CORPORATE GOVERNANCE

Good governance can be the saviour

Proper corporate governance is important in times of prosperity, but bad governance is more visible in times of difficulty, writes **Dave Boland**


Helen H Whelan, department head of the Corporate Law Unit at O'Rourke Reid Solicitors

Bad corporate governance happens and happens regularly. But when business is booming boards and directors have, at least in the past, tended to get away with it. Good trading conditions often conspire to allow bad governance to be ignored, but bad governance can be a major contributory factor to business failure.

"Good corporate governance is about how to run a business, and a lot of the elements are about doing the obvious things, such as keeping your returns up to date, and keeping your books of account properly," said Helen H Whelan, department head of the Corporate Law Unit at O'Rourke Reid Solicitors.

"It could be as simple as doing your filing, with the Companies Registration Office (CRO) acting as a large filing cabinet."

Despite the fact that many of these activities seem to be concerned with the 'boring' parts of business, the reality, according to Whelan, is that by dealing with the little issues, companies are actually dealing with the bigger issues too.

"Corporate governance is about strategy," Whelan said. "It is about looking beyond the day-to-day running of a company."

The importance of good legal advice from a corporate governance standpoint is that it overlaps so heavily with Company Law, so by complying with the myriad legislative issues contained within the Companies Acts, organisations will effectively be complying with their governance issues.

"The 14 or so pieces of legislation that make up the Companies Acts provide a framework within which modern limited companies can operate," said Whelan. "For example, they set out what type of company your business is, and the rules under which you will operate the company.

"The memorandum and articles of association set out the objectives of the company, and included in all of this is how you will sell shares, appoint directors and, eventually, how you will wind up your company."

This last point is a crucial one, because in the current business climate, there is every possibility that more companies will begin to hit the wall.

So, while it is always important to remain in compliance with the law, it is in times of insolvency that this requirement becomes particularly pressing.

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Because, while company law will impose a variety of duties on directors, the most important one, the prime directive, is to always act in the best interests of the company.

Failure to do so and failure to maintain proper books and returns are likely to lead to significant sanctions against individual directors, including restriction and disqualification.

Under current legislation, the onus in the case of insolvency is on the directors to prove that they have acted responsibly and honestly, although this could be subject to change following comments from Mr Justice Hardiman of the Supreme Court on the fairness of the situation. But a disregard of company law, whether the burden of proof lies with the prosecutor or the defendant, will cause significant difficulties for the directors involved.

"Take the example of reckless or fraudulent trading," said Whelan. "It could be that directors carried on with the business, knowing that it was insolvent or not caring that it was insolvent. If a director is concerned with insolvency, then they should not take on any new debts.

"Nor should they prefer any particular creditor. If it is proven that directors were engaged in reckless or fraudulent trading, then these directors could be made liable for all or part of the debts."

Of course, it is the raison d'etre of a company that it takes certain risks to make a profit, which is why it could appear that good corporate leadership might seem at odds with dogmatic corporate governance.

But the key to governance, as it is with company law, is that the risk must be assessed with the requisite amount of due diligence.

"Directors are not expected to be commodities brokers just because they buy milk," said Whelan. "But they are expected to be able to act responsibly within what their own skills allow."

Because of the complexity of the law, it is important for directors to seek professional legal advice, rather than ploughing a lone furrow to the heart of the commercial court. But legal advice is not just about putting out fires; it can also be about strategy and business growth.

"We look to understand the businesses of our clients, and to look at particular situations to come up with particular legal solutions," said Whelan. "But we will always prefer for our clients to have a conversation with us so that we can anticipate any problems before they become a crisis.

"It might seem like a small business issue, or maybe a situation where the business is not doing as well as it was expected to.

"But if they talk to us, we will be able to tell them if it is an issue, and how to deal with it, so that it doesn't become a catastrophe for the business or for the director."