Focus on
COVID-19
Coronavirus

A&L Goodbody

FAQs for directors of Irish special purpose companies

Businesses in all sectors are facing very challenging times arising from the outset of, and reaction to COVID-19.

With the challenges in some instances being unprecedented, directors of affected special purpose companies need to be cognisant of their duties especially around decisions they are looking at making to get through current difficulties. We have put together a list of frequently asked questions that we have received from directors of Irish special purpose companies (particularly in respect of aviation and structured finance vehicles) designed to give clients an initial response to the most relevant questions facings directors at the moment.

You will find a full range of timely materials for businesses in our dedicated **COVID-19 HUB** on our website.

01

I am a non-executive director of an Irish incorporated special purpose company (SPC). What is the most important thing for me to do right now?

Now more than ever, information and communication are key. It is very important that you speak with your servicer or investment manager to fully understand the challenges they face which will impact the relevant transactions generally and what impact there might be on the SPC in particular. Formal and informal virtual meetings and conference calls with the other directors are likely to be required to ensure that the SPC can move quickly in this changing environment.

It is important to review the terms of the documents to which the SPC is a party to better understand the events of default (or potential events of default (if any)), any repeating representations which are given, the ongoing covenants of the SPC and whether there are (or could be with the passage of time) any breaches of such provisions as a result of the current crisis. It will also be vital to review the terms of any applicable officer recourse, limited recourse and non-petitions provisions included in those agreements (discussed below).

You may have to consider having a commercial discussion with lenders or other counterparties about revising credit or contractual terms, or seeking payment deferrals, repayment holidays, waivers or other standstill arrangements, etc. Where there is a real concern about liquidity or solvency, be proactive and involve your legal and financial advisors from an early stage, so they can take you through your options and possible solutions, and help you manage risk.

02

What are my duties as a director and do they change if it seems that there is a real risk the Irish SPC could become insolvent?

When a business is solvent and trading as normal, an Irish company's directors owe their fiduciary duties to the company, meaning the interests of its members as a whole.

Directors have eight statutory fiduciary duties under the Companies Act 2014, as follows:

i. To act in good faith in the interests of the company

ii. To act honestly and responsibly in company affairs

iii. To adhere to the company's constitution and exercise powers only for the purposes allowed by law

iv. To not use the company's property, information or opportunities for their own or anyone else's benefit unless one of the exceptions in s. 228 (d) of the Companies Act 2014 applies

v. To not agree to restrict the exercise of their independent judgment unless one of the exceptions in s. 228 (e) of the Companies Act 2014 applies

vi. To avoid conflict between their 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

vii. To exercise the care, skill and diligence which would be exercised in the same circumstances by a reasonable person having both the knowledge and experience: (a) reasonably be expected of a person in the same position as the director; and (b) which the director has

viii. To have regard to the interests of the company's members, in addition to their duty to have regard to the interests of the company's employees in general

In circumstances where a breach of duty is proven, a director may be required to: (a) account to the company for any personal gain made from the breach; and (b) indemnify the company for any loss or damage resulting from the breach. The High Court of Ireland is empowered to relieve a director from personal liability if he or she has acted honestly and reasonably and where the court believes that, in the circumstances, the director ought to fairly be excused.

Where uncertainty arises as to whether a company can trade through financial difficulties, directors continue to owe their duties to the company, but must take the interests of creditors into account. Typically, this means considering the impact of material decisions on creditors. Material decisions can include:

a. ongoing trading (i.e. whether to continue trading or to cease)

b. incurring additional material credit

c. granting security

d. discharging material creditors

During a time of financial distress, directors may feel a strain on their judgment and, accordingly, their ability to fulfil their duties. A prudent director, however, is unlikely to go far wrong where he or she is conscious in their daily business activities of adhering to their fiduciary duties.

Creditors do not have a direct right of action against a director for breach of fiduciary duties. Accordingly, only the relevant company (or its liquidator) may take an action for breach of duty against a director.

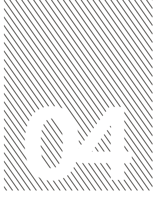
A&L Goodbody

i. The airline to whom the SPC leases an aircraft has asked for a rent holiday but the SPC has monthly payment obligations on the debt used to finance the aircraft. We are speaking with our lenders but have not yet reached an agreement on a waiver or an amendment to the loan agreement and I am concerned that as a technical matter, the SPC may not be able to meet its debts as they fall due. What steps should I take?

ii. A substantial number of the borrowers/debtors on the underlying pool of assets acquired by the structured finance SPC have requested that they be allowed to avail of a government-mandated/voluntary payment holiday. However, the SPC has monthly/quarterly payment obligations on the loans/bonds used to finance the SPC's acquisition of the assets. We are speaking with our lenders/the bond trustee but have not yet reached an agreement on a waiver or an amendment to the loan agreement/bonds and I am concerned that as a technical matter, the SPC may not be able to meet its debts as they fall due. What steps should I take?

Where there is a clear risk of insolvency, the directors owe a duty to the company's creditors not to conduct business in such a way as to prejudice their interests. To manage this, and to ensure the directors are properly fulfilling their duties where they continue trading while in the 'zone of insolvency', the board should ensure that, at a minimum, the following occur:

- Liaise with the servicer, investment manager or sponsor/originator and closely investigate the financial position and the future prospects for the SPC
- Continuously monitor the company's financial position
- Stress-test the financial information being relied on by asking questions until you are comfortable that you understand the position.
- Support the view that the SPC can continue to trade through its financial difficulties with documentary evidence and independent advice (e.g. on structured finance deals there may be general or senior note liquidity reserves that can be drawn upon to cover an income shortfall triggered by any payment holiday).
- Consider getting an independent view on any proposed material transaction from an insolvency practitioner (e.g. disposals, acquisitions, group restructuring drawing down on existing debt, incurring any additional debt or granting new securities).
- Obtain legal advice on the implications of any proposed material action.
- Hold frequent board meetings using tele-conferencing and video-conferencing.
- Prepare regular management accounts.
- Ensure that the company's books and records are current and accurate.
- Take material decisions only after considering the impact on creditors.
- Stress-test the rationale for making substantial payments to creditors or classes of creditors.



I am a United States' resident but I sit on the board of a Cayman Islands incorporated special purpose company which is tax resident in Ireland (the Cayman-Irish SPC). I typically travel to Ireland to be physically present at board meetings in compliance with our board guidelines and the advice of our tax advisors. The Cayman-Irish SPC is due to have a board meeting next week but I won't be able to travel to Ireland. What should I do?

A non-Irish incorporated company, such as the Cayman-Irish SPC, will only be regarded as resident in Ireland for tax purposes where it can show that its place of "central management and control" is in Ireland.

The factors taken into account when determining the place of central management and control of a company were established by case law. It is taken to mean the place where strategic control of the company is exercised and not merely the place where day-to-day management decisions are taken. The key factor is generally where the meetings of the board of directors take place, on the basis that the strategic decisions of the company are taken at these meetings.

For companies, such as the Cayman-Irish SPC, it is recommended that the directors (or a majority of them) are physically present in Ireland for board meetings in order to ensure that the central management and control of the company is carried on in Ireland.

If individual non-Irish resident directors of the Cayman-Irish SPC are not in a position to travel to board meetings, there are a number of practical measure that could potentially be taken with a view to ensuring that the place of central management and control of the company remains in Ireland. For example,

- If the Cayman-Irish SPC has Irish resident directors, consideration should be given to whether it is possible to have a quorum with a majority of directors participating in the meeting (including the chair) physically present in Ireland (and without the participation of certain non-Irish resident directors, where appropriate).
- Consideration could be given to the appointment of Irish-based alternate directors (where permitted by the company's articles of association or constitution) to act in place of non-Irish resident directors and/or the appointment of additional directors in Ireland on a temporary basis to ensure that a quorum of directors is physically present in Ireland in order to convene a board meeting.
- Consideration should also be given to whether it is necessary to convene a meeting at all at this time, and whether certain scheduled meetings could be postponed until non-Irish directors are in a position to travel to attend.

The ability to avail of these practical measures is fact specific and not all companies will be in a position to alter their practices in this manner. Helpfully, the Irish Revenue Commissioners (Revenue) have published guidance which provides that where a director of a company is present outside of Ireland because of COVID-19 related travel restrictions, but would otherwise have been present in Ireland, Revenue are prepared to disregard their presence outside of Ireland for corporation tax purposes. This means that a failure by a director of the SPC to physically attend board meetings in Ireland because of COVID-19 related travel restrictions should not impact on the tax residence status of the SPC under Irish tax rules.

This guidance requires the director and the Cayman-Irish SPC to maintain a record of the facts and circumstances of their inability to travel to Ireland for production to Revenue where requested. It does not specify what evidence must be kept, but we would recommend that full details of proposed travel dates be maintained together with a record of any cancelled flights and accommodation and a full record of intended board schedules and meeting venues be kept. In addition, if any director is unable to attend for COVID-19 related medical reasons copies of relevant doctor's notes should be kept. For any board meetings attended by a director who is not physically present in Ireland, the minutes should specifically state that the reason that the director did not physically attend was due to COVID-19 related travel restrictions.

While the above deals with the position under Irish tax rules, it does not address the possible tax implications in other jurisdictions or under Ireland's double tax treaties. Consideration would need to be given to whether directors attending board meetings from abroad and exercising control over the Cayman-Irish SPC from another jurisdiction could impact on the tax residence status of the Cayman-Irish SPC under the provisions of a double tax treaty, or whether it create a taxable presence of the Cayman-Irish SPC in that other jurisdiction.

For this reason, we would recommend that, to the extent that alterations are made to board schedules and directors' travel plans, directors obtain Irish tax advice and tax advice in their local jurisdiction that is tailored to their specific facts, prior to determining the best course of action.

I am a director of an Irish incorporated and tax resident special purpose company which acts as the borrower in a limited recourse loan transaction (the Limited Recourse SPC). The Limited Recourse SPC is facing liquidity issues and is likely to default on its payment obligations. Should I be concerned that I may face personal liability?

A typical limited recourse loan agreement should include an officer recourse provision pursuant to which the counter-parties/creditors of the Limited Recourse SPC agree that they shall have limited (or no) recourse against any director or contractual officer of the Limited Recourse SPC in respect of any obligations, covenants or agreements entered into by the Limited Recourse SPC. There may be carve-outs from this recourse provision in respect of fraud, gross negligence or willful misconduct by the director or officer in question but otherwise, such an officer recourse provision may shield a director from personal liability (in its capacity as director) in respect of any claims from the counterparties/ creditors of the Limited Recourse SPC that are party to the relevant agreement. Directors should however also carefully consider with their advisers if any liabilities may arise outside of claims which are the subject of the limited recourse protection, such as third party claims or liabilities arising under statute/ insolvency laws.

Notwithstanding the terms of the loan agreements, directors can be made personally liable for the debts of an insolvent company if they have knowingly carried on the business in a reckless manner. A director acts in a reckless manner where he/she ought to have known that his/her actions would cause loss to the creditors or where he/she allows the company to incur debt when he/she knows it is unlikely that debt will be paid as it falls due. In considering recklessness, the courts will have regard to the directors' position and experience. One defence would be to prove that the director acted honestly and responsibly. The courts have set the reckless trading hurdle reasonably high and the Irish judiciary has some appreciation for good faith entrepreneurial risk.

Similarly, a director can be made personally liable for the liabilities of an insolvent Irish company where he/she knowingly carries on the business with intent to defraud creditors. The courts have set a high standard of proof for fraudulent trading and successful prosecutions are relatively rare.

A director can also be made personally liable for all the debts of the company where his/her failure to maintain proper books of account has contributed to the company's insolvency, has resulted in a substantial uncertainty as to the assets and liabilities of the company or has impeded an orderly winding up, then. Prosecutions for failure to maintain proper books of account are not uncommon as it is relatively easy to prove.

A director must also remain cognizant of any reporting obligations which it has under the market abuse directive or stick exchange rules.

If the SPC is liquidated, could I be restricted or disqualified from acting as a director in future?

In Ireland, there is a positive legal obligation on the liquidator of an insolvent company to bring an application for the restriction of directors of a company that is wound up on an insolvent basis, unless specifically directed by the Office of the Director of Corporate Enforcement (ODCE) not to bring such an application.

The ODCE may relieve a liquidator of their obligation to bring a restriction application where it is satisfied that the director acted honestly and responsibly in relation to the affairs of the company, that he/she cooperated with the liquidator in winding up the company and that there is no other reason to restrict him/her. A restriction order results in a director being restricted for a period of five years from acting as an officer of a company unless that company has a paid up share capital of €100,000 in the case of private companies or €500,000 in the case of public companies. A restricted director who acts as director of a company which does not meet the minimum capital requirements may be made personally liable for the debts of that company if it goes into insolvent liquidation. It should be noted that mere commercial misjudgment by a director will not usually suffice to merit an order of restriction

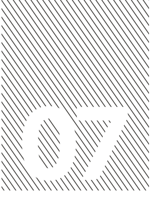
Circumstances in which an application for disqualification will be brought by a liquidator (and certain other concerned parties) against directors tend to be more serious, and are typically less common. This may include the director having former convictions for reckless or fraudulent trading in relation to the company or he/she is otherwise considered to be “unfit to be concerned in the management of a company”. A director will automatically be disqualified where he/she is convicted of an indictable criminal offence in relation to a company or where he/she is convicted on indictment of a fraud or dishonesty offence.

In our experience, an application will generally not be brought in respect of a director who co-operates fully with the liquidator and relevant authorities, where the company has kept accurate and complete books and records and where no offences have been committed under Irish companies legislation or other applicable Irish law. Such offences often involve fraud, deceit or dishonesty.

A disqualified director cannot act as an officer of a company or be involved in the promotion, formation or management of any company. A disqualification order is usually for a period of five years, though it can be longer depending on the gravity of the behavior leading to the disqualification.

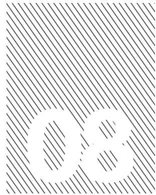
In circumstances where an SPC director’s livelihood is acting in this capacity (i.e. professional independent non-executive directors of the SPC’s corporate administrator) or directors who are employees, the inclusion of limited recourse provisions in the transaction documents entered into by the SPC is helpful, as it may prevent the SPC being wound up on an insolvent basis. However, in our view, the inclusion of a non-petition clause will not be definitive and may not always be enforceable.

Market practice recognises the need for this protection, which is why it is standard to included non-petition language (whereby counter-parties of the SPC agree that they will not institute any bankruptcy, reorganisation, arrangement, examination, insolvency or liquidation proceedings against the SPC) in any agreements to which the SPC is party. It would be advisable to consult with your solicitor to ensure that the transaction documents entered into by the SPC contain sufficiently robust non-petition provisions.



I am a director of an SPC whose annual return is due to be filed in April. Should I be concerned about missing this deadline?

The Companies Registration Office (CRO) has announced that all annual returns due to be filed between 20 March 2020 and 30 June 2020 will be deemed to have been filed on time if they are completed and filed by 30 June 2020. This will not excuse the SPC of its obligation to file an annual return but will at least give it more time in which to do so. It is possible that circumstances may require the 30 June 2020 date to be extended even further.



The SPC of which I am a director is facing liquidity issues but the group parent is solvent, does that mean I am protected?

No. Each company needs to be considered on its own merits and independently from its parent. This is particularly the case in bankruptcy-remote structures which have been specifically designed to ring-fence the SPC from the group parent. If the group parent has provided a creditor or group of creditors with a parent guarantee, this is a helpful fact in avoiding an SPC insolvency but it is not a panacea.

I am concerned that the SPC of which I am a director may be insolvent. What is the appropriate test to apply?

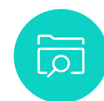
Under Irish law, solvency will be determined by the ability of the company to pay its debts as they fall due, taking into account its current, contingent and prospective liabilities. While (unlike the United Kingdom) Irish law does not provide for an express solvency test where liabilities exceed assets, directors do need to carefully consider the balance sheet position of the company when making any judgement as to whether the company is able to pay its debt as they fall due.

In assessing the solvency of a company, directors should consider whether there are reasonable grounds to conclude that the company can trade though its difficulties, and apply a common-sense approach taking into account:

- inability to pay debts as they fall due
- whether any liabilities can be reduced or waived (for example, if debt has been made available to the company by a related party)
- if any liabilities on the balance sheet do not affect the future cash flow position of the company (for example if a swap liability is being valued in the balance sheet on a mark to market basis)
- whether value can be realised from balance sheet assets
- whether future funding via refinancing is credible

A&L Goodbody

For more information please contact your usual partner contact, or any member of A&L Goodbody's Aviation & Transport Finance or Capital Markets Debt teams.



You will find a full range of timely materials for businesses in our dedicated **COVID-19 HUB** on our website.

KEY CONTACTS

David Berkery
Partner, Aviation
+353 1 649 2885
dberkery@algoodbody.com

Séamus Ó Cróinín
Partner, Aviation
+353 1 649 2255
socroinin@algoodbody.com

Peter Walker
Partner, Capital Markets Debt
+353 1 649 2202
pwalker@algoodbody.com

Jack Sheehy
Partner, Capital Markets Debt
+353 1 649 2140
jsheehy@algoodbody.com

David Baxter
Partner, Restructuring & Insolvency
+353 1 649 2514
dbaxter@algoodbody.com

Brian O'Malley
Associate, Restructuring & Insolvency
+353 1 649 2466
bomalley@algoodbody.com

Disclaimer: A&L Goodbody 2020. The contents of this document are limited to general information and not detailed analysis of law or legal advice and are not intended to address specific legal queries arising in any particular set of circumstances.