WILLIAM FRY

# Directors' Duties

The Companies Act 2014 (the "Act"), for the first time, codifies directors' duties, drawing together both existing statutory rules on transactions involving directors and also the various common law duties developed by the courts. Much of the Act is substantially similar to the existing law but there are also some significant amendments and codifications, the most relevant of which are detailed below.

**Directors' Duties**

In line with the approach adopted in the UK, the Act introduces for the first time in Irish law a list of the principal fiduciary duties of the directors of an Irish company. This list sets out broad general principles based on existing common law and equitable principles which have been developed by Courts in Ireland and the UK over many years. This approach will lead to greater clarity for directors although it continues to leave discretion to the Courts as to how to interpret these duties.

The key fiduciary duties as set out in the Act are:

| | | | |
|---|---|---|---|
| Act in good faith in interests of Company | Act honestly, responsibly in conduct of company's affairs | Act in accordance with company's constitution and the law | Not use company's property, information or opportunities for own/other third party benefit |
| Do not restrict director's power to exercise independent judgment | Avoid any conflict between director's duties and own interests | Exercise the care, skill & diligence that would be exercised by reasonable person with knowledge & experience a director expected to have and that director actually has | Have regard to interests of members, in addition to general duty to employees |

These duties are owed to the company and the company alone and are similar but not identical to, the list of directors' duties in the UK. Directors appointed by a shareholder may, in the performance of their duties, have regard to the interest of that shareholder subject to the director's overriding obligation to act in good faith in what they consider to be the best interests of the company.

If a director is found to be in breach of their duties, they are liable to account to the company for any gain which they make directly or indirectly from the breach of duty and/or to indemnify the company for any loss or damage resulting from that breach.

As is the case under the current legislation, duties will be owed not just by directors who have been formally appointed as such, but also by 'shadow' directors and 'de facto' directors who have not been formally appointed.

Each director has a duty to ensure that the provisions of the Act are complied with by their company. A director must provide a written statement upon their appointment in the following terms:

> "*I acknowledge that, as a director, I have legal duties and obligations imposed by the Companies Act, other statutes and at common law*."

In respect of infringements of company law by companies, officers of the company will be presumed to have permitted a default by their company, and so be "officers in default", where it is proved that they were aware of the basic facts concerning the default, unless they show they took all reasonable steps to prevent it or that, by reason of circumstances beyond their control, they were unable to do so.

**Secretaries' Duties**

In a departure from the current legislation, company secretaries will no longer have a statutory responsibility for ensuring that a company complies with the provisions of the Act. Their duties are instead stated to be:

> "…*without derogating from the secretary's statutory and other legal duties, be such duties as are delegated to the secretary, from time to time, by the board of the Company.*"

On appointment a company secretary must sign an acknowledgement of their duties and responsibilities in the same manner as a director. The Act imposes a new duty on Directors to ensure that the company secretary has the necessary skills required to discharge their duties.

**Disclosure Obligations**

The Act maintains the existing requirement for directors who are interested in a contract or proposed contract with the company, to declare his/her interest. However, the Act introduces a new materiality threshold which provides that this requirement does not apply in relation to an interest that cannot reasonably be regarded as likely to give rise to a conflict of interest.

The Act also introduces a new de minimus threshold in relation to the obligation on a director of a private limited company (or persons closely related to them) to disclose an interest in shares or debentures of a company which they are a director of. A director will not be obliged to disclose an interest in non-voting shares or in shares which represent 1% or less of the nominal value of the company's issued share capital of a class carrying votes. The disclosure obligation applies also to shadow directors and de facto directors however the Act specifically provides that the making of such a notification shall not be proof in itself that the person making it is a shadow director or de facto director.

A duty to notify the company also arises if the director or secretary of the company (or the person's spouse, civil partner or child):

a) holds shares or debentures in such company or any body corporate of the same group at the date of commencement of the Companies Act and such interest has not already been notified to the company in accordance with the provisions in the 1990 Act (must be notified within 8 days);

b) has acquired or ceased to hold shares or debentures in the company or any body corporate of the same group (must be notified within 30 days if the mode of notification is delivering the relevant instrument of transfer; otherwise, the company must be notified within 8 days);

c) holds shares or debentures in a company or any body corporate of the same group and subsequently becomes an officer of the company (must be notified within 8 days);

d) is granted by another body corporate of the same group a right to subscribe for shares or debentures in that other body corporate or exercises such a right (must be notified within 5 days); and/or

e) assigns or enters into a contract to sell shares or debentures of the relevant company or another body corporate of the same group (must be notified within 5 days).

None of the above duties operate so as to impose an obligation:

(i) with respect to shares in a body corporate which is the wholly owned subsidiary of another body corporate; or

(ii) on a director or secretary of a company who is granted an option to subscribe for shares in, or debentures of, that company to make any notification to that company in respect of such grant.

Where a person fails to fulfil his or her duties to notify the company within the relevant time period, no right or interest of any kind in respect of the shares or debentures is enforceable by him or her.

However, section 266 provides that failure to notify may be remedied in the following ways:

- the right contained in the 1990 Act has been retained to apply to the court for relief if the default was accidental or due to inadvertence or there are other just and equitable grounds for granting relief;

- details of the shares or debentures are entered on any of the statutory registers within 30 days;

- the board of directors may, within 18 months of the date of commencement of the Companies Act resolve that any default in complying with section 53 of the 1990 Act shall cease to operate if the relevant person presents evidence to the board, and the board is satisfied, that the default concerned was inadvertent; and

- a company in general meeting may pass a special resolution that (i) the notification provisions have been complied with in relation to the relevant shares or debentures and (ii) the registered holder is entitled to deal with the shares or debentures registered in his or her name. A third party may then rely on such resolution.

The Act also provides that if a payment, other than a bona fide discharge of an existing legal obligation, is to be made to a director as compensation for loss of office in connection with the transfer of all or any of the shares in a company pursuant to a general offer, the director has a duty to take all reasonable steps to secure that details of the proposed payment are included in any notice of the offer sent to shareholders.

**New Compliance Statement**

Directors of private limited companies and guarantee companies that have, in a particular year, a balance sheet of over €12,500,000 and turnover in excess of €25,000,000 will be required to make a compliance statement in the Directors' Report. Directors of all public limited companies (other than those that are investment plcs) are also required to make compliance statements regardless of balance sheet or turnover figures.

The Directors' Report must include a statement that acknowledges that the directors are responsible for securing the company's compliance with its relevant obligations, i.e. provisions of the Act the contravention of which is a Category 1 or 2 offence (these are the most serious offences under the Act), market abuse and prospectus requirements (where applicable) and tax law.

The Directors' Report must confirm that the directors have:

a) drawn up a compliance policy statement setting out the company's policies respecting compliance with its relevant obligations;

b) put in place appropriate arrangements or structures that are designed to secure material compliance with relevant obligations; and

c) conducted a review during the financial year of the arrangements and structures put in place.

If these statements, confirmations and reviews have not been made or carried out, the directors must specify the reasons why not.

Directors can rely on the advice of one or more persons employed by the company or retained under a contract for services, who appear to the directors to have the requisite knowledge and experience to advise the company on compliance with its relevant obligations. This is likely to put an increased emphasis on the need for directors to seek financial, tax and legal advice in relation to transactions contemplated by the company.

The Directors' Report, including the compliance statement, must be annexed to the company's annual return publicly filed with the CRO.

**Loans by a director to a company**

This area is not one which had been previously legislated for but section 237 introduces new evidentiary requirements in relation to loans by directors to the company. The section relates to civil proceedings, in which it is claimed that a transaction or arrangement entered into or alleged to have been entered into by a:-

a) director of a company with the company or its holding company; or

b) person connected with such director with that company or its holding company

constitutes a loan or a quasi loan by a director with that company or its holding company.

If in such civil proceedings the terms of the transaction or arrangement concerned are not in writing or are ambiguous as to whether they are a loan or quasi-loan, then it shall be presumed, until the contrary is proved that it is neither a loan or a quasi-loan. What it is actually then treated as is not stated but it would appear to be some form of capital contribution or gift to the company.

The section goes on to clarify that if it is proved to be a loan or quasi-loan but it is ambiguous as to:-

a) interest, then it is presumed to be interest free;

b) security, then it is presumed to be unsecured;

c) priority of security, then it is presumed to be subordinate to all other security.

As such, care will need to be taken in documenting any loans from a director to a company to ensure that the terms are clear and unambiguous.

**Loans by a company to a director**

Section 236 governs the same form of civil proceedings as section 237 described above but this time deals with loans <u>from</u> a company <u>to</u> a director. In these circumstances, where a loan from a company to a director is not in writing, then it is presumed that the loan is repayable on demand and that the unpaid amount of the loan has borne interest at the "appropriate rate".

If the loan is in writing or partially in writing but its terms are ambiguous, the same form of presumption operates so that if the time at which the loan is to be repaid is ambiguous, then it is presumed to be repayable on demand and if it is ambiguous as to whether interest is payable, then interest at the appropriate rate is due.

Section 239 is the relevant section in the Act governing the prohibition on loans to directors and connected persons.

The new section 239 is similar to the existing section 31 of the 1990 Companies Act with the following exceptions:

a) In determining whether the 10% de-minimis test is met, any transactions which have been approved by the Summary Approval Procedure are excluded;

b) Previously, the de minimis exception could not be used for guarantees or security – these are now allowed;

c) The old section 34 validation procedure has been dispensed with and the Summary Approval Procedure can be used to validate any transaction or arrangement which would otherwise be prohibited by section 239.

The Companies Act 1990 allowed certain transactions prohibited by section 31 to be sanctioned by the company by carrying out a procedure similar to the whitewash procedure in the context of the existing section 60. However, the requirement to produce an independent accountant's report, which was almost impossible to give in most cases, meant that this procedure was rarely used and it has been replaced by the Summary Approval Procedure. No independent accountants report is now required.

**Transactions in non-cash assets involving directors**

Section 138 replaces section 29 of the Companies Act 1990. This section is very similar to the existing section 29 with some minor changes. A non-cash asset is of the requisite value if it is not less than €5,000 but exceeds €65,000 or 10% of the company's relevant assets.

In addition, the restriction no longer applies where the arrangement involves the disposal of a company's assets by a receiver.