

COMPANY DIRECTORS DUTIES & RESPONSIBILITIES

A Company is a separate legal entity separate and apart from the persons who own or run the Company. The vast majority of Irish Companies are Private Companies Limited by Shares. I propose to deal with Companies Limited by Shares in this article as this is the most common Company type used by small to medium sized businesses throughout the Country to carry on their commercial activities.

To Incorporate a Company you require at least two Directors one of whom must be an Irish Resident. The Directors act on behalf of the members/shareholders (I will use the term shareholder rather than member for the remainder of this article) and make all commercial decisions relating to the running of the company. The Articles of Association of the Company establish how a Company is administered and will generally provide for the appointment removal and retirement of Directors and set out the number of Directors required to carry on the business of the Company. They will also generally provide that the Directors may exercise all the powers of the Company which are not required by the Companies Acts or Articles of Association of the Company to be exercised by the Company/Shareholders in general meeting. This effectively means the Board of Directors may do what the company may do provided that they do not do anything which is illegal or outside the powers of the Company. Directors powers are conferred collectively and are exercised by a resolution at a board meeting usually on a majority basis.

In family businesses you often have Directors who are also the only shareholders in the Company. This can create difficulties as it can blur the lines in relation to property and assets owned by the Company as a separate legal entity and the property and assets of the individual Directors shareholders who may effectively own the Company. The main difficulty which may arise in this situation is the free use of the Company's property and assets by the shareholder.

Directors Common Law Duties

In common law the Director of a Company has a duty to act in good faith in the interest of the Company as a whole. This is not a duty owed to an individual shareholder or to the creditors of a Company.

Directors must avoid situations where there is a conflict of interest unless they disclose the fact to the Company. They are not allowed to make an undisclosed profit from their position as Directors of a Company. This can result in Directors having to surrender up to their Companies benefits which they acquired as a result of their position as Directors.

A Director may be involved with a business which competes with the Company of which he or she is a director provided this involvement is not in breach of his or her duty of trust to the Company.

Whilst Directors are obliged to carry out their duties to a Company with due care, skill and diligence they are not obliged to carry out these duties with any greater degree of skill and expertise than would be expected from them in light of their knowledge and experience. However a Director is liable to the Company for any loss resulting from their negligent or reckless behaviour in the carrying on of their office.

A Director may delegate duties to the management or employees of the Company when it is appropriate to do so provided these duties are not reserved to him or her as Directors as a specific duty or power under the Articles of Association. The Director should, at the very least, if not involved in the day to day running of the Company, attend meetings of the Company to ensure that the Company is being run in compliance with all legislative provisions.

If a Director of a Company acts outside his powers such an act would generally be invalid unless it is subsequently ratified by the shareholders of the Company in general meeting. Likewise a Director cannot lawfully enter into a Contract with the Company or through a firm in which he or she has an interest unless the action is ratified by the shareholders in general meeting.

Directors Statutory Duties

Directors Statutory Duties arise under the provisions of the Companies Act 1963 and subsequent amending legislation and regulations.

A Director has a statutory duty to ensure that the provisions of the Companies Acts and related legislation are complied with. The Director is presumed to have committed a breach of the legislation where there is a breach of the legislation by the Company unless the Director can prove that he or she took all reasonable steps to prevent the breach and due to circumstances beyond his or her control was unable to do so.

Examples of Directors Statutory Duties are as follows:

The Duty to Maintain Proper Books of Account. The legislation sets out the type of books of accounts required. These accounts must be kept up to date to accurately reflect the current financial position of the Company. If a Company is unable to pay its debts as they fall due, is being wound up and has failed to maintain the requisite books of account, the Court may if it establishes that the failure to maintain the requisite books of account contributed to the inability of the Company to pay its debts hold every Director in default guilty of an offence and may if appropriate make the directors personally liable for the debts of the Company.

The Duty to Prepare Annual Accounts (Financial Statement). Companies are obliged to prepare accounts on an annual basis. The Annual Accounts/Financial Statement is required to give a "true and fair view" of the Company's affairs.

The Duty to have an Annual Audit Performed. The Financial Statement must be Audited by an independent expert at least once a year. The Auditor's report must state inter alia that the financial statement gives a true and fair view of the affairs of the Company and is in agreement with the books of account. It should be noted that certain Companies are not required to have an annual audit if they have a turnover and balance sheet which do not exceed certain limits, it has less than 50 employees, is not a parent or subsidiary Company and has complied with its filing obligations with the Companies Registration Office.

The Duty to Maintain Certain Registers and Other Documents. The Company must maintain a register of members, register of directors and secretaries, register of directors and secretary's interests, register of debenture holders, minute books, directors service contracts, contracts to purchase own shares, register of interests of persons in its shares (public limited companies only).

The Duty to File Certain Document with the Registrar of Companies. Directors are legally obliged to ensure that the Annual Returns are filed with the Registrar of Companies. Examples of other requisite filings are change of Company registered office, change of Directors/Secretary, creation of mortgages or charges, satisfaction of mortgages or charges.

The Duty of Disclosure. Directors must disclose inter alia personal information in the register of Directors, interests in the shares of the Company or related Companies, payments for share transfers, contract of employment and interests in contracts with the Company.

The Duty to Convene General Meetings of the Company. The Directors are obliged to convene an Annual General Meeting (with no more than 15 months between each Annual General Meeting) and if required Extraordinary General Meetings to deal with matters outside the normal business conducted at the Annual General Meeting. The requirements and notice periods for convening an AGM or an EGM are generally set out in the Articles of Association of the Company.

Directors Duties Regarding Transactions between the Directors and the Company. When a Director or a person connected with a Director of a Company purchases or acquires an asset from, or sells an asset to the Company over a certain value the arrangement must first be approved by resolution of the company in a general meeting. A Company is also prohibited from giving a loan or quasi loan to a Director or entering into a Credit transaction or Guarantee on behalf of the Director. It should be noted that there are a number of permitted exception to this prohibition.

Duties of Directors of Insolvent Companies. A Director can be held personally liable for a company's debts if found liable for reckless or fraudulent trading.

Duties of Directors of Companies in Liquidation. Directors have a duty to co-operate with the Liquidator. On a voluntary liquidation the Directors must make an accurate declaration of solvency and may be liable for some or all of the Company's debts if the Company is found to be insolvent.

A Director who is guilty of a criminal offence such as fraudulent trading or insider trading may be subject to a substantial fine and or a term of imprisonment. Civil

Penalties such as a disqualification from acting as a Company Director for up to 5 years may also be applied.

Directors of Companies can also be personally liable for an offence for breaches of Health and Safety Legislation if an employee works under their control and direction or in relation to work procedures put in place by the Directors.

Please note that the issues addressed in this article are, due to the limitation of space, by way of introduction only. A Company Director should take full Legal, Accounting and Tax advice on an ongoing basis to ensure ongoing compliance with legislative requirements.

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