

Directors' Duties

29 October 2019



Dublin

London

New York

San Francisco

Introduction

Purpose of this presentation

- Directors are responsible for ensuring that they, their company and that company's staff comply with a wide variety of legislation, including legislation concerning insolvency, anti-corruption, employment, health & safety, protection of the environment, data protection and tax.
- Today we will consider:
 1. a director's statutory duties under the Companies Act 2014 and Irish common law; and
 2. best practice in terms of the behaviour of directors when fulfilling those duties.

The role of director

- Members delegate management of the company to the directors.
- Directors manage the company in the interests of the members.
- Directors can in turn delegate tasks (e.g. to company employees).
- Directors have responsibilities under:
 - law;
 - the company's constitution;
 - internal policies.
- Directors are the trustees or minders of the company's assets and their duties reflect this position of responsibility.

Management of a company

Directors' deemed authority

- Directors are responsible for the management of the business of the company, subject to the company's constitution and any direction made by special resolution of the members.
- Directors are authorised to bind the company.
- A director should not act to bind the company on his own without the authority of the board as a whole either specifically or generally.
- A third party may take a director as having ostensible authority to bind the company, even if that director has no actual authority to do so.

Management of a company

Delegation of authority

- The board of directors of a company may delegate their powers. The board should review the constitution of the company before delegating.
- There are a number of ways to delegate authority including:
 - appointment of board committees;
 - approving an authorised person to act in specified circumstances;
 - appointing an attorney under the terms of a power of attorney; or
 - appointing a registered person.

Management of a company

Delegation of authority

- Each form of delegation comes with different considerations for the board.
- The terms of delegation must be clearly defined as these will dictate the extent of powers delegated. (N.B. – registered person).
- Delegation of authority, not of duties or responsibility.

Management of a company

Board meetings

- Notice: must be reasonable
- Board pack: should be issued well in advance of the board meeting to allow sufficient time to review the documents
- Quorum: any resolutions passed at an inquorate meeting are void – constitution
- Resolutions: directors determine issues arising at a meeting by way of majority votes. In the event of an equality of votes, the chairman *may* have a second or casting vote
- Written resolutions: directors may pass resolution in writing signed by all the directors of the company*
- “Virtual” meetings: directors may hold board meetings by video, telephone or other electronic means provided all participants can hear and speak to each other*

* There are tax considerations where directors conduct the business of the company by way of resolution passed in writing or at a virtual meeting.

Management of a company

Minutes of board meetings

- Legal requirement: all appointments of officers, the names of directors present at each meeting and all resolutions and proceedings
- Best practice: time and date, place of the meeting, record of the names of the members present and “in attendance” and the name of the director taking the chair
- Best practice: accurate, clear and unambiguous, well structured, concise, record the essential elements of the discussion on each item, avoid expressions of opinion
- Amendment: board minutes that have been signed by the chairperson can only be amended by resolution of the board
- Form: can be retained in hard or soft copy once they are capable of being produced for inspection

Management of a company

Execution of documents

- Deeds
 - Required for certain types of documents (e.g. conveyance of land, mortgages, contracts where no consideration is given)
 - Require the affixing of the common seal
 - Company's constitution should be checked for signing authority
- Powers of attorney
 - Not required to be executed as a deed

Directors' duties

- Directors owe duties to the company and to the company alone, but must have regard to the interests of:
 - shareholders
 - creditors (in certain circumstances); and
 - employees.
- The company is a separate legal entity from its shareholders, and the best interests of the company will not necessarily be the same as those of the shareholders.
- Directors are required to remain impartial where there are different groups of shareholders and are required to ensure that their actions are not oppressive to any shareholder or group of shareholders.

Directors' duties

Where the duties are found

- **Common law:** replaced by statutory duties, but the Companies Act requires that “regard ... be had to the corresponding common law rules”.
- **Statute:** the Companies Act 2014 codified the old common law duties.
- **Constitution:** a company's constitution can impose extra duties on directors and it is a statutory duty of a director to act in accordance with the company's constitution.

Directors' duties

Codified duties in the Companies Act 2014

- Duty to act in good faith;
- Duty to act honestly and reasonably
- Duty to act in accordance with the constitution and law;
- Duty not to use company property, information or opportunities for own benefit;
- Duty to exercise independent judgement;
- Duty to avoid conflicts of interests;
- Duty to exercise care, skill and diligence; and
- Duty to have regard to the interests of the company's members.

Directors' statutory duties

Other duties under the Companies Act

- Directors of a company have a general duty to ensure compliance by the company with the Companies Act 2014.
- These duties include:
 - Duty to maintain proper books of account
 - Duty to prepare and approve annual accounts
 - Duty to have an annual audit performed (unless exempt)
 - Duty to maintain certain registers and other documents*
 - Duty to file certain documents with the Registrar of Companies* – recent CRO policy of prosecuting companies and their directors for late filings of annual returns and accounts
 - Duty to convene general meetings of shareholders* and
 - Duty to comply with company law rules on dealings between companies and their directors (e.g. loans to directors).

Certain duties (marked *) are often delegated to the company secretary.

Directors' liability

Civil liability

- A director can incur civil liability where they breach their duties.
- Where a director is in breach, the company may sue them for damages, seek an indemnity for losses or seek an account for profits.
- The remedy for breach only extends to a director being made personally liable for the company's debts in particular situations, including failure to keep adequate accounting records, trading recklessly and trading fraudulently.

Directors' liability

Criminal liability

- Directors can have criminal liability in their capacity as director in two distinct circumstances:
 1. where the director's company commits an offence under the Act and the director is found to be an "*officer in default*"; and
 2. where the director's company commits an offence under another statute and it is shown that the offence was committed with the connivance of or attributable to any neglect on the part of the director.

Directors' liability

Companies Act 2014

- A director who is in default is any officer who:
 - authorises the default or,
 - in breach of his or her duty, permits the default.
- Where it is proved that the director in default was aware of the basic facts of the matter, it shall be presumed, that they permitted the default.
- If a company contravenes certain provisions the company and any officer of it who is in default shall be guilty of offence.
- Auditors have a statutory duty to report Category 1 and 2 offences to the Office of Director of Corporate Enforcement

Directors' liability

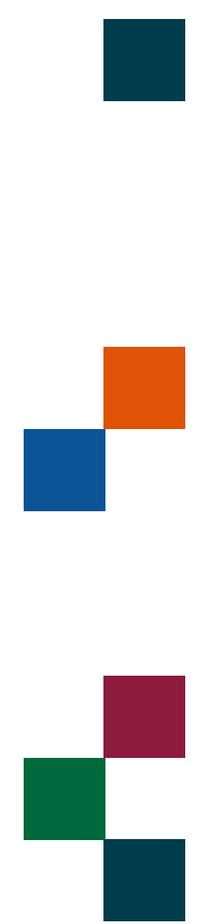
Classification of offences

- Securities law offences:
 - Market abuse, prospectus, transparency
- Category 1
 - False accounting, fraudulent trading
- Category 2 - General
 - Financial assistance, loans etc. to directors
 - Unlawful acquisition of own shares, unlawful offering of securities
 - Personation of shareholder, unlawfully acting as director
 - Dishonest dealings before a company becomes insolvent or goes into liquidation
- Category 2 – false information
 - Generally
 - In dealings with DCE, Courts, mergers, divisions
- Category 2 – Accounting and dealings with auditors
 - Failure to keep adequate accounting records
 - Denying access to and failure to retain accounting records
 - Non-compliance requirements as to contents of annual financial statements
 - Failure to communicate with and make full disclosure to auditors
- Category 3
 - Shares not being paid up
 - Non-filing of annual returns, documents relating to issued share capital and insolvency
 - Not having AGM, selective sending of proxies
 - Trading under misleading name, without trading certificate
- Category 4
 - Failure to make routine filings

Directors' liability

Classification of Companies Act offences

	Summary prosecution		Indictment		Extras
	Fine	Imprisonment	Fine	Imprisonment	
Market abuse	€5,000	1 year	€10,000,000	10 years	Disq, CBol
Prospectus, Transparency	€5,000	1 year	€1,000,000	5 years	Disq CBol
Category 1	€5,000	1 year	€500,000	10 years	Disq
Category 2	€5,000	1 year	€50,000	5 years	Disq
Category 3	€5,000	6 months	-	-	
Category 4	€5,000	-			



Directors' liability

Defences

- Generally:the officer in question shows that he or she took all reasonable steps to prevent the default in question or that, by reason of the circumstances beyond his or her control, was unable to do so.
- Accounting Offences: In any proceedings against a person in respect of an accounting offence, it shall be a defence to prove that the defendant had reasonable grounds for believing and did believe that
 - a competent and reliable person was charged with the duty of ensuring that the provisions of the relevant subsection[s] concerned were complied with, and
 - the latter person was in a position to discharge that duty; and
 - the director monitored the competent and reliable person, by means of reasonable methods, properly used.

Directors' liability

Offences under other legislation

- Anti-corruption legislation
- Health and safety legislation
- Competition legislation
- Data protection legislation
- Theft and fraud offences
- Tax legislation
- Pensions legislation
- Environmental legislation

In general terms, where a company is guilty of an offence under this legislation, the offence can extend to that company's directors and employees where it is shown that the offence was committed with the connivance of or attributable to any neglect on the part of the director.

Thank you

