

AUDIT COMMITTEE INSTITUTE IRELAND

# ***Directors' responsibilities in the not for profit sector and update on director and officer insurance issues***

*Tuesday, 17 May 2011*

***Supported by KPMG***

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# **Directors & Officers Liability Insurance – Key Considerations**

# Liabilities

- **PERSONAL** → **JOINT & SEVERAL**
- **UNLIMITED** → **LONG TAIL**

# Indemnity to Directors

## Section 200 - Companies Act 1963

Makes void any agreement by the company to indemnify the Directors unless and until they have been proven innocent

# Indemnity to Directors

## **Section 56 Companies (Auditing & Accounting) Act 2003**

“Notwithstanding Section 200, a company may purchase and maintain for any of its officers or auditors, insurance in respect of any liability referred to”

# Directors & officers liability insurance

## Personal Protection Policy For:

- Claims for actual or alleged breach of duty, breach of trust, breach of warranty of authority, error, misleading statement, act, omission or neglect in their capacity as Directors and Officers of the Company
- Any matter claimed against them solely because of their status as a Director or Officer of the Company

# Directors & officers liability insurance

## SIDE A

**Covers the personal liability of the Directors**

## SIDE B

**Cover for reimbursement where the company has indemnified the Directors**

## SIDE C

**Cover for the company for Securities Clause**

# Standard exclusions in a D&O policy

- Insured V Insured exclusion in respect of USA only
- Pollution exclusion, can be amended to provide a sub-limit for defence costs and claims by shareholders
- Bodily injury / property damage ( Absolute ? / HSA )
- Dishonest or fraudulent actions (once proven)
- Non entitled personal profit (once proven)
- Fines penalties and punitive damages (although punitive damages can be covered where insurable)
- Liability from management of pension funds

# What to watch for

## Claims Made

- Run Off Cover – Voluntary or Compulsory Liquidations
- Transaction
- Discovery Period in the event of non-renewal
- Retired Directors

# What to watch for

## Definition of Claims

- Civil Actions
- Criminal Proceedings
- Formal, Administrative Regulatory proceedings including any appeals there from

## Claims Reporting

- Receipt of a written demand for compensation or other relief
- Civil Proceedings commenced by the service of a writ or summons
- Becoming aware of any circumstances that might give rise to a claim

# What to watch for

## Indemnity Limit

- Aggregate for all claims in the policy year
- Entity Cover (Side B and C)
- Shared Limits (Parent)
- Side A Only
- Non Executives Additional Cover
- Priority of Payments
- Prospectus Liability


# What to watch out for

## Duty to Defend

- Directors
- Separate Representation
- Severability of Disclosures
- Severability of Exclusions
- Exclusions - allegations / adjudication / For


# What to watch for

- Outside Directorships
- Cancellation Clause
- Global Placements – Local Admitted Cover Requirements
- Employment Claims
- Major Shareholder Exclusion
- Conditions Precedent
- Allocation
- Insurer Duty of Good Faith
- Advancement of Defence Costs



The Managing Director of a property company sold shares in the company, which then fell in value by over 50%. He was accused of knowing of the possible fall when he sold the shares and was prosecuted in the Dublin Circuit Criminal Court for insider trading, facing maximum penalties of a 12 month prison sentence and a €250,000 fine. He was acquitted at the end of a 12 day trial. **Defence Costs came to around €260,000**

The Director of a Financial Institution investigated by regulators for allegedly disclosing confidential and price - sensitive information to the marketplace. This led to Civil Court Proceedings. Although the matter was settled with no liability to the Director, **over €156,000 was spent in defending the proceedings**



Following dismissal from his job, a company employee not only sued the company for unfair dismissal, but also sued the company and its general manager for defamation. **€468,000 in damages was awarded.**  
**Defence Costs reached €156,000**


An investment company sold a large stake in a European Group a few weeks before the group issued a profits warning. The investment company's chief executive, who was also a non-executive director of the European Group, is alleged to have been well aware of the financial position and to have used his knowledge to procure the investment company's sale. The group sued the investment company and the chief executive for insider trading under Ireland's Companies Act 1990. **Damages of €85,000,000 were sought and defence costs ran into millions. Representation costs in connection with ODCE investigation were circa €1,000,000.**



A director of a large trading company was sued, along with his company for allegedly misappropriating trade secrets. **This led to a settlement of €2,000,000 following €1,000,000 spent on defence costs**

The buyers of a company sued its principal directors, alleging negligent and / or fraudulent misrepresentation of the company's financial standing. The amount claims represented the entire purchase price of the company. Following lengthy and expensive case preparation, the action was settled with **damages and defence costs amounting to over €5,000,000**

A managing director and several technical managers faced criminal prosecution for alleged breaches of health and safety legislation, which sought separate legal representation and the **costs incurred in their defence amounted to €1,388,000**



**Executive of a company traded on the Dublin and New York stock exchanges are the subject of class actions in the USA. This followed an article in the Wall Street Journal highlighting the company's complex accounting practices and comment by the company that, without those practices, it's earnings would have been much lower, all of which drove down the company's share price by over 60%. Claim settled for approximately \$130,000,000 plus defence costs of several million.**

**A company appointed one of it's managers to the board of a French company, in which it was involved. The French company went into liquidation. The Paris Court of Appeal held all the directors, including the board representative, jointly and severally liable to contribute the equivalent of €62,000,000 to the assets of the French company. The representative's share was about €6,864,000**



**Tom O'Higgins**  
***Specialist in Corporate***  
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***Master Coach at Praesta Ireland***

# **Directors Roles and Responsibilities in Not-for-Profit Organisations**

- **The Reforms - The Reports and the Code**
- **Good Governance - A Priority**
- **The Consequences and Impact of Failed Governance**

# Directors Roles and Responsibilities in Not-for-Profit Organisations

- **Are Governance Codes to Blame?**
- **Cadbury's Views on Governance of Not for Profit Bodies**

*“the disciplines of governance are at least as necessary in a not-for-profit organisation as they are in a publicly quoted company”*

# Directors Roles and Responsibilities in Not-for-Profit Organisations

- **Issues for Every Director**
- **The Tone at the Top**
- **Roles of Directors and Management**
- **The Fundamentals**

*Strategy, Performance, Risk, People*

# Directors Roles and Responsibilities in Not-for-Profit Organisations

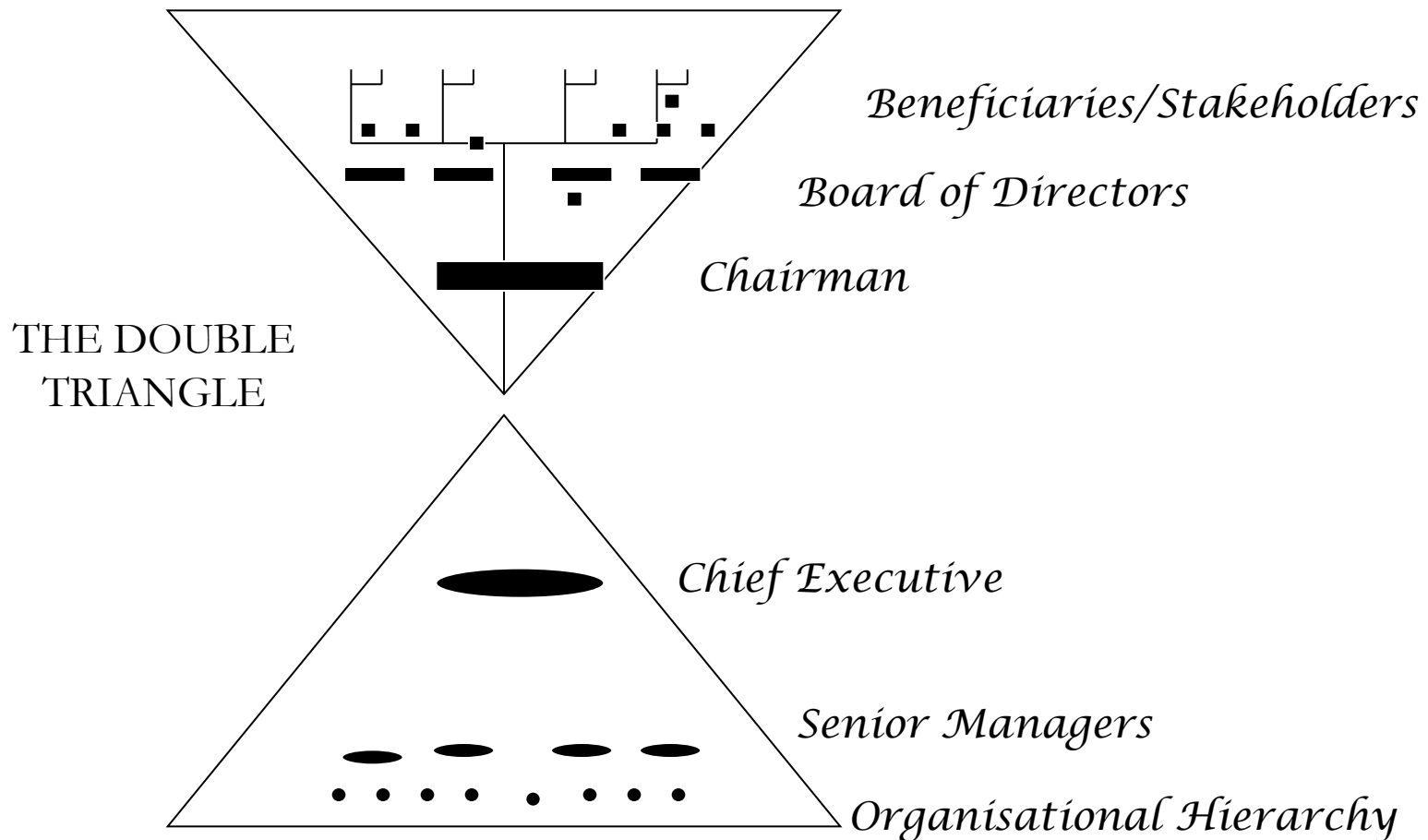
- **Charity Regulation**
- **UK Charities Code of Governance**
- **Due Diligence before joining an NPO board**

***Structure - Policies - Financial - Control – Board Meetings – Strategic Plan***

# **Directors Roles and Responsibilities in Not-for-Profit Organisations**

- **Dysfunctional Board Syndromes**
- **The Asymmetry of Information**
- **A Balanced Relationship - the Board and Management**

# Directors Roles and Responsibilities in Not-for-Profit Organisations



# Directors Roles and Responsibilities in Not-for-Profit Organisations

- **The Limpet Reflex Syndrome**
- **The Founder Syndrome**
- **The Celebrity Syndrome**
- **Paddy's Pals and Maggie's Mates Syndrome**

# Directors Roles and Responsibilities in Not-for-Profit Organisations

- **Challenges for the NPO Sector**
- **Publicity and Lobbying**
- **Concern Worldwide**
- **Conclusion**

# Presenter contact details

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