Breach of Directors' Duties

Case studies

by Dan Geddes

Risks for Directors

- Personal liability/prosecution for directors:
  - Civil liability to pay damages (e.g. for breach of fiduciary duty)
  - Criminal liability (fine or prison sentence)
  - Disqualification (CDDA 1986 – 1-15 years)
  - [Personal guarantee]
- Investigation of director conduct can be triggered by:
  - Company insolvency
  - Boardroom/shareholder disputes (e.g. derivative claims)
  - Investigation by regulators/police/press

The Power Struggle

- Scientific research company
- Never generated revenue in 13-year lifespan but raised circa £45M from investors and spent large amounts on R&D
- Offers made in Summer of 2013 to introduce further finance but also change of control of board.
- Declined by existing directors
- Company put into administration
- Administrators bring claim against directors (2 of whom were NEDs) who were accused of misleading investors, manipulating control of shareholders and putting own interests above those of Company
- Directors found to have breached certain duties but Company found to have suffered no loss

The Company Accountant

- Manufactoring company went into liquidation
- Prior to liquidation, company entered into various 'antecedent' transactions (i.e. transactions that can be unravelled by a liquidator)
- Investigations revealed that director had fallen ill and company accountant had essentially assumed control of company
- Accountant deemed to be shadow director
- Shadow directors have same responsibilities as *de jure* directors
- Accountant deemed liable for antecedent transactions

The Unwitting Spouse

- Family-owned construction group
- Two directors: husband and wife
- Husband ran group with iron fist; wife barely involved
- Husband misappropriated cash from group
- Family assets held in wife’s name
- Although wife apparently had no involvement with misappropriations she was deemed liable as co-director by failing to keep herself informed

The Generous Father

- Wine importing business run by father
- Business profitable but heavily reliant upon French wine suppliers, who provided wine on credit
- Son set up engineering business
- Father loaned company money to son’s new business and company therefore unable to pay suppliers
- Company eventually forced into liquidation by suppliers
- Father deemed liable for ‘misfeasance’ as not in company’s best interests to loan money to engineering start-up when it should have been paying its key supplier

The Demanding Shareholder

- Family-owned business (family members as shareholders) but run by independent board of directors
- Shareholders persuaded directors to pay large dividends to them despite company having contingent liability
- Contingent liability later became actual liability and company put into liquidation
- Liquidators concluded that dividends were unlawful
- Liquidators made claim not only against shareholders for repayment of dividends but also for damages against directors

The School Governor

- Independent school
- Registered charity but also company (limited by guarantee, not shares)
- School governors were charitable trustees but also company directors
- Unpaid volunteers, some with busy careers
- Incident at school led to numerous complaints and regulatory investigations
- Company law and statutory/fiduciary duties of directors apply

Lessons

- Keep yourself informed
- If it feels wrong, it probably is; if in doubt, take advice
- The board is collectively responsible for decisions; if you cannot persuade co-directors to do the right thing, resign
- The law does not expect you to be perfect but you must not be reckless, negligent or act in your own self-interest
- Good record-keeping essential; but not *too* good
- Establish processes and policies; follow and monitor them
- Ensure that company takes professional advice (lawyers, accountants, HR consultants, etc)
- Consider D&O insurance

Questions