Directors’ and Officers’ Liability

UK Report

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UK Overview

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

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’

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

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

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
**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