

ARTICLE

DIRECTOR'S DISSENT: WHERE YOUR UNDUE SILENCE WILL BE USED AGAINST YOU

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Time and again, business reports have revealed how many organisations have seen their demise as a result of their nonchalant board of directors. Yet in so many of these cases, the directors somehow seem to get off scot-free and stakeholders are left counting the costs. Whilst there may be a variety of reasons for the collapse of organisations, one of the most often over-looked areas for an organisation's inability to perform optimally -- and hence its failure -- may be found in directors who fail to take a stand against issues they know is undesirable or even detrimental for the organisation and they remain silent on the issue.

No matter how one looks at any of the circumstances or reasons for a director's inaction, there's no doubt that directors are expected to protect the interests of an organisation at all times. They must be able to demonstrate their fiduciary duties, including the fact that they are in full control of the organisation's affairs. For this to happen, directors -- be they executive or non-executive -- need to have an enquiring, probing mind that interrogates all possible areas of risk which could expose the organisation to unnecessary, unwanted damages. If a director does not have a clear understanding of the organisation, its business and its full operating environment, including the ability to stand firmly upon their own convictions about that which is right for the organisation, this can become a sure recipe for disaster at a number of levels. Frankly put, if a director does not actually show their disapproval and verbalise such dissent in the boardroom upon any matter which can cause the organisation harm, then they are simply not doing their job of protecting the organisation, neither are they fulfilling their fiduciary duties owed to the organisation.

In ideal conditions where legal sanctions are applied to individuals who fail to apply their minds to the myriad of matters placed before them, directors may be held jointly and/or severally accountable for their failure of not dissenting upon matters which were actually deserving of such dissent. Indeed -- through such accountability -- where the organisation suffers damage and the director cannot reasonably prove they took reasonable steps to robustly debate a particular matter until such time that they were completely informed and in agreement with their fellow directors; their silence upon such matters (or inaction) is tantamount to their failure to protect the organisation.

"The board has no room for insouciant directors who are not committed or who believe they can serve as passive observers."

Directors who lack initiative or fail or are unable to contribute should resign. Effective directors are not afraid of being bold."

Author: Paul P. Brountas

Clearly by not performing the duties expected of a director, which may include upsetting the boardroom collegiality if need be, will surely lead to a variety of consequences, not least incurring some form of liability; be this at the level of the board or at the door of the laggard director. As the ancient axiom goes; *"the fish rots from the head down"*. This axiom says a lot about the role of directors and how this affects the ultimate success of the organisation.

The board of directors of an organisation is essentially a deliberative body. As such, they are expected to strive toward reaching consensus when making decisions on behalf of, and for the benefit of the organisation. However, there may be instances when a director may not agree with the course of action

proposed by the board. When this occurs, directors are expected to voice their dissent in the boardroom in a respectful manner, stating their reasons for such dissent. However, there may be a number of reasons why directors remain silent, and most often this is to the detriment of the organisation.

Remaining silent in the boardroom may potentially be enough to cause the organisation to suffer serious loss or damages and it may be -- done often enough -- the final nail in the organisation's proverbial coffin. Many directors have, in the past, remained silent when they should have dissented against a particular decision. This phenomenon begs various questions.

Why do directors refrain from dissenting?

There are three main categories detailing the reasons why directors may not express their dissent in the boardroom, namely:

1. *Lack of knowledge*, including:
 - a failure to understand the duties owed to the organisation;
 - a failure to understand the director's liabilities attached to their fiduciary duties;
 - a failure to appreciate the general role and responsibilities attached to directors; and
 - lack of skills or experience necessary to make business decisions.
2. *Lack of preparation*, including:
 - not preparing sufficiently for board meetings; and
 - not preparing sufficiently for the role of director within that particular organisation.
3. *Lack of interpersonal skills / psychological attributes*, including:
 - fear of being disliked, ostracised or viewed negatively by board members;
 - lack of confidence in their opinion or lack of confidence to voice their opinion in front of the board; and
 - the desire for social harmony.

The first two categories -- lack of knowledge and lack of preparation -- may be easily remedied should directors, inter alia, undergo training and commit to their duties as a director. However, the last category - lack of interpersonal skills / psychological attributes -- may indicate that the director does not have the necessary qualities to fulfil the position as a director.

What qualities do directors need to fulfil their role effectively?

The qualities and attributes directors possess will ultimately determine if they are fit for the role of directorship. The following three qualities will ultimately influence their ability (or willingness) to dissent:

1. *Independence* - independence of mind promotes constructive scepticism and the freedom to express differing views.
2. *Informed & involved* - being fully informed of the organisation's business will put the director in a better position to dissent. The dedication of time to carry out fiduciary duties will affect whether a director has a sufficient understanding of the business of the organisation which is necessary to dissent constructively.
3. *Initiative* - taking the initiative by asking questions, listening and insisting on answers is a quality that will lend itself to the expression of dissent.

Notwithstanding the above, many organisations do not take heed of the necessary directorship qualities when recruiting directors to the board. Instead, in many cases directors are appointed for political, nepotistic or other impure rationale. Having unsuitable directors on the board may cause the board to become dysfunctional and, in turn, will lead to a lack of healthy dissent in the boardroom.

What are the consequences of refraining from dissent?

Directors are under an obligation to express dissent against actions or omissions that are inconsistent with their fiduciary and statutory duties. Board decisions are taken collectively and it is assumed that each director supported the decision unless dissent was expressed by an individual director. Thus, where the board has made a decision that is contrary to the law (i.e. ultra vires), all the directors may be jointly and severally liable regardless of who initiated the course of action. Remaining silent is therefore a potentially costly exercise for directors.

The consequences of not expressing dissent as and when it is required are potentially serious and can be costly to an organisation in a number of ways; including anything from a negatively impacted strategy through to board members mistrusting each other and ultimately impacting the functionality of the board.

Failure by a director to dissent as and when is necessary is construed as a failure to discharge their fiduciary duties and may render them liable to both civil and criminal penalties. However, directors who can prove they rightfully dissented, whilst the board took a different direction may be excluded from certain liability. Expectedly, dissenting to a course of action may be what separates certain directors from the failure and liability attached to a particular decision.

What are the benefits of dissent?

The presence of dissent in the boardroom ultimately improves the decision-making process - it provides an opportunity for questionable business proposals to be challenged and new ideas to surface. Therefore, constructive debate and dissent should be encouraged during the deliberation process for the board to operate at its optimum level and benefit for the organisation.

Appropriate dissent in the boardroom is vital to the success of the organisation. Boardrooms that lack healthy debate and dissent may be the reflection of a dysfunctional board of directors. Remaining silent in the boardroom will not exonerate directors from liability; it may in fact be the cause of a director's personal demise and an organisation's inevitable failure. When it comes to directorship, remaining silent when a questionable decision is being made, will surely be used against you.

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