusion of the proxy was an error. The second issue was whether the court should exercise its discretion to convert the voluntary liquidation into a court liquidation.

Having considered the first issue, the court held that the petitioner's proxy had been properly excluded from voting on the basis that the petitioner had failed to comply with Order 74 Rule 82(1) of the Superior Court Rules which requires that all proxy forms must be lodged with the company at its registered office not later than 4pm of the afternoon of the day before the creditors meeting.

However, the court also held that the court should exercise its discretion to convert the creditors voluntary liquidation

into a court winding up and replace the company's nominee as liquidator with the Revenue Commissioners nominee. The court's decision was influenced by the following factors:

- a) the assets of the company, such as the goodwill of its business, had gone to an associated company without any payment;
- b) the liquidation was in the hands of a nominee of the shareholder who had control over the company and the associated company to which the assets had been transferred;
- c) the nominee of the majority creditor (i.e. the Revenue Commissioners) had been rejected;
- d) the petitioner had given an undertaking to discharge all the costs of the voluntary liquidation to date, together with all costs of the compulsory winding up; and
- e) the petitioner brought its application expeditiously.

Comment

It is in order to exclude a proxy where it has not been delivered to a registered office of the company prior to 4pm in the afternoon of the day before the creditors meeting. However, in certain circumstances a creditor whose proxy was excluded from voting at a creditors meeting can ask the court to exercise its discretion and convert the voluntary liquidation into a court liquidation and replace the liquidator with its nominee. To achieve this the petitioning creditor would probably need to show some possible impropriety in the conduct of the company's affairs and may also need to commit to discharging the costs of the creditors voluntary liquidation.

If you have any queries or require further information on insolvency issues, please contact any one of Mason Hayes+Curran's insolvency team.



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