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**ARTHUR COX**

**Directors, Officers and Managers Liability  
The Legal Position in Ireland**

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# **DIRECTORS, OFFICER'S AND MANAGERS LIABILITY THE LEGAL POSITION IN IRELAND**

## **Introduction**

*The purpose of this article is to provide a brief overview of the more important liabilities of directors, officers and managers. In doing this, we have striven to explain these liabilities in a non-legal manner and to be as concise as possible. For this reason, it has not been possible to deal with some of the complex legal issues with which directors, officers and managers are sometimes faced with in the discharge of their duties and responsibilities.*

## **1. Structure of Irish Corporate Entities**

Irish corporate entities exist in various forms. The main types of corporate entities in Ireland are as follows: private limited companies, unlimited companies, public limited companies, chartered companies or corporations, companies incorporated by statute, semi-state bodies, industrial and provident societies, friendly societies, building societies, trade unions and trustee savings banks. Partnerships also closely resemble a corporate entity.

The most usual form of corporate entity in Ireland is the company with limited liability formed and registered under the Companies Acts 1963 to 2001 ("the Acts"). It is this company we have in mind in this article when detailing directors personal liabilities under the Acts. These companies can be limited by shares (in which case the liability of the members for the debts and wrongs of the company is limited to the amount unpaid on the shares which they own in the company) or limited by guarantee (in which case the liability is limited to the amount which the members undertake to pay in the event of the company ceasing to exist.)

## **2. Who are Directors, Officers and Managers?**

### **Directors**

The persons charged with the responsibility of running corporate entities are usually called directors. While a company is recognised by law as a legal person, in practice it cannot act without the assistance of agents. The most important agents of a company are its directors. As agents, directors are in a unique position in that they receive most of their instructions from themselves. The law has recognised this unique position and in many circumstances will require the directors of a company to behave towards the company and its property in a manner which is very similar to trustees. For this reason, a director can be called a fiduciary agent.

A director may also be an employee of the company with some form of senior executive

responsibility. If so, he is commonly referred to as an executive director as opposed to a non-executive director who is not involved in the day to day management of the company. This does not alter the duties and responsibilities owed by a director to his company, though it may be that more will be expected of an executive director in his compliance with these duties and responsibilities since he will usually have a greater knowledge of the management of the company and its affairs and be in a better position to discharge these duties and responsibilities.

As an employee, an executive director will also owe other duties and responsibilities under his contract of employment with the company. Other than this, the duties and responsibilities of executive and non-executive directors are the same.

There is also, in Irish law, the concept of "Shadow Directors"®. These are persons in accordance with whose directions or instructions the directors of a company are accustomed to act.

### **Officers**

All directors and company secretaries are officers of a company. For the purposes of various provisions of the Companies Act, 1990 ("the 1990 Act"®) any of the following may be officers: a director; secretary or employee; a liquidator; any person administering a compromise or arrangement made between the company and its creditors; an examiner; an auditor; and a receiver.

### **Managers**

If a manager is not a director of the company, then he/she is an employee of the company, and any duties and responsibilities a manager owes to the company will be set out in the contract of employment the manager has entered into with the employer company. The manager's duties and responsibilities are governed by normal contract law applicable.

## **3. Legal Bases of Directors, Officers and Managers Liability in Ireland**

### **(a) Statutory, civil or contractual legal framework**

#### **Statutory Law**

#### **The imposition of personal liability on directors and officers**

Prior to the enactment of the 1990 Act and the Company Law Enforcement Act, 2001 ("the 2001 Act"), a director of a company could be compelled to contribute personally to the company's debts and liabilities in a limited number of instances only. The 1990 and 2001 Acts changed that. Outlined below are some of the most important and relevant instances in which such a liability may arise under the Companies Acts.

**(1) 2001 Act**

Section 100 of the 2001 Act represents a fundamental change in the duties and responsibilities of directors and company secretaries. Hitherto, a director or company secretary could not automatically be guilty of breach of duty or breach of statutory duty through a failure to act. Liability in such circumstances depended on knowledge and the skill and the experience of the individual. Section 100 now provides that it is the duty of each director and secretary of a company to ensure that the requirements of the Acts are complied with by the company. The Section also provides that they will be presumed to have permitted a default by a company unless they can establish that they took all reasonable steps to prevent it or that, by reason of circumstances beyond their control, were unable to do so.

**(2) Fraudulent Trading**

Any person found by a Court to be knowingly a party to the carrying on of the business of a company with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose may be held personally responsible, without limitation of liability for all or any of the debts or other liabilities of the company as the Court may direct. An application to Court under this section may be made by the liquidator, or any creditor or contributory of the company.

**(3) Reckless Trading**

If a company is being wound up, an officer of the company may be made personally liable for some or all of the debts of the company if he is found guilty of reckless trading. The threshold for reckless trading is lower than that for fraudulent trading. In summary, a person may be found guilty of reckless trading if either (a) he was a party to the carrying on of the business of the company and having regard to the general knowledge, skill and experience that may reasonably be expected of a person in his position, he ought to have known that his actions or those of the company would cause loss to the creditors of the company, or any of them, or (b) he was a party to the contracting of a debt by the company and did not honestly believe on reasonable grounds that the company would be able to pay the debt when it fell due for payment as well as all its other debts, including contingent liabilities.

A person will not be found guilty of reckless trading if he can satisfy the Court that he acted in an honest and responsible manner.

**(4) Section 60 Declaration**

Section 60 of the Companies Act, 1963 Act ("the 1963 Act") contains a general prohibition against the giving of financial assistance by a company in the purchase of its own shares. A company may provide financial assistance for the purchase

of its own shares if certain criteria are followed including the making of a statutory declaration. Any director of a company making the statutory declaration without having reasonable grounds for the opinion that the company having carried out the transaction whereby such assistance is given will be liable to pay its debts in full as they become due can be made personally liable for the company's debts in full as they become due. If the company is wound up within twelve months after making the statutory declaration and its debts are not paid or provided for in full within the period of twelve months after the commencement of the winding up it is presumed that the director did not have reasonable grounds for his opinion.

**(5) Company Loans to Directors**

Subject to a number of exceptions, Section 31 of the 1990 Act contains a general prohibition on a company entering into a loan, quasi loan, credit transaction, guarantee or security arrangement with the director of that company or of its holding company or a person connected with such a director.

Section 39 of the 1990 Act provides that if a company is being wound up and it is unable to pay its debts and if the Court considers that any arrangement of a kind described in Section 31 of the 1990 Act has contributed materially to the company's inability to pay its debts the Court may on the application of the liquidator or any creditor or contributory of the company, if it thinks proper to do so declare that any person for whose benefit the arrangement was made shall be personally liable, without any limitation of liability, for all, or apart as may be specified by the Court, of the debts and other liabilities of the company.

The 2001 Act has introduced a procedure, similar to that in relation to the “whitewash” procedure outlined above for a Section 60 declaration, to allow a company to enter into a guarantee or a security with a director of the company by making a statutory declaration. Any director making a statutory declaration without having reasonable grounds for the opinion that the company having provided the guarantee/security, will be able to pay its debts in full as they fall due can be made personally liable for the company’s debts in full without any limitation of liability.

If the company is wound up within twelve months after making the statutory declaration and its debts are not paid or provided for in full within the period of twelve months after the commencement of the winding up it is presumed that the director did not have reasonable grounds for his opinion.

**(6) Declaration of Solvency on Voluntary Winding Up**

Section 256 of the 1963 Act (as amended) provides that on a voluntary solvent winding up of a company, the directors of a company are required to make a statutory declaration to the effect that the company will be able to pay its debts in full within twelve months from the commencement of the winding up.

Where a statutory declaration is made under Section 256 of the 1963 Act and it subsequently proved to the satisfaction of the Court that the company is unable

to pay its debts, the Court on the application of the liquidator or any creditor or contributory of the company may, declare that any director who was a party to the declaration shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court may direct.

A director will be held liable to contribute to the debts of the company if the Court believes that he was a party to the declaration without having reasonable grounds for the opinion that the company would be able to pay its debts in full. If the company's debts are not paid the director shall be presumed unless the contrary is shown that he did not have reasonable grounds for his opinion (as outlined in the declaration) that the company would be able to pay its debts in full.

**(7) Failure to Keep Proper Books of Account**

Section 204 of the 1990 Act provides that where a company is being wound up and where it is unable to pay its debts and it has failed to keep proper books of accounts in accordance with Section 202 of the 1990 Act the Court on the application of the liquidator or any creditor or contributory of the company may if it considers that the contravention of Section 202 has contributed to the company's inability to pay its debts or has resulted in substantial uncertainty as to the assets and liabilities of the company or has substantially impeded the orderly winding up thereof and it thinks it proper to do so, may declare that any one or more of the officers and former officers of the company who is or are in default shall be personally liable, without any limitation of liability, for all or such part as may be specified by the Court of the debts and other liabilities of the company.

Section 90 of the 2001 Act introduced a requirement that the annual report of the directors includes a statement of the measures taken by the Directors to secure compliance with the requirement for the keeping of proper books and accounts and the location of those books.

**(8) Investment in Holding Company**

In accordance with Section 225 of the 1990 Act if a company has acquired shares in its holding company within the period of six months prior to its winding up and the company at the time of the commencement of the winding up is unable to pay its debts the Court on the application of a liquidator, creditor, employee or contributory of the company may declare that the directors of the company shall be jointly and severally liable to repay to the company the total amount paid by the company for the shares. Section 225(2) of the 1990 Act provides that the Court may grant relief in certain circumstances as it may think fit.

**(9) Contractual Legal Framework**

A manager (and an officer of the company if the officer is also an employee of a company) will also have duties and responsibilities as set out in a contract of employment with the company and normal contract law principles would apply.

**(b) Duties and requirements of Directors, Officers and Managers**

**Common Law Duties**

Over time certain duties and responsibilities have come to be generally accepted by the courts as being owed by directors to their companies. They may be summarised under the following categories:

**(1) Duty to act in the best interests of the company**

This is tested subjectively and provided a director satisfies himself that he is acting in the best interests of the company, he will not be in breach of this duty if it subsequently transpires that the best interests of the company were not being met by such action.

In recent years this duty has been slightly confused by court decisions which suggest that a director must also have regard to the interests of the company's shareholders and its creditors. In addition, the 1990 Act now requires a director to have regard to the interests of the company's employees. Often, the interests of each of these parties will be conflicting and, though a director will have to have regard to each of them to different degrees, ultimately, any decision taken must be in the best interests of the company.

**(2) Duties of diligence, skill and care**

See the note on Section 100 of the 2001 Act above. Hitherto, it was generally accepted that a director was not required to exercise any greater degree of skill than may reasonably be expected from a person of his knowledge and experience. For this reason, when considering a transaction involving financial or legal issues, more will be expected of a director with experience in those areas than one who has no knowledge or experience.

**(3) Duties of good faith and honesty**

In carrying out his duties and responsibilities, a director must at all times act with good faith and honesty in the best interests of the company.

**(4) Duty of personal performance**

Unless a company's Articles of Association provide otherwise, directors may not delegate their duties and responsibilities to a third party. However, most companies allow such delegation by including provisions in their Memorandum and Articles of Association allowing for the appointment of a managing director, committees and/or attorneys to whom all or some of the duties and responsibilities of the directors may be delegated.

**(5) Duty as to conflicts of interests**

In recognizing the unique relationship between a director and his company and the position of trust which he occupies, the courts have developed a rule that a director may not benefit from his position as a director of a company and he must account to the company for any benefit accruing to him in such circumstances. This is a very strict rule. It will not be an excuse to show that the company was not in a position to obtain the benefit. The strictness of this rule is explained by the fact that the courts see it as a means of deterrence or for the avoidance of temptation to directors.

There are two main exceptions to this strict rule. First, a company may provide in its Memorandum and Articles of Association for circumstances in which a director may obtain a benefit. The best example of this is the provisions allowing for the payment of remuneration to directors which are found in the memorandum and articles of association of most companies. In order to have the benefit of this exception, the procedures set out in these provisions must be closely followed.

The other exception, is that a director may obtain a benefit where he has made a full disclosure of the facts to the shareholders of the company and has obtained their consent to a benefit being obtained by him.

**(c) Is there an equivalent in Ireland to the US Business Judgment Rule?**

Liability is rarely imposed upon corporate directors or officers simply for bad judgement and this reluctance to impose liability for unsuccessful business decisions has been doctrinally labeled the business judgement rule. Thus the business judgement rule protects directors who make decisions in good faith although Ireland has no direct equivalent judgement business rule, you will note the common law duties above which the courts apply.

**(d) Duties of Directors, Officers and Managers towards the Company**

See the section on the duty to act in the best interests of the company above.

**(e) Duties of Directors, Officers and Managers towards majority and minority shareholders**

As discussed above, directors have extensive obligations to the company's shareholders which originate from case law and statute. Directors have an important role in ensuring that any decisions which require prior shareholders approval are proposed to members in general meetings and that any scheduled meetings, such as the AGM, are convened within the required period in a manner that complies with the company's Articles and the Acts.

Directors have a duty to ensure that restrictions relating to changes in share ownership, which have been devised to protect shareholder's interests, are absolved and that authority to waive or vary such restrictions is obtained in the correct fashion.

The Acts impose the requirement for significant business decisions to be made by a specified majority of shareholders. However, directors must at all times remain aware that they have a duty to protect the interests of the minority shareholders when decisions and changes are proposed.

**(f) Duties of Directors, Officers and Managers in case of bankruptcy**

Where a company is liable to be wound-up, that is, is insolvent, then even though no steps have been taken to wind the company up the directors' duties are owed not to the company and to the members but to the creditors. In such circumstances the directors hold the assets of the company in trust for the benefit of the creditors and cannot dispose of same other than for full value. The basic duty of directors in this situation is to ensure that the company does not take any action which would increase the indebtedness of the company to creditors. Should the company breach this duty the directors can be made personally liable.

Directors have various duties as set out in the Acts, on the appointment of a liquidator and these duties differ depending on whether the liquidation is a members voluntary winding up, a creditor's voluntary winding up, or a winding up by the court.

On appointment of a liquidator, all powers of directors cease. When a liquidator has been appointed directors have a duty to cooperate with them and supply information concerning the company as required by the liquidator. Failure to comply and assist the liquidator is a criminal offence, for which a fine may be imposed.

**(g) Status of the enforcement of Directors, Officers and Managers liability with respect to tax, labour, environmental regulations**

The principal means for enforcing directors' obligations under the Acts is the prosecution of delinquent or defaulting directors under the Acts or other legislation. Alternative remedies for breaches of director statutory obligations to their companies or the infringement of statutory prohibitions imposed on them are rarely specified expressly in the Acts. On the few occasions when the acts do create a specific remedy, it most

frequently takes the form of a power for the company to rescind an offending transaction, or to recover funds of the company which have been improperly expended, or to require a director who is improperly benefited to account to the company for the value of the benefit he had obtained, or to recover damages or compensation from a director responsible for the contravention if the company has suffered loss in consequence. There are, nevertheless, certain obligations of directors which the court is expressly empowered to enforce specifically by the Acts.

## **h)Tax Regulations**

The Irish tax code imposes certain obligations on taxpayers, including companies. These obligations are primarily to file tax and other returns with the Revenue Commissioners within prescribed time limits; to make payments in respect of relevant tax liabilities by specified dates under the self-assessment system, and to furnish certain additional information to the Revenue Commissioners where required. The tax code imposes penalties and certain other sanctions on tax payers for breach of these obligations. Where the taxpayer is a corporate entity, certain provisions of the tax code direct that in some instances penalties and sanctions are also to be imposed on the secretary or other officers of the company.

For example, where a company has failed to deliver a corporation tax return, the company is liable to a penalty of  $\text{€}630$  and if the failure continues after judgment has been given by the court before which proceedings for the penalties have been commenced, to a further penalty of  $\text{€}60$  for each day on which the failure continues. The secretary of the company is liable to a separate penalty of  $\text{€}125$ . If the failure to deliver a return continues after the expiration of one year, the penalty is  $\text{€}1,265$  on the company with the secretary of the company liable to a separate penalty of  $\text{€}250$ . Where at any time not earlier than 3 months after the date on which a return was required to be delivered by a company, the company has failed to pay any penalty to which it is liable for failing to deliver the return, the secretary of the company is liable to pay the company's unpaid penalty, in addition to the penalty to which the secretary is liable. The secretary of a company is entitled to recover this latter penalty from the company (Section 1071 Taxes Consolidation Act, 1997).

The tax code also imposes penalties where a company :

- fraudulently or negligently makes an incorrect return;
- fails to furnish particulars required to be supplied;
- fails to give notice of liability to corporation tax; or
- fails to furnish certain specified information or furnishes incorrect information.

In each such case, the company is liable to penalties ranging from  $\text{€}630$  to  $\text{€}1,265$ , with the secretary of the company being liable to a separate penalty of  $\text{€}125$  to  $\text{€}250$ . In certain instances a further penalty of  $\text{€}60$  per day is imposed on the company (but not the

secretary) for each day on which the failure continues (Sections 1072 - 1075 inclusive Taxes Consolidation Act, 1997).

Section 1054 of the Taxes Consolidation Act, 1997 also imposes sanctions on a company and the company secretary for failure to furnish any of the returns or declarations specified in Schedule 29 of the Taxes Consolidation Act (such as third party returns). The penalties range from €630 to €1,265 in the case of a company, with in some instances an additional penalty of the amount or, in the case of fraud, twice the amount of the difference between the amount of tax payable per a return and the amount which would have been payable if the return had been correct or €60 per day for each day on which failure to deliver a return continues. In the case of the company secretary, the penalties range from €125 to €250.

It should be noted that the secretary includes any officer of the company other than the secretary (by whatever name called) performing the duties of secretary. In the case of any company the secretary of which is not an individual resident in Ireland, an individual resident in Ireland who is a director of a company may be regarded as the secretary of the company.

Section 1078 of the Taxes Consolidation Act provides that tax payers shall be guilty of an offence if they commit certain acts, such as knowingly or wilfully delivering an incorrect tax return or incorrect information in connection with the tax, or knowingly or wilfully issuing or producing incorrect invoices, receipts or other documents in connection with tax. Taxpayers convicted of an offence under the Section are liable :

- (a) on summary conviction to a fine of €1,900 or at the discretion of the court to imprisonment for a term not exceeding 12 months or both the fine and the imprisonment; or
- (b) on conviction on indictment, to a fine not exceeding €126,970 or at the discretion of the court, to imprisonment for a term not exceeding five years or to both the fine and the imprisonment.

Section 1078(5) directs that where an offence under the Section is committed by a body corporate and the offence is shown to have been committed with the consent or the connivance of any person who, when the offence was committed, was a director, manager, secretary or other officer of the body corporate, or a member of the committee of management or other controlling authority of the body corporate, that person is also deemed to be guilty of the offence and may be proceeded against and punished accordingly.

#### **i) Labour Regulations**

From an employment law perspective, at common law, an employer is liable for the acts or omissions of directors, officers or managers (who are employees) in respect of acts carried out in the course of their employment. Furthermore, some statutes such as the Employment Equality Act, 1998 specifically provide that for the purposes of that Act, the employer is liable for anything done by employees in the course of their employment. While employees can also be personally liable for e.g. acts or omissions towards other employees, they are very rarely sued in their personal capacity.

**j) Environmental Regulations**

Directors' duties in relation to pollution and protection of the environment has increased and now, in addition to a company's strict civil liability for environmental damage under common law established in the case Rylands v Fletcher, legislation imposes criminal liability where statutory requirements have been infringed. At the same time, directors should be aware that they may be held personally liable for offences committed by the company where they were perpetrated with their consent or connivance or resulted from their negligence, and that the company may be responsible for damage to the environment even if it is not aware of the damage (Environment Agency v Brock plc (1998)).

**k) Directors, Officers and Managers criminal liability**

It has become standard form for new statutory obligations and prohibitions to be attended automatically by a provision that in the event of non-compliance the company and every officer of it who is in default shall be liable to a fine, or in the case of more serious contraventions by directors or officers, to imprisonment or a fine or both.

**4. Statute of Limitations**

**(a) Shareholders actions**

The statutory limit for a breach of contract is 6 years or 12 years in respect of a contract under seal.

**(b) Contractual disputes**

The statutory time limit for a breach of contract is 6 years or 12 years in respect of a contract under seal.

**(c) Discrimination actions**

Under the Employment Equality Act, 1998, there is a time limit for statutory discrimination claims of 6 months from the act, or most recent act, of discrimination. This time limit can be extended by up to 12 months where there are exceptional circumstances. If a civil claim is brought, then the time limits are as per (b) above.

**(d) Sexual harassment actions**

With regard to statutory claims under the Employment Equality Act, 1998, again, the time limit is 6 months, or 12 months in exceptional circumstances. If a civil claim is brought, then the time limits are as per (b) above.

**(e) Wrongful termination actions**

A statutory claim for unfair dismissal under the Unfair Dismissals Acts, 1977-2001 must be brought within 6 months of the date of dismissal or within 12 months where there are exceptional circumstances. In respect of a common law claim for wrongful dismissal, this is effectively a breach of contract action and therefore the time limits under (b) above would apply.

**(f) Tax**

The Statute of Limitations 1957, as amended does not apply to proceedings instituted by the Revenue Commissioners for the recovery of any sum due in respect of a tax or duty.

The Taxes Acts themselves set out the limitation periods that apply in respect of actions taken to recover outstanding taxes, penalties and interest.

In general, a six year limitation period applies to such actions. However, where a taxpayer (individual or corporate) is guilty of fraud or negligence, actions may be commenced outside this six year limitation period. In addition for certain types of offences the time period is extended to 10 years, for example, making of false statements to obtain allowances.

**(g) Fraud**

See comments above in 4(f) in tax.

**5. Who can sue?**

This differs depending upon the particular statutory provision. The persons entitled to sue include, as seen above, the company, any member, contributory, officer, employee, receiver, liquidator, examiner, creditor, registrar of companies, the Director of Public Prosecutions and the Director of Corporate Enforcement.

**(a) Company: (Derivative Actions)**

In the case of a breach of any of the common law duties listed above, the proper Plaintiff would be the company, since the duty of care of directors is owed to the company rather than to shareholders.

Shareholders can sue on behalf of the company against the directors or officers by way of a derivative action. In such an action, the plaintiff would invoke the company's cause of action on behalf of himself and all other members of the company. In any case where it is alleged that a director has committed an unratifiable wrong, a derivative action will lie in respect of it. Such actions are not uncommon in Ireland.

**(b) Shareholders (direct actions and class actions)**

The general rule, enshrined in Irish company law is that only a company can maintain proceedings in respect of wrongs done to it (*Foss v Harbottle*). There are a limited number of circumstances and exceptions to this rule in which an individual shareholder can enforce the duties owed to a company. These exceptions include cases in which the majority commits an illegal act or acts beyond the powers of the company, makes a decision by a simple majority which requires more than a simple majority, or commits actions which purport to abolish the individual rights of a shareholder, and fraud on the minority.

A minority shareholder can also present a petition under Section 205 of the 1963 Act for the winding up of the company claiming that the company's affairs are being conducted in a manner oppressive to him and in disregard of his interests as a member. Such actions are commonplace in Ireland but most are settled out of court.

- can shareholders associate in a class action? And if yes, what are the basic requirements for class action under the law of Ireland?

Order 15 of the Rules of the Superior Courts, 1986 provides for the joining of persons in an action as plaintiffs where their alleged right to relief arises out of the same transaction or series of transactions or where, if such persons brought separate actions, any common question of law or fact would arise. However, this power is solely at the discretion of the Court where it appears to the Court that such joining of plaintiffs might embarrass or delay the trial of the proceedings, it may order separate trials. In cases where plaintiffs have been joined, although judgment may be given for one or more of the plaintiffs and the reliefs sought by them are granted, the defendant shall still be entitled to such costs as were accrued by him in joining any plaintiff whose claim was unsuccessful.

**(c) Creditors**

Actions by creditors normally arise in an insolvency situation. It is usual, however, that a liquidator will be appointed and the liquidator will take an action against the directors for the benefit of the liquidation and the creditors. The provisions of Section 251 of the 1990 Act, however, provide that where a company although insolvent is not being wound-up as a result of its not having sufficient assets then creditors can take action against the directors for breach of certain sections of the Acts and seek to have the directors rendered personally liable. Such action although uncommon has taken place on a number of occasions in the past and is likely to become more frequent. [Accident] by creditors are usually couched in terms of rendering the director liable for all of the debts of the company with the creditor seeking a further order that the debt payable to it should be repaid.

**(d) Third Parties**

The Director of Corporate Enforcement, an office established by the 2001 Act, may initiate a summary prosecution for a suspected breach of the Acts. The Director of Corporate Enforcement may also refer cases to the DPP for a decision as to whether prosecutions on indictment should be commenced. This office has only just been established and it remains to be seen how frequent and severe such suits will be.

The Director of Corporate Enforcement is now entitled to apply to the High Court to seek the appointment of an inspector to investigate the affairs of a company.

(e) **Insolvency Administrators / Trustees in Bankruptcy**

It is not uncommon for liquidators to take action against the directors of the company to which they have been appointed. The usual actions are for failure to keep books and records, fraudulent or reckless trading, etc. In such cases the liquidator will seek to have the directors made personally responsible for all of the debts of the company.

(f) **Regulatory Authorities: What type of administrative proceedings and court actions?**

- Irish financial services regulator?

Apart from the director of corporate enforcement there is no overall capital market's regulator in Ireland.

The Central Bank of Ireland is the principal financial services regulatory authority in Ireland and is responsible for the regulation and supervision of credit institutions, financial institutions, building societies and others engaged in the provision of financial services. The Central Bank has the power to bring prosecutions against individuals for certain breaches of legal or regulatory requirements, including where an offence has been committed by a body corporate with the consent, approval or willful neglect on the part of a director of that body corporate. Draft legislation is currently before the Oireachtas (the Irish Parliament) in relation to the creation of a new single regulatory authority for financial services (the "Central Bank and Financial Services Authority of Ireland"). It remains to be seen what powers the new authority will be given to bring proceedings against directors and others.

- Irish employment and labour regulators?
- frequency and severity of such suits?

There is no labour regulator in Ireland save that there are inspectors appointed under certain pieces of legislation to monitor and enforce the law. For example, there are inspectors of the Government Department of Enterprise Trade & Employment who can inspect workplaces to ensure compliance with the Organisation of Working Time Act, 1997 with regard to e.g. maximum working hours and rest breaks. Also, the Health and Safety Authority has statutory responsibilities under the Safety Health and Welfare at Work Act, 1989 and related regulations with regard to compliance by employers and employees with health and safety practices in the workplace.

Also, the Department of Enterprise Trade & Employment has responsibility with regard to issuing work permits for non-nationals of the European Economic Area who come to work in Ireland.

See also the note in 5(d) above regarding the Director of Corporate Enforcement.

**(g) Employees**

- how and when can employees sue Directors, Officers and Managers for discrimination, sexual harassment and wrongful employment practices?
- frequency and severity of such suits?

As stated above, it is usually the Company who is sued by employees on the principle of vicarious liability rather than individual directors, officers or managers.

There are various forums for bringing employment claims depending on the nature of the claims. The civil courts have jurisdiction in respect of all common law and equitable (e.g. injunctions) claims arising from the employment relationship including breach of employment contract claims or claims for e.g. employer liability personal injury and occupational stress claims. These courts comprise the District Court (jurisdiction currently not exceeding €6,348.690), the Circuit Court (jurisdiction currently not exceeding €38,092.14), the High Court (unlimited jurisdiction) and the ultimate court of appeal is the Supreme Court.

There are also industrial and labour relations bodies. The Labour Relations Commission has a function in trying to conciliate collective industrial relations (non-legal) disputes between employers and employees/trade unions which are referred to it. If unresolved at this level, disputes can be referred to the Labour Court.

Individual industrial relations disputes can be referred to Rights Commissioners who come under the aegis of the LRC. Again, if unresolved at this level, the disputes can be referred to the Labour Court.

Rights Commissioners, the Labour Court and another statutory body, the Employment Appeals Tribunal, also have a separate function in determining legal disputes under certain legislation such as for unfair dismissal.

With regard to employment equality, discrimination and harassment claims, these can be referred under the Employment Equality Act, 1998 to the Office of the Director of Equality Investigations.

Employment claims of all types are very frequent in Ireland and are increasing in scope beyond traditional remedies so that in the past few years we have seen a large increase in certain types of claims such as injunction applications to restrain dismissals and High Court personal injury proceedings for bullying, harassment and occupational stress in the workplace.

**6. What is the Enforceability of a foreign judgment on Irish Directors, Officers and Managers under Irish Law?**

The procedure regarding enforcement of foreign judgments in civil and commercial matters in Ireland can essentially be divided into two categories. The first category consists of statutory codes which govern the recognition and enforcement of judgments

between courts of Member States of the EU and the European Free Trade Association (“EFTA”). Previously the jurisdictional relationship between the courts of the fifteen EU Member States was governed by the Brussels Convention of 1968, and as among EFTA Member States themselves and between them and EU member states by the Lugano Convention. Although the Lugano Convention is still in force, the situation regarding the Brussels Convention has changed somewhat recently with the coming into force of EC Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (EC Reg. No. 44/2001). All EU Member States with the exception of Denmark have agreed to be governed by this Regulation. The Brussels Convention continues to apply vis-a-vis dealings between courts of other EU states and Denmark and the Lugano Convention continues to apply with regard to the EFTA States.

The terms of the 2001 Regulations allow for a streamlined procedure with regard to the enforcement of foreign judgments between member states. However the underlying principles remain largely the same as these contained in the Brussels Convention. In general they provide that an enforcing court in Ireland will enforce a foreign judgment emanating from another Member State once it is satisfied that that court was the court of correct jurisdiction. The only defence which is available to a party seeking to resist such a judgment from being enforced in this country, is to show that the judgment or the enforcement of it would be manifestly contrary to Irish public policy which is difficult to prove. As an enforcing court does not have any discretion to examine the substance of the proceedings which led to the judgment, the enforcement of such judgments under the EU Regulations, the Brussels Convention or the Lugano Convention is more a procedural than a substantive matter.

The procedure with regard to Irish courts enforcing judgments from non-EU or EFTA countries is quite different. Such applications are governed by Order 11 of the Irish Rules of the Superior Court. In such cases the Irish courts are obliged to satisfy themselves that the foreign judgment has resulted from an adjudication by a court of competent jurisdiction according to the Irish Conflicts of Law Rules. The Irish courts have previously accepted specific grounds in relation to the recognition and enforcement of judgments such as the residency or presence of the defendant in the foreign country in question at the commencement of the foreign action, the fact that a defendant may have submitted to the jurisdiction of the foreign court, etc. However several grounds have been held by Irish courts not to be sufficient for the purposes of recognition or enforcement of foreign judgments. These include the nationality of the defendant, his domicile, the existence of a reciprocal agreement between Ireland and the other jurisdiction in question, that the cause of action arose in the country in which the judgment was obtained, or that the defendant owned or possessed a property in that foreign country.

The Irish courts must also satisfy themselves that the judgment in question is final and conclusive and that the judgment itself is for a definite sum of money. Once the above criteria have been satisfied, the Irish court is not permitted to examine the judgment itself on its merits and will recognise and enforce the judgment. Unlike the statutory provisions referred to in the previous paragraphs, if a person wishes to resist an application for recognition and enforcement, there are a number of defences which may be pleaded. These range from such arguments that the court of origin lacked jurisdiction, the judgment was obtained by fraud or that the enforcement of a foreign judgment would be contrary to natural constitution at justice or to Irish public policy.

**7. Can the Directors, Officers and Managers be liable for punitive damages under Irish law, and are punitive damages insurable under Irish law?**

Directors, Officers and Managers may be liable under Irish law for punitive damages in much the same way as any other defendant in Irish proceedings might be found so liable.

As regards insurability for such awards, and as elaborated in greater detail below, the current Irish legal position is such that in effect an indemnity made by a company in favour or for the benefit of a director is limited to the costs incurred by a director or officer in successfully defending a case taken against him. This would naturally exclude all costs and/or damages, including punitive damages, incurred by such an officer who unsuccessfully defends a claim made against him.

However, given the proposed amendment to Section 200 of the 1963 Act, as put forward by the Company Law Review Group, it is interesting to note the position in the United Kingdom on this subject. English legislation was introduced in the mid-1980's to address the limitations on such insurance imposed by their equivalent of our Section 200. This has resulted in a situation now whereby a company is entitled to purchase insurance for the benefit of its officers. Such insurance has been held to have quite wide scope and this was illustrated in a 1996 case where the court held that the word "compensation" used in a director's liability insurance policy included exemplary damages. However, it should further be noted that although it is now possible in the UK to insure against such damages being awarded against officers of the company, most insurance companies now specifically exclude liability for this from the scope of their insurance policies.

**8. Can the Company indemnify its Directors, Officers and Managers under Irish law and under which conditions?**

**Section 200 of the Companies Act, 1963.**

Section 200 of the 1963 Act provides that any provision contained in the Articles of Association of a company or contained in any contract with the company or otherwise which seeks to indemnify any officer of the company or any person employed by the company as auditor from any liability which by virtue of any rule of law will otherwise attach to him in respect of any negligence, default, breach of duty or breach of trust for which he may be guilty in relation to the company shall be void.

Section 200 of the 1963 Act does not contain a blanket prohibition on a company from exempting or indemnifying any officer or person employed as its auditor. Section 200(b) of the Act, provides that a company may in accordance with the terms of its Articles of Association or in any contract entered into by the company or otherwise indemnify any officer or auditor of the company against any liability incurred by him in defending proceedings, whether civil or criminal, in which judgment is given in his favour or in which he is acquitted. A company may also indemnify an officer or auditor of the company in connection with any application under Section 391 of the Act or Section 42 of the Companies (Amendment) Act, 1983 (the "1983 Act") in which relief is granted to him by

the Courts.

Section 391 of the Act confers on the Court the power to grant either partial or total relief to an officer or an auditor of a company in any proceedings for negligence, default, breach of duty or breach of trust taken against an officer or an auditor of a company if it appears to the Court hearing the case that the officer or auditor may be liable in respect of the negligence, default, breach of duty or a breach of trust but that he acted honestly and reasonably and that, having regard to all the circumstances of the case, including those connected with his appointment, he ought fairly to be excused.

Section 42 of the 1983 Act also confers on the Court a limited power to grant either partial or total relief to a subscriber or a director of the company in connection with proceedings brought for the recovery of any sum for which the subscriber or director may be liable in respect of the acquisition of shares in the company as the company's nominee. The Court may grant the aforementioned relief if the Court considers that the subscriber or director acted honestly or reasonably.

## **9. Is Directors, Officers and Managers Liability Insurance legal?**

Section 200 of the 1963 Act has not been the subject of judicial interpretation. It is clear from the terms of the section that the extent to which a company may indemnify directors is very limited. In effect, the indemnity is limited to the costs incurred by a director or officer in successfully defending a case taken against him.

It can be argued that the purchase by a company of insurance cover which, in turn, would provide an indemnity to the officers is potentially void having regard to the restrictive nature of section 200. An alternative view is that an insurance contract is a contract of indemnity by which a third person (rather than the company) agrees to compensate the officer for the loss he suffers by having to make good his liability to the company. A similar concern that Directors and Officers Insurance could be void under the English law equivalent of section 200 was addressed in England by a specific statement in their Companies Act, 1985 to the effect that the section does not prevent a company from purchasing and maintaining for any officer or auditor insurance against liability.

From a practical point of view, the question arises as to who might seek to claim that an insurance policy is void under section 200. Presumably, a company or its officers would have no interest in making such a claim. An insurer could, in theory, seek to avoid liability by making such a claim. Accordingly, the practice has developed in Ireland of insurers confirming to companies seeking D & O Insurance that it will not seek to rely on the provisions of section 200 for the purposes of avoiding liability. The only other circumstances in which section 200 might be invoked would be if a liquidator of a company thought that by doing so he could re-claim premiums already paid. To our knowledge, this has not occurred.

### **Who can pay the insurance premium ?**

Having regard to what is stated above in relation to section 200, the payment of the

premium by the company may bring the insurance policy within the realms of section 200 and create the possibility that the insurance policy could be declared void. You will note our view that the likelihood of anyone seeking to void the policy, in practical terms, is remote. Clearly, if the directors/officers were to pay the premium, no question of invalidity would arise.

### **Possible changes to Section 200**

The Company Law Review Group established by the Irish Government has recommended changes to the law which, if introduced, would remove the uncertainty created by Section 200. The Review Group recommends that Section 200 of the 1963 Act ought to be amended to provide:-

- (i) that a company can take out and fund directors and officers insurance;
- (ii) that such policies of insurance cannot be avoided by reason of the other provision of Section 200; and
- (iii) all existing policies of insurance where the parties have agreed to invoke Section 200 should be recognised as being and always to have been unaffected by Section 200.

- **Must the D & O insurance policy be issued by a local admitted insurer? If yes, does the same rules apply to an Irish subsidiary of a multinational carrying a D & O insurance policy in the country of incorporation?**

Although there is no prohibition on obtaining D&O insurance from a locally admitted insurer in Ireland, as stated earlier Section 200 of the 1963 Act imposes a significant limitation on the extent of this cover. There is also no prohibition on an Irish subsidiary of a multinational corporation obtaining D&O insurance cover outside the State. However, it is important to note that such an insurance policy may not be effective. Given the limitation on such insurance cover imposed by Section 200, it could well be argued in litigation that any insurance policy obtained outside the State which covers risks the insurance of which is prohibited by Section 200 was obtained in order to circumvent this statutory prohibition and accordingly should be rendered void. There has been little if any judicial interpretation in this area and as a matter of practice many companies, especially those whose parent corporations are based in the US and who have obtained such insurance for the group, add the directors of their Irish subsidiary to the list of beneficiaries who are covered under this policy. However, it is unclear whether such a policy would stand up to challenge as to its validity in an Irish Court.

- **Issue of tax allocation of local premium for local D & O insurance policy under Irish law?**

The tax treatment of payments under such policies is not specifically dealt with in Irish legislation or practice. Therefore, we have set out the position based on general

principles. If the employer pays the premium this amount will be taxable on the employee, in practice, under the benefit-in-kind provisions. Strictly speaking the employer would only be able to claim a tax deduction for the contributions if it could demonstrate that the expense is incurred *wholly and exclusively* for the purposes of the trade. While it is unlikely that the “*exclusively*” test can be met where the proceeds of the policy are paid to the director in respect of his/her personal liability, in practice, the Revenue allow a tax deduction for the employer provided the employee pays the tax due on the benefit-in-kind.

It is unlikely that the Irish Revenue would allow the director to claim a tax deduction for any premiums he/she might pay directly. The test for deductibility is that the expense must be incurred *wholly, exclusively and necessarily* in the performance of his/her duties. It would be difficult to persuade the Revenue that it is necessary to incur the expense to carry out the duties of being a director, even if the employer stipulates this as a requirement. We are not aware of any Revenue practice to the contrary.

## **10. General Comments**

As can be seen from the above, there is now under Irish law, whether by common law or statute, a wide range of circumstances in which directors or officers of a company may incur personal liability to the company or its creditors. Even if a director or officer is found not guilty of any wrongdoing, the costs involved in defending himself may be significant. In those circumstances, it is sensible for directors and officers to ensure that an appropriate D & O insurance policy is in place. The doubt which may be cast on such policies because of the restrictive nature of section 200 of the Companies Act, 1963 and coupled with the possible changes in the law proposed should not, in practice, deter companies and their directors and officers from seeking to ensure that adequate insurance is in place.