



CPA Ireland Skillnet

CPA Ireland Skillnet, is a training network that is funded by Skillnets, a state funded, enterprise led support body dedicated to the promotion and facilitation of training and up-skilling as key elements in sustaining Ireland's national competitiveness.

The CPA Ireland Skillnet provides excellent value CPD (Continuing Professional Development) in accountancy, law, tax and strategic personal development to accountants working both in practice and in industry.

However our attendees are not limited to the accountancy field as we welcome all interested parties to our events.

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Adding Value to your Organisation

Directors, Reckless Trading & Restriction Orders

Webinar by Sharon Sheehan, Examiner
P1 Corporate Laws



Directors

- Companies are artificial entities – cannot manage themselves
- Defined as: *any person involved in the management of the company*
- Minimum 1 Director in an LTD and 2 Directors in a PLC and DAC – although the Constitution may state a higher minimum
- One Director must reside within the EEA – otherwise a €25,000 bond must be paid to a person nominated by CRO

Directors

- Directors appointed to manage the company – human agents of the company and trustees of the company's assets
 - Because they are agents and trustees specific obligations and duties are imposed upon them pursuant to the Companies Act 2014
 - One such obligation is not to engage in reckless trading



Reckless Trading

- Section 610 CA 2014:
 - *“... If in the course of the winding up of a company ... it appears that ... any person was, while an officer of the company, knowingly a party to the carrying on of any business of the company in a reckless manner ... the court, on the application of the liquidator or examiner of the company, a receiver of property of the company or any creditor or contributory of it, has the following power [declare that such person] shall be personally responsible, without any limitation of liability, for all or any part of the debts or other liabilities of the company as the court may direct.”*

Reckless Trading

- Purpose:
 - To protect the public from unsuitable directors – rather than to punish the director



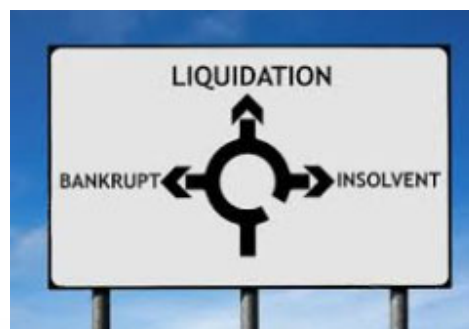
Reckless Trading

- Offence only applies to company officers
- Liability only applies on winding-up
- Application by a:
 - Liquidator
 - Receiver
 - Examiner
 - Creditor/Contributory



Reckless Trading

- Company must be insolvent for personal liability to be imposed
- Applicant must suffer loss or damage, or represent someone who has suffered loss or damage



Reckless Trading

- Relief:
 - Section 610(8) CA 2014:
 - An officer of a company subject to a declaration of reckless trading may apply for relief from personal liability on the grounds that he acted “honestly and responsibly” in relation to the conduct of the affairs of the company

Reckless Trading

- Meaning of Reckless:
 - *R v Cunningham (1957)* – if the person contemplated the consequences of their actions, and went on to consciously run the risk of such consequences ensuing
 - *R v Caldwell (1982)* – where the person does not appreciate the risks consequential upon such actions, where such risks would have been appreciated by a reasonable man

Reckless Trading

- Section 610(3) provides that an officer is deemed to have been *knowingly a party to reckless trading* if either of two circumstances arise, namely:
 - The person was party to the carrying on of such business which, in his expertise and given his knowledge and skill, he ought to have known would cause loss to the creditors

Reckless Trading

- Section 610(3):
 - A person is deemed to have traded recklessly if he was 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.



Reckless Trading

- *A party to:*
 - As per Carroll, J in *Re Hunting Lodges Ltd (1985)* this means:
 - Participates in
 - Takes part in
 - Concurs in



Reckless Trading

- *Re Maidstone Building Provisions Ltd (1971)*
 - Company secretary (qualified accountant) failed to inform the Directors of the company's insolvency and the liquidator brought proceedings for reckless trading – as per Pennycuik VC the secretary had no duty to advise the directors to stop trading:
 - *[A] company secretary, merely performing the duties of such office, is not a party to the company's business ... mere omission or inertia, could not represent being a party to the carrying on of a business*

Reckless Trading

- Offence may also arise where a director continued to allow a company to trade whilst knowing that the company was insolvent, thereby facilitating the company contracting further debt



Reckless Trading

- *Re PSK Construction Ltd (2009)*:
 - In March 2005 a director decided to under-declare and underpay the company's liability to the Revenue as the company was in financial difficulty – this decision resulted in trading losses of in excess of €2.81m between August 2004 and March 2006 – when the company was placed into liquidation
 - Court imposed liability for losses arising after March 2005, in the amount of approximately €1.6m

Reckless Trading

- *Re PSK Construction Ltd (2009):*
 - According to Justice Finlay Geoghan:
 - *As a matter of probability ... [the director] must have known, in March 2005, that if he continued to keep the company trading by under-declaring and underpaying to the Revenue, that such decision involved an obvious and serious risk of loss or damages to the creditors*

Reckless Trading

- The comments of Justice Finlay Geoghegan in *Re Heffernan Kearns (1993)* are important when assessing the issuing of liability for trading while insolvent:
 - *[i]t would not be in the interests of the community that wherever there might appear to be any significant danger that a company was going to become insolvent, the directors should immediately cease trading and close down the business*

Reckless Trading

- Offence involves a combination of objective and subjective testing
- Offence lacks the mental element of fraudulent trading



Reckless Trading

- *Re Heffernon Kearns (1993)*:
 - As per Justice Lynch:
 - It is not necessary to prove fraud in an action for reckless trading
 - There is no assumed collective responsibility upon the Board of Directors – a case must be proven against each Director in relation to his actions and based on his conduct

Reckless Trading

- *Re Heffernon Kearns (1993)*:
 - For a Director to be knowingly involved in reckless trading, he must have been party to the carrying on of the business in a manner that he knew very well involved a risk of loss or damage to others, and ignored that risk as he did not care that others had suffered loss or damage or because of his own personal desire overrode any concern he had for others

Reckless Trading

- *Re Heffernon Kearns (1993)*:
 - The law requires knowledge or imputed knowledge that a Director's actions will cause a loss to the creditors – worry or uncertainty about the company's ability to pay debts is not sufficient to create liability

Reckless Trading



- *Re Eastland Warehousing Ltd (2003)*

- The directors were held personally liable for a shortfall of €1.5 million arising from reckless trading. The Court concluded that very large sums of money were misappropriated by the directors by lodging the money to a building society account. Once funds in the account were cleared the directors (as sole signatories) were in a position to distribute the funds in any way they pleased – all such transactions occurred outside the books of the company

Reckless Trading

- *Stafford v Beggs, Martin & Others (2006)*

- Damages of €2.2m were obtained against two directors of Doherty Advertising. According to the Court:

“the board of directors did not function in a structured way. There was a degree of informality in their operation which could be criticised.”

Reckless Trading

- Sanctions:
 - Civil law sanctions only
 - Personal liability, without limit, for the debts created as a consequence of this reckless activity
 - Liability may be in whole or in part
 - Restriction Order
 - Possible Disqualification Order

Restriction Order

- Sections 818-836 of the Companies Act 2014:
 - *Any person who acts as a Director/shadow Director of an insolvent company, within 12 months of it going into liquidation, can be restricted from being an officer of another company for a period of up to five years*



Restriction Order

- Purpose:
 - To avoid an abuse of the concept of separate legal personality
 - To prevent “phoenix trading”



Restriction Order

- Justice Shanley in *Re La Moselle Clothing Ltd et al (1998)* declared that the purpose of the Order is:

“The protection of the public from persons, who, by their conduct, have shown themselves unfit to hold the office of, and discharge the duties of, a director of a company, and in consequence, represent a danger to potential investors and traders dealing with such companies.”

Restriction Order

- Justice Finlay Geoghegan in *Re Colm O'Neill Engineering Ltd (2004)*:

“...to protect the public against the future supervision and management of companies by persons whose past record as directors of insolvent companies have shown them to be a danger to creditors and others.”

Restriction Order

- Application for a Restriction Order can be made by:
 - The Director of Corporate Law Enforcement (ODCE)
 - Liquidator
 - Receiver



Oifig an Stiúirthóra um
Fhorfheidhmiú Corparáideach
Office of the Director
of Corporate Enforcement



Restriction Order

- *Re Mayfair Properties Ltd (2011)*
 - Restriction orders were imposed against the company's directors where the company was liquidated with debts of €2.4m – in the 18 months before liquidation the directors had spent almost €146,000 of the company's money on personal expenses, and did not pay PAYE/PRSI on behalf of employees to the Revenue, owing them in excess of €477,000

Restriction Order

- The applicant is entitled to a Restriction Order, under the Director can prove that:
 - (1) he acted honestly and responsibly in relation to the company (whether before or after it became insolvent),
 - (2) he co-operated with the liquidator in relation to the winding up of the company, and
 - (3) there is no other reason why it would be just and equitable to restrict him.

Restriction Order

- The burden of proof lies with the director in this regard
- Justice Murphy in *Business Communications Ltd v Baxter and Parsons (1995)* stated that there is:
“... a burden on the directors to establish that the insolvency occurred in circumstances in which no blame attaches to them as a result of dishonesty or irresponsibility ... there must be no witch hunt because the business failed ...”



Restriction Order

- In *Re Gasco Ltd (2001)* Justice McCracken considered an application for a Restriction Order against two Directors and a shadow Director, where the liquidator could not find any financial books or records of the company, which he believed would show evidence of serious irresponsibility by the Directors

Restriction Order

- *Re Gasco Ltd (2001)*:
 - A Restriction Order was imposed upon the shadow Director
 - No Order for one Director, who upon identifying serious problems in the company had assisted in the drafting of a business plan – and upon realisation of its inadequacy, he had refused to comply with it, and thereafter he was effectively excluded from company management – consequently he later resigned

Restriction Order

- *Re Gasco Ltd (2001)*:
 - No Order was imposed upon third Director, as although, based upon the facts, he had acted naively – he had relied upon the other Directors, and on balance had acted honestly and responsibly



Restriction Order

- *Moselle Clothing Ltd v Soualhi (1998)*
 - The defendant was a Director and 99% shareholder of the plaintiff company, and was restricted because the company had traded while insolvent
 - The Court established that the test to determine whether a Director had acted honestly and whether relief should be granted was:
 - (1) the extent of compliance with the Companies Acts,



Restriction Order

- *Moselle Clothing Ltd v Soualhi (1998)*
 - (2) whether the Director's conduct was so incompetent as to be irresponsible,
 - (3) the extent of the Director's responsibility for the insolvency,
 - (4) the extent of the Director's responsibility for the net deficiency in assets at winding-up, and
 - (5) the extent to which the Director displayed a lack of commercial probity or want of proper standards

Restriction Order

- *Re Squash (Ireland) Ltd (2001)* the Supreme Court ruled that (1) in applying the standards established in the Moselle case, the Courts should look at the entire tenure of the director and not just the few months in the run up to the liquidation of the company, and (2) the question of whether a director acted responsibly should be reviewed from an objective standard



Restriction Order

- In 2008 the Supreme Court lifted a Restriction Order against a director of *Tralee Beef and Lamb Ltd (TBL)*, which went into liquidation in 2002 with liabilities of more than €5m, on the basis that the Court was of the opinion that the Director, had acted fairly and honestly in relation to the company's affairs and the Office of the Director of Corporate Enforcement (ODCE) had no evidence to indicate otherwise

Restriction Order

- *Re Tralee Beef and Lamb Ltd (TBL) (2008)*
 - The Supreme Court was also highly critical of the ODCE in that the Liquidator believed that the Order should not have been granted but nonetheless the Order was imposed upon the bequest of the ODCE – the Supreme Court commented that this regime was “draconian” in nature and could not be justified



Restriction Order

- *Re CMC (Ireland) Ltd; Fennell v Carolan (2005)*
 - The directors failed to return the company’s fork-lift truck to the liquidator
 - Failed to co-operate with the liquidator (refused to meet)
 - Filed witness claims that conflicted with the company’s records
 - Order was imposed

CMC Limited

Restriction Order

- Acting while restricted:
 - Category 2 offence
 - Disqualification Order
 - Insolvent liquidation within five years
 - Personal liability for debts of the second company

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Restriction Order

- Exception:
 - Can act as an officer of a highly capitalised company:
 - €500,000 if a PLC or €100,000 if any other company
 - Restricted person must give notice to the company before accepting appointment or acting as a director or secretary
 - Special capital maintenance rules also apply

Restriction Order

- Register of Restricted Persons
 - In accordance with Section 823 the Companies Registration Office maintains a register of all Restriction Orders
 - 867 persons were on the restricted persons register at the end of 2017

[REGISTER](#)

Restriction Order

- Distinction between Restriction and Disqualification Orders
- As per Justice Denham in the Supreme Court decision in *Director of Corporate Enforcement v Byrne (2009)*:
 - “... [a] Disqualification Order disqualifies the person from acting in virtually any capacity in relation to any company, no matter what its size, and is a far more severe order than a Restriction Order ...”

Restriction Order

“The conduct necessary to lead to a disqualification must of its nature be manifestly more blameworthy than merely failing to exercise an appropriate degree of responsibility ... Incompetence, even when occurring with irresponsibility, is not sufficient to ground a Disqualification Order ...

Commercial misjudgement is not sufficient. The conduct complained of must display a lack of "commercial probity", although in an extreme case of gross negligence or total incompetence, disqualification could be appropriate.

"Probity" is used in the sense of dishonesty, lack of integrity.”



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