



CORPORATE AND COMMERCIAL

ESG and Directors' Duties

by **Gemma Forde**

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Environmental, Social and Governance (ESG), the framework used to assess an organisation's business practices and performance on various sustainability and ethical issues, may have eyed its next target in directors' duties.

The recent UK case of ClientEarth v Shell [2023] EWHC 1137 brought the issue of directors' duties and ESG under the spotlight.

ClientEarth v Shell

ClientEarth sought the court's permission to continue a derivative claim against Shell directors on the basis that they had failed in their duty under s.172 of the Companies Act 2006, which provides that "directors have a duty to promote the success of the company for the benefit of its members as a whole." As part of this duty, directors are to have regard to a number of factors in their decision making including "the impact of the company's operations on the community and the environment". The court rejected ClientEarth's argument that the directors had a number of ESG-related duties incidental to their statutory duties emphasising the point that the law does not go so far as to impose duties beyond those defined in statute. The court also considered the duty to promote the success of the company for the benefit of its members as one which is determined by numerous competing factors.

If the lawsuit had been allowed to proceed, it could have opened the door for investors in other companies to sue boards that allegedly fail to adequately manage climate related risks.

Although unsuccessful, the case has magnified the issue of directors' duties against the ever looming backdrop of ESG, with calls being made from various quarters for more robust legislation.

One example is the Better Business Act Campaign in the UK. Under the proposals spearheaded by the campaign, s.172 would be amended so that a director must act in the way most likely to advance the "purpose" of the company with the purpose of a company then defined as being a balance between the need to benefit its members as a whole (as s.172 currently requires), and to also benefit wider society and the environment in a way commensurate with the company's size and the nature of its operations, whilst looking to reduce or eliminate wider social and environmental harms or costs (as the UK Corporate Governance Code already in effect asks).

The Irish Situation

The legislation in Ireland relating to directors' duties currently lags behind the UK with there being no statutory basis for directors to take account of ESG factors in their decision making.

Directors' duties in Ireland are codified under s.228 of the Companies Act 2014 and are as follows:

- (1) A director of a company shall:
 - (a) act in good faith in what the director considers to be the interests of the company;

- (b) act honestly and responsibly in relation to the conduct of the affairs of the company;
- (c) act in accordance with the company's constitution and exercise his or her powers only for the purposes allowed by law;
- (d) not use the company's property, information or opportunities for his or her own or anyone else's benefit unless—
 - (i) this is expressly permitted by the company's constitution; or
 - (ii) the use has been approved by a resolution of the company in general meeting;
- (e) not agree to restrict the director's power to exercise an independent judgment unless—
 - (i) this is expressly permitted by the company's constitution;
 - (ii) the case concerned falls within subsection (2); or
 - (iii) the director's agreeing to such has been approved by a resolution of the company in general meeting;
- (f) avoid any conflict between the director's duties to the company and the director's other (including personal) interests unless the director is released from his or her duty to the company in relation to the matter concerned, whether in accordance with provisions of the company's constitution in that behalf or by a resolution of it in general meeting;
- (g) exercise the care, skill and diligence which would be exercised in the same circumstances by a reasonable person having both—
 - (i) the knowledge and experience that may reasonably be expected of a person in the same position as the director; and
 - (ii) the knowledge and experience which the director has; and
- (h) in addition to the duty under section 224 (duty to have regard to the interests of its employees in general), have regard to the interests of its members.

Irish companies and interested parties should keep a close eye on any further developments in this area in the UK. Should ESG factors become more embedded in directors' duties in the UK, this will lead to further disparity between the statutory duties in Ireland and the more environmentally oriented duties for UK directors.

Impact of EU Legislation

It may be the case that Ireland's position will change as a result of forthcoming EU Directives. The Corporate Sustainability Reporting Directive (CSRD), which is due to be transposed into Irish law by July 2024, requires in scope companies to report annually in their management/directors' report on environmental, social and governance (ESG) and human rights matters according to European Sustainability Reporting Standards. Further information on these standards can be found [here](#).

Although the CSRD will not bring about any change in terms of directors' duties, a further EU Directive, known as the Corporate Sustainability Due Diligence Directive is still being negotiated. The initial proposal by the Commission for the Directive would have required directors to take into account human rights and climate change impacts when fulfilling their duty to act in the best interests of the company. However, the EU Council recommended removing such provisions. Whether the Directive, which is likely to be adopted at some point in 2024, will impose any further obligations or duties on directors across the EU remains to be seen. Either way, the topic of directors' duties and ESG will be one of much debate over the coming years.

Further Information

Please contact [Gemma Forde](#) if you require further information on ESG.

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