MILLS & REEVE

Foundation Trust Network

briefing

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Duties of directors to provide financially sustainable health and care systems

With trusts required to submit two and five year operational and strategic plans in the context of unrelenting financial pressures, balanced with the requirements of safeguarding and improving patient care, what are the duties of directors to the creditors of the trust?

In the commercial world directors of a company can expose themselves to personal liability to a company's creditors under the provisions of the Insolvency Act 1986, where they have allowed the company to trade beyond the point at which the directors should have realised that there was no reasonable prospect of avoiding being unable to pay creditors in full. Moreover where a normal trading company is confronted by a real prospect of insolvency then the directors duties to act in the best interests of the shareholders are subordinated to acting in the best interests of the creditors.

The good news is that the Insolvency Act 1986 does not apply to foundation trusts. When it comes to responsibility for financial decisions then in the absence of dishonesty or woeful incompetence, the directors of a trust are unlikely to be exposed to claims brought against them personally by the individual creditors of the trust. Any such claim is likely to be misconceived and liable to be struck out by a court. This is because the directors' duties are owed to the trust and are enforceable by the trust and not by its' creditors.

It would of course be possible for a foundation trust to take action against its directors (or former directors) if it considered they had failed in their duties to the trust, including the new statutory duty to act with a view to promoting the success of the corporation. This duty is very similarly worded to the duty of a Companies Act director to promote the success of his company, but the test is subjective – which means a director can in theory escape liability under this duty provided his intention was to promote the success of the corporation, which also means that it will be difficult to make a successful claim in all but the most extreme circumstances. While the insolvency regime does not apply to foundation trusts the NHS Foundation Trust Code of Governance is based on the principles and provisions of the Combined Code of Corporate Governance but amended to make the code consistent with the public service values of trusts. The code is not mandatory but is best practice advice and included in the principles are:

1 that the board ensure that the necessary financial and human resources are in place for the trust to meet its main priorities and objectives;

2 that the board ensures that the trust meets its obligations to its members, patients and other stakeholders; and

3 that all directors have joint responsibility for every decision of the board regardless of their individual skills or status.

While neither the code nor the legislative framework provides any guidance on what a board should do when confronted by insolvency, the principles of good governance are of universal application whatever the sector. However, this is subject to the very important proviso, that it is unlikely that critical and/or immediately essential duties to patients can, or should, ever be subordinated to duties to creditors. That does not mean that the duties to patients outweigh the duties to creditors in all circumstances. A board confronted by financial difficulty must take an active approach to address its financial challenges and be fearless in protecting the interests of all stakeholders. Knowing that liabilities are being incurred to creditors when there is no certainty of being able to meet those liabilities is not going to be regarded as good governance.

In circumstances where information (including financial information) is provided to the sector regulator Monitor in compliance with a foundation trust's statutory obligations, managers should take all reasonable steps and exercise all due diligence to make sure such information is accurate, so as not to fall foul of the Enterprise Act 2002. Provisions in force from April this year make it an offence to pass false or misleading information to Monitor, and managers may find themselves personally liable if they know, or ought to have known, that such information has been provided.

Some readers may have heard of claims being brought for misfeasance in public office. While this is a developing area, a claim on this basis requires proof of malice or bad faith in the exercise of a power, or the deliberate omission to act, by a public officer. A well run board acting in genuine pursuit of the public good is unlikely to be exposed to a misfeasance claim. Readers will also not be surprised to hear that directors will almost certainly be personally liable if they have acted fraudulently or made an explicitly personal promise to a creditor.

The Company Directors Disqualification Act 1986 does apply to directors of trusts. Where the conduct of a director is deemed 'unfit' then a director can be disqualified from being either directly or indirectly involved in the management of a trust or company for a period of between 2 and 15 years.

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