

DIRECTORS DUTIES & LIMITED LIABILITY

The principle of limited liability applies to the vast majority of companies, however since the setting up of the Office of the Director of Corporate Enforcement (ODCE) in 2001 and with the increase in the number of company liquidations, directors should be aware of their duties and also aware of the instances where they will become personally liable for failing to meet these duties.

Duty to Company

Prior to the introduction of the ODCE directors already had a number of common law and statutory duties. At common law a director has a fiduciary duty to the company to act in the best interests of the company as a whole and they may not make undisclosed profit from their position. Along with this, the Companies Acts impose a number of duties such as an obligation to keep proper books of account, to disclose and register interests held in shares in the company, to disclose interests in contracts with the company and not to act in a manner oppressive to any of the members or in disregard of the interests of any members of the company.

Duty to Creditors

In certain circumstances directors may also owe a duty of care to the creditors of the company. If the company is solvent and has the ability to pay its debts as they fall due no duties arise. In circumstances where the company is insolvent or is threatened with becoming insolvent, this principle changes and it is now well established that directors owe fiduciary duties to the creditors of the company. If the company is insolvent on a balance sheet basis or because it is unable to pay its debts as they fall due for payment then the directors must recognize this fact. They must act exercising due care, skill and diligence.

In understanding the interaction between the principle of limited liability and the statutory and common law duties of directors that lead to the lifting of this limitation on liability, it is useful to review some of the instances where directors can be sanctioned by the courts.

Fraudulent Trading

Under the Companies Acts any person found guilty of fraudulent trading can also be held personally liable without limitation of liability for all or any part of the debts or other liabilities of the company as the court may direct. A director is guilty of fraudulent trading where they are “...*knowingly a party to the carrying on of a business with intent to defraud creditors of the company, or creditors of any other person or for any fraudulent purpose...*”

Potentially, a director found guilty of this offence can be found criminally liable and imprisoned for up to seven years or liable to a fine of up to €63,480. In order to prove a person guilty under this section however, intent to defraud must be proven and this has been found to be difficult to prove.

Reckless Trading

A director can be guilty of an offence under this section where they are “...*knowingly a party to the carrying on of any business of the company in a reckless manner.*”

There are various tests for determining recklessness and the ODCE has been active in bringing proceedings against directors under this section. As with fraudulent trading a director can potentially be made liable without limitation for all or part of the debts or liabilities although case law has determined that any such liability will be proportionate to the wrongdoing committed and to the loss suffered by the company or its creditors.

Failure to keep proper books of account

The Companies Acts require that every company shall cause proper books of account to be kept. If the company is subsequently being wound up and is unable to pay all of its debts and has not met this obligation and if the court considers that such contravention has either contributed to the company's inability to pay all of its debts or has resulted in uncertainty as to the assets and liabilities of the company, then a director can be liable to a fine of up to €12,697 or a term of imprisonment up to five years or both. Also, the court has power to declare that any director in breach of this section shall be personally liable without limitation of liability for part or all of the debts of the company.

Restriction and Disqualification

Section 150 of The Companies Act, 1990 provides that where a person has been a director of a company at any time within a period of twelve months prior to the commencement of the winding up and the company is placed in liquidation, he shall be liable to be restricted from acting as a director of any other company for a period of five years. In more extreme cases, under section 160 a person can be disqualified from acting as a director.

The onus of proof in the two sanctions differs. In an application under section 150, the onus is on the director to prove that he acted honestly and responsibly whereas in a section 160 application the onus is on the liquidator or other applicant, such as ODCE, to prove that the director has committed the conduct requiring an order for disqualification.

Since 2006, directors are liable for the applicant's cost of investigation in restriction and disqualification applications to the High Court where they are found guilty. To date it is estimated that over 2,700 directors have been disqualified and over 700 restricted and this number is rising.

It is essential that directors take appropriate steps to make themselves aware of their obligations and duties and to take the right decisions, especially at times when their company begins to experience financial difficulties.

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