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## **Trainee Accountant Workshop**

19 December 2016

### **P1 – Corporate Laws and Governance Presented By: Sharon Sheehan**

## **Introduction**

- Welcome
- Thank you
- Objectives



## Introduction

- Format of the Paper
  - Question 1 (Compulsory)
    - Corporate Finance
  - Question 2 (Compulsory)
    - Company Officers
  - Either Question 3 or 4
    - Importance of the Examiners Article

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## Corporate Finance

- Types of Capital
- Types of Shares
- Rules regarding issuing shares
- Rules on Capital Maintenance
- Loan Capital – Debentures and Charges
- Dividends

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## Capital and Shares

- Definition of Capital: money available to trade with – basic funding of the company
- Two types:
  - Loan Capital – borrowings from institutional or personal investors or through issuing debentures
  - Share Capital – money raised through issuing shares

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## Capital and Shares

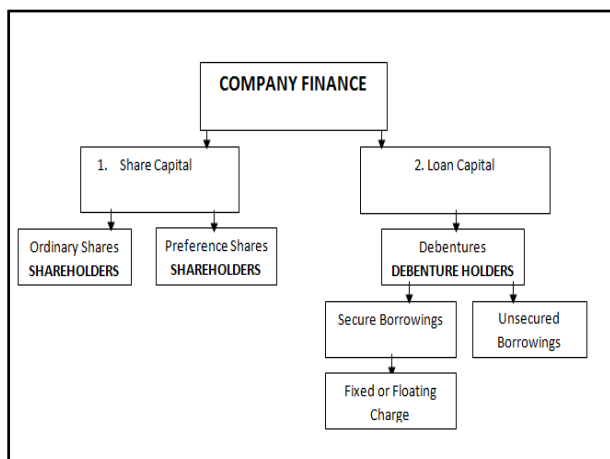


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## Capital and Shares

- Share Capital includes:
  - Share premium – part of un-denominated capital – excess of the company's capital over the nominal value of the issued shares
  - Capital conversion reserve fund
  - Capital Redemption reserve fund
- Restrictions re LTD's and DAC's
- Original allotment in the Constitution

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## Capital and Shares

- Types of Capital:
  - Authorised/Nominal Share Capital
  - Issued/Allotted Share Capital
  - Called-up/Paid-up Share Capital
  - Uncalled/Unpaid Share Capital
  - Reserve Capital
    - Special purpose
    - Liquidation

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## Capital and Shares

- Shares:
  - Definition: interests of a shareholder in a company measured by a sum of money
  - Intangible assets
  - Contract between shareholder and the company
  - Confers rights and obligations

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## Capital and Shares

- Shares (cont'd):
  - Legal evidence of ownership
    - Register of Members
    - Share Certificate/Warrant
  - No provision restricting a person from being a shareholder of a company by reason of (1) infancy (2) insanity, (3) bankruptcy or (4) because they are also a shareholder of a competing company

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## Capital and Shares

- A person ceases to be a member of the company upon:
  1. Dissolution of the company
  2. Transfer of shares
  3. Transmission of shares (death, bankruptcy, insanity etc)
  4. Where the shares are forfeited or surrendered, or
  5. By an Order of the Court (compulsory acquisition order)

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## Capital and Shares

- Shares (cont'd):
  - Nominal value – base value stated in a company's Constitution
    - Lowest value it can be sold for
  - Market value – only applies to a PLC
    - May be in excess or less than the nominal value

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## Capital and Shares

- Partly-Paid Shares:
  - Once the share has been paid for in full the member has no liability for the debts of the company
  - Where the full nominal value of the shares has not been paid on subscription – these are known as partly-paid shares
  - There may be an agreement to pay the unpaid portion at a specific future date (un-called capital) or on liquidation (reserve capital)
  - On liquidation the shareholder is liable for the amount remaining unpaid on their shares

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## Capital and Shares

### • Types of Shares:

- The Constitution may confer the right to issue different classes of shares
- Rights of shareholders depend on share classifications
- Companies may issue shares of the same class but with different rights

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## Capital and Shares

### • Types of Shares:

- Main classifications:
  - Ordinary Shares
  - Preference Shares

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## Capital and Shares

### • Ordinary Shares:

- Equity shareholders – full membership rights
- Right to a dividend, if profits are available
- Fluctuating/variable dividend
- Right to participate in the distribution of capital on liquidation, once all other debts are paid
- Right to attend company meetings
- Right to vote at company meetings

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## Capital and Shares

- Preference Shares:
  - Definition: shares that carry one or more rights than ordinary shareholders
  - Fixed dividend – no automatic right to payment
  - Presumed to be cumulative
  - Prior right to payment of the dividend (if preferred as to dividend)

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## Capital and Shares

- Preference Shares (cont'd...):
  - Prior right to return on capital (if preferred as to capital)
  - Ability to participate in the surplus upon liquidation – unless otherwise stated in the Constitution
  - Right to attend company meetings but no voting rights

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## Capital and Shares

- Deferred Shares:
  - These are shares that have some rights, special rights or restrictions attaching to them, but which are deferred for a period of time or on the occurrence of a specified event

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## Capital and Shares

- Redeemable Shares:
  - Definition: shares issued that are redeemed (bought back) at some future date at a fixed rate
  - May be issued as redeemable shares or converted
  - Mechanism to effect the lawful reduction of capital
  - Applies to both ordinary and preference shares
  - Must be authorised by the Constitution

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## Capital and Shares

- Rules re redemption of shares:
  - Redeemable shares (and any premium payable on redemption) may only be redeemed when there are profits available for distribution
  - If a company intends to cancel shares on redemption, they may redeem the shares out of a fresh issue of shares
  - The terms of redemption must provide for payment on redemption
  - If the shares were originally issued at a premium, then this premium (or an amount less than it) can be repaid from the share premium account

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## Capital and Shares

- Rules re redemption of shares (cont'd...):
  - On redemption if the shares are cancelled – this cancellation must be reflected as a reduction to issued capital account – and an equivalent sum transferred to the capital redemption account
  - If they are not cancelled they can be held as Treasury Shares

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## Capital and Shares

- Characteristics of Treasury Shares:
  - No voting rights
  - No right to a dividend or any distribution (such as pre-emption)
  - No rights on liquidation
  - Can be re-issued by the company at a later date – if this happens the price must be fixed in advance by a special resolution
  - Treasury shares cannot account for more than 10% of the nominal value of the company's issued capital

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## Capital and Shares

- Variation of Class Rights:
  - Rights not attaching through the Constitution:
    - Altered by a special resolution of the class at a class meeting or the written consent of 75% of the nominal value of that class

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## Capital and Shares

- Variation of Class Rights:
  - Rights attaching through the Constitution:
    - Altered by a special resolution of the class at a class meeting or the written consent of 75% of the nominal value of that class
    - Compliance with any further obligations, as outlined in the Constitution

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## Capital and Shares

- Variation of Class Rights:
  - Rights attaching through the Constitution where no procedure is stated:
    - Unanimous agreement for a valid alteration
- Right of minority shareholders to object in all circumstances

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## Capital Maintenance

- Allotment of Shares:
  - Directors must have the authority to allot shares
  - Must be authorised by the Constitution OR
  - Passing of a special resolution at a general meeting
    - Authority can be specific or general
    - Must state the maximum number of shares to be allotted and the timeframe
  - Restrictions in Ltd's and DAC's

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## Capital Maintenance

- Allotment of Shares:
  - Pre-emption
    - Definition: a company that is allotting shares must first offer them to existing shareholders in the same proportion as their existing holding
    - Rationale for pre-emption
    - Known as a rights issue – the right to purchase the shares allotted on a pre-emption basis

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## Capital Maintenance

- Pre-emption Right can be removed by:
  - (1) a provision in its Constitution,
  - (2) by the passing of a special resolution, or
  - (3) where the terms of a prior allotment of shares dis-allow it

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## Capital Maintenance

- Allotment of Shares/Rules on Pre-emption :
  - Irrevocable notice in writing for 14 days – no allotment until expiry
  - Compensation for breach
  - Pre-emption must be exercised in whole – Ocean Coal Company v Powell Duffryn Steam Coal Company (1932)

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## Capital Maintenance

- Application
  - Does not apply to shares allotted:
    - As part of an employee share schemes
    - For non-cash consideration
    - Shares subscribed for prior to the incorporation of the company (often known as founder shares)
    - In a PLC the right only applies to equity shares (although this can be waived)

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## Capital Maintenance

- Private Companies and DAC's may also include a right of voluntary pre-emption in their Constitution
  - This is a form of pre-emption right to existing members when others wish to sell their shares

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## Capital Maintenance

- Rights Issue:
  - Offering shares on a pre-emption basis
  - Payment in full
  - Often a discount on full market value (not on nominal value)
  - No obligation to participate
  - Classified as tradeable securities
    - Restrictions in an LTD and DAC

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## Capital and Shares

- Bonus Shares:
  - Capitalisation of profit or use of reserve revenue to buy your own shares and gift them to your shareholders based on the proportion of shares held (for example, one share for every five shares held)
  - Advantage: money is retained within the company

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## Capital and Shares

### — Bonus Shares:

- Can be funded by the capitalisation of monies:
  - Credited to the un-denominated capital account,
  - Representing profits available for distribution, or
  - Representing unrealised asset revaluation reserves.
- Can be issued as wholly paid or partly-paid shares

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## Capital Maintenance

- Allotment and PLC's
  - A PLC may not allot securities unless authorised to do so by ordinary resolution or by its Constitution
  - That authority may not exceed 5 years
  - A PLC cannot allot shares unless at least one-quarter of its nominal value, together with the whole of any premium had been received

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## Capital Maintenance

- PLC's and allotment of shares for non-cash consideration:
  - Can't accept work or services for the payment of shares
  - Section 1027(1) – undertaking or promise, must be fulfilled within 5 years – breach – nominal value + premium – Category 3
  - Section 1028 – asset – independent valuation, at least 6 months prior to allotment, file a report with the CRO

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## Capital Maintenance

- PLC's and Allotment of shares for non-cash consideration:
  - A PLC is prohibited, within 2 years of formation or re-registration as a PLC, from acquiring non-cash assets from a member at the time of that formation or re-registration, for a consideration of 10% or more of its subscribed capital, unless the consideration is valued in an expert's report approved by the members (Sections 1032-1033)

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## Capital Maintenance

- Issuing shares at a premium:
  - Definition: issuing shares above their nominal value – whether for cash or otherwise
  - Excess lodged into the Share Premium Account – known as the un-denominated capital account
  - Uses of the Account:
    - Bonus issue
    - Paying a premium on the redemption of shares

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## Capital Maintenance

- Issuing shares at a premium:
  - Share Premium Account is classed as un-distributable capital – subject to three exceptions:
    - Mergers – where one company has secured at least 90% equity share capital in another company – s.72 CA 2014

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## Capital Maintenance

- Exceptions:
  - Group reconstructions – where a company allots shares to its holding company in consideration for the transfer of assets, other than cash – s.73 CA 2014
  - The acquisition of shares – where company A allots shares to the members of company B in exchange for all the shares of company B so that B becomes a wholly owned subsidiary of A – s.74 CA 2014

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## Capital Maintenance

- Issuing shares at a discount:
  - Prohibition – *Ooregum Gold Mining Co of India v Roper (1892)* – Section 71(2) CA 2014
  - Rationale
  - Can discount market value – but not the nominal value

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## Capital Maintenance

- Issuing shares at a discount:
  - Breach:
    - Repayment of the discount, plus interest
    - Company officers – Category 3 offence

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## Capital Maintenance

- Rules on Capital Maintenance:
  - Reasons behind the rule
    - Market Manipulation
    - Insider Trading
  - Capital as a “buffer fund”
    - A common fund to which creditors may seek compensation if the company is unable to pay its debts

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## Capital Maintenance

- Rules on Capital Maintenance:
  - A company cannot purchase its own shares
  - A company cannot provide financial assistance for the purchase of its own shares
  - A company must follow a strict procedure for increasing and reducing its capital

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## Capital Maintenance

- Purchase by a Company of its own Shares:
  - General Prohibition – Breach = Category 2 offence
  - Exceptions (where authorised by Constitution or a special resolution):
    - Transfer or surrender of shares other than for valuable consideration
    - Redemption of redeemable shares
    - Acquisition of shares in a reduction of capital,
    - By virtue of a Court Order (Section 212 protection)
    - Arising by a merger or division of the company

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## Capital Maintenance

- Restriction on providing financial assistance for the purchase of shares:
  - Section 82 CA 2014 – breach = Category 2
  - Idea of “directly or indirectly”
  - Does not apply where the purpose of this assistance is not just to give the assistance, but where it is for a much larger purpose that is in good faith and in the best interests of the company

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## Capital Maintenance

- Restriction on providing financial assistance for the purchase of shares:
  - Exceptions:
    - In accordance with the Summary Approval Procedure (explained under Reduction of Capital);
    - As part of an employee share scheme
    - In its ordinary course of business
    - In accordance with lending money to non-director/employees, or
    - In accordance with a refinancing or re-arrangement of the company

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## Capital Maintenance

- Alteration of Share Capital
  - Specific procedures must be complied with
  - Two main methods:
    - Increasing capital
    - Reducing capital

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## Capital Maintenance

- Increase in Capital:
  - Increase in issued capital – endorsed by Constitution or by an ordinary resolution, notification to the CRO within one month
  - Increase in authorised capital – endorsed by Constitution and by an ordinary resolution, notification to the CRO within 30 days – copy of the resolution within 15 days

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## Capital Maintenance

- Reduction in Capital:
  - Section 84-85 CA 2014
  - THREE possible methods:
    1. Removing/reducing liability for any unpaid capital (authorised & partly paid)
    2. Cancelling paid capital to reflect trading losses/losses in the value of assets
    3. Repaying of paid up capital in excess of the company's requirements

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## Capital Maintenance

- Reduction of Capital (cont'd...):
  - Methods (1) and (3) reduce the creditor fund
  - Method (2) does not actually reduce the creditor fund – but recognises that a loss of capital has already occurred

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## Capital Maintenance

- Procedure for reduction:
  - (1) Summary Approval Procedure
  - (2) Passing a Special resolution and obtaining Court approval

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## Capital Maintenance

- Summary Approval Procedure:
  - (1) Declaration of solvency by the directors
  - (2) A special resolution of the shareholders at a general meeting must be passed within 12 months of effecting the reduction
  - (3) A report of an independent person qualified to act as a statutory auditor must confirm that the declaration of solvency is not unreasonable, and
  - (4) A copy of the declarations and resolutions must be forwarded to the Registrar of Companies (CRO)

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## Capital Maintenance

- Resolution and Court Confirmation:
  - Special resolution – setting out the terms of reduction
  - Advertising intention to apply to the Court for confirmation of this reduction in at least one daily newspaper, and notification to creditors
  - Petition to the Court to affirm the reduction – must be affirmed to be valid
  - In procedures (1) and (3) – the Court takes cognisance of the position of the creditors

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## Capital Maintenance

- Resolution and Court Confirmation:
  - In all situations the Court takes the interest of the public into consideration and the rights of the share classes – i.e. is the reduction fair between classes
  - CRO notification
  - Breach = Category 3

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## Company Borrowing



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## Company Borrowing

- Loan Capital: company borrowing raised from shareholders, institutional investors and personal investors
- Express power in the objects clause of PLC's and DAC's

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## Company Borrowing

- Optional provisions of the Companies Act 2014 deal with the specifics of borrowing including:
  - The power to create Debentures
  - The power to give security for borrowings

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## Company Borrowing

- Debentures:
  - Document acknowledging a debt, due and owing by a company
  - Document will acknowledge the obligation to repay the debt
  - Set out the terms of repayment, including interest
  - Issue of security

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## Company Borrowing

- Three types of Debentures:
  - Single Debenture
  - Series of Debentures – rank *in pari passu* – if offered to the public they are issued through a prospectus
  - Debenture Stock – only applies to PLC's and DAC's – offered by way of a prospectus

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## Company Borrowing

- Debenture Trust Deed:
  - Issued with a Series of Debentures or Debenture Stocks
  - Legal document appointing a Trustee to act on behalf of the Debenture Holder

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## Company Borrowing

- Company Charges:
  - Debentures may be unsecured – but are generally secured
  - Assets are pledged as collateral
  - Ability to appoint a Receiver where default arises
  - Two main types:
    - Fixed Charges
    - Floating Charges

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## Company Borrowing

- Register of Charges:
  - Section 409 CA 2014
  - Within 21 days of creation
  - Responsibility of borrower (company) and not the charge holder
  - Can notify CRO of intention to create a charge
    - Form 1: intention to register within 21 days
    - Form 2: details of the charge to be registered – within 21 days of the submission of Form 1

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## Company Borrowing

- CRO must retain a register of charges
- Companies must submit relevant information to the CRO
- Register must include:
  - Date of creation (judgment mortgage)
  - Description of charge
  - The amount secured by the charge
  - Property to which it applies
  - Details of charge holders
  - Date of property purchase, secured by charge

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## Company Borrowing

- Register of Charges (cont'd...):
  - When proper particulars are registered – CRO issues a Certificate of Registration
  - Company must retain a copy of the instrument creating the charge – available for at least 2 hours every day
  - Where the charge is not registered – automatically void
    - debts loses its priority of payment and is instantly repayable
      - Company/officers = Category 4 Breach

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## Company Borrowing

- Register of Charges (cont'd...):
  - Possibility of late registration through a Court application – Section 417
    - Delay or inadvertence
    - Extension is not prejudicial to the parties
    - Court considers it “just and equitable”
  - Where the Debenture is re-paid – CRO must complete a Memorandum of Satisfaction of the Charge

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## Company Borrowing

- Priority of Charges:
  - Fixed Charges – in order of registration
  - Preferential Debts
  - Floating Charges – in order of registration
  - Unsecured Creditors
  - Shareholders:
    - Preference Shareholders (if preferred as to capital return)
    - Ordinary Shareholders

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## Dividends

- Shareholder Profit:
  - Selling shares at a profit on the purchase price
  - Earning a dividend:
    - Definition: periodic payment of money representative of the company's profits
    - Proportion of the distributable profits of the company

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## Dividends

- Dividends:
  - Implied power of a company
  - Regulated by the Constitution and CA 2014
  - Payment of a dividend is known as a distribution
  - Preference share – fixed in priority & cumulative
  - Ordinary share – fluctuating – and dependent upon revenue
  - Payment is not mandatory

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## Dividends

- Payment of Dividends:
  - Company must be solvent
  - Cannot be paid out of capital
  - Must be paid out of profits:
    - Including past profits in excess of past losses not previously distributed or capitalised and not written off in a reduction/re-organisation of capital
    - The availability of profits is determined by reference to the latest audited accounts

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## Dividends

- Declaration of Dividends:
  - Declared at a GM of the shareholders – cannot exceed the amount recommended by the Directors – agreed by an ordinary resolution of the members
  - “Properly audited accounts and relevant account”
    - last annual a/c's, interim a/c's and accounts necessary for the distribution

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## Dividends

- Declaration of Dividends (cont'd...):
  - Interim dividends – does not require a resolution of the members
  - No automatic right to a dividend – unless declared and payment date has arrived
  - The amount of the dividend, if any, is at the Director's discretion – Bond v Barrow Haematite Steel Company (1902) – although the Constitution can confer an automatic right if certain conditions are satisfied
  - Cannot exceed directors recommendation

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## Dividends

- Declaration of Dividends (cont'd...):
  - Payable on paid-up amounts of shares only
  - Can deduct dividend from sums due by shareholders on foot of partly-paid shares
  - Paid in cash – payment in specie (assets or paid up shares)
  - Cannot bear interest against the company
  - Members can sue for non-payment where declared

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## Dividends

- Dividends & PLC's:
  - Cannot be paid unless the net assets are greater than the aggregate of the called up share capital and un-distributable reserves - and the distribution does not reduce the assets to less than the aggregate
  - Un-distributable Reserves: (1) undenominated capital account, (2) Past unrealised profits over losses (not yet capitalised), (3) Reserves protected by the Constitution

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## Dividends

- Unlawful Distribution:
  - "Knows or has reasonable grounds to believe that it is unlawful"
  - Directors are joint and severally liable
  - Repayment to the company
  - *Re Exchange Banking Co (1882)* – inaccurate statement re assets
  - *Re Thomas Gerrard & Sons Ltd (1967)*
  - *Precision Dippings Ltd v Precision Dippings Marketing Ltd (1985)* – no audit of the accounts

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## Dividends

- Limitation of Actions:
  - 12 years from declaration/payment date (later)
  - Constitution may provide for forfeiture in a shorter period
  - Liquidation: unclaimed dividends – 6 years – after 7 years funds go to the exchequer

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## Dividends

- Scrip Dividend:
  - A company may decide to use its profits available for distribution or un-denominated capital to make a bonus issue of shares, instead of paying a dividend
  - In this situation this transaction is generally referred to as a scrip dividend

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## Company Directors



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## Directors

- Formalities
- Restriction and Disqualification
- Contractual Capacity
- Duties

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## Directors

- Directors appointed to manage the company – human agents of the company
- Defined as a person involved in the management of the company
- Minimum 1 Director in an LTD and 2 Directors in a PLC and DAC – although the Constitution may state a higher minimum
- One Director must reside within the EEA – otherwise a €25,000 bond must be paid to a person nominated by CRO or RC

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## Directors - Formalities

- *De Jure* Director:
  - Translates to mean a “legally a director”
  - Defined as a person who is formally and legally appointed or elected as a director in accordance with the Constitution of the company, and gives written consent to hold the office of a director. He or she enjoys full rights and privileges of a director, and is held individually and collectively liable (with other directors) for his actions and negligence.

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## Directors - Formalities

- Types of Directors:
  - Executive
    - Permanent officers of the company
    - Involved in the everyday operational management of a company and may perform a specified role
    - Usually employed by the company under a separate employment service contract

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## Directors - Formalities

- Non-Executive Director:
  - Transient officers of a company
  - Not involved in the direct operational management of a company but are involved in the governance of a company
  - Role is exercised at Board level only, where they are involved in the strategic management and objectives of the company
  - Act as monitors of the executive directors

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## Directors - Formalities

- Non-Executive Director:
  - Provide the board of directors with additional expertise and an objective view point
  - Appointed due to their reputation, skills and previous business experience
  - Not company employees but independent contractors
  - No distinction re controls and liabilities re an ED and an NED

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### Directors - Formalities

- Managing Director
  - Delegation of responsibility by the Board, may also be revoked by the Board
  - Authorised by the Constitution
  - Casting vote
  - Can bind the company in contracts
  - Employed under a contract of service: Liability if contract is prematurely terminated

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### Directors - Formalities

- Directors for Life – private company – governed by optional provisions of CA 2014 - Constitution
- Alternate Director
  - Consent of the majority of the Board
  - Revocation by the Board
- Nominee Director

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### Directors - Formalities

- Non *De Jure* Directors:
  - Shadow Director
    - Section 221 defines a shadow director as a person in accordance with whose directions or instructions the directors of a company are accustomed to act
  - De Facto Directors
    - Section 222 defines a de facto director as a person who occupies the position of director of a company but who has not been formally appointed as such
  - Same liability as a *de jure* director

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## Directors - Formalities

- Appointment:
  - Details included in the statement of particulars upon formation (formerly Form A1)
  - Governed by the Constitution
  - By members at a general meeting
  - Must be appointed individually
  - Ordinary resolution

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## Directors - Formalities

- Appointment (cont'd...):
  - Casual Vacancy:
    - Vacancy between AGM
    - Directors co-opt a person to the Board
    - Retirement by rotation at the next AGM

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## Directors - Formalities

- Eligibility for Appointment:
  - No formal qualifications attach to the position of director, although the following are prohibited:
    - (1) un-discharged bankrupts (Category 2)
    - (2) corporate bodies
    - (3) the auditor of a company or its holding company
    - (4) a minor
    - (5) a disqualified person
    - (6) a restricted person (in certain situations)

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## Directors - Formalities

- Resignation:
  - Notice in writing or not offering oneself for re-election
  - Must automatically vacate their office if:
    - (1) they fail to acquire their share qualifications
    - (2) they become bankrupt or make an arrangement with their creditors, and
    - (3) they become disqualified or are deemed disqualified

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## Directors - Formalities

- Resignation:
  - They may be required to resign (optional provisions CA 2014) if:
    - (1) by notice in writing to the company, or
    - (2) the health of the director is such that he can no longer be reasonably regarded as possessing an adequate decision making capacity, or
    - (3) a declaration of restriction is made in relation to the director and the directors, at any time during the currency of the declaration, resolve that his office be vacated, or

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## Directors - Formalities

- Resignation:
  - (4) the director is sentenced to a term of imprisonment (whether suspended or otherwise) following conviction for an indictable offence, or
  - (5) the director is for more than 6 months absent, without the permission of the directors, from meetings of the directors held during that period

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## Directors - Formalities

- Retirement:
  - Where term of office expires – must retire at the next AGM – although they may stand for re-election

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## Directors - Formalities

- Retirement and PLC's:
  - Retirement of all Directors at the first AGM
  - Thereafter 1/3 – longest in office or by drawing lots
  - Excludes certain Directors (Managing Director/ Director for Life etc.)
  - Purpose of rotation

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## Directors - Formalities

- Removal:
  - Ordinary resolution – Section 146 CA 2014
  - 28 days notice
  - Copy of the resolution must be given to the director
  - Representations at the meeting in defence
  - Representations circulated prior to the meeting, if possible
  - Vote by shareholders – CRO notification within 14 days - breach = Category 3

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## Directors - Formalities

- Removal:
  - Director for Life – Private Company – alteration of the constitutional document – requirements of natural justice – breach of duties – *Shuttleworth v Cox Brothers*

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## Directors - Formalities

- Wrongful Removal:
  - Sue for damages – wrongful or unfair dismissal
    - *Carvill v Irish Industrial Bank (1968)* – notice of one year
    - *Glover v BLN Ltd (1973)*
- Directors in quasi-partnerships:
  - Reasonable expectation that they will not be removed – *Re Murph's Restaurant*

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## Directors - Formalities

- Attempts to remove for incorrect reasons:
  - Injunction
  - Application for compulsory liquidation

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## Directors - Disqualifications

- Disqualification of Directors:
  - Automatic Disqualification:
    - Where a person is convicted of any offence under the Companies Act 2014, or any offence involving fraud or dishonesty (Section 839)
    - Where a person is convicted of acting while restricted, except in the limited circumstances permitted by company law
    - Where a person is convicted of acting while disqualified




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## Directors - Disqualifications

- Automatic Disqualification:
  - Where a person is a Director of a company and there has been a failure to notify the Companies Registration Office, either at the time the company was being registered or when there was a change in the Register of Directors, that the person was disqualified in another jurisdiction, and failed to provide the requisite details




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## Directors - Disqualifications

- Discretionary Disqualification:
  - Where a person found guilty of fraud while acting as a company promoter, officer, auditor, receiver, liquidator or examiner
  - Where a person found guilty of a breach of duty while acting as a company promoter, officer, auditor, receiver, liquidator or examiner




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## Directors - Disqualifications

- Discretionary Disqualification:
  - Where a person guilty of fraudulent or reckless trading
  - Where a person unfit to be involved in the management of a company by reason of their past conduct as a company promoter, officer, auditor, receiver, liquidator or examiner

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## Directors - Disqualifications

- Discretionary Disqualification:
  - Where a person unfit to be involved in the management of a company, following an inspectors report under the Companies Acts, by reason of their past conduct as a company promoter, officer, auditor, receiver, liquidator or examiner
  - Where a person commits two or more offences in respect of failing to keep proper books of account

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## Directors - Disqualifications

- Discretionary Disqualification:
  - Where a person persistently in default of the filing requirements of the Companies Acts – three or more defaults in a five year period prior to the application
  - Where a person was a director of a company that was struck off the register (exception: no liabilities)

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## Directors - Disqualifications

- Discretionary Disqualification:
  - Where the person is disqualified under the law of another state from being appointed or acting as a director or secretary of a body corporate or an undertaking, and it would have been proper to make a disqualification order against the person based on his conduct or the circumstances which gave rise to the foreign disqualification if it had occurred or arisen in the State

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## Directors - Disqualifications

- Discretionary Disqualification:
  - Where the Court considers it just and equitable
  - Where it is in the best interest of the public
    - In *Re Connolly Commissions Ltd* (1992) the directors were disqualified for their refusal to compile annual accounts or hold an annual general meeting notwithstanding the fact that they had been directed by the court to do so

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## Directors - Disqualifications

- Application may be made by:
  - ODCE
  - DPP
  - CRO
  - Members, contributories, creditors, officers, employees, receivers, liquidators or examiners

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## Directors - Disqualifications

- Effect of disqualification:
  - Cannot be involved directly or indirectly in the promotion, formation or management of a company for up to 5 years, or any such period as the Court decides
  - Must be notified to the CRO
  - CRO maintains a Register of Disqualified Persons

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## Directors - Disqualifications

- Consequences of acting while disqualified:
  - Being guilty of a Category 2 offence
  - Having the period of disqualification extended for a further period of 10 years, and/or
  - Incurring personal liability for the debts of the company if it becomes insolvent during, or within 12 months of, the Disqualification Order

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## Directors - Disqualifications

- Relief from disqualification
  - An application for relief from disqualification can be made
  - The ODCE and the applicant for the disqualification order have the right to be heard in Court
  - This relief may be granted in whole or in part and on such terms and conditions as the Court deems fit

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## Directors - Disqualifications

- Relevant Case Law:
  - *ODCE v Collery (2006)* – 9 years
  - *Cahill v Grimes, Re Readymix Limited (2002)*: not to punish the individual but to protect the public against the future conduct of companies by persons whose past records as directors of insolvent companies have shown them to be a danger to creditors and others



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## Directors - Disqualifications

- *Re N.I.B. Ltd.: Director of Corporate Enforcement v D'Arcy (2006)*:
  - "The Court should take into account ... (1) the entire history of the person in question and not just the alleged act or acts of wrongdoing in isolation ... (2) there is an element of deterrence in the exercise of the Court's discretion ... (3) the matter is not to be judged with the inevitable benefit of hindsight ... (4) in the exercise of its discretion, the Court is entitled to take into account the fact that the effect of a Disqualification Order may be greater on a professional person .... (therefore) the Court should exercise its discretion proportionately ... (5) the burden of establishing that a Disqualification Order is warranted rests on the Director (of Corporate Enforcement) ..."



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## Directors - Disqualifications

- *Re N.I.B. Ltd.: Director of Corporate Enforcement v Lacey (2011)*: 9 year Disqualification Order imposed upon Jim Lacey on the basis that his breaches of duty as Chief Executive and Director of National Irish Bank were "grossly negligent" and that his conduct fell below the required standard and "constituted a fundamental failure of governance"



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### Directors - Restriction

- Director of a company within 12 months of insolvency
- Effects: cannot be a Director/Secretary
- Period of 5 years
- To prevent “phoenix trading”
- CRO maintains a register of all Restriction Orders

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### Directors - Restriction

- Application for Restriction:
  - DPP
  - Liquidator
  - Receiver

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### Directors - Restriction

- The Order won't be granted where:
  - (1) The officer acted “honestly and reasonably” in relation to the company (whether before or after it became insolvent), or
  - (2) The officer co-operated with the liquidator in relation to the winding up of the company, and
  - (3) There is no other reason why it would be just and equitable to restrict him
  - The burden of proof lies with the director in this regard

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## Directors - Restriction

- *Re Gasco Ltd (2001)*
  - Liquidator could not find any financial books or records of the company – restriction against one director – but not the other – who upon identifying serious problems in the company had assisted in the drafting of a business plan – when not viable – resigned – no restriction against the third – who acted honestly – but naively
- *Re Costello Doors Limited (1995)*
  - Trading while insolvent – hoping to trade out of the insolvency

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## Directors - Restriction

- Acting while restricted:
  - Category 2 offence
  - Disqualification Order
    - Insolvent liquidation within five years
  - Personal liability for debts of the second company

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## Directors - Restriction

- Exception:
  - Can act as an officer of a highly capitalised company:
    - €500,000 if a PLC or
    - €100,000 - any other company
  - Restricted person must give notice to the company before accepting appointment or acting as a director or secretary
  - Special capital maintenance rules also apply

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## Directors Authority

- Board of Directors:
  - Directors act collectively as the Board
  - The directors of a company (through the Board) may exercise all the powers of the company as are not by the Act or the company's Constitution required to be exercised by the company in a general meeting
  - In the case of a private company limited by shares with a single director, the powers are conferred on the director

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## Directors Authority

- Board of Directors:
  - Section 39 states that the Board can authorise any person as being a person entitled to bind the company
    - CRO notification in the prescribed form
    - Known as a registered person
    - Both the Board of Directors and a registered person have the authority to exercise any power of the company and to authorise others to do so
    - Section 39(6) - the fact that a person is an officer of a company should not be seen as an authorisation to bind the company

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## Directors Authority

- Individual Directors:
  - They are empowered to exercise all powers of the company to borrow money and to mortgage or charge its undertaking, property and uncalled capital, or any part thereof
  - They may delegate any of their powers to such person or persons as they think fit, including committees

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## Directors Authority

- Individual Directors:
  - Express Actual Authority:
    - The board may delegate specific powers to individual directors under s.158(4) CA 2014.
    - In this situation the company is bound by any contract entered into by the person to whom the power was delegated
    - Issue of a registered person

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## Directors Authority

- Individual Directors:
  - Implied actual authority
    - This authority derives from a person's position
    - Without actual knowledge to the contrary, they may safely assume that the agent has the usual authority which goes with their position
    - *Watteau v Fenwick* (1893) – Hotel Manager/Cigars

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## Directors Authority

- Individual Directors:
  - Apparent/ostensible authority
    - This arises where the individual director has neither express nor implied authority – but is held out by the actions of the company as having the authority to bind the company
    - *Kilgobbin Mink & Stud Farm Ltd v National Credit Co Ltd* (1980) – surrender of lease by CEO – issue regarding instruction from CEO to pay money into a specific bank account – ostensible authority

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## Directors Obligations

- Audit Committees and Directors Obligations
  - Must establish or explain why not
    - A company whose balance sheet total exceeds €25m and whose turnover exceeds €50m; or
    - A company that has one or more subsidiaries, and who in combination meet the financial thresholds as stated above
  - Composition:
    - One independent NED (3 years) – with competence in accounting and auditing

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## Directors Obligations

- Audit Committees and Directors Obligations
  - Role:
    - Monitoring the financial reporting processes of the company
    - Monitoring the effectiveness of the company's systems of internal control, internal audit and risk management
    - Monitoring the statutory audit of the company's statutory financial statements; and
    - Reviewing and monitoring the independence of the statutory auditors (additional services)

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## Directors - Duties

- Main duty is to ensure compliance with CA 2014
- Consent in writing:
  - *"I acknowledge that, as a director, I have legal duties and obligations imposed by the Companies Act, other statutes and at common law."*

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### Directors – Statutory Fiduciary Duties

- Fiduciary is a person entrusted with powers for the benefit of others but whose exercise of those powers are not subject to direct and immediate control
- Duty to act in the best interest of the company, its shareholders, employees, and creditors (insolvency)
- Burden of proof is placed on the party alleging a breach of duties – subjective test

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### Directors – Statutory Fiduciary Duties

- (1) To act in good faith and in the best interest of the company as a whole:
  - *Clarke v Workman (1920)* – resolution to transfer shares in the company
  - *Re Frederick Inns (in liquidation) (1994)* – proceeds of the sale of the assets of four companies in the group were used to discharge the debts owed to the Revenue Commissioners by the ten companies in the group – leaving these companies insolvent

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### Directors – Statutory Fiduciary Duties

- (2) To act honestly and responsibly in relation to the affairs of the company:
  - *La Moselle Clothing Limited v Soualhi (1998)*:
    - The extent to which the director has or has not complied with any obligation imposed on him by the Companies Acts;
    - The extent to which his conduct could be regarded as so incompetent as to amount to irresponsibility;

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### Directors – Statutory Fiduciary Duties

- The extent of the director's responsibility for the insolvency of the company;
- The extent of the director's responsibility for the net deficiency in the assets of the company disclosed at the date of the winding up or thereafter; and
- The extent to which the director in his conduct of the affairs of the company has displayed a lack of commercial probity or want of proper standards

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### Directors – Statutory Fiduciary Duties

- (3) Exercising powers in accordance with the Constitution and for the purpose allowed by law:
  - Substantial purpose
  - Illegal actions: *Cockburn v Newbridge Steam Sanitary Laundry Co Ltd (1915)*
  - Ultra-vires actions – PLC and DAC only
  - Acts intra-vires but beyond the Directors powers – *Royal British Bank v Turquand (1897)*
  - *Boschoek Pty Company Ltd v Fuke (1906)* – limit on directors salaries - exceeded

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### Directors – Statutory Fiduciary Duties

- (4) Not to use the company's property, information or opportunities for his or her own or anyone else's benefit
- Exceptions:
  - (1) expressly permitted by the company's Constitution; or
  - (2) where the use has been approved by a resolution of the company in general meeting.

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### Directors – Statutory Fiduciary Duties

- (5) To maintain independent judgment
  - *Fullham Football Club Ltd at al v Cabra Estates Plc (1992)*

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### Directors – Statutory Fiduciary Duties

- (6) To avoid transactions that amount to a conflict of interest:
  - Directors interests in contracts/making a secret profit
    - *Aberdeen Railway Co v Blaikie Bros (1854)*
  - Diverting business opportunities from the company
    - *IDC v Cooley (1972)*
    - *Cooks v Deeks (1916)*
  - Competition
    - *Irish Microforms v Browne (1987)*

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### Directors –Statutory Fiduciary Duties

- (7) To act with due care and skill in the performance of their duties
  - *Re City Equitable Fire Insurance Co Ltd (1925)*
  - (A) Must act to a standard reasonably expected from a person of his knowledge and experience
    - Subjective testing
    - *Dorchester Finance Co Ltd v Stebbing (1989)*
    - accountants – non-executive directors

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### Directors –Statutory Fiduciary Duties

- B. Directors are not bound to give continuous attention to the affairs of the company
- Duties are intermittent – performed at periodic Board meetings
  - Attendance as regular as possible
  - A Non-Executive Directors duty of care to the company is owed at board meetings only

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### Directors –Statutory Fiduciary Duties

- C. Can delegate the duties of the company to the management
- Provided it is normal business practice and there are no suspicious circumstances
- Use of an exclusion clause to exempt or limit liability of company officers is automatically void

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### Directors –Statutory Fiduciary Duties

- (8) Directors have a duty to have regard to the interests of the members of the company as well as those of the company's employees
  - This duty is owed by the directors to the company, not to the shareholders or employees individually
  - as this protects the concept of separate legal existence

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## Directors – Statutory Duties

- Directors also have a variety of statutory obligations under the terms of CA 2014
- (1) Duty of Compliance:
  - To ensure that the provisions of the Companies Act 2014 are complied with
  - Certain companies are obliged to include in their year-end Directors' Report a compliance statement

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## Directors – Statutory Duties

- Applicable companies:
  - All public limited companies
  - All private companies limited by shares, designated activity companies and companies limited by guarantee where the balance sheet exceeds €12.5m and its turnover exceeds €25m

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## Directors – Statutory Duties

- Content – this statement must:
  - (1) acknowledge their responsibility for ensuring corporate compliance,
  - (2) confirm that a compliance policy statement is in place,
  - (3) confirm that arrangements and structures are in place to secure compliance, and
  - (4) confirm a review of these arrangements and structures
- Non-compliance = Category 3 offence

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### Directors – Statutory Duties

- (2) Directors Interests in Contracts:
  - S231 CA 14
  - Disclosure at a board meeting when the contract is being considered or when they are first aware of the conflict
  - Full Board of Directors
  - Records by the company – inspection by any officer/member
  - Default = Category 2 offence

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### Directors – Statutory Duties

- (3) Substantial Transactions involving a non-cash asset (Section 238)
  - Prior approval from the company
  - Non-cash asset – value exceeds is not less than €5,000 but exceeds €65,000 or 10% of the value of the company
  - Ordinary resolution at a GM

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### Directors – Statutory Duties

- (4) Directors interests in shares/ debentures:
  - Disclosure obligation
  - Maintenance of a Register
  - Exception:
    - Where the interest is less than 1%
    - Where the director has been given an option to subscribe for these shares
  - Breach = Category 3

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## Directors – Statutory Duties

- (5) Political donations:
  - Up to 2012, all donations in excess of €5,079 – must be disclosed in the Director's Report at the AGM
  - Electoral Amendment Political Funding Act 2012 – reduces this threshold to €200
  - Goods, services and money



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## Directors – Statutory Duties

- (6) Loans to Directors:
  - S239 CA 2014 – prohibition on:
    - Making loans or quasi-loans to its Directors or Directors of its holding/subsidiary companies,
    - Making loans or quasi-loans to a person connected to a Director,
    - Entering into a credit transaction as creditor for a Director or connected person, or
    - Entering into a guarantee or providing security for a loan, quasi-loan or credit transaction for a Director or connected person.



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## Directors – Statutory Duties

- Exceptions:
  - If the loan is less than 10% of the value of the company's assets (Section 241), or
  - The advancing of money to a Director for reasonable expenses (Section 244)
  - Where the company loans money in the normal course of business (Section 245)
  - Intra-company loans (Section 243)
  - Where the summary approval procedure is adopted (Section 242)



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### Directors – Statutory Duties

- Disclosure obligations in the companies financial statements:
  - The name of the person for whom the arrangements were made and where that person is or was connected with a director of the company or undertaking, the name of the director,
  - The value of the arrangements at the beginning and end of the financial year,
  - Advances made under the arrangements during the financial year,

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### Directors – Statutory Duties

- Amounts repaid under the arrangements during the financial year,
- The amounts of any allowance made during the financial year in respect of any failure or anticipated failure by the borrower to repay the whole or part of the outstanding amount,
- The maximum amount outstanding under the arrangements during the financial year,
- An indication of the interest rate, and
- The arrangements' other main conditions

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### Directors – Statutory Duties

- Rules:
  - Where the loan is not in writing – it is presumed to be repayable on demand – and that it is interest bearing
  - Where the loan is by an officer to the company – and it is not in writing – presumed not a loan at all – not interest bearing and not repayable
- Breach:
  - Contract is voidable, Personal Liability, Category 2 offence

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### Directors – Statutory Duties

- (7) Disclosure of Directorships:  
– Section 149(2)(f)

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### Directors – Statutory Duties

- (8) Duties re Maintenance of Proper Books of Account (Section 281)
  - Continuous and consistent basis
  - Enable the financial position of the company to be determined with reasonable accuracy
  - True and fair view
  - Breach:
    - Personal liability in the event of insolvent liquidation
    - Category 1/2 offence

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### Directors – Statutory Duties

- Directors should also ensure that annual accounts and Directors Reports are prepared and that there is an annual audit of the accounts (unless the company is audit exempt)

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### Directors – Statutory Duties

- (9) Directors contracts of employment:
  - Copy must be maintained by the company
  - Maximum term of 5 years where it cannot be terminated by notice or in specific situations by an ordinary resolution
  - Terms in contradiction are void

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### Directors – Statutory Duties

- Miscellaneous Duties:
  - The requirements of approval by a resolution of the members of a company in order for the Board of Directors to make a payment to a director or a directors' dependants for the loss of their office, or compensation for the loss of office
    - Breach is classed as a Category 3 offence.
  - Duty of a director to disclose to company payments to be made to him in connection with transfer of his shares in company arising from his loss of office

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### Directors – Statutory Duties

- Breach:
  - Account for profits
  - Indemnify for losses
  - Exclusion clause is void

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### Additional Topics

- Corporate Offences
- Company Secretary
- Company Auditor

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### Miscellaneous Topics



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### Miscellaneous

- Types of Companies
- Formation and promoters
- Separate Legal Existence
- Meetings
- Minority Protection
- Investigations, Examinership, Receivership and Liquidations
- Employment Law

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