

Decision of the Institute of Directors Standards Committee

Member: Clive Tilby, MInstD, Bay of Plenty Branch

Date of decision: 19 November 2024

Introduction

The Standards Committee (Committee) is a subcommittee of the Institute of Directors (IoD) Council. It convenes to hear and determine complaints against IoD members in accordance with the IoD's Constitution.

The purpose of the IoD's complaints and disciplinary framework is to ensure that IoD members meet appropriate standards of conduct and retain the confidence of the business community and the public. The IoD's relationship with its members is contractual. It is not a primary regulator of directors' conduct, and nor is it responsible for the enforcement of statutory duties.

However, under Rule 4.8 of the IoD Constitution, every person admitted to membership of the IoD:

- (a) is deemed to have agreed to be bound by its Rules and any binding Codes issued by the Council;¹ and
- (b) must not act in a manner that compromises (or is likely to compromise) the position of the IoD or brings (or is likely to bring) the IoD into disrepute.

Complaint

On 26 August 2023, the Registrar received a complaint against IoD member Clive Tilby (Member), in his capacity as a former Director of Mainzeal Property and Construction Limited (Mainzeal).

The IoD-initiated complainant identified a potential breach of Rule 4.8 following the delivery on 25 August 2023 of the Supreme Court's judgment in *Yan v Mainzeal Property and Construction Limited (in liquidation)* [2023] NZSC 113 (Mainzeal Decision). The Mainzeal Decision contained adverse judicial commentary regarding the conduct of the Mainzeal directors, including the Member. The complaint was referred to the Member for his response.

The Committee decided to investigate the complaint and then considered the complaint and the Member's written response to it. On 14 June 2024, the Committee conducted an oral hearing with the Member via Zoom in the presence of his support person. The Member subsequently provided written testimonials supporting his response.

¹ This includes the current IoD Code of Conduct applicable to all members.

Discussion

Under Rule 4.8 (b) members must not act in a manner that brings, or is likely to bring, the IoD into disrepute. Where appeal rights in a proceeding have been exhausted, adverse judicial commentary regarding a member's conduct can diminish the member's professional reputation and, by extension, the reputation of the IoD. There may also be a material risk that the IoD will be brought into disrepute in the future.

The Court unanimously held in its [Mainzeal Decision](#) that:

- the directors had breached s 135 of the Companies Act 1993 (Act) by “unreasonably” agreeing to Mainzeal carrying on trading as from 31 January 2011 in a manner likely to create a substantial risk of serious loss to the company's creditors. The Court noted that the directors may have been in breach of s 135 from mid-2010, but that because of the way the case had been pleaded and run at trial, it was appropriate to take 31 January 2011 as the breach date
- the directors had also breached s 136 of the Act in that they did “not have reasonable grounds” for believing that obligations incurred after 5 July 2012 (and in respect of the four major projects entered into by Mainzeal, after 31 January 2011) would be honoured.

In so holding, the Court found that the directors had failed to act “reasonably and diligently” as required by ss 135 and 136. In respect of the breach of s 136, the Court awarded substantial compensation against the directors, but when fixing the incidence of liability between directors based on culpability, capped the Member's personal liability at a reduced (although still very significant) amount.

In the context of this complaint, the Member accepted that he had made errors of judgment, but the Member did not accept that he had breached Rule 4.8 of the IoD Constitution because the Court had found that in carrying out his duties as a director of Mainzeal he had acted honestly, in good faith and without deriving personal benefit from the breaches of ss 135 and 136. The Member had not identified any media articles that were directly critical of him, nor had the Mainzeal decision negatively impacted his other governance roles.

After considering the material put forward and submissions made by the Member, the Committee determined that the Member had breached Rule 4.8(b), noting:

- the judicial commentary was critical of the Mainzeal directors, including the Member, in the manner referred to above
- the conduct at issue concerned the proper discharge of fundamental directors' duties ('core business' for IoD members)
- the context was the collapse of a high-profile company with a significant deficiency (one of the largest such collapses in New Zealand in recent times)
- the protracted litigation that followed, concluding at Supreme Court level, attracted widespread media attention and public interest in relation to the directors' conduct
- in the Committee's view, the adverse judicial comments had lowered the Member's professional reputation and, by extension, had (or were likely to have) an adverse reputational impact on the IoD as his professional body.

As a consequence, the Committee concluded that the IoD had been brought into disrepute and/or there was a material risk of such disrepute occurring in the future.

Given the status, authority and content of the Mainzeal Decision the Committee considered that the IoD Code of Practice for Directors (requiring adherence to statutory directors' duties) had also been breached, constituting a breach of Rule 4.8(a).

Penalty

The Committee considered the penalties available to it under Rule 17.11 being, in ascending order of seriousness, to:

- admonish the member
 - reprimand the member
 - remove or suspend a category of membership for a specified period
 - suspend the member's membership for a specified period
- or
- terminate the member's membership.

The Committee noted that when imposing penalty, it was required to consider and balance a range of factors (including those summarised in the Roberts decision²), and then to stand back and impose a penalty that, looked at overall, is fair, reasonable and proportionate in the circumstances.

The Committee noted that its role was not to penalise the Member for his failings as a director of Mainzeal (that being the role of the courts and, if appropriate, the Registrar of Companies). The Committee's focus was the extent to which the adverse judicial commentary brought the IoD into disrepute (or risked doing so).

The Committee considered the breach of Rule 4.8(a) to be a serious one. In particular, it noted the scale and significance of the Mainzeal collapse, its effect on third parties and the community, and the widely reported litigation that followed. The profile and dissemination of the adverse judicial commentary reflected that context. The actions of the directors of Mainzeal were placed under significant scrutiny and found wanting in fundamental respects.

However, the Committee considered there were important mitigating factors. Mr Tilby has had a long career with an unblemished disciplinary record. He has shown remorse, a degree of insight, and cooperated fully with the complaints process despite some personal issues. The Committee was also conscious of the significant toll that protracted litigation can take on an individual, both personally and financially.

The Committee did not consider an admonishment or reprimand would sufficiently reflect the seriousness of the breach of Rule 4.8. Similarly, having regard to the mitigating factors outlined above, termination of membership was not considered a proportionate response in this case.

The Committee instead concluded that a period of suspension was appropriate. After considering the period of suspension, the Committee resolved to suspend the Member's membership for 12 months. The suspension starts on 19 November 2024. The Committee considered that this was the minimum penalty required to denounce the Member's conduct and to maintain public confidence in membership of the IoD. Suspended members may not promote themselves with the endorsement that IoD membership brings, nor access any other members benefits, during their suspension.

² *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354.

Publication

Under Rule 17.13, the Committee may publish its decisions in a form it considers appropriate. In considering whether to publish (and in what form) the Committee balances the public interest factors that underpin Rule 17 (including the need for transparency, open justice and maintenance of public confidence) against the Member's private interests.

In this case the Committee decided to publish its decision, including the Member's name and location. An important consideration was that the Mainzeal Decision has already been the subject of widespread media reporting. The Committee considered the public interest factors, including continued transparency in relation to the matter, outweighed the Member's private interests in this instance.

Costs

Under Rule 17.11(c)(iii), the Committee may order costs to be paid by the member. The Committee concluded that the costs associated with the complaint were not sufficiently significant to impose costs on the member complained against. No costs were ordered.