

# **Dublin Solicitors Bar Association**

## **Directors Duties & Rights**

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### **Introduction:**

- 1.1 This talk is aimed at assisting the solicitor in general practice in advising those of his clients who are Directors of Irish incorporated companies or are about to become so. It is intended to focus on the position of individual Directors rather than on that organ of a Company - the collective Board of Directors. It is not intended to explore exhaustively all issues which arise for consideration; such would require a lengthy and detailed paper and is beyond the time and scope of a half hours talk. However it is hoped to provide those in general practice with a checklist of legal principles and matters around which he or she can frame his or her initial advices and it can form the basis of future research and enquiry by him or her.
- 1.2 I will not deal in any great detail with the areas being covered today by my colleagues Paul Keane, Julie Murphy O'Connor and Jacqueline Cross. Those areas are restriction and disqualification of Directors, fraudulent and reckless trading and the new proposed regime for Directors' compliance statements.
- 1.3 The origin of the concept of limited liability for corporate business entities was rooted in encouraging entrepreneurship and risk-taking by offering entrepreneurs protection to their individual personal assets, home etc. in circumstances where an intended enterprise was being undertaken or more particularly should fail. By and large, for a shareholder in a private limited Company or public limited Company this protection still exists. However for Directors of such enterprises who would always have a trickle of exposure,

this protection has been whittled away and the trickle of exposure has now become a torrent. However matters can be even worse than incurring civil liability. Many of the statutory duties placed on Directors carry criminal offences if breached. In some instances the burden of proof is reversed. We may soon see as has happened in other jurisdictions Directors in handcuffs for breach of various statutory duties. Post Enron, Worldcom and Parmalat with Sarbanes Oxley et al Governments and Regulators have moved towards the increasing criminalisation of acts of supposed neglect of Directors.

1.4 The Cadbury Committee Report of December 1992 in the U.K. may have also influenced this line of thinking in that its central recommendation was for a prescribed code of practice for listed companies and that listed companies should in the annual report state whether the Company has complied with the code.

1.5 I should also quote from the Higgs Report 2003 in the UK – *Review of the Role and Effectiveness of Non-Executive Directors*.

*“Good corporate governance must be an aid to productivity not an impediment”.*

1.6 OECD’s revised principles of corporate governance 2004 includes the principle:

*“Board Members should act on a fully informed basis, in good faith, with due diligence and care, and in the best interests of the Company and the shareholders.”*

1.7 In this environment anybody considering appointment as a Director must be cautious and ensure that the Company is sufficiently resourced and focused to support Directors in the discharge of their duties.

1.8 The duties of Directors can be classified under common law and under statute. Similarly the rights of Directors can be classified under common law and statute.

## Duties at Common Law

### 2.1 Law which applies?

Which law applies? This was dealt with in the case *Base Metal Trading Limited –v- Shamurin* [2005] I.W.L.R. (5) 1157, a case where a company took action against a Director for wrongful acts which took place in Russia. It was held that Directors duties were part of the internal management of the company and had to be governed by the law of the place of incorporation.

### 2.2 Who May Sue for Breach of Duty?

The basic rule which was dealt with in the case of *Foss –v- Harbottle 1843-2 Hare 461* is that if a wrong is done to a Company it is the Company only who can take action although there are exceptions, *Prudential Assurance Company Limited –v- Newcomon Industries Limited* (No. 2) [1982] Ch 204. For example an action challenging an ultra vires transaction; a transaction requiring validation by special resolution; a situation of fraud where those responsible control the company; an application under *Section 205 of C.A. 1963*.

Even though a Director may have a duty to have regard to employees interests *Section 52 C.A. 1990* or to creditors interests *Re Frederick Inns Limited [1991] IRLM 582* in general the duty is enforced by the Company. *O’Neill –v- Ryan* [1993] IRLM 557. There is some suggestion that the Directors may in certain circumstances have a duty to the shareholders. *Securities Trust Limited –v- Associated Properties Limited HC*. 19 November 1980.

### 2.3 Fiduciary Duty

Directors have a fiduciary duty (from the Latin ‘fiducia’ meaning ‘trust’) to act bona fide in what they consider is in the interests of the company. They have a fiduciary relationship with the Company i.e. a relationship of trust and confidence. It is not what the Court feels is in the best interest of the Company but what the Directors honestly believe at the time is in the best interest of the Company. *Regentcrest Plc –v- Cohen* [2001] 2 BCLC 80.

A number of other principles flow from this fiduciary relationship.

#### **2.4 Cannot Fetter his Discretion**

Because of the requirement to act in the best interest of the Company a Director cannot fetter his direction or agree to merely follow the direction of another e.g. a particular shareholder. *Clarke –v- Workman* [1920] 1 IR 107; *Motherwell –v- Schoof* [1949] 4 DLR 812; *Selangor Limited Rubber Estates Limited –v- Cradock* [1968] 2 AE 1073.

Fettering their discretion by the Directors is to be distinguished from exercising this discretion which restricts their future conduct. *Fulham Football Club Limited –v- Cabra Estates plc* [1994] IBCLC 363; *Thorby –v- Goldberg* [1964] 112 CLR 597.

#### **2.5 Must not use Powers for a Purpose other than that for which Granted.**

If the Directors exercise their powers for a collateral purpose the transaction is voidable. *Re Smith & Fawcett Limited* [1942] Ch 304; *Hogg –v- Cramphorn Limited* [1967] Ch 254.

#### **2.6 Must not put himself into a Conflict of Interest**

A Director must not have a personal interest which conflicts with his duty to the Company except with the fully informed consent of the Company. Neither can a Director have an inconsistent arrangement with a third party except with the fully informed consent of the Company.

#### **2.7 No Misappropriation of Company's Property**

This is self evident that a Director must not misappropriate a Company's Property for his own or a third party's benefit.

#### **2.8 Not to Misuse Position to make a Profit**

A Director must not misuse his position to gain a profit for himself or a third party. Neither must he divert a business opportunity to himself or a third party. *Cook –v- Deeks* [1916] 1 AC 554; *Gencor ACP Limited –v- Dalby* [2000] 2 BCLC 754. This duty can survive a Director leaving a Company. *CMS Dolphin Limited –v- Simonet* [2001] ALL ER (D) 592. If Directors

make a profit in breach of their fiduciary duty while a Director of a Company they will have to account to that Company for the profit made. *Regal (Holdings) Limited –v- Gulliver* [1967] 2 AC 134; *Quarter Master U.K. Limited (in liquidation) –v- Pyke* [2005], BCLC (13) 245.

## **2.9 Duty of Skill, Care and Diligence**

Directors have a duty to use reasonable care and skill in the performance of their duty. The leading case on this *City Equitable Fire Insurance Company Limited* provided that a Director in the performance of his duty need not exhibit a greater degree of skill than may be reasonably be expected from a person of his knowledge and experience. He is not bound to give continuous attention to the affairs of his Company Re: *City Equitable Fire Insurance Company Limited* [1925] C.H. 407. However there has been a movement away from this by the Courts and by statute to a standard ‘*having regard to the general knowledge, skill and experience that may reasonably be expected of a person in his position*’ Section 297A C.A. 1963; *Brian D. Pierson (Contractors) Limited* [2001] 1 BCLC 275.

## **2.10 A Director has a duty to inform himself of the affairs of the Company and to Supervise and Control**

This is a duty which every Director has. He may feel he is making a nuisance of himself but he must inform himself of the affairs of the Company and with his co-directors supervise and control these affairs. *Secretary of State for Trade & Industry –v- Baker* (No. 6) [1999] BCLC (26) 433. *In the matter of Tralee Beef and Lamb Limited*. H.C. Ms. Justice Finlay Geoghegan 20<sup>th</sup> May 2004.

## **2.11 Delegation of Functions**

The older cases on this point allowed Directors to discharge their duties by delegation. In *Dovey –v- Cory* [1901] AC 477 it was said:-

*“I cannot think that it can be expected of a Director that he should be watching either the inferior officers of the bank or verifying the calculations of the auditors himself. The business of life could not go*

*on if people could not trust those who are put into a position of trust for the express purpose of attending to the details of management”.*

However modern cases have moved somewhat from this position.

A Director could not rely on the fact that preparation of financial statements which turned out to be false or misleading had been delegated to other Board Members or that the accounts had not been qualified by the Company’s auditor to show he had discharged his duty. *Secretary of State for Trade and Industry –v- Bairstow* (No. 2) [2005] 1 BCLC (16) 136. A Director could delegate a particular function but he still remained responsible for the performance of that function. *Secretary of State for Trade & Industry –v- Baker* (No. 6) [1999] 1 BCLC (26) 433. *In the matter of Tralee Beef and Lamb Limited H.C. Ms. Justice Finlay Geoghegan 20<sup>th</sup> July 2004.* Any delegation by a Director of one of his functions as a Director does not fulfil his duty if he did not believe on reasonable grounds that the persons to whom the duty was delegated had appropriate expertise and competence and were appropriate repositories of his trust. *Gold Ribbon (Accountants) P/L –v- Sheers & Others S. Ct. Queensland 29<sup>th</sup> June 2005.*

## **2.12 To Attend Board Meetings**

A Director has a duty to attend all meetings of Directors unless there is a reasonable excuse for failure to attend. *Gold Ribbon (Accountants) P/L –v- Sheers & Others S. Ct Queensland 29<sup>th</sup> June 2005.*

## **2.13 Dividends**

Directors who cause a Company to pay an unlawful dividend can be held accountable personally to the Company for such payments. *Flitcrofts* case [1882] 21 Ch D 519.

## **2.14 Liability for Breach of Fellow Company Directors**

A Director only incurs liability for breaches of duty of his fellow Directors from the time he has become aware of the breach. *Jackson –v- Munster Bank Limited* [1884] – 13 L.R. 1r 118.

## **Statutory Duties and Liabilities**

### **3.1 What is 'default' under the Companies Acts**

The Companies Acts provide that a Director who is in default is a Director who authorises or who, in breach of his duty as such Director permits the default. A Director shall be presumed to have permitted a default by the Company unless the Director can establish that he took all reasonable steps to prevent it or that by reason of circumstances beyond his control was unable to do so. You will note that the burden of proof is put on the Director in this regard. There is also a general provision that every Director has a duty to ensure that the requirements of the Companies Acts are complied with by the Company.

*Section 383 C.A. 1963.*

### **3.2 Liability for Issuing Share application forms without a Prospectus**

It is not lawful to issue any form of share application or debenture to the public without a prospectus. A Director can be relieved of liability if he did not know of the breach or his was an honest mistake or the contravention was immaterial or in all the circumstances the Court could reasonably excuse the non compliance.

*Section 44 C.A. 1963.*

### **3.3 Minimum Subscription on Allotment**

Where a minimum subscription as set out in a prospectus on the allotment of shares is required and not complied with; on the expiration of 40 days after the first issue of a prospectus, all monies received from applicants for shares shall be refunded within 8 days. If not then the Directors are jointly and severally liable for refunds and interest.

*Section 53 C.A. 1963.*

### **3.4 No Payment of Tax Free Remuneration**

Directors are not permitted to be paid tax free remuneration.

*Section 185 – C.A 1963.*

**3.5 Compensation for loss of Office to be approved by Members in General Meeting**

Directors are not to be paid compensation for loss of office or retirement from office unless approved by the members in general meeting.

*Section 186/187 C.A. 1963.*

**3.6 Compensation associated with offer for Shares in Company**

If in connection with an offer for shares in a Company a payment is to be made to a Director by way of compensation for loss of office or as a consideration for or in connection with his retirement from office it shall be the duty of the Director to ensure that particulars of the proposed payment shall be included in or sent with any notice of the offer to the shareholders.

*Section 188 - C.A. 1963.*

**3.7 Payments to Directors to be shown in Accounts**

Payments to Directors are to be shown in the accounts laid before the Annual General Meeting of the Company.

*Section 191 - C.A. 1963.*

**3.8 Duty to make Disclosure**

There is general duty on Directors to make disclosures in writing to the Company as may be necessary for the purposes of complying with Section 191 and to ensure such disclosure is read at a meeting of Directors.

*Section 193 & Regulation 83 Table A Part I - C.A. 1963.*

**3.9 Declaration of Interest in Contract**

If a Director has an interest in a contract he must declare this at a meeting of Directors or if in a proposed contract, at the meeting of Directors at which the question of entering this contract is considered. A copy of the declaration shall be entered in a special book for this purpose within 3 days. Subject to a Company adopting Regulation 84 Table A Part I, then a Director may not vote in respect of any contract or arrangement in which he has an interest.

*Section 194 & Regulation 84 Table A Part I - C.A. 1963.*

### **3.10 The Validity of Floating Charge**

Where a Company is being wound up and a floating charge is created in favour of a Director or a person connected with a Director, on the undertaking or property of the Company, within two years before the commencement of the winding up unless it is proved that the Company immediately after the creation of the charge was solvent shall be invalid except as to money actually advanced or paid or the actual price or value of the goods or services sold or supplied to the Company at the time of or subsequently to the creation of and in consideration for the charge together with interest on that amount at the rate of 5% per annum.

*Section 288 C.A. 1963.*

Within twelve months before the commencement of a winding up a Company is indebted to a Director or the spouse, child or nominee of a Director and such indebtedness was discharged wholly or partly by the Company and the Company created a Floating Charge on any of its assets or property within twelve months before the commencement of the winding up in favour of the Director, his spouse, child or nominee then such charge shall be invalid to the extent of the repayment made unless it is proved the Company immediately after the creation of the charge was solvent

*Section 289 C.A. 1963.*

### **3.11 Offences by Directors of Companies in Liquidation**

If a Director of a Company which is being wound up or subsequently is wound up:

- (a) does not to the best of his knowledge and belief fully disclose to a liquidator (when he requests such disclosure) all the property real and personal of the Company and how and to whom and for what consideration and when the Company disposed of any part thereof except such part as has been disposed of in the ordinary way of business of the Company; or
- (b) does not deliver up to the liquidator all or such part of the real and personal property of the Company under his custody or control; or
- (c) does not deliver up to the liquidator all books and papers in his custody or under his control; or

- (d) within 12 months, before the commencement of the winding up conceals any part of the property of the Company to the value of €12.70 or conceals any debt due to or from the Company; or
- (e) within 12 months, before the commencement of the winding up or at any time thereafter fraudulently removes any part of the property of the Company to the value of €12.70 or upwards; or
- (f) makes any material omission in any statement relating to the affairs of the Company; or
- (g) knowing or believing that a false debt has been proved by any person under the winding up fails for a period of one month to inform the liquidator thereof; or
- (h) after commencement of the winding up prevents the production of any book or paper affecting or relating to the property or affairs of the Company; or
- (i) within 12 months before the commencement of the winding up or at any time thereafter conceals, destroys, mutilates or falsifies or is privy to the concealment, destruction, mutilation or falsification of any book or paper relating to property or affairs of the Company; or
- (j) 12 twelve months, before the commencement of the winding up or at any time thereafter makes or is privy to the making of any false entry in any book or paper affecting or relating to the property or affairs of the Company; or
- (k) within twelve months of the winding up fraudulently parts with alters or makes any omission in or is privy to the fraudulent parting with or altering or making any omission in any document affecting or relating to the property or affairs of the Company; or
- (l) after the commencement of the winding up at any meeting of the creditors of the Company within 12 months next before the commencement of the winding up attempts to account for any part of the property of the Company by fictitious losses or expenses; or
- (m) has made within twelve months, before the commencement of the winding up or at anytime thereafter by any false representation or other fraud obtained any property for or on behalf of the Company on credit which the Company does not subsequently pay for; or

- (n) within 12 months before the commencement of the winding up or at anytime thereafter under the false pretence the Company is carrying on its business obtains on credit for and on behalf of the Company any property which the Company does not subsequently pay for; or
- (o) within 12 months, before the commencement of the winding up or at anytime thereafter pawns, pledges or disposes of any property of the Company which has been obtained on credit and has not been paid for unless such is the ordinary way of business or
- (p) is guilty of any false representation or other fraud for the purpose of obtaining the consent of the creditors of the Company or any of them to an agreement with reference to the affairs of the Company or to the winding up;

In all those circumstances an offence is committed.

*Section 293 C.A. 1963.*

### **3.12 Frauds by Directors of Companies which have gone into Liquidation**

If a Director of a Company which is subsequently wound up by the court or passes a resolution for voluntary winding up has by false pretences or by means of any other fraud induced any person to give credit to the Company or with intent to defraud creditors of the Company has made or caused who made any gift or transfer of or charge on or caused or connived at the levying of any execution against the property of the Company or with intent to defraud creditors of the Company has concealed or removed any part of the property the Company since or within 2 months before the date of any unsatisfied judgement or order for payment of money obtained against the Company; then in these circumstances he commits an offence.

*Section 295 C.A. 1963.*

### **3.13 Carrying on Business with intent to defraud Creditors**

If a Director is knowingly a party TO the carrying of the business of the company with the intent to defraud creditors of the company or of any person or for any fraudulent purpose he is guilty of an offence.

*Section 297 C.A. 1963.*

### **3.14 Liability for Fraudulent or Reckless Trading, Misfeasance & Breach of Duty or Trust**

If in the course of winding up of a company or in the course of proceedings under the Companies (Amendment) Act 1990 – (Examinership) it appears that a Director was knowingly a party to the carrying on of any business of the Company in a reckless manner or it appears the Director was a party to the carrying on business of the Company with intent to defraud creditors of the Company or any person or for any fraudulent purpose the Court may declare him personally responsible without any limitation of liability for all or any part of the debts or other liabilities of the Company. If in the course of a winding up there has been misfeasance, breach of duty or trust the Court can order a repayment or compensation.

*Section 297A C.A. 1963, Section 298 C.A. 1963.*

### **3.15 Criminal Offences committed by Directors**

If it appears to the Court in a course of a winding up by the Court that a Director has been guilty of an offence in relation to the Company for which he is liable the Court may either on the application of any person interested in the winding up or of its own motion, direct the liquidator to refer the matter to the Director of Public Prosecutions and where the Court so directs it shall also direct the Liquidator to refer the matter to the Director of Corporate Enforcement.

If it appears to the Liquidator in the course of a voluntary winding up that any past or present Director of the Company has been guilty of an offence he shall forthwith report the matter to the Director of Public Prosecutions and also refer the matter to the Director of Corporate Enforcement.

If it appears to the Court in the course of voluntary winding up that any past or present Director of the Company has been guilty of an offence in relation to the Company and that no report has been made by the Liquidator to the Director of Public Prosecutions or to the Director of Corporate Enforcement the Court may on the application of any person interested in the winding up or of its own motion direct the Liquidator to make such a report.

*Section 299 C.A. 1963*

**3.16 Enforcement of Duty to comply with the provision of the Companies Act 1963**

If a Director has made default in complying with any provision of the Companies Act 1963 and fails to make good such default within 14 days after the service of notice on him requiring him to do so the Court can direct the Director concerned to make good any default within such time as may be specified in the order and the order may provide that all costs of the application shall be borne by the Director.

*Section 371 C.A. 1963*

**3.17 Contracts of Employment**

If a contract for services is to be entered into by a Director with a Company, in general, if the contract is for a term in excess of 5 years which cannot be terminated by the Company by notice then it must be approved by the members in general meeting.

*Section 28 C.A. 1990.*

**3.18 Substantial Property Transaction**

A Company shall not enter into an arrangement whereby a Director or a person connected with such a Director is to acquire one or more non-cash assets of a value not less than €1,269.74 but subject to that, exceeds €63,486.90 or 10% of the Companies net assets unless the arrangement is first approved by the members in general meeting.

*Section 29 C.A. 1990.*

**3.19 Purchase of Option for Shares**

A Director who purchases a right to call for delivery or to make delivery at a specified price within a specified time of a specified number of shares or debentures in the Company of which he is a Director or an associated Company commits an offence. There is exemption in respect of Revenue approved schemes.

*Section 30 C.A. 1990.*

### **3.20 Prohibition on Receipt of Loans Quasi-loans etc**

A Company is prohibited from making loans, quasi-loans to a Director or connected person or becoming a creditor, entering into guarantees or providing security in connection with loans, quasi-loans or credit transactions for Directors or a connected person or the assignment to it or assumption of rights, obligations, and liabilities which if entered into by the Company would have contravened the foregoing. There are exemptions, such as, if the cumulative amounts involved do not exceed 10% of the relevant assets (net assets) or if the loan, quasi-loans or credit transaction is made in the ordinary course of business on no more favourable term than normally would apply.

There is also a procedure commonly now known as ‘white wash’ under *Section 34 C.A. 1990* to validate the entering into a guarantee or providing any security by any other person for a Director or a connected person.

*Section 31 of the C.A. 1990.*

### **3.21 Inspection of Service Contracts**

If a contract of service with a Director is in force a Company shall keep a copy (if in writing) or a written memorandum of its terms at its registered offices or where its register of members is kept or at its principal place of business. The members are entitled to inspect. There is an exemption if the unexpired term is for less than 3 years or can be terminated within 3 years without payment of compensation.

*Section 50 C.A. 1990.*

### **3.22 Obligation to notify interest in Shares or Debentures**

If he becomes or ceases to become interested in shares or debentures (as determined by *Section 54* and *Section 55 C.A. 1963*) – a Director must notify the Company within 5 days (*Section 56*) specifying compliance with this section. Failure to do so is an offence. Also *Section 58* provides where there is default in notification no right or interest of any kind whatsoever in respect of the shares or debentures shall be enforceable. It is required to disclose their interests in the Directors’ report or as a note to the Accounts.

*Section 53/Section 54 of C.A 1990.*

### **3.23 Restriction of Director**

The Court can restrict a person who was a Director of an insolvent Company from being a Director, Secretary or being concerned or taking part in the promotion or formation of any Company for a period of 5 years unless the allotted share capital of a public limited Company is at least €317,434.51 and of any other Company €63,486.90 and is fully paid up together with any premium. If the Court is satisfied that the Director acted honestly and responsibly or the Director was solely a nominee of a financial institution or venture capital Company then the Director is relieved.

*Section 150 of the C.A. 1990.*

### **3.24 Disqualification Orders**

If a person is convicted on indictment of any indictable offence in relation to a Company or involving fraud or dishonesty, then during the five year period from date of conviction or such other period as the court may order on the application of the prosecutor, then such person may not act as a Director or be directly or indirectly concerned or take part in the promotion, formation or management of any Company or any society registered under the Industrial and Provident Societies Acts 1883 to 1978. Where the Court is satisfied in any proceedings or as a result of an application under the section that:

- (a) a person has been guilty while an officer etc. of fraud in relation to the Company, its members or creditors;
- (b) or has been guilty of any breach of his duty;
- (c) or the subject of a declaration under *Section 297A of C.A. 1963* (reckless or fraudulent trading) that he is liable for all or part of the debts or other liabilities of the Company;
- (d) or his conduct makes him unfit to be involved in the management of a Company;
- (e) or in consequence of an Inspector's report his conduct makes him unfit to be concerned in the management of a Company; or
- (f) he has been persistently in default of any provisions which require any return, account or other document to be filed with, delivered or sent to, or any notice of matter to be given to, the Registrar of Companies.

the Court may of its own motion or as a result of the application make a disqualification order.

*Section 160 C.A. 1990.*

### **3.25 Responsibility for Keeping Proper Books of Account**

A Company is required to keep proper books of account in the form of documents or otherwise. A Director who fails to take all reasonable steps to secure compliance by the Company or has been the cause of any default is guilty of an offence. If an insolvent Company is being wound up and the Court considers that the contravention of this requirement has contributed to the Company's inability to pay all of its debts or has resulted in substantial uncertainty as to the assets and liabilities of the Company or substantially impeded the winding up then the Court can declare that any one or more officers and former officers of the Company who is or are in default can be made personally liable for all or part of the debts and other liabilities of the Company. The discretion of the Court must be exercised in a responsible and constitutional manner. *David Meighan –v- John Duignan. In Re Mantruck Services Limited [1997] 1 ILRM, Section 202, 203, 204 C.A. 1990.*

### **3.26 Limitation of Number of Directorships**

A person may not be a Director of more than 25 companies at one particular time. However in deciding on this number of 25 a Directorship of a public limited company or public Company or a Company in respect of which the Registrar of Companies has given a certificate stating the Company has a real and continuous link with one or more economic activities that have been carried on in the State or the Company is a holder of a banking licence and various other general exceptions which are set out in the second schedule to the Company's (Amendment) (No. 2) Act of 1999.

In counting the companies there shall be counted as one, two or more companies of which a person is a Director at the time if one of those companies is the holding Company of the other or others.

*Section 45 Companies Amendment (No. 2) Act 1999.*

### **3.27 Freezing Orders**

The Court may on the application of a Company Director, member, liquidator, receiver, creditor or the Director of Corporate Enforcement order a Director of a Company not to remove his or her assets from the State or to reduce his or her assets within or outside the State below an amount to be specified by the Court where the Court is satisfied that the Applicant has a substantive civil cause of action or right to seek a declaration of the personal liability or claim for damages against the Director and there are grounds for believing that the Director may remove or dispose of his or her or the Company's assets with a view to evading his or her or the Company's obligations and frustrating an order of the Court. *Company Law Enforcement Act 2001, Section 55.*

Analysis of the implication of this Section is dealt with by Aillil O'Reilly in the *Commercial Law Practitioner May 2002*. It is note worthy that the order can have extra territorial effect. The absence of a requirement to offer security for costs or an undertaking as to damages make it attractive as a remedy.

### **3.28 Unlawful Dealing by Insiders**

The original provisions regarding Insider Dealing were dealt with in Part V of the Companies Act 1990. These are now dealt with under *Statutory Instrument 342 of 2005*. The Statutory Instrument 342 of 2005 is the implementation of the Market Abuse Directive (Directive 2003/6/EC). The regulations have been implemented for the purpose of giving effect to the Market Abuse Directive on insider dealing and market manipulation. The regulations provide (Regulation 5) that a person to whom the paragraph applies who possesses inside information should not use that information by acquiring and disposing of or by trying to acquire or dispose of, for the persons own account or for the account of a third party directly or indirectly financial instruments to which the information relates. This applies to any person who possesses the information concerned by virtue of the person's membership of the administrative, management or supervisory bodies of the issuer of the financial instrument which obviously includes Directors; by virtue of the person's holding in the capital of the issuer; by virtue of having access to the information through the exercise of the persons employment, profession or duties or by virtue of the persons criminal activities!

These regulations generally apply only to companies whose stock is traded on “a regulated market in at least one member state”.

A person who is guilty of an offence created by Irish market abuse law shall without prejudice to any other penalties provided by that law in respect of a summary conviction for the offence be liable to a fine not exceeding €10 million or imprisoned for a term not exceeding 10 years or both. *Section 32 C.A. Investment Funds, Companies and Miscellaneous Provisions Act 2005.*

A person who contravenes a provision of Irish Market Abuse Law shall be liable to compensate any other party to the transaction concerned who is not in possession of the relevant information for any loss sustained by that party by reason of any difference between the price at which the financial instruments concerned were required or disposed of and the price at which they would have been likely to have been acquired or disposed of on such a transaction at the time when the first mentioned transaction took place if that information had been generally available and to account to the body corporate or other legal entity which issued the financial instruments concerned for any profit accrued.

*Section 33 C.A. 2005*

### **3.29 Directors Compliance Statements**

This matter is being dealt with by my colleague Jacqui Cross. The Companies (Auditing and Accounting) Act 2003 amended the 1990 Act by substituting a new section 205E providing for Directors to prepare a compliance statement and the inclusion of the statement in the Director’s Report to the annual accounts. This section has not yet been implemented and as Jacqui Cross will explain it is intended that an amendment be made which will reduce the obligations imposed on Directors in this regard.

*Section 45 Companies (Auditing and Accounting) Act 2003.*

### **3.30 Liability Created by Other Legislation**

There has been a tendency in recent years to place a liability on Directors for defaults by their companies in areas of legislation other than Company Law and Taxation Law. Examples of these follow.

### **3.31 Taxation**

Pursuant to section 1078 of the Taxes Consolidation Act 1997 where a revenue offence is committed by a body corporate and it is shown to have been committed with the consent or connivance of or is attributable to the neglect of any director of the Company, that person shall be deemed to be guilty of the offence and may be punished accordingly. The penalties are fines of up to £10,000 (€12,699) or 5 years imprisonment.

A person shall be guilty of an offence under this section where he/she

- (a) knowingly delivers any incorrect return, statement or accounts or knowingly furnishes any incorrect information in connection with any tax or aids/ induces another person so to do
- (b) claims or obtains any relief or exemption from any tax which he/she knows they are not entitled
- (c) knowingly fails to comply with any provision of the tax acts requiring the furnishing of any return of any tax and the keeping of records in relation thereto
- (d) knowingly destroys or conceals from the Revenue Commissioners any documents which a company is obliged to keep
- (e) knowingly issues or produces any incorrect invoice, receipt or other document in connection with any tax and fails to make any deduction for DIRT
- (f) knowingly fails to remit any PAYE or VAT within the time specified by the Acts

Proceedings in respect of an offence may be instituted within 10 years from the date of the commission of the offence.

*Section 1078 Taxes Consolidation Act 1997.*

### **3.32 Competition Legislation**

The Competition Act 2002 provides for both criminal and civil liability. Section 8 deals with criminal offences. Subsection 6 provides that where an offence has been committed under the Act and the acts that constituted the offence had been authorised, or consented to by a Director, that person shall be guilty of an offence.

Section 8(1) deals with the penalties applicable for 'hard core cartel' offences. These are the offences of price fixing, limiting output or sales and market sharing and are known as the 'per se' offences because such activities are presumed to have an anti-competitive effect and no actual proof of such an effect is required. Under section 8(1) an individual found guilty of such an offence shall be liable to imprisonment of up to five years on indictment. The offence is an arrestable offence under Irish law (section 2, Criminal Law Act 1997) which means that Gardai may detain and question individual managers and directors suspected of involvement in a cartel.

Section 8(2) deals with the criminal sanctions applicable to the lesser offences under section 4 (anti-competitive agreements) and 5 (abuse of dominance) of the Act. It provides that a Director may be liable for fines of up to €10 million for breach of these sections, but not imprisonment.

Section 14 deals with civil liability of Directors under the Act. A Director of a company involved in anti-competitive behaviour can, pursuant to section 14(b) of the Act, be made liable in damages to 'any person who is aggrieved in consequence of any agreement, decision, concerted practice or abuse'. These damages can include exemplary damages (damages not aimed at making good a loss of the plaintiff but at making an example of the defendant). A Director will be made so liable where he/she 'authorised or consented to' the entry by the company, or the implementation by it of, the offending practices. Under subsection 8 it shall be presumed that a Director who is involved in the management of the company consented to such activities. The use in the section of the term 'any person who is aggrieved...' imports a potential, virtually limitless liability on a Director to such actions being taken against him.

*Section 8 & 14 Competition Act 2002.*

### **3.33 Safety Legislation**

The Safety Health & Welfare at Work Act 2005 which provides that where an offence under any of the relevant statutory provisions have been committed by an undertaking and the doing of the acts that constitute the offence have been authorised or consented to, or is attributable to connivance or neglect on the part of a person, being a Director, Manager or other similar officer of the undertaking or a person who purports to act in such capacity, that person as well as the undertaking shall be guilty of an offence.

The Act goes on to state that if it is proved that at the material time the person concerned was a Director of the undertaking it shall be presumed until the contrary is proved that the doing of the acts by the undertaking which constituted the commission by it of the offence concerned under any of the relevant statutory provisions was authorised or consented to or attributable to connivance or neglect on the part of the Director. It will be noted that the onus of proof is on the Director in this regard. *Section 80-Safety, Health and Welfare at Work Act 2005.*

## Rights Under Common Law

### **4.1 Not obliged to take Directions from Members**

Directors are not agents of the Members and cannot be directed by the members in general meeting as to the management of the Company if the Company's articles vest the management in the Directors. *Automatic Self Cleaning Filter Syndicate Company Limited –v- Cunnighame* [1906] 2 C.H 34. *John Shaw & Sons (Salford) Limited –v- Shaw* [1935] 2 KB 113.

The wording of Regulation 80 of Table A in the 1963 Act provides that the business of the Company shall be managed by the Directors who may exercise all the powers of the Company subject to such directions (not being inconsistent with the provisions of the articles) as may be given by the Company in general meeting. The Courts interpreted such as requiring a special resolution. *Butterworths Company Law Guide, Fourth Edition* (note 2 on page 193). In certain limited circumstances the Court will hold that there is a residual power of management in the general meeting e.g. if the Board is deadlocked or unable to act or has ceased to exist. *Barron –v- Potter* [1914] Ch 895 *Foster –v- Foster* [1916] 1 Ch 532.

### **4.2 Right to Exercise Office**

A Director has a right to exercise his office and cannot be prevented from so doing, *Courbough –v- James Parton & Co. Limited* 1965 IR. 272.

### **4.3 Right to Engage Professional Advisors**

Has a Director the right to engage a professional adviser, for example, a lawyer to advise him at the expense of the Company? The law as yet developed has not provided a clear answer to this question. There is an Australian case on the point. In this case the Court held that in principle arising from the fiduciary relationship the Director has a right to be indemnified against his expenses incurred but that the Director must show that he or she honestly and reasonably believed that to fulfil his duty required the incurring of such expense. There has been some criticism of this case as it

was to some extent based on the analogy of a trustee which is not a complete analogy. *Talbot –v- NRMA Limited* (2000) 50 NSW LR 300.

In the United States and the United Kingdom the practice has developed under principles of corporate governance to allow particular groups of Directors to obtain as a group external advice. Also a case in the Iowa Supreme Court suggests equity has broad powers to make appointments to enable corporate functions to be carried out. *Miller –v- Register & Tribunal Syndicate* [1983] 336 NW 2 d 709.

## Rights Under Statute

### **5.1 Right to be heard on Removal**

If a Director is to be removed by ordinary resolution of members, extended notice (i.e. 28 days) is required and a Director is entitled to be heard on the resolution at the meeting and to have sent written representations to the members (if not received too late) and if not sent to have the representations read out at the meeting. This removal pursuant to *Section 182 C.A. 1963* is not to be taken as depriving a Director so removed from compensation or damages to which he would have been entitled by reason of termination of his appointment.

The mere holding of office does not entitle a Director to remuneration.

*Section 182 C.A. 1963. Hutton –v- West Cork Rly Company Limited* 1883 23 Ch D 654. *Guinness –v- Saunders* [1990] BCLC 402.

If the Director does not have a service contract but has been appointed under the articles, his position can be terminated at any time and he cannot recover damages. *Read –v- Astoria Garage (Streatham) Limited* [1952] C.L. 637.

### **5.2 Rights to Access Records**

A Company shall make its books of account available at all reasonable times for inspection by the officers of the Company. *Section 202 (8) C.A. 1990*. If a Director wishes his professional agent or accountant to inspect on his behalf this can be done. *Healy –v- Healy Homes Ltd* [1973] IR 309.

### **5.3 Indemnity & Relief against Liability**

Section 200 (1) of the 1963 Act makes void any provision contained in the articles or in any contract with the company or otherwise for exempting any Director against any liability which by rule of law would otherwise attach to him in respect of any negligence, default, breach of duty, or breach of trust.

*Section 200 C.A. 1963*

A company may however indemnify a Director against any liability incurred by him in defending proceedings whether criminal or civil, in which judgement is given in his favour or in which he is acquitted, or in connection with any application under Section 391 or Section 42 of the Companies

(Amendment) Act 1983 (provision for relief, to Directors for amounts payable on shares where shares are improperly issued to a nominee of the Company).

An amendment was made to Section 200 by the Companies (Auditing and Accounting) Act 2003 which permitted a Company to purchase and maintain insurance for any of its officers in respect of the liability referred to in Section 200 (1).

There is provision for the Court to grant relief to a Director for negligence, default, breach of duty or breach of trust if having regard to all the circumstances the Court feels he ought fairly to be excused. *Section 391 C.A. 1963*.

However the Director must have acted honestly and responsibly. *Re Duomatic Ltd* [1969] 1 A E 161. It is only the liability to the Company which is relieved *Commissioners of Customs & Excise –v- Hedon Alpha Ltd* [1981] QB 818. Section 391 does not allow for relief from criminal liability under the Companies Acts *Commissioners of Customs & Excise –v- Hedon Alpha Ltd* [1981] QB 818. Relief is not available if the Director has retained company property. *Guinness Plc –v- Saunders* [1990] 1 A E 652.

#### **5.4 Right to Appoint an Alternative Director**

For a private Company if Regulation 9 of Part II of Table A C.A. 1963 is adopted, a Director has a right to appoint an alternate or substitute Director to attend and vote at meetings in his absence. This appointment can be revoked by the appointer or the majority of the other Directors or by the Company in general meeting.

### **Conclusion**

- 6.1** The roles of auditors in relation to their duty has been famously stated as being “ a watchdog, not a bloodhound ” You will have seen that the role of Directors is now more akin to the hounds of Sherlock Holmes. What price enterprise and risk taking?