

TRAINING & DEVELOPMENT PROGRAMME

# Knowledge Network

Webinar Series

## Directors' Duties in Uncertain Times and Navigating the 'Twilight Zone'

Wednesday, 12 May 2021 | 8.30 am to 9.30 am



**Ciara O'Herlihy**  
Senior Associate  
+353 1 607 1386  
Ciara.OHerlihy  
@mccannfitzgerald.com



**Áine Murphy**  
Senior Associate  
+353 1 511 1553  
Aine.Murphy  
@mccannfitzgerald.com

---

# Directors' Duties in Uncertain Times and Navigating the 'Twilight Zone'

Wednesday, 12 May 2021

Ciara O'Herlihy, Senior Associate and Áine Murphy, Senior Associate



## Overview

- Refresher on key directors' duties under Irish company law
- Key challenges facing directors of Irish companies over the last 12 months
- Practical tips and advice to navigate coming months





## Current Challenges

- Very challenging trading environment for Irish businesses
  - COVID-19
  - BREXIT
- Greater trend towards enforcement
- Difficulties in obtaining D&O insurance



# ODCE Response

- ODCE Guidance - June 2020
  - No change to insolvency rules ...
  - But ODCE will have regard to impact of COVID-19 pandemic and extent to which directors acted “honestly and responsibly” during period of financial difficulty

## THE IRISH TIMES

Wed, May 5, 2021

NEWS SPORT BUSINESS OPINION LIFE & STYLE CULTURE

The Economy | Your Money | Companies | Technology | Work | Commercial Property |

### ODCE offers comfort to firms facing insolvency amid Covid-19

Stance on responsible behaviour of directors will take into account coronavirus havoc

© Mon, Jun 22, 2020, 05:26

Joe Brennan



The ODCE will have due regard to the impacts of the pandemic as it examines and adjudicates upon liquidators' reports. Photograph: Dara Mac Donailt

# Key Directors' Duties

- Directors' Duties in ordinary course
  - Non-exhaustive list of fiduciary duties in Companies Act 2014
  - Duties of competence
  - Duties of probity
- Duties during financial uncertainty
  - Critical shift - duty to creditors to preserve assets
- NB: Structures to support and underpin decision making



## Recent Experience in Corporate Transactions Group

- Wide range of issues reflecting breadth of issues affecting clients
- <https://www.mccannfitzgerald.com/knowledge/covid-19>
- Companies (Miscellaneous Provisions) (Covid-19) Act 2020
- AGMs
- Board meetings
- Execution of documents
- Dividends



## Recent Experience in Corporate Transactions Group (contd.)

- COVID-19/BREXIT issues in context of sales processes
  - Material Adverse Change clauses
  - Pre-completion undertakings
  - Enhanced warranties and disclosure
  - Reliance on hold-backs / rep & warranty insurance
  - Pricing structures





## Key Takeaway

- No change to core directors' duties
- Some additional flexibilities in terms of corporate governance and, given business disruption, extra onus on directors to keep company's financial position under review ....
- But basic company law rules remain the same



## What is the “Twilight Zone”?

- Questions arise regarding a company’s ability to trade on solvent basis
- Assessment of the company’s solvency:
  - Balance Sheet Test
  - Cash Flow Test
- Cash Flow Test key for trading businesses
- Directors’ duty shifts to Creditors
- Decision to continue to trade is critical



## Decision to Continue to Trade

- If insolvent under either test, decision to continue to trade must be kept under constant review
- Monthly, weekly and even daily assessments required in some circumstances
- Directors should look at all options:
  - Restructuring
  - Lenders support e.g. standstills, covenant waivers and/or new lending
  - Shareholder or Group support e.g. letters of support or additional investment
  - New money e.g. equity or finance
  - Formal rescue and insolvency procedures
- Directors should not assume the safest course is to stop trading



## Sanctions for Directors

- Sanctions apply equally to shadow directors or de facto directors
- Sanctions likely to be of most concern to directors:
  - Reckless or Fraudulent Trading – Section 610 of the Companies Act 2014
  - Restriction Order – Section 819 of the Companies Act 2014
  - Disqualification Order – Section 842 of the Companies Act 2014
- Directors must act honestly and responsibly





# Practical steps Directors should take

Financial



Governance



## Practical steps Directors should take (contd.)

### Communication with Key Stakeholders

- Shareholders
- Lenders
- Payment processing banks
- Creditors
  - Suppliers
  - Landlords
- Partners
- Advertisers
- Revenue Commissioners

### Compliance

- Accounts/Financial Returns
- Tax Returns

### Other Supports/Options

- Government Supports
- Business Interruption Insurance
- Directors' & Officers' (D&O) Insurance

---

## Conclusion

- Directors need to keep their decision to continue to trade under constant review
- They should look at all options to try to restore the company to a more solid financial footing
- During the “twilight zone”, they should exercise great care in monitoring the company’s operations and financial position and make sure they implement key mitigating steps
- Directors should not assume that the safest course is to stop trading - they may continue to trade while they honestly believe that there will be a successful outcome for the company and its creditors - if that opinion changes, they should promptly take steps to cease trading and liquidate the company

---

## Questions?



**Ciara O'Herlihy**  
Senior Associate  
+353 1 607 1386  
[Ciara.OHerlihy@mccannfitzgerald.com](mailto:Ciara.OHerlihy@mccannfitzgerald.com)



**Áine Murphy**  
Senior Associate  
+353 1 511 1553  
[Aine.Murphy@mccannfitzgerald.com](mailto:Aine.Murphy@mccannfitzgerald.com)

