The company director restriction regime – the evolution thus far

by Aoife McPartland

The primary purpose of company law is to facilitate continuity and encourage entrepreneurial activity. It does so by providing for separate legal personality and limited liability, thereby circumscribing personal exposure to financial risk.

In return for these privileges, company law sets down a framework within which:

- company directors are expected to operate,
- certain transparency requirements must be complied with,
- certain protections are afforded to shareholders, creditors, and the wider public, and
- sanctions, both civil and criminal, are provided for in respect of certain non-compliance.

One of these sanctions that serves a public protection purpose is the restriction regime provided for under company law. Since 2003, over 2,700 company directors have been restricted. In this article, I will trace the evolution of this public protection measure.

A restriction order is a declaration from the High Court that a director of an insolvent company cannot become involved in the management of a company for a period of five years unless certain statutory capitalisation requirements have been complied with.

Under the Companies Act 2014 (the 2014 Act), a court shall make a restriction order unless a director of an insolvent company can satisfy the court that:

- s/he acted honestly and responsibly in the conduct of the affairs of the company,
- s/he co-operated with the liquidator, and
- there was no other reason it would be just and equitable to restrict them.

Breach of a restriction order is a criminal offence and, moreover, can expose a restricted person to personal liability for company debts.

The evolution of the restriction regime

Restriction of company directors was first introduced under section 150 of the Companies Act 1990 (1990 Act). The 1990 Act arose after Ireland joined the European Union (EU). From approximately 1977 to 1990 Ireland was conducting a review of its company law provisions and implementing EU Directives on company law in a sweep. During this time company activity had expanded in Ireland, leading to an increase in 'misfeasance' not envisaged at the time of the drafting of the 1963 Act (Department of Industry Commerce and Trade, 1983).

The disqualification of company directors' regime under section 184 of the Companies Act 1963 (1963 Act), pre-dated Ireland's restriction regime. Restriction was proposed as an expansion of the disqualification of company directors' regime to take account of a wider array of director conduct. It was aimed at tackling malpractices and/or abuses of company law in the period between insolvency and the conclusion of court proceedings appointing a liquidator over the company. Directors of insolvent companies were to be automatically disqualified from being involved in the management of any subsequent company unless there was a minimum allotted share capital in the subsequent company. The liquidator of the insolvent company would be required to use the restriction period to report to the court on whether the interests of creditors were in jeopardy and request the court make a disqualification order (Department of Industry Commerce and Trade, 1983).

However, concerns arose from these proposals to expand the disqualification regime. Namely, that bona fide directors would be unfairly caught by disqualification of this nature. As a result, the proposals changed to allow directors to apply for relief from the automatic bar on being a director between insolvency and the end of the liquidation of the company (McKenna, 1987).

Around the same time as Ireland was considering implementing the restriction regime, the Cork Report in the United Kingdom (UK) sought to examine company law with the objective of deterring and penalising irresponsible behaviour (Review Committee on Insolvency Law and Practice, 1982).

The UK

The Cork Report was published in the UK a year after the Irish government proposed the expansion of the disqualification regime outlined above. In terms of the disqualification regime, the Cork Report advocated the mandatory disqualification of company directors 'in certain cases of serious misconduct' wherein the Court maintained a discretion over the period of the disqualification. While initially not enacted, against a backdrop of recession, renewed

interest arose in abuses of company law and scandals, resulting in the Cork Report being 'hastily dusted off' and the preparation of a White Paper (Fletcher, 1989).

This White Paper advocated for the automatic disqualification of company directors for three years who 'allow their companies to arrive at a state of affairs where they are wound up compulsorily by the Court' because the directors 'have demonstrated that they are not fit to be in control of a company'. Directors who were automatically disqualified were to be entitled to seek relief from this disqualification or to seek the leave of the court to act in the management of a subsequent company (Review Committee on Insolvency Law and Practice, 1982).

These recommendations made their way into clause 7 of the Insolvency Bill 1984, which 'was the most controversial provisions in the Bill and underwent considerable alteration throughout all parliamentary stages' (Fletcher,1989). Ultimately, despite these proposals, automatic disqualification did not feature in the UK's Insolvency Act 1986.

Ireland

During Oireachtas debates of the 1990 Act, there was comment that first time business failure is more common than first time business success. However, this concern was mixed with concern that directors themselves should have a 'sense of responsibility' to prove they should get a clean start in business again after the previous insolvency of a company of which they were a director of (various Oireachtas debates, 1987). Further, during Oireachtas debates a fixed five-year restriction period was introduced as an amendment, instead of the originally proposed 'open-ended' period of restriction (O'Malley, 1990).

Present day

Since the enactment of the restriction regime in the 1990 Act, further amendments or expansions have been made to the regime. The first such amendment concerned the oversight of the restriction regime.

The Gallagher Report advocated for the establishment of a centralised executive unit within the Department of Enterprise and Employment charged with making company law applications to court, including restriction applications. The Gallagher Report recommended that liquidators and receivers would be obliged to report to this executive unit within six months of their appointment about whether a disqualification application was appropriate (Company Law Review Group, 1994).

Around the same time, the High Court issued practice directions requiring all official liquidators of insolvent companies to bring restriction applications for persons falling within the remit of section 149 of the 1990 Act. Four years later, the McDowell Report recommended the establishment of what became the Office of the Director of Corporate Enforcement (ODCE) as a statutory office with non-exclusive responsibility for the enforcement of company law in Ireland, such as bringing restriction and disqualification applications to court. The McDowell Report also recommended that all liquidators of insolvent companies should be required to make a report on director conduct to the ODCE within six months of their appointment and that liquidators should be required to make restriction applications unless relieved of this obligation by the ODCE or face criminal sanction (Working Group on Company Law Compliance and Enforcement, 1998).

Under the Company Law Enforcement Act 2001, the ODCE was established, and the ODCE, a liquidator or a receiver could bring an application for restriction. Liquidators of insolvent companies were obliged to make a report to the ODCE and to make restriction applications to the court within a required time period if they are not relieved of such a requirement by the ODCE.

In 2007, the Company Law Review Group (CLRG) recommended the introduction of restriction and disqualification undertakings (Company Law Review Group, 2007) and undertakings were provided for by the Companies Act 2014. Restriction undertakings arise where a director consents to being restricted from acting as a company director when invited to do so by the Corporate Enforcement Authority (CEA). No application is made to court if a director consents to a restriction undertaking but the undertaking has the same effect on a director as a restriction order. Undertakings, therefore, provide a cost saving to the directors concerned, as well as freeing up court time.

On 6 July 2022, the Companies (Corporate Enforcement Authority) Act 2021 (2021 Act) was commenced. The 2021 Act established the CEA to replace the ODCE. Section 34 of the 2021 Act included amendments to the restriction regime expanding the grounds under which an applicant may seek to have a company director restricted. The amendments still require company insolvency as a ground for restriction but also impose restriction on directors for failures to:

- convene a general meeting of shareholders to propose nominating a liquidator for the company, and/or
- table a notice to nominate such a liquidator at such a general meeting, and/or
- provide a notice to employees of the winding up on the company.

A director will be restricted on any of these grounds unless they can establish their honesty and/or responsibility, etc.

Conclusion

Ireland's restriction of company directors' regime was originally envisaged as an expansion to the disqualification of company directors' regime to specifically tackle and/or discourage director behaviours in the period between insolvency of a company and the winding up of that company.

Around the same period as the restriction regime was proposed, an expansion of the UK's disqualification of company directors' regime was also proposed. However, in the UK, concern for honest and bona fide directors being unfairly prejudiced by this automatic disqualification resulted in the proposals being scrapped.

Ireland enacted the restriction regime with amendments to tackle the concern with honest and responsible directors falling within the restriction regime. Many concerns after the enactment of the restriction regime centred on who would be charged with oversight of the regime.

Eventually, this oversight became a responsibility shared by the CEA and liquidators of insolvent companies.

More recently, restriction undertakings were introduced and section 34 of the 2021 Act amended the restriction regime by expanding the grounds for restriction.

Restriction is an important feature in the landscape of company law enforcement in Ireland and has been applied to over 2,700 people since 2003, sanctioning persons who have not met the required standards of behaviour while acting as company directors.

References:

Company Law Review Group, Report of the Company Law Review Group 1994.

Company Law Review Group, Annual Report of the Company Law Review Group 2007.

Department of Industry, Commerce and Trade, Memorandum for the Government on the Draft Scheme of a Bill to Amend the Companies Acts, 1963 – 1983 (8 August 1983).

Fallon, S., Seanad Deb 27 May 1987, Vol 116, No. 4. For further comment on the likelihood of business failure, see Mr T. Mckenna, Seanad Deb 16 July 1987, Vol 116, No. 19.

Fletcher, I., "The genesis of modern insolvency law – an odyssey of law reform", (1989) 1 Journal of Business Law 365.

McKenna, T., Seanad Deb 16 July 1987, vol 116, No. 19.

O'Malley, D., TD, Seanad Deb 13 December 1990, Vol 127, No. 2.

Review Committee on Insolvency Law and Practice, Report of the Review Committee on Insolvency Law and Practice 1982, (Cmd 9175).

Working Group on Company Law Compliance and Enforcement, Report of the Working Group on Company Law Compliance and Enforcement 1998, (Pn. 6697).

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