Oifig an Stiúrthóra um
Fhorfheidhmiú Corparáideach

Office of the Director
of Corporate Enforcement

Information Book 7 **Liquidators, Receivers & Examiners**

Decision Notice D/2011/1

The Principal Duties and Powers of

# Liquidators, Receivers & Examiners

under the Companies Acts 1963-2009

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# Copyright Statement



## Disclaimer

Nothing herein should be construed as a representation by, or on behalf of, the ODCE as to its definitive interpretation of any of the provisions of the Companies Acts 1963 to 2009 or as an authoritative interpretation of any law.

Independent legal advice should be sought in relation to the effects of any legal provision. The Director of Corporate Enforcement accepts no responsibility or liability howsoever arising from any errors, inaccuracies or omissions in the contents of this document. The Director reserves the right to take action, which may or may not be in accordance with the provisions of this document.

# Contents

# 1.0 Introduction

The Companies Acts 1963-2009 contain extensive provisions detailing how the affairs of companies are to be conducted. These provisions describe how the various participants in companies should discharge their duties and obligations. In addition, participants are accorded substantial rights and powers in order to enable them to assert their rights and, if necessary, defend their personal and/or corporate interests.

The Director of Corporate Enforcement is of the view that the extensive requirements of the Companies Acts make it difficult for many non-professional participants in company affairs to be well informed of their rights and obligations under the law. This has, in part, contributed to an inadequate standard of compliance with company law in the past.

Section 12(1)(b) of the Company Law Enforcement Act 2001 specifies that a function of the Director is *"to encourage compliance with the Companies Acts"*. Consistent with this remit, the Director has issued a series of information books. These Information Books were first issued in November 2001, and this edition updates those books for changes in the law up to the end of 2010. There are information books on the following topics:

**Information Book 1 – Companies**

**Information Book 2 – Company Directors**

**Information Book 3 – Company Secretaries**

**Information Book 4 – Members and Shareholders**

**Information Book 5 – Auditors**

**Information Book 6 – Creditors**

**Information Book 7 – Liquidators, Receivers & Examiners**

In addition to information on the relevant duties and powers, each book also contains information on the penalties for failure to comply with the requirements of the Companies Acts and useful addresses and contact points.

Each book has been prepared for use by a non-professional audience in order to make the main requirements of company law readily accessible and more easily understandable.

The Director of Corporate Enforcement considers it important that individuals who take the benefits and privileges of incorporation should be aware of the corresponding duties and responsibilities. These information books are designed to increase the awareness of individuals in relation to those duties and responsibilities.

The Director wishes to make clear that this guidance cannot be construed as a definitive legal interpretation of the relevant provisions. Moreover, it must be acknowledged that the law is open to different interpretations. Accordingly, readers should be aware that there are uncertainties in how the Courts will interpret the law, particularly when the law is applied to the specific circumstances of specific companies and individuals.

It is important to note that where readers have a doubt as to their legal obligations or rights, they should seek independent professional legal or accountancy advice as appropriate.

As changes are made to company law in the future, the Director intends to keep this guidance up to date. He also welcomes comment on its content, so that future editions can remain as informative as possible.

**Office of the Director of Corporate Enforcement**

October 2011

# 2.0 Principal Duties and Powers of Liquidators

## 2.1 What is a Liquidation

Liquidation, also known as winding up, is the process whereby a company is legally dissolved. The liquidation of a company involves the cessation of the company's activities, the conduct of an investigation into the company's affairs, the realisation of the company's assets, the payment of the company's creditors to the extent possible (i.e. if there are sufficient funds) and, if having discharged the company's debts there are any surplus funds, distribution of same to the members. The company is then dissolved, terminating its legal existence.

There are a number of different types of liquidation and these are explained in detail in Appendix 2.1.

## 2.2 What is a Liquidator

A liquidator is a person who conducts a winding up. The main legislative provisions concerning liquidators are set out in Part VI of the Companies Act, 1963, Part VI of the Companies Act, 1990 and Part 5 of the Company Law Enforcement Act, 2001.

## 2.3 Qualifications of a Liquidator

In practice, liquidators are usually practising accountants. However, there is no requirement that a liquidator have any specific qualifications. In compulsory liquidations, the Court requires an affidavit (sworn statement) of fitness in respect of the person proposed for appointment as liquidator.

Certain parties, such as bodies corporate (i.e. companies), undischarged bankrupts and those who have links with the company being wound up (for example, officers and employees of the company and their near relations) are prohibited from being appointed as liquidator to a company. Similarly, a person who is the subject of a disqualification order is precluded from acting as liquidator.

## 2.4 Principal Duties of Liquidators

The general functions of both voluntary and Court-appointed (official) liquidators are the same i.e. to:

- inquire into the company's affairs;
- realise its assets;
- pay its debts, and;
- distribute any surplus to the members.

A liquidator is an agent of the company, while a Court-appointed liquidator is, in addition, an officer of the Court, having a duty to act responsibly. The main duties of a liquidator are to:

- take possession of the company's property and assets, including its books and records and other documents relevant to its affairs;
- make a list of the company's creditors and of the persons (known as contributories) who are obliged to contribute to the assets of the company on its winding up;
- have any disputed cases adjudicated by the Court;
- realise the company's assets;
- apply the proceeds in payment of the company's debts and liabilities in proper priority (see section 2.9.9);
- distribute any remaining surplus amongst the members in accordance with their respective entitlements.

A voluntary liquidator (see Appendix 2.1 for an explanation of a voluntary liquidation) may call a general meeting of the company for any purpose he or she sees fit[1]. Moreover, a voluntary liquidator is obliged[2] to summon a general meeting of the company (and in the case of a creditors' winding up, a meeting of the creditors) each year where the liquidation is not concluded and to make an account of his or her dealings during that year. In a members' voluntary liquidation, a liquidator is also required to call a creditors' meeting where he or she thinks that the company will be unable to pay its debts[3].

Where the affairs of the company are fully wound up, a liquidator must make an account of the winding up and call a general meeting and, if applicable, a creditors' meeting[4]. The liquidator's report is then delivered to the Registrar of Companies and the company is deemed to be dissolved three months after the filing of final returns.

A Court-appointed liquidator reports to, and liaises with, the Examiner of the High Court in relation to the performance of his or her duties. When the Examiner has passed the liquidator's final account, the liquidator applies to the Court for directions as to the application of any balance remaining. The Examiner will certify that the affairs of the company have been completely wound up, and the Court will make an order that the company be dissolved.

1 Section 276 Companies Act, 1963 as amended.

2 Voluntary liquidators' obligations to call a general meeting at the end of each year (and a creditors' meeting in the case of a creditors' voluntary liquidation) are set out in section 262 Companies Act, 1963 (members' voluntary liquidation) and section 272 Companies Act, 1963 (creditors' voluntary liquidation).

3 Section 261 Companies Act, 1963 as amended.

4 Voluntary liquidators' obligations to hold a final meeting (and in the case of a creditors' voluntary liquidation) are set out in section 263 Companies Act, 1963 (members' voluntary liquidation) and section 273 Companies Act, 1963 (creditors' voluntary liquidation).

## 2.5 Effect on a Company of the Appointment of a Liquidator

In the case of a voluntary liquidation, once the company has passed a resolution to wind the company up, it must cease to carry on its business except insofar as may be required for the beneficial winding up of the company. However, unless the articles of association state otherwise, the company retains its corporate state and powers until it is finally dissolved[5]. Once a voluntary liquidator is appointed, the directors' powers in general cease to have effect and the liquidator assumes his or her powers (which are dealt with from section 2.8 onwards).

In the case of a Court liquidation, the winding up of the company is deemed to have commenced on the date of the presentation of the petition (request) for the winding up of the company to the Court[6]. The company's status as a separate legal entity continues. However, once the liquidator is appointed, the directors' powers cease to have effect and the liquidator assumes his or her powers (which are dealt with from section 2.8 onwards). Following the appointment of an official liquidator, the High Court's permission is required before any legal proceedings can be taken against the company.

Where a company is wound up, a floating charge[7] created in the twelve months prior to the commencement of the liquidation shall, unless the company was solvent immediately after the time it was created, be invalid.

5 Section 254 Companies Act, 1963.

6 Section 220 Companies Act, 1963.

7 A floating charge is a charge on a class or group of assets rather than on a specific asset.

## 2.6 Liquidators' Duties to the Director of Corporate Enforcement

Liquidators have a number of legal duties to the Director of Corporate Enforcement. These are set out below:

### *2.6.1 Duty to Report on the Behaviour of Directors of Insolvent Companies*

Where a company is insolvent, a liquidator is obliged to provide a report to the Director of Corporate Enforcement on the conduct of its directors and to assist the Director in carrying out his or her functions[8].

Moreover, liquidators of all such insolvent companies are also required to make application to the High Court for the restriction of each of the company's directors unless specifically relieved of that obligation by the Director of Corporate Enforcement. The consequences of restriction for directors are dealt with in Appendix B to Information Book 2 – Company Directors.

The costs of the restriction application must be borne by the liquidator. However, the Company Law Enforcement Act, 2001 allows the Court to make an order making restricted directors liable to reimburse the liquidator for the costs of the application and any costs incurred in investigating the matter[9].

The Director has published a Decision Notice (D/2002/3) on the operation of this provision. The Decision Notice is available on the ODCE website (address: *www.odce.ie*).

### *2.6.2 Liquidators' Duty to Report Criminal Offences*

Where it appears to a voluntary liquidator during the course of a liquidation that any past or present officer, or any member, or the company has been guilty of a criminal offence, the liquidator is required to report the matter to the Director of Corporate Enforcement (and the Director of Public Prosecutions). The liquidator is required to furnish the Director of Corporate Enforcement with such information and give to the Director such access to, and facilities for, inspecting and taking copies of any documents in the possession of, or under the control of, the liquidator which relate to the matter[10].

Similarly, in the case of an official liquidation, where it appears to the Court that any past or present officer, or any member, or the company has been guilty of a criminal offence, the Court can instruct the liquidator to make a report to the Director of Corporate Enforcement (and the Director of Public Prosecutions). Where the liquidator is so instructed, he or she is required to furnish the Director of Corporate Enforcement with such information and give to the Director such access to, and facilities for, inspecting and taking copies of any documents in the possession of, or under the control of, the liquidator which relate to the matter[11].

### *2.6.3 Liquidators' Duty to Produce Books to the Director of Corporate Enforcement[12]*

Liquidators are obliged, on request from the Director, to produce for inspection their books, either in relation to a particular liquidation process or in relation to all liquidations undertaken by them, except those liquidations which have concluded more than six years previously.

**8** Section 56 Company Law Enforcement Act, 2001.

**9** Section 150(4B) Companies Act, 1990.

**10** Section 299(2A) Companies Act 1963.

**11** Section 299(1A) Companies Act, 1963.

**12** Section 57 Company Law Enforcement Act, 2001.

The liquidator is also required to answer any questions as to the content of the books and to give all reasonable assistance to the Director.

## 2.7 Liquidators' Filing Duties

Liquidators are required to make certain returns to the Registrar of Companies. A full list of the returns required to be filed by liquidators and the circumstances under which they must be filed is set out in Information Leaflet No. 16 (Company Secretary) as published by the Registrar of Companies. A copy of the leaflet is accessible on the Registrar's website (address: *www.cro.ie*).

## 2.8 Liquidators' General Powers

The powers of voluntary and Court appointed liquidators are similar. However, both classes of liquidator are required to obtain the approval of either the Committee of Inspection (where one exists) or the Court before certain powers are exercised. A liquidator always has the power to apply to the Court for directions.

### *2.8.1 Court-Appointed Liquidators' Powers*

The powers of a Court-appointed liquidator, which may be exercised without the approval of the Court, include the powers to:

(a) sell any of the company's property;

(b) execute all necessary documents on the company's behalf;

(c) mortgage the company's assets;

(d) appoint agents to do such work which the liquidator is unable to do himself or herself;

(e) generally do all other things necessary for the winding up.

A Court-appointed liquidator requires the approval of the Court to:

(a) bring or defend any action on behalf of the company;

(b) carry on the business of the company if necessary for a beneficial winding up;

(c) appoint a solicitor;

(d) pay any class of creditors in full;

(e) make any compromise or arrangement with creditors;

(f) compromise all calls and liabilities to calls of contributories.

### *2.8.2 Voluntary Liquidators' Powers*

A voluntary liquidator is required to obtain the approval of the High Court or of the Committee of Inspection (where one exists) to exercise any of the powers at (d), (e) and (f) in the preceding paragraph but is entitled to exercise the other powers without any approval.

In a creditors' voluntary liquidation, a liquidator appointed by the members can only exercise limited powers before the holding of a creditors' meeting at which the appointment is confirmed or another person is appointed as liquidator. For instance, he or she is entitled to take the assets of the company under control, to dispose of goods of diminishing value and to protect the company's assets.

### *2.8.3 Powers of a Provisional Liquidator*

The powers of a provisional liquidator are defined by the High Court order of appointment. The provisional liquidator's function is to ensure the preservation of the company's assets so that they can be realised and distributed after the making of a winding up order. In some circumstances, the order will entitle a provisional liquidator to go further and to carry on the business of the company as is necessary for its beneficial winding up. Where a provisional liquidator is appointed, the powers of the directors to manage the company are displaced.

## 2.9 Liquidators' Powers of Investigation and Asset Realisation

In order to assist liquidators in carrying out their duty to realise the assets of the company and to carry on an investigation into the company's affairs, a number of further powers are conferred on them.

### *2.9.1 Examination[13]*

A liquidator has the power to ask the High Court to order an examination. Where an examination is ordered, the Court summons before it any person whom it considers capable of giving information about the affairs of the company, in particular an officer of the company, or a person who is suspected to have company property or to be in debt to the company. A failure to attend is treated as contempt of Court.

Where, in the course of an examination, it appears to the Court that the person being examined is indebted to the company or has in their control any money, property or books of the company, the Court may order the person to repay the money or to return the property or books.

### *2.9.2 Arrest and Freezing of Assets*

Where a person fails to attend an examination, the liquidator has a power of civil arrest. A liquidator can apply to the High Court for an order to arrest a contributory to the company, in order to prevent him or her from absconding or removing property to avoid examination or payment of sums due[14]. A liquidator can apply to the Court for an order to freeze company assets where he or she suspects that a director or other person is likely to dissipate the assets or to remove them from the jurisdiction.

### *2.9.3 Disclaimer of Onerous Contracts*

Where a company owns property which is more of a liability than an asset to it (such as, for example, a lease on a premises or an unprofitable contract), a liquidator is entitled to disclaim the property in order to facilitate the liquidation[15].

### *2.9.4 Pooling and Contribution Orders*

Where there is a shortfall of available assets, a liquidator may apply to the High Court for an order directing that a related company, such as a parent or subsidiary company or a company in common ownership, contribute to the assets of the company being wound up. Where a related company is also in liquidation, he or she can apply for an order directing that the assets of the related company be pooled between the creditors of both companies[16].

### *2.9.5 Fraudulent Preference*

Where an insolvent company enters into a transaction with the intention of favouring a creditor and then goes into liquidation within six months, a liquidator can apply to the High Court to have the transaction set aside on the basis that it constitutes a 'fraudulent preference'. Where such a transaction is made in favour of a person connected with the company, such an application can be made if the company goes into liquidation within two years of the transaction.

Generally, it is necessary for a liquidator to prove an intention to prefer the creditor in question, although a transaction in favour of a connected person is deemed to have been made with a view to giving such a preference unless the contrary is shown[17].

**13** Section 245 Companies Act, 1963 as amended.

**14** Section 245(8) Companies Act, 1963 as amended.

**15** Section 290 Companies Act, 1963.

**16** Section 141 Companies Act, 1990.

**17** Section 286 Companies Act 1963 as amended.

### *2.9.6 Return of Improperly Transferred Assets*

A liquidator can also apply to the High Court for the return of property disposed of by the company if he or she considers that the effect of the disposal was to perpetrate a fraud on the company, its creditors or members. Where the Court is satisfied of this, it may order the return of the property or the proceeds of sale on such terms as it sees fit[18].

### *2.9.7 Fraudulent and Reckless Trading[19]*

A liquidator may institute proceedings against directors or other persons, including shadow directors[20], for fraudulent or reckless trading, seeking to make such persons personally responsible for all or part of the company's debts. Criminal liability can also be imposed on a person found guilty of fraudulent trading.

An officer of the company, such as a director or secretary, can be held personally liable where it appears that, while he or she was an officer, he or she was knowingly a party to the carrying on of the business of the company in a reckless manner. Furthermore, any person, whether an officer or not, can be made personally liable if he or she was knowingly a party to the carrying on of any business of the company with intent to defraud its creditors or for any fraudulent purpose.

An officer is deemed to be knowingly a party to reckless trading where he or she was party to the carrying on of the business and ought to have known that his or her actions, or those of the company, would cause loss to the creditors.

An officer is also deemed to be knowingly a party to reckless trading where he or she was party to the contracting of a debt by the company and did not honestly believe on reasonable grounds that the company would be able to pay the debt when it fell due for payment as well as its other debts.

The High Court has the power to relieve any person of liability in whole or in part where it appears that the person concerned acted honestly and reasonably in relation to the affairs of the company.

### *2.9.8 Wrongful Use of Company Property*

Where the directors, managers or other officers of a company have misapplied or wrongfully retained or become liable or accountable for any money or property of the company or have wrongfully exercised their lawful authority for which they are accountable to the company or have breached their duty of trust to the company, it is possible for a liquidator to institute proceedings for recovery of, or payment of compensation for the value of, such money or property so lost. A liquidator can also apply to impose personal liability on a director where the company has not maintained proper books[21].

### *2.9.9 Distribution of Assets – Ranking of Claims[22]*

When the assets of the company have been gathered in, a liquidator's function is then to distribute them. A liquidator can also make interim distributions when approved, usually for the purposes of paying costs and expenses. Naturally, where a company is insolvent, all bodies of creditors will not be paid in full. A secured creditor who holds a fixed charge or mortgage does not have to bring his or her claim in the liquidation.

**18** Section 139 Companies Act, 1990.

**19** Sections 297 Companies Act, 1963 as amended and section 297A Companies Act, 1963 as amended.

**20** A shadow director is a person, other than a professional advisor, with whose instructions the directors of the company comply.

**21** Section 204 Companies Act, 1990.

**22** Section 285 Companies Act, 1963 as amended.

He or she is entitled to realise the security outside the liquidation. The priority for the distribution of assets is generally:

i. costs and expenses of the liquidation;

ii. preferential creditors;

iii. floating charges;

iv. unsecured creditors;

v. members of the company.

Costs and expenses of the liquidation include matters such as the liquidator's remuneration, the expenses of the Committee of Inspection, the costs payable to the liquidator's solicitor, the necessary disbursements of the liquidator, the costs of the initial Court application, if any, to wind up the company and the costs and expenses of those involved in the making of the statement of affairs.

Preferential creditors include taxes owed to the Revenue Commissioners and various payments owed to employees.

### *2.9.10 Powers under the European Insolvency Regulation*

The European Insolvency Regulation gives liquidators appointed in this State the right to exercise their powers in other Member States.

## Appendix 2.1
## Types of Liquidation

There are two types of winding up – voluntary and compulsory (also known as an official liquidation). The main distinction between the two is that while a compulsory liquidation is undertaken under the supervision of the High Court (the Court appoints a liquidator to act on its behalf), a voluntary liquidation is usually carried out with little or no recourse to the courts, with members and/or creditors playing a more active role.

Voluntary liquidations can be classified into two categories, namely; members' voluntary liquidations and creditors' voluntary liquidations.

#### Members' Voluntary Liquidation

A members' voluntary liquidation usually occurs where the members of a solvent company (i.e. a company that can pay its debts as they fall due) decide to end its existence. The process is commenced by a special resolution of the company in general meeting. The meeting must also appoint a liquidator.

A vital element of a members' voluntary liquidation is the 'Declaration of Solvency', which must be made by the directors of the company or a majority of them at a board meeting[23]. The declaration of solvency is a sworn statement to the effect that the directors have made a full enquiry into the affairs of the company and that having done so, they are of the opinion that the company will be able to pay its debts in full within 12 months from the date of the commencement of the winding up.

**23** Section 128 Companies Act, 1990.

The declaration must be accompanied by a report from an independent person who is qualified to act as the company's auditor[24]. The independent person is required to state whether, in his or her opinion, the directors' opinion regarding the company's solvency and the statement of the company's assets and liabilities contained in the declaration are reasonable[25].

Where, contrary to the statutory declaration of solvency, a company is actually insolvent (i.e. unable to pay its debts), a company director can be made personally liable for some or all of the company's debts[26]. Furthermore, where a company's debts have not been paid or provided for 12 months after the commencement of the members' voluntary winding up, it is presumed that the directors did not have reasonable grounds for their opinion that the company was solvent[27].

The statutory declaration of solvency must be made no more than twenty-eight days before the resolution to wind up is passed. Where the declaration is not made in its proper form or where the company is not able to pay its debts within 12 months of the commencement of the winding up, a members' voluntary liquidation is converted into a creditors' voluntary liquidation.

### Creditors' Voluntary Liquidation

A creditors' voluntary liquidation occurs either where:

- a members' voluntary liquidation is converted (see preceding paragraph), or;
- the members of the company in general meeting resolve that the company cannot by reason of its liabilities continue its business and that it be wound up as a creditors' voluntary liquidation.

In the latter case, a liquidator is usually appointed at the members' meeting and the company calls a meeting of its creditors for the day on, or the day after, the winding up resolution is proposed[28]. It must advertise this meeting in at least two daily newspapers circulating in the district where the registered office or principal place of business of the company is situated and give ten days notice to the creditors.

The directors must also prepare a full statement ('Statement of Affairs') containing:

- details of the company's financial position;
- a list of its creditors, and;
- the estimated amount of the creditors' claims.

This statement of affairs is then presented to the creditors' meeting.

A nominated director will preside at the creditors' meeting and will generally give short reasons for the failure of the company and answer questions. The meeting will consider:

- the statement of affairs;
- the liquidator nominated at the members' meeting and whether the creditors wish to replace the members' nominee. The creditors can replace the members' nominee with their own liquidator where a majority of creditors in value wish to do so;
- whether to appoint a Committee of Inspection[29].

**24** The qualifications required to qualify as a company auditor are set out in Information Book 5.

**25** Section 256(4) Companies Act, 1963 as amended.

**26** Section 256(8) Companies Act, 1963 as amended.

**27** Section 256(9) Companies Act, 1963 as amended.

**28** Section 266 Companies Act, 1963 as amended.

**29** A Committee of Inspection is comprised of a number of creditors and contributories. In practice a Committee of Inspection will usually have 3 to 5 members. Its function is to oversee the liquidator in the discharge of his or her functions. Where appointed, the Committee also fixes the liquidator's remuneration (see section 233 Companies Act, 1963).

### Compulsory (Official) Liquidation

The High Court can order the winding up of a company on various grounds[30], including:

- where the company is unable to pay its debts;
- where the company has by special resolution resolved that the company be wound up by the Court;
- where the company has not commenced business within 1 year of incorporation or suspends its business for a whole year;
- where the company's affairs are being conducted, or the powers of the directors are being exercised, in a manner oppressive to any member or in disregard to their interests as a member;
- where it is just and equitable to do so.

It is possible to convert a voluntary liquidation into an official liquidation where the Court is satisfied that there is good reason to do so. The most frequent basis, however, for applications to compulsorily liquidate companies is that the company in question is unable to pay its debts.

A company is deemed to be unable to pay its debts in a number of circumstances including, where:

(a) a creditor to whom the company is indebted in a sum exceeding €1,269 has served a written demand on the company at its registered office to pay the sum due and the company has for three weeks failed to pay the sum due;

(b) a creditor has obtained a judgment for a debt but has been unsuccessful in attempting to have it executed by the sheriff;

(c) it is otherwise proved to the satisfaction of the Court that the company is unable to pay its debts.

A High Court petition for the appointment of a liquidator can be brought by a range of parties, including the company itself, any creditor and, in certain circumstances, members or persons required to contribute to the company's assets in a winding up (contributories). The petition is then advertised, following which it is heard by the Court. The Court also has the power, after the presentation of the petition but before its hearing, to appoint a provisional liquidator over the company[31].

Where a Court order is made to wind up a company, a liquidator will be appointed, usually on the nomination of the petitioner. The order takes effect from the date of the presentation of the petition, with the effect that all dispositions of property by the company after the presentation are rendered void and ineffective, unless the Court otherwise directs.

**30** Section 213 Companies Act, 1963 as amended.

**31** Section 226 Companies Act, 1963.

# 3.0 Principal Duties and Powers of Receivers

## 3.1 What is a Receiver

A receiver is a person appointed pursuant to a debenture (loan agreement) or a Court order, whose main task is to take control of those of the company's assets that have been mortgaged or charged by the company in favour of a debenture holder (lender), to sell such assets and apply the proceeds to discharge the debt owing to the debenture holder. The main legislative provisions concerning receivers are set out in Part VII of the Companies Act, 1963 and Part VIII of the Companies Act, 1990.

## 3.2 Qualifications of a Receiver[32]

While it is usual that a receiver be a practising accountant, there is no requirement that a receiver have any specific qualifications. Certain parties, such as bodies corporate, undischarged bankrupts and those who are connected with the company in question, are disqualified from being appointed as a receiver. Similarly, persons who are the subject of a disqualification order are precluded from acting as receivers.

## 3.3 Appointment of a Receiver

Most debentures (written loan agreements) created by a company in favour of an institutional lender (e.g. a bank) provide that the debenture holder is entitled to appoint a receiver where an event of default occurs, such as a default on payment to the institution, on becoming insolvent or an adverse change in circumstances of the company.

The High Court also has jurisdiction to appoint a receiver on application by a creditor. However, the circumstances in which this jurisdiction is commonly exercised is where a debenture holder fears that their security is in jeopardy and applies to the Court for the appointment of a receiver, even though, under the terms of the debenture itself, an event of default entitling the debenture holder to appoint a receiver may not yet have occurred.

In appointing a receiver, a debenture holder while owing no special duty to the company, must consider whether the appointment of the receiver will further the debenture holder's interests. In circumstances where the appointment does not advance the debenture holder's interests, the appointment may be said to have been made in 'bad faith'.

Where a receiver is appointed in relation to the whole, or substantially the whole, of the property of the company by the holders of a debenture secured on a floating charge, notice of appointment must be sent to the company and, within fourteen days, the company must make a statement as to its affairs on the prescribed form, together with a sworn affidavit of its accuracy, and submit it to the receiver. This statement must then be sent by the receiver to the company itself, the Registrar of Companies, debenture holders or any trustees of debenture holders and the High Court where the receiver is appointed by the Court, together with a note of the receiver's comments, if any.

## 3.4 Receivers and Receiver Managers

A receiver can be appointed as either a 'Receiver' or a 'Receiver Manager'. There is a significant distinction between the two functions. Where the property mortgaged and charged is a specific asset or series of assets, a receiver will be appointed in respect of that specific asset or assets. However, where a debenture creates a charge over the entire undertaking and business of a company, a debenture holder may appoint a receiver manager over the entire undertaking and

**32** Section 314 Companies Act, 1963 and section 315 Companies Act, 1963 as amended.

business. A receiver manager will, in addition to performing his duties as receiver also act as manager of the business for the duration of the receivership.

## 3.5 Effect on the Company of the Appointment of a Receiver

On the appointment of a receiver, the legal status of the company is not affected. However, receivership does have the following effects on the company:

- if the appointment of a receiver is deemed to be a crystallising event under a loan agreement, any floating charges in relation to the company's assets crystallise and become fixed charges on the assets or undertaking over which they were created, and;
- the powers of the company and the authority of the directors are suspended in relation to the assets affected by the receivership and can only be exercised with the consent of the receiver.

## 3.6 Resignation of a Receiver

A receiver appointed under the powers contained in a debenture may resign provided that notice of one month is given to:

- the holders of floating charges over all or part of the property of the company;
- the company (or its liquidator, if applicable);
- the holders of any fixed charge over all or part of the property of the company.

## 3.7 Removal of a Receiver

A receiver can be removed under the following circumstances:

- if the High Court decides that the removal is in the interests of the creditors;
- if the High Court finds that the receiver has been guilty of misconduct;
- if a liquidator, having been appointed to the company, applies to the Court for the removal of the receiver;
- where the debenture holder chooses to remove the receiver;
- where an examiner is appointed within three days of the appointment of the receiver (see section 4.0 for further information on examiners).

## 3.8 Receivers' Duties

### *3.8.1 General*

Where a receiver is appointed by the High Court, he or she is an officer of the Court, having a duty to act responsibly, and takes his or her instructions from the Court. In such circumstances, the receiver owes a general duty to be concerned with the interests of all creditors of the company.

Where a receiver is appointed pursuant to a debenture, his or her status will depend on the terms of the debenture. In the event that the debenture does not otherwise state, the receiver will be an agent of the debenture holder. Usually however, the debenture will state that the receiver acts as an agent of the company. This will generally mean that the company is responsible for the acts and defaults of the receiver as well as his or her remuneration. A liquidator, creditor or member of a company can apply to the High Court to fix the remuneration of a receiver, even where the remuneration is fixed under the debenture[33].

Most debentures will provide that a receiver will have the power of attorney (authority to act on behalf of the company) on appointment enabling him or her to do all acts necessary to enforce the security. While existing contracts remain binding on the company after the appointment of a receiver, a receiver is not personally liable in respect of such

**33** Section 318 Companies Act, 1963.

contracts. Any claims arising from those contracts constitute unsecured claims against the company. Where a receiver enters into a contract following appointment, he or she is personally liable unless the contract provides otherwise[34]. The receiver is however generally entitled to be indemnified (reimbursed) out of the assets of the company in respect of that personal liability.

### *3.8.2 Receivers' Duties to the Debenture Holder*

A receiver's primary duty is towards the debenture holder who has appointed him or her. A receiver's relationship with the debenture holder is a fiduciary one, which means that a receiver is required to act in a manner which is legally becoming of his or her office and which places the interests of the debenture holder ahead of his or her own. If a receiver fails to exercise reasonable care, he or she will be liable to the debenture holder for damages for negligence.

### *3.8.3 Receivers' Duties Regarding the Disposal of Assets*

In disposing of the company's assets, a receiver is obliged to exercise all reasonable care to obtain the best price reasonably obtainable for the property as at the time of the sale[35]. Where a receiver has any doubt when selling an asset as to whether the proposed method of sale is the most efficient and valuable, he or she should obtain the advice of an independent professional who is expert in the area. This duty is owed to the company and to third parties who may be affected by a receiver's actions, such as those who have guaranteed the debts of the company. A receiver who breaches this duty is not entitled to be compensated or indemnified by the company for any liability which he or she may incur.

A receiver is also required when selling non-cash assets to an officer or former officer of the company (by private treaty) to give notice of his or her intention to do so to the company's creditors[36].

### *3.8.4 Receivers' Duty to Provide Information*

The extent to which a receiver is obliged to provide information to the company will vary according to circumstances. There is no general duty on a receiver to inform the company of how the business is going. In special circumstances however, in order to ensure that the best price possible is obtained for the assets, trading information after the appointment of a receiver should be given to the company's directors.

### *3.8.5 Receivers' Filing Duties*

After each six month period of his or her tenure and when he or she ceases to act as receiver, a receiver must send an abstract to the Registrar of Companies[37]. This abstract must set out the company's assets of which he or she has taken possession, their estimated value (as set out in the Statement of Affairs), the proceeds of sale of any such assets and their receipts and payments during that period.

Where a receiver ceases to act, he or she must send the Registrar of Companies a statement of opinion as to whether the company is solvent. The Registrar is then required to forward the statement of opinion to the Director of Corporate Enforcement[38].

A full list of the returns that receivers are required to file is set out in the Registrar of Companies' Information Leaflet No. 16 (Company Secretary) which is available on the CRO website (*www.cro.ie*).

**34** Section 316(2) Companies Act, 1963 as amended.

**35** Section 316A Companies Act, 1963.

**36** Section 316A(3) Companies Act, 1963.

**37** Section 319(2) Companies Act, 1963 as amended.

**38** Section 319(2A) Companies Act, 1963.

### *3.8.6 Duties Regarding the Application of Proceeds*

Where a receiver realises assets which are the subject of a floating charge, he is obliged to pay all preferential creditors before applying the proceeds to discharge the debts owed to the debenture holder. Any surplus is then paid back to the company. Where he receives assets which are the subject of a fixed charge or legal mortgage, he is not obliged to pay preferential creditors and, accordingly, applies the proceeds to discharge debts owed to the debenture holder and then pays any surplus to the company.

### *3.8.7 Receivers' Duties to the Director of Corporate Enforcement*

The Director of Corporate Enforcement can request a receiver to produce for inspection his or her books, either in relation to a particular receivership or in relation to all receiverships undertaken by the receiver, except those which were concluded more than six years previously. The receiver is obliged to comply with the request, to answer any questions as to the content of the books and to give all reasonable assistance to the Director. A receiver who fails to comply with this provision is guilty of an offence[39].

### *3.8.8 Receivers' Duty to Report Criminal Offences*

Where it appears to a receiver during the course of a receivership that any past or present officer, or any member of the company has been guilty of any offence in relation to the company for which they are criminally liable, the receiver is required to report the matter to the Director of Public Prosecutions (DPP) and to provide the DPP with such information as he requires[40].

## 3.9 Receivers' Powers

### *3.9.1 Powers of Court Appointed Receivers*

Where a receiver is appointed by the High Court, his or her powers will be dependent on the Court order of appointment. Such an order usually empowers a receiver to collect, take assets in and realise those assets. In addition, a receiver has an implicit power to perform all acts incidental to, and consequent upon, the exercise of his or her express powers.

### *3.9.2 Powers of Receivers Appointed on Foot of a Debenture*

Where a receiver is appointed on foot of a debenture, his or her powers are generally set out in the debenture instrument itself, combined with certain statutory powers. The extent of the powers enjoyed by a receiver will depend on whether they are a receiver or a receiver manager.

The powers of a receiver generally include the power to take possession, the power to collect, take in and receive property and the power to sell that property. A receiver manager will often have the power to carry on the business of the company, to borrow money, to employ or dismiss employees, to compromise debts of the company and to insure and repair property.

Any receiver who is uncertain about the exercise of any of his or her powers is entitled to apply to the Court for directions[41]. Such an application can also be made by company officers, members, employees, liquidators and all those who are liable to contribute to the assets of the company in the event of its being wound up.

**39** Section 323A Companies Act, 1963.

**40** Section 179 Companies Act, 1990.

**41** Section 316 Companies Act, 1963 as amended.

### *3.9.3 Receivers' Powers Regarding the Return of Improperly Transferred Assets*

A receiver can apply to the High Court for the return of property disposed of by the company if he or she considers that the effect of the disposal was to perpetrate a fraud on the company, its creditors or members. Where the Court is satisfied of this, it may order the return of the property or the proceeds of sale of such items as it sees fit[42].

### *3.9.4 Receivers' Power to Apply for Asset Freezing[43]*

A receiver may apply to the High Court for an order preventing a director or other officer of the company from removing their assets from the State or from reducing their assets below an amount specified by the Court. The Court may grant such an order where it is satisfied that:

- the receiver has a substantive cause of action or right to seek a declaration of personal liability or claim for damages against the director or other officer, or;
- there are grounds for believing that the respondent may remove or dispose of their, or the company's, assets with a view to evading their, or the company's, obligations.

### *3.9.5 Fraudulent and Reckless Trading[44]*

A receiver may institute proceedings against directors or other persons, including shadow directors[45], for fraudulent or reckless trading, seeking to make such persons personally responsible for all or part of the company's debts. Criminal liability can also be imposed on a person found guilty of fraudulent trading.

An officer of the company, such as a director or secretary, can be held personally liable where it appears that, while he or she was an officer, he or she was knowingly a party to the carrying on of the business of the company in a reckless manner. Furthermore, any person, whether an officer or not, can be made personally liable if he or she was knowingly a party to the carrying on of any business of the company with intent to defraud its creditors or for any fraudulent purpose.

An officer is deemed to be knowingly a party to reckless trading where he or she was party to the carrying on of the business and ought to have known that his or her actions or those of the company would cause loss to the creditors. An officer is also deemed to be knowingly a party to reckless trading where he or she was party to the contracting of a debt by the company and did not honestly believe on reasonable grounds that the company would be able to pay the debt when it fell due for payment as well as its other debts.

The High Court has the power to relieve any person of liability in whole or in part where it appears that the person concerned acted honestly and reasonably in relation to the affairs of the company.

### *3.9.6 Powers of a Receiver where a Liquidator is Appointed*

Where a receiver has been appointed to a company and a liquidator is subsequently appointed, the receiver's appointment is not affected per se. However, the liquidator can apply to the High Court to have the receivership determined or limited. In such circumstances, the Court may order that the receiver shall cease to act or shall from a certain time act only in respect of certain assets specified by the Court[46]. An examiner (see Section 4.0) cannot be appointed to a company where a receiver has been appointed for a continuous period of at least three days.

**42** Section 178 Companies Act, 1990.

**43** Section 55 Company Law Enforcement Act, 2001.

**44** Sections 297 Companies Act, 1963 as amended and section 297A Companies Act 1963 as amended.

**45** A shadow director is a person, other than a professional advisor, with whose instructions the directors of the company comply.

**46** Section 322B Companies Act 1963 as amended.

# 4.0 Principal Duties and Powers of Examiners

## 4.1 What is an Examiner

An examiner is a person, appointed to a company by the Court, who assesses the affairs of a company which has been placed into 'examinership' and, if possible, prepares a plan for the rescue of the company, its undertakings or substantial parts thereof.

## 4.2 What is Examinership

Examinership is a process whereby a company can be placed under the 'protection' of the Court in certain circumstances. In this context, protection means protection from the company's creditors.

Where a company is placed in examinership, the examiner:

- considers whether the company is capable of rescue, and if so;
- brings forward a scheme for this purpose (which must be approved by the Court).

The main legislative provisions concerning examiners are set out in the Companies (Amendment) Act, 1990, Part IX of the Companies Act, 1990 and Part II of the Companies (Amendment) (No.2) Act, 1999.

## 4.3 Qualifications of an Examiner

While it is usual that an examiner be a practising accountant, there is no requirement that they have any specific qualifications. Certain parties, such as bodies corporate, those who are connected with the company in question and undischarged bankrupts, are disqualified from being appointed as an examiner. Similarly, persons who are the subject of a disqualification order are precluded from acting as examiner to a company. Also, a person cannot be appointed as examiner of a company if they are not eligible to be appointed as the company's liquidator[47].

## 4.4 Grounds for Appointment of an Examiner

A court (usually the High Court) may appoint an examiner where it appears that:

- a company is, or is likely to be, unable to pay its debts;
- there is no winding up (liquidation) in being, either compulsory or voluntary, and;
- the Court is satisfied that there is a reasonable prospect of the survival of the company and the whole or any part of its undertaking as a going concern[48].

Where a receiver has been appointed to the company for three days, it is not possible to apply for the appointment of an examiner.

## 4.5 Procedure for Appointment of an Examiner

An application for the appointment of an examiner (which is made by way of petition) may be made by the company itself, its directors, a creditor (including an employee) or by a member holding not less than one-tenth of the voting shares. There is a requirement to exercise utmost good faith in the presentation of the petition[49].

The application must be accompanied by the report of an independent accountant, who is either the auditor of the company or a person who is qualified to be appointed as auditor to the company. The report is required to set out relevant information concerning the company, including a statement of affairs. The report should also state whether investigations carried out by the independent accountant indicate that the

**47** Section 28 Companies (Amendment) Act, 1990.

**48** Section 2 Companies (Amendment) Act, 1990 as amended.

**49** Section 3 Companies (Amendment) Act, 1990 as amended.

company has a viable future and what steps, including possible arrangements with creditors, are necessary to that end[50]. The report must give details of the funding required to enable the company to continue trading during the protection period and recommend as to which of the company's liabilities incurred before the presentation of the petition should be paid.

Where, by reason of exceptional circumstances outside the control of the petitioner which the petitioner could not reasonably have anticipated, the report of the independent accountant is not available in time to accompany the petition, as an interim measure, the company can be placed under the protection of the Court for a period of up to ten days prior to the presentation of the report[51].

After the presentation of the petition, it must be advertised prior to its hearing. At the hearing, the Court is obliged to give each creditor an opportunity to be heard. It will then decide whether to appoint an examiner[52]. The Court can also appoint an examiner to a related company.

## 4.6 Effect on the Company of the Appointment of an Examiner

Where an examiner is appointed, the period of Court protection lasts for seventy days from the date of presentation of the petition, unless the protection is withdrawn or extended.

The main restrictions which apply during the period are that:

- no winding up (liquidation) can be instituted nor can a receiver be appointed to the company;
- a receiver appointed within the three days prior to the appointment of the examiner must cease to act;
- it is not possible to seek to enforce debts or security against the company's property, to repossess goods subject to hire purchase agreements or to exercise retention of title agreements without the examiner's consent;
- secured creditors cannot take steps to realise their security without the consent of the Court;
- no proceedings may be taken against a party who may be liable for the company's debts, such as a guarantor;
- no proceedings may be taken against the company without the permission of the Court[53].

On appointment of an examiner, the directors of the company retain their functions in relation to its management.

## 4.7 Examiners' Duties

### *4.7.1 Examiners' Duties Regarding the Formulation of Proposals*

Once an examiner is appointed, his or her main duty is to try to formulate rescue proposals for the company, which are known as a compromise or 'scheme of arrangement'. The examiner is also obliged to carry out any other duties which the Court may direct should be carried out.

Within thirty five days of his or her appointment, an examiner is obliged to report to the Court as to whether he or she has been able to formulate any proposals for a compromise or scheme of arrangement to rescue the company. Where he or she is not able to do so, the examiner may apply for directions to the Court, and the Court may make such order as it sees fit, including an order for the winding up of the company.

**50** Sections 3(3A) and 3(3B) Companies (Amendment) Act, 1990.

**51** Section 3A Companies (Amendment) Act, 1990.

**52** Section 3B Companies (Amendment) Act, 1990.

**53** Section 5 Companies (Amendment) Act, 1990 as amended.

For the purpose of formulating proposals for a compromise or scheme of arrangement, an examiner may appoint a committee of creditors to assist him or her and may convene meetings of members and/or creditors[54].

The proposals for a compromise or scheme of arrangement must specify the various classes of members and creditors, ensuring that the claims and/or interests of each particular class are treated equally, unless the holder of a particular claim agrees to less favourable treatment. The compromise or scheme of arrangement must also provide for the implementation of the proposals, specify any necessary changes to the management or direction of the company or in the memorandum or articles of association of the company and include such other matters as the examiner deems appropriate. The proposals should also include a statement of the assets and liabilities of the company and describe the estimated financial outcome of a winding up of the company for each class of members and creditors[55].

The proposals as formulated are put to meetings of each class of members and creditors. Along with the notice convening the meeting sent to the creditors and members, a statement must also be sent explaining the effect of the compromise or scheme of arrangement.

The proposals are deemed to have been accepted by a class of creditors when a majority in number representing a majority in value of the claims represented at the meeting have voted in favour of the proposals.

The proposals are then brought before the Court, which decides whether to confirm them (with or without modifications) or reject them. The Court cannot confirm the proposals unless:

- they have been accepted by at least one class of creditors whose interests would be impaired by their implementation;
- they are fair and equitable in relation to any class of members or creditors who have not accepted them and whose interests would be impaired, and;
- they are not unfairly prejudicial to any interested party[56].

At the hearing, any member or creditor whose interests would be impaired by implementation of the proposals is entitled to object to their confirmation on any one of a number of specified grounds.

If the Court confirms the proposals, they are binding on everyone concerned. They are also binding on anyone who is liable for the debts of the company, for example, a guarantor of the company's debts. A guarantor's liability is not affected by the fact that the debt is the subject of a compromise or scheme of arrangement.

Where the Court makes modifications to the proposals which alter them in a fundamental way, further meetings of members and creditors are required.

In circumstances where the Court refuses to accept the proposals, the company will invariably be wound up.

### *4.7.2 Examiners' Liability*

Examiners are personally liable for any contracts entered into in their own name or in the name of the company. However, they are entitled to be indemnified (reimbursed) out of the assets of the company at the discretion of the High Court[57].

**54** Section 21 Companies (Amendment) Act, 1990.

**55** Section 22 Companies (Amendment) Act, 1990.

**56** Section 24(4) Companies (Amendment) Act, 1990 as amended.

**57** Section 13(6) Companies (Amendment) Act, 1990.

#### *4.7.3 Duty, in Certain Circumstances, to Report to the Court on Irregularities*

Where it appears to the Court, on the basis of the independent accountant's report or otherwise, that there is evidence of a substantial disappearance of the company's property that is not adequately accounted for or evidence that other serious irregularities have occurred in relation to the company's affairs, the Court holds a hearing to consider these. Where the Court so directs, an examiner must prepare a report setting out any matters which he or she considers will assist the Court in considering the evidence at the hearing[58].

## 4.8 Examiners' Powers

#### *4.8.1 Power to Dispose of Company Assets*

On appointment of an examiner, the directors of the company retain their functions in relation to its management. However, an examiner is entitled to apply to the Court to seek to have all or any of the directors' powers vested in him or her. In determining whether to accede to such a request, the Court will consider whether it is just and equitable to do so. Where such an order is made an examiner has the power to dispose of the company's assets if the examiner considers that this would facilitate the achievement of his or her objectives. In such circumstances assets which are subject to a security can be disposed of as if they were not subject to the security. However, where assets which are subject to security are disposed of, the holder of the security retains the same priority for payment purposes in respect of any property of the company directly or indirectly representing the property disposed of [59].

#### *4.8.2 Right of Access to Books and Records[60]*

An examiner has the right of access at all reasonable times to the books, accounts and vouchers of the company. He or she has the power to require all officers and agents of the company, including the company's bankers, solicitors and auditors, to make available all documents relating to the company in their custody or power, to attend before the examiner and give sworn evidence and otherwise give all reasonable assistance.

Subsidiary companies incorporated in the State and their auditors are also required to give the examiner of the holding company such information and explanations as the examiner may reasonably require. Where the company has subsidiaries outside the State, the company itself is obliged to take all reasonable steps to obtain such information and explanations for the examiner.

#### *4.8.3 Powers Relating to Meetings[61]*

An examiner has the power to convene, set the agenda for and preside at board meetings of the directors and general meetings of the company and propose resolutions and present reports at such meetings. He or she has the right to be given reasonable notice of, to attend and be heard at, board meetings and general meetings.

#### *4.8.4 Power to Repudiate Contracts[62]*

Where an examiner becomes aware of an act, omission, decision or contract of the company, its officers or anyone else, in relation to the company which is likely, in his or her opinion, to be detrimental to the company or to any interested party, the examiner is entitled to take any steps necessary to halt, prevent or rectify the effect of the activity in question. An examiner may not, however, repudiate a

**58** Section 13A Companies (Amendment) Act, 1990.

**59** Section 11(3) Companies (Amendment) Act, 1990 as amended.

**60** Section 7 Companies (Amendment) Act, 1990.

**61** Section 7(3) Companies (Amendment) Act, 1990.

**62** Section 7 Companies (Amendment) Act 1990 as amended.

contract entered into by the company prior to his or her appointment.

#### *4.8.5 Right to Seek Direction from the Court*

An examiner has the power to apply to the Court for the determination of any question arising in the course of the examinership.

#### *4.8.6 Examiners' Powers Regarding the Return of Improperly Transferred Assets*

An examiner can apply to the High Court for the return of property disposed of by the company if he or she considers that the effect of the disposal was to perpetrate a fraud on the company, its creditors or members. Where the Court is satisfied of this, it may order the return of the property or the proceeds of sale of such items as it sees fit[63].

#### *4.8.7 Remuneration and Expenses*

An examiner is entitled to be paid reasonable remuneration as sanctioned by the Court, along with expenses that have been properly incurred. Liabilities incurred by the company during the protection period which have been certified by the examiner can be treated as expenses properly incurred, but while all other remuneration and expenses are payable in priority to any other claim, such liabilities do not have priority over secured creditors.

#### *4.8.8 Fraudulent and Reckless Trading[64]*

An examiner may institute proceedings against directors or other persons, including shadow directors[65], for fraudulent or reckless trading, seeking to make such persons personally responsible for all or part of the company's debts. Criminal liability can also be imposed on a person found guilty of fraudulent trading.

An officer of the company, such as a director or secretary, can be held personally liable where it appears that, while he or she was an officer, he or she was knowingly a party to the carrying on of the business of the company in a reckless manner. Furthermore, any person, whether an officer or not, can be made personally liable if he or she was knowingly a party to the carrying on of any business of the company with intent to defraud its creditors or for any fraudulent purpose.

An officer is deemed to be knowingly a party to reckless trading where he or she was party to the carrying on of the business and ought to have known that his or her actions or those of the company would cause loss to the creditors. An officer is also deemed to be knowingly a party to reckless trading where he or she was party to the contracting of a debt by the company and did not honestly believe on reasonable grounds that the company would be able to pay the debt when it fell due for payment as well as its other debts.

The High Court has the power to relieve any person of liability in whole or in part where it appears that the person concerned acted honestly and reasonably in relation to the affairs of the company.

#### *4.8.9 Powers under the European Insolvency Regulation*

The European Insolvency Regulation gives examiners appointed in this State the right to exercise their powers in other Member States.

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**63** Section 180(2) Companies Act, 1990.

**64** Sections 297 Companies Act, 1963 as amended and section 297A Companies Act, 1963.

**65** A shadow director is a person, other than a professional advisor, with whose instructions the directors of the company comply.

# 5.0 Penalties Under the Companies Acts

## 5.1 Penalties for Criminal Offences

### Court Imposed Penalties

Under the Companies Acts, provision is made for two types of criminal offence, namely summary and indictable offences. A summary offence is generally of a less serious nature and is tried before a judge only in the District Court. Indictable offences are generally of a more serious nature. Indictable offences can, in the same way as summary offences, be tried in the District Court before a judge only. However, the distinction between a summary offence and an indictable offence is that, due to their more serious nature, indictable offences can also be tried in the Circuit Court i.e. before a judge and jury. Where this course is taken, the indictable offence is said to be prosecuted on indictment.

Where an offence is prosecuted on indictment, the penalties provided for by the law on conviction are generally considerably higher than had the offence been prosecuted summarily.

In general the maximum penalty on conviction:

- of a summary offence under the Companies Acts is €1,904 and/or 12 months imprisonment, and;
- of an indictable offence under the Companies Acts is €12,697 and/or 5 years imprisonment.

However, the Companies Acts also provide for considerably higher sanctions in respect of certain offences e.g. fraudulent trading (€63,487 and/or 7 years imprisonment on conviction on indictment) and market abuse €10 million and/or 10 years imprisonment on conviction on indictment).

## 5.2 Civil Penalties

### Disqualification

In addition to fines and penalties, there are also provisions for other sanctions under the Acts. Persons convicted on indictment of an indictable offence relating to a company or involving fraud or dishonesty are automatically disqualified from acting as company directors/ officers (see Appendix B to Information Book 2 – Company Directors).

The Director of Corporate Enforcement can also apply to the Courts seeking the disqualification of any person:

- guilty of two or more offences of failing to maintain proper books of account, or;
- guilty of three or more defaults under the Companies Acts.

### Restriction

The provisions relating to the restriction of company directors apply to insolvent companies i.e. companies that are unable to pay their debts as they fall due. Where a company which goes into liquidation or receivership is insolvent, a director of the company who fails to satisfy the High Court that he or she has acted honestly and responsibly will be restricted for a period of up to five years.

Such a restriction prevents a person from being a director or secretary or being involved in the formation or promotion of any company unless it is adequately capitalised. In the case of a private company, the capital requirement is €63,487 in allotted paid up share capital, and in the case of a public company, €317,435. Such a company is also subject to stricter rules in relation to capital maintenance. The topic of restriction is dealt with in detail in Appendix B to Information Book 2 – Company Directors.

### Strike Off

Where a company defaults in performing certain of its legal obligations e.g. fails to file an annual return with the Registrar of Companies, the Registrar can strike the company off the register of companies.

If struck off the register, ownership of a company's assets automatically transfers to the State. Ownership will remain with the State until such time as the company is restored to the register. While struck off, the liability of every director, officer and member of the company continues and may be enforced as though the company had not been dissolved[66].

The procedures required to have a company reinstated to the register are dealt with in Appendix A to Information Book 1 – Companies.

**66** Section 12B(1) Companies (Amendment) Act, 1982.

## 6.0 Useful Addresses

**Office of the Director of Corporate Enforcement**

16 Parnell Square
Dublin 1

Tel: 01 858 5800
Web: *www.odce.ie*

**Companies Registration Office**

14 Parnell Square
Dublin 1

&

O'Brien Road
Carlow

Tel: 01 804 5200
Web: *www.cro.ie*

**Department of Jobs, Enterprise & Innovation**

Kildare Street
Dublin 2

Tel: 01 631 2121
Web: *www.djei.ie*

**Company Law Review Group**

Earlsfort Centre
Hatch Street Lower
Dublin 2

Tel: 01 631 2763
Web: *www.clrg.org*

**Basis**

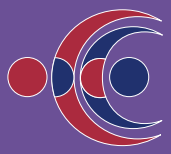
*Business Access to State Information & Services*

Web: *www.basis.ie*

**Irish Auditing & Accounting Supervisory Authority**

Willow House
Millennium Park
Naas
Co. Kildare

Tel: 045 983600
Web: *www.iaasa.ie*



Oifig an Stiúrthóra um
Fhorfheidhmiú Corparáideach

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*Tá leagan Gaeilge den leabhrán seo ar fáil*
*An Irish version of this booklet is available*