



January 2015

Companies Act 2014: Directors' Duties

Introduction

The commencement of the Companies Act 2014 (the “**Companies Act**”), which is expected to take place in June 2015, will consolidate, reform and amend existing company law legislation, and will impact every Irish company as well as its directors and shareholders.

Part 5 of the Companies Act gives statutory recognition to the current common law and equitable principles regarding directors' duties, ensuring greater clarity for directors.

The newly codified duties detailed in Chapter 2 of Part 5 of the Companies Act are discussed below.

Who owes the Duties?

Chapter 1 of Part 5 of the Companies Act provides that those persons who are “shadow directors” and “*de facto*” directors will equally be bound by the provisions of Part 5 in the same manner as directors who have been formally appointed. These concepts are not necessarily new and refer to directors who effectively act as such (without formal appointment having been made) or in accordance with whose instructions the directors are accustomed to act.

The duties as set out in this Part of the Companies Act can be broadly broken down into fiduciary duties (previously developed and detailed by means of case law) and general duties (recognising certain common law duties but also including and expanding upon existing statutory duties).

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General Duties of Directors

The general duties which directors owe to the company in the performance of their role include:

(i) **Compliance with legislation**

Directors must ensure compliance by the company with the Companies Act. A breach of this duty will not invalidate any contract or agreement or affect its enforceability, other than by the director in breach. This is without prejudice to the principles of liability of a third party where he or she has been an accessory to a breach of duty or has knowingly received a benefit from such a breach.

(ii) **Interests of shareholders and employees**

Directors must take into account the interests of the members of the company and have regard to the interests of the employees in the performance of their functions however it is worth noting that this duty is owed by the directors to the company, not to the shareholders or employees.

(iii) **Compliance statement**

Directors are required to acknowledge the existence of their duties by signing a declaration to that effect in the form of a compliance statement. Directors of all public limited companies and of private companies which meet certain financial thresholds will be required to include a directors' compliance statement in their directors' report (or explain why not).

(iv) **Appointment of company secretary**

There is an obligation on directors to ensure that the company secretary is suitably qualified for the role. In appointing a company secretary, the directors shall have a duty to ensure that he or she has the skills necessary to enable him or her to maintain (or procure the maintenance of) the records of the company (other than accounting records) necessary under the Companies Act.

(v) **Directors' duty to disclose any interests in contracts made by the company**

A director who is, in any way, directly or indirectly interested in a contract or proposed contract to which his or her company is a party, shall have a duty to disclose the nature of that interest at a meeting of the directors. This is, in the main, a restatement of the existing law.

(vi) **Breach of duty: liability to account and indemnify**

The Companies Act provides that breaches of certain director duties will result in the director who is in breach being liable to account to the company for any gain made by him or her and to indemnify the company against any loss made by it as a result of any such breach.

Fiduciary Duties of Directors

The eight principal fiduciary duties of directors are set out at section 228 of the Companies Act:

(i) **Act in good faith**

Each director is obliged to act in good faith in what the director considers to be the best interests of the company. This is a subjective test and recognises that two directors can have two different but equally legitimate opinions as to what constitutes the best interests of the company.

(ii) **Act honestly and responsibly**

Directors must act honestly and responsibly in relation to the conduct of the affairs of the company. While this was not a common law duty, it was deliberated on by the courts on numerous occasions in the context of imposing restrictions on directors.

(iii) **Act within powers**

Directors must act in accordance with the company's constitution and exercise his or her powers only for the purposes allowed by law.

(iv) **Use of company property**

A director is not permitted to use the company's property, information or opportunities for his or her own or anyone else's benefit unless this is expressly permitted by the company's constitution or the use has been approved by a resolution of the company in general meeting.

(v) **Independent judgment**

A director shall not agree to restrict his or her power to exercise independent judgment unless this is expressly permitted by the company's constitution; or the director believes, in good faith, that to fetter his or her discretion is in the best interests of the company.

(vi) **Avoid conflicting interests**

A director is obliged to avoid any conflict which may arise between the duties the director owes to the company and the director's other (including personal) interests, unless the director is released from his or her personal duty to the company in relation to the matter concerned by virtue of either the provisions of the company's constitution or by a resolution in a general meeting.

(vii) **Due care, skill and diligence**

A director must exercise the care, skill and diligence which would be exercised in the same circumstances by a reasonable person having the knowledge and experience that may reasonably be expected of a person in the same position as the director; and who also possesses the equivalent level of knowledge and experience which the director has. This

sets a quasi-objective standard by which a director should be judged. While it does use the 'reasonable man' test, that man is taken to be a person with the director's knowledge and experience.

(viii) **Regard to shareholders' interests**

In addition to the general duty as referred to above, directors have a fiduciary duty to have regard to the interests of the shareholders of the company.

Breach of Duties

As in the case of a breach by directors of their general duties, a breach of any of the fiduciary duties will not invalidate the validity of any contract or transaction or its enforceability, other than by the director in breach. However this is without prejudice to the principles of liability of a third party where he or she has been an accessory to a breach of duty or has knowingly received a benefit from the breach in question.

Where an officer of the company is shown to have acted honestly and reasonably the court may grant relief to that officer in any proceedings for negligence, default, breach of duty or breach of trust. Likewise a court may grant relief where an officer has acted honestly and reasonably in relation to any anticipated future claim for negligence, default, breach of duty or breach of trust.

While providing welcome clarification, the Companies Act does not displace the importance of case law relating to existing common law rules and equitable principles and section 227 reiterates that regard shall be had to the corresponding common law rules and equitable principles in interpreting the duties and applying the new provisions.

Conclusion

This codification of directors' duties is a welcome inclusion in the Companies Act as it removes ambiguity surrounding the duties owed by directors and provides a centralised reference point for directors in considering their duties and responsibilities in respect of their position. Such centralised documentation of directors' duties was up until this point notably lacking in Irish company law.

The clarification of these duties and the requirement, where applicable, for directors to include a compliance statement in their annual report to include confirmation that the directors have taken appropriate steps to ensure compliance by the company with its 'relevant obligations' (including the Companies Act and tax legislation) is likely to focus the minds of directors on the issue of compliance and the responsibilities of their role as directors.

The above is a general overview of the proposed changes to be introduced by the Companies Act and should not be relied upon as legal advice. For further information on any of the issues discussed, please contact Lorcan Tiernan, Catherine Hicks or your usual contact in Dillon Eustace.

Dillon Eustace will provide regular updates and briefing sessions on the Companies Act as the effective date becomes closer.

The firm's multi-disciplinary team includes the following members who will be responsible for co-ordinating client communications on the impact of the Companies Act in the following practice areas over the course of 2015:-

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