

Directors' and Officers' Liability

UK Report

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DIRECTORS' AND OFFICERS' LIABILITY

UK Overview

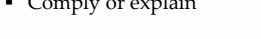
- Public and private companies
- Companies Act 2006
- FSMA 2000
- Staggered regulation
- Listing Rules, Prospectus Rules, City Code, UK Corporate Governance Code



DIRECTORS' AND OFFICERS' LIABILITY

Roles and Responsibilities of the Board of Directors and Shareholders' Meeting


- Unitary board of directors
- Executive and non-executive
- Minimum number
- Appointment by shareholders or co-option
- No qualifications required
- 'Chairman' needed
- UK Corporate Governance Code – CEO, Chairman and SID, with rules re proportion of independent directors
- 'Comply or explain'



DIRECTORS' AND OFFICERS' LIABILITY

Removal of Directors


- Relatively straightforward
- Not subject to prohibitions in terms of the service agreement or articles of association
- But subject to 'weighted voting' rights in articles – *Bushell v Faith* [1970] AC 1099
- Removal for bad cause or no cause permitted
- Ordinary resolution – simple majority
- Procedural protections only



DIRECTORS' AND OFFICERS' LIABILITY

Basis of Liability for Director's Duties


- Source of director's duties
- Statutory, but fiduciary in origin
- Has implications for remedies
 - Restitutionary remedies
 - Gain-based damages
 - Avoidance of contracts
 - Knowing receipt and dishonest assistance
- Duty of care, skill and diligence



DIRECTORS' AND OFFICERS' LIABILITY

Scope of Director's Duties

- Seven director's duties
- No 'business judgment' rule
- Subjective test for principal duty – section 172
- Distinction between duties of loyalty and care
- Duty of care:
 - Mixed objective and subjective test
 - Self-modulating according to circumstances
 - Executive and non-executive directors



DIRECTORS' AND OFFICERS' LIABILITY

Director's Dissent

- No collective liability of directors
- Dissenting directors not liable for breach where they vote against a proposal



Internal Controls

- Directors have right to delegate
- Duty to oversee, supervise and monitor performance of delegatee
- Board responsible for maintaining internal control and risk management
- Directors must not be manipulated or dominated by other directors



Damage to Shareholder's Interests

- Breach of duty owed to company
- Company's loss recoverable
- 'No reflective loss' rule
- Derivative claims/proceedings



Position of Directors When Insolvent or Nearing Insolvency

- Wrongful trading
- Insolvent liquidation
- Mixed objective/subjective test – no reasonable prospect of avoiding insolvent liquidation
- Personal liability
- Defence – every step taken to minimise potential losses to creditors
- Duties to creditors, but no creditor right to recover
- Only insolvency administrator can recover ex post facto when company insolvent



Waiver of Liability

- Waiver by shareholders in general meeting is possible
- Section 239 of the Companies Act 2006
- Ordinary resolution – simple majority of shareholders
- But some non-ratifiable wrongs remain
- And indemnities in respect of criminal liability or regulatory liability are void



Liability for Damage to Third Parties; Presenting False Balance Sheets and Violation of Cartel/Competition Law

- Duties of directors owed to company
- No duties to individual shareholders, employees, suppliers, clients or other third parties in respect of their loss
- Agency liability
- Creditors?
- Deceit or duty of care in tort law – prospectus liability or misleading statements
- No civil liability for breach of competition law



Conclusion

- Flexible company law
- Default rules with few mandatory laws
- Mandatory rules increase as company ascends along spectrum from private to public
- Directors shielded from court second-guessing their decisions

