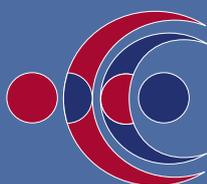
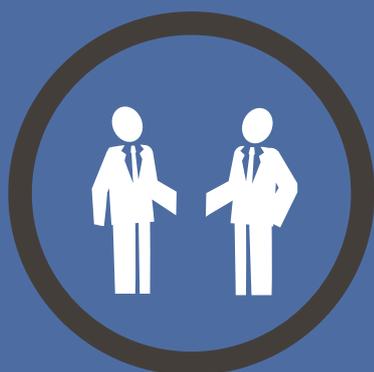


The Principal Duties and Powers of

Creditors

under the Companies Act



Oifig an Stiúirthóra um
Fhorfheidhmiú Corparáideach

Office of the Director
of Corporate Enforcement



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1.0 Introduction

The Companies Act 2014 brought about some of the most significant changes in company law in fifty years. It created new forms of company, and introduced a number of changes to the roles of various parties in company law.

The Office of the Director of Corporate Enforcement (ODCE) in furtherance of its remit to encourage compliance with company law, has historically issued a range of Information Books outlining the main roles and responsibilities of some of the key parties in company law, to assist non-professionals who aspire to be better informed about their rights and obligations under the law.

These Information Books were first issued in November 2001, and the current edition represents the third major rewrite of these publications since their first publication. The current edition reflects the law as at the passing of the Companies Act 2014. The books are 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 and 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 Companies Act.

Each book has been prepared for use by a non-professional audience in order to make the main requirements of company law 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 when 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
May 2015**



2.0 Principal Powers of Creditors

2.1 What is a Creditor

A creditor of a company is a person or company that is owed money (a debt) by the company. Broadly speaking, there are two types of creditor, namely: secured and unsecured. Whether a debt is secured or unsecured determines how a creditor can collect that debt.

- **Secured creditor:** a secured creditor is a creditor that has a claim over some of the borrower's assets. For example, a financial institution which lends money to a company to purchase premises will usually require the deeds to the premises to be given as security for the loan. A secured creditor may, as part of the loan agreement, also reserve the right to appoint a receiver where its debt is not repaid. A receiver's task is to sell, or otherwise dispose of the secured asset(s) with a view to repaying the debt.
- **Unsecured creditor:** an unsecured creditor is a creditor that is owed money and does not have any claim over the company's assets. An unsecured creditor takes on more risk than a secured creditor and in the event that the company cannot pay its debts, secured creditors will be paid before unsecured creditors.

2.2 Creditors' Powers

The most significant power that creditors have under the Companies Act is to seek to have the company liquidated (i.e. legally dissolved). In addition to liquidation and receivership, creditors have various other powers to address defaults in the operation of a company. Details of these powers are set out below.

2.2.1 Creditors' Powers to Appoint a Liquidator

A company can be wound up in two ways which involve the creditors, namely; by order of the Court and by way of a creditors' voluntary liquidation.

By Order of the Court¹

A creditor can petition the Court² for the winding up of a company where it is unable to pay its debts³. A company is deemed to be unable to pay its debts where:

- a creditor has not been paid a debt of €10,000 or more within three weeks of a written demand; or
- two or more creditors have not been paid debts exceeding €20,000 or more within three weeks of a written demand; or
- where a Court judgment is unsatisfied; or
- where it is otherwise proved to the satisfaction of the Court that the company is unable to pay its debts.

¹ Section 572 Companies Act.

² Section 571 Companies Act.

³ Section 570 Companies Act.



Where a company disputes in good faith that the debt is due and owing to the creditor, the petition will be adjourned pending determination of the validity of the debt. In order to have the petition dismissed, the company must establish that there is no liability in respect of the debt. The Court also has an inherent jurisdiction to refuse relief where it considers the application to be an abuse of its process, such as using the petition as a method of debt collection.

Creditors' Voluntary Liquidation⁴

Where the members of a company in general meeting resolve that the company cannot by reason of its liabilities continue its business, and that it be wound up voluntarily, a liquidator should be appointed at a members' meeting and the company should call a meeting of its creditors for the day on which or the day after the winding up resolution is proposed.

In preparing for the meeting of creditors, the company directors must:

- advertise notice of the creditors' meeting in at least two daily newspapers and give ten days' notice to the creditors;
- prepare a full statement of the position of the company's affairs, together with a list of its creditors and the estimated amount of their claim;
- nominate a director to preside over the creditors' meeting and present the statement of affairs to the creditors' meeting.

The nominated director presiding over the meeting will generally outline the reasons for the failure of the company and answer questions.

The creditors may at the creditors' meeting nominate a person to be liquidator of the company and where that nominee is a different person than the company's nominee, the person nominated by the creditors will be liquidator⁵. The creditors' at a meeting may also appoint a "Committee of Inspection" and appoint not more than five persons⁶ to the committee.

Creditors' participation in the liquidation process, where a company is in insolvent liquidation, is outlined in Appendix A.

2.2.2 Creditors' Powers to Appoint a Receiver

Where a company is in default in paying a secured creditor, the secured creditor may seek to have a receiver appointed to the company, either pursuant to powers contained in the debenture (loan agreement) relating to the debt in question or by making application to the High Court as appropriate. See Information Book 7 for further detail on Receivers.

2.2.3 Creditors' Powers to Seek the Appointment of an Examiner

Examinership is a process whereby the protection of the Court is obtained to assist the survival of a company. Essentially, examinership protects the company from its creditors for a period of 70 days and allows the company to restructure with the approval of the Court⁷.

The topic of Examinerships is dealt with in more detail in Information Book 7.

⁴ Sections 585-588 Companies Act.

⁵ Section 588(2)(a) Companies Act.

⁶ Section 667 Companies Act.

⁷ Section 520 Companies Act.



A creditor can apply to the Court⁸ for the appointment of an examiner where it appears that:

- a company is, or is likely to be, unable to pay its debts; and
- no resolution exists for the winding up of the company; and
- no order has been made for the winding up of the company; 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 concern⁹.

Creditors' participation in the examinership process is outlined in Appendix B.

2.2.4 Creditors' Powers to Seek Court Judgments in Respect of Debts Owed

Where a company fails to pay a debt owing to a creditor, the creditor can seek a court judgment against the company, which may thereafter be enforced by a number of methods including registration in the Court and collection by the Sheriff.

2.2.5 Creditors' Powers where Default Exists¹⁰

Where a company or any of its officers is in default in complying with any provision of the Companies Act, a creditor can serve a notice requiring the default to be made good within fourteen days. If the company or officer fails to make good the default, the creditor can apply to the Court for an order directing the company or officer to make good the default.

2.2.6 Creditors' Powers to Seek an Investigation of a Company¹¹

A creditor of the company can apply to the Court for the appointment of one or more Inspectors to investigate and report on the affairs of a company. Where the Court appoints Inspector(s), it specifies the precise matters to be enquired into. Where a creditor makes such an application, the Court may require the applicant to give security for payment of the costs of the investigation.

Inspectors appointed under this section take their directions from, and report to, the Court.

2.2.7 Creditors' Powers where a Company is not in Liquidation¹²

Where it is proven to the satisfaction of the Court that:

- a company is unable to pay its debts; or
- creditors of the company have obtained a favourable Court judgment or decree or order for a debt which in execution is returned unsatisfied in whole or in part;

and, in either case, it appears to the Court that the reason or the principal reason for the company not being wound up is the insufficiency of its assets, the creditors can apply to the Court for the exercise of a number of powers.

⁸ Section 510 Companies Act.

⁹ Section 509(2) Companies Act.

¹⁰ Section 797 Companies Act.

¹¹ Section 747 Companies Act.

¹² Section 567 Companies Act.



Creditors can apply to the Court for various reliefs, including:

- (a) an order directing that a related company contribute to the assets of the company being wound up;
- (b) an order for the return of assets which have been improperly transferred;
- (c) the imposition of personal liability on officers where adequate accounting records were not kept by the company;
- (d) the imposition of personal liability on officers for fraudulent or reckless trading;
- (e) the assessment of damages against certain persons for wrongdoing;
- (f) inspection of books by creditors and contributories of the company;
- (g) the examination of any officer or any other person capable of giving information on oath relating to the promotion or formation, dealing or trade, affairs or property, of the company; and
- (h) arrest and seizure on proof of probable cause that a contributory, director, secretary or other officer of the company is about to quit the State.

2.2.8 Creditors' Power to Seek the Restoration of a Company to the Register¹³

Where a company has been struck off the register of companies, a creditor can apply to the Circuit Court for an order restoring the company to the register, so that it can proceed against the company. Where a company is restored in this manner, the company is deemed to have continued in existence as though it had not been struck off.

¹³ Section 738 Companies Act.



3.0 Penalties Under the Companies Act

3.1 Penalties for Criminal Offences

Court Imposed Penalties

Under the Companies Act, 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.

Under Section 871 of the Companies Act, a person guilty of an offence under the Companies Act that is stated to be a category 1 offence shall be liable:

- on summary conviction, to a class A¹⁴ fine or imprisonment for a term not exceeding 12 months or both; or
- on conviction on indictment to a fine not exceeding €500,000 or imprisonment for a term not exceeding 10 years or both.

In general, a person guilty of an offence under the Companies Act that is stated to be a category 2 offence shall be liable:

- on summary conviction, to a class A fine or imprisonment for a term not exceeding 12 months or both; or
- on conviction on indictment to a fine not exceeding €50,000 or imprisonment for a term not exceeding 5 years or both.

A person guilty of an offence under the Companies Act that is stated to be a category 3 offence will be liable on summary conviction to a class A fine or imprisonment for a term not exceeding 6 months or both.

A person guilty of an offence under the Companies Act that is stated to be a category 4 offence will be liable on summary conviction to a class A fine.

The Court in which a conviction for an offence under the Companies Act is affirmed or recorded may order the person convicted to remedy the breach¹⁵.

However, the Companies Act also provides for considerably higher sanctions in relation to certain offences, such as:

- Transparency Directive¹⁶ – a fine of up to €1 million and/or 5 years imprisonment on conviction on indictment under transparency (regulated markets) law¹⁷;

¹⁴ “Class A fine” at the date of publication means a fine not exceeding €5,000 (Source: Fines Act 2010).

¹⁵ Section 872 Companies Act.

¹⁶ Transparency (Directive 2004/109/EC) Regulations 2007 – S.I. No. 277 of 2007.

¹⁷ Section 1382 Companies Act.



- Prospectus Directive¹⁸ – a fine of up to €1 million and/or 5 years imprisonment on conviction on indictment under Irish Prospectus Law¹⁹;
- Market Abuse Directive²⁰ – a fine of up to €10 million and/or 10 years imprisonment on conviction on indictment under Irish market abuse law²¹.

3.2 Civil Penalties

Disqualification

In addition to fines and penalties for criminal offences, there are also provisions for other sanctions under the Companies Act, such as disqualification and restriction.

Disqualification means a person being disqualified from being appointed or acting as a director or other officer, statutory auditor, receiver, liquidator or examiner or being in any way, whether directly or indirectly, concerned or taking part in the promotion, formation or management of any company²².

A person can be disqualified by way of:

- (a) Disqualification Order by the court; or
- (b) Accepting a Disqualification Undertaking – whereby the person submits to being subject to disqualification, by accepting and signing a prescribed disqualification undertaking.

Automatic Disqualification²³

A person is automatically disqualified by the court, if that person is convicted on indictment of:

- any offence under the Companies Act or any other enactment in relation to a company as prescribed; or
- any offence involving fraud or dishonesty.

A person disqualified by the court is subject to a disqualification order for a period of 5 years or other period as specified by the court. The court is obliged to send details of the disqualification order to the Registrar of Companies so that the details supplied are included in the public register of disqualified persons²⁴.

The Director of Corporate Enforcement can also apply to the Courts seeking the disqualification of any person on a number of grounds²⁵ including:

- guilty of two or more offences in relation to accounting records offences (section 286);
- guilty of persistent defaults under the Companies Act;
- guilty of fraudulent or reckless trading while an officer of a company.

¹⁸ Prospectus (Directive 2003/71/EC) Regulations 2005 – S.I. No. 324 of 2005.

¹⁹ Section 1356 Companies Act.

²⁰ Market Abuse (Directive 2003/6/EC) Regulations 2005 – S.I. No. 342 of 2005.

²¹ Section 1368 Companies Act.

²² Section 838 Companies Act.

²³ Section 839 Companies Act.

²⁴ Sections 863 & 864 Companies Act.

²⁵ Section 842 Companies Act.



Disqualification Undertaking²⁶

This is a new administrative procedure that provides a person (where the Director is of the opinion that certain circumstances in relation to a person apply) with an option to submit to a disqualification without the need for a court hearing. This procedure can be availed of where the Director has reasonable grounds for believing that one or more of the circumstances specified in section 842(a) to(i) of the Companies Act applies to the person²⁷. The Director of Corporate Enforcement may, at his discretion, offer the person an opportunity to submit to a disqualification. Where the person submits to a “disqualification undertaking” and returns the disqualification acceptance document duly signed to the Director, they are deemed to be a disqualified person. The Director is obliged to send details of the disqualification to the Registrar of Companies, for inclusion in the public register of disqualified persons²⁸.

Restriction

The provisions relating to the restriction of company directors²⁹ apply to insolvent companies, i.e. companies that are unable to pay their debts³⁰ as they fall due. Where a company which goes into liquidation or receivership and is insolvent, a director of the company who fails to satisfy the Director of Corporate Enforcement or the Court that he or she has acted honestly and responsibly may be restricted for a period of up to five years.

Restriction Undertaking³¹

This is a new administrative procedure that provides the person with an opportunity to submit to a restriction without the need for a court hearing. The Director may, at his discretion, offer the director of an insolvent company an opportunity to submit to be restricted. The offer will include the circumstances, facts and allegations leading to the Director forming the belief that restriction is appropriate.

Where the person accepts the restriction, and returns the restriction acceptance document, duly signed, the Director will send details of the “restriction undertaking” to the Registrar of Companies, for inclusion in the register of restricted persons³².

Such a restriction prevents a person from being appointed or acting in any way, directly or indirectly as a director or secretary or being involved in the formation or promotion of any company unless it is adequately capitalised³³. In the case of a public limited company (other than an investment company), the capital requirement is €500,000 in allotted paid up share capital, and in the case of any other company, the capital requirement is €100,000. Such a company is also subject to stricter rules in relation to capital maintenance.

A person who continues in office as a director of a company on the restriction taking place without the company being adequately capitalised, will be deemed, without proof of anything more to have contravened the Companies Act and will be automatically disqualified as a director. The topic of restriction is dealt with in detail in Appendix B to Information Book 2.

²⁶ Section 849 Companies Act.

²⁷ These are the circumstances which if the court were satisfied that they applied would result in a disqualification order, and are set out in section 862 Companies Act.

²⁸ Section 864 Companies Act.

²⁹ Section 819 & 820 Companies Act.

³⁰ Section 570 Companies Act.

³¹ Section 852 Companies Act.

³² Section 823 Companies Act.

³³ Section 819(3) Companies Act.



A person who acts in relation to any company in a manner or a capacity which they are prohibited by virtue of being (a) subject to a disqualification order, or (b) subject to a declaration of restriction, shall be guilty of a category 2 offence³⁴.

Strike Off³⁵

The Registrar of Companies may give notice of the intention to strike a company off the register on any of the following grounds:

- the company has failed to make an annual return as required; or
- there are no persons recorded as being current directors of the company; or
- the Revenue Commissioners have given notice of the company's failure to deliver a statement of particulars by new companies; or
- the Registrar has reasonable cause to believe that the company is not complying with the requirement to have a director resident in an EEA state or does not hold the requisite bond in the absence of such a director³⁶; or
- the company is being wound up and the Registrar has reasonable cause to believe that no liquidator is acting; or
- the company is being wound up and no returns have been made by the liquidator for a period of 6 consecutive months.

If a company is 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 enforced³⁷ as though the company had not been dissolved.

The procedures required to have a company reinstated to the register are dealt with in Appendix A to Information Book 1 – Companies. Specific and detailed information on restoring a company to the Register is available on the CRO website – www.cro.ie

³⁴ Section 855 Companies Act.

³⁵ Section 725 Companies Act.

³⁶ Section 137 Companies Act.

³⁷ Section 734 Companies Act.

Appendix A

Creditors' Participation in a Liquidation

Where a company is in insolvent liquidation, a creditor has a number of powers available.

- A creditor can apply to the Court for inspection of the books and papers of the company³⁸.
- A creditor can apply to the Court for an examination of the officers of the company under oath in relation to the affairs of the company³⁹.
- A creditor can apply to the Court for an order that a director or other officer of the company not reduce his or her assets within the State below an amount specified by the Court where the creditor has a substantive cause of action against the director, other officer or company and there are grounds for believing that the director or other officer may remove or dispose of his or her or the company's assets with a view to evading his or her or the company's obligations and frustrating an order of the Court⁴⁰.
- A creditor can apply to the Court for the arrest of a contributory to the assets of the company, director, shadow director, secretary or other officer of a company and for the seizure of his or her books, papers and movable property where it has probable cause for believing that person is about to abscond or to remove or conceal any of his or her property for the purpose of evading payment of calls or avoiding examination about the affairs of the company⁴¹.
- Where there is a shortfall of available assets, a creditor may apply to the Court for an order directing that a related company contribute to the assets of the company being wound up⁴².
- A creditor can apply to the Court for the return of property disposed of by the company if it 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 fit⁴³.
- A creditor may institute proceedings against directors or other persons for fraudulent or reckless trading, seeking to have such persons made personally responsible for all or part of the company's debts⁴⁴. Criminal liability can also be imposed on a person found guilty of fraudulent trading⁴⁵.
- Where, in the course of a winding up of a company, it appears that any person who has taken part in the formation or promotion of the company, or any past or present officer, liquidator, provisional liquidator, receiver or examiner has misapplied or wrongfully retained or become liable or accountable for any money or property of the company or has been guilty of negligence or misfeasance (wrongdoing) or other breach of duty or trust in relation to the company, it is possible for a creditor to institute misfeasance proceedings for recovery of such money⁴⁶.
- A creditor can also apply to impose personal liability on a director where the company has not kept adequate accounting records⁴⁷.

³⁸ Section 684 Companies Act.

³⁹ Section 671 Companies Act.

⁴⁰ Section 798 Companies Act.

⁴¹ Section 675 Companies Act.

⁴² Section 599 Companies Act.

⁴³ Section 443 Companies Act.

⁴⁴ Section 610 Companies Act.

⁴⁵ Sections 722 Companies Act.

⁴⁶ Section 612 Companies Act.

⁴⁷ Section 609 Companies Act.





Appendix B

Creditors' Participation in an Examinership

Examinership is a process whereby the protection of the Court is obtained to assist the survival of a company. Essentially, Examinership protects the company from its creditors for a period of 70 days and allows the company to restructure with the approval of the Court⁴⁸. Where the Court is satisfied that the examiner would be unable to report within the timeframe, it may extend the period by not more than 30 days⁴⁹.

The effect of a petition to appoint an examiner means that as long as the company is under the protection of the court the company cannot be wound-up or a receiver cannot be appointed over any part of the company's property. In addition, no attachment or no repossessions can be put into force against the property or effects of the company except with the consent of the examiner.

Right to be Heard

The Court, at the hearing of the petition to appoint an examiner, will hear representations from any creditors who wish to attend. Where an examiner has been appointed to a company, creditors participate in the examination process in a number of ways.

Where the independent experts reports to the court that there is evidence of a substantial disappearance of property of the company or of other serious irregularities in relation to the company, the court will hold a hearing to consider that evidence. The creditors of the company are entitled to appear and be heard at a hearing regarding irregularities⁵⁰.

Appointment of Creditors' Committee⁵¹

An examiner may appoint a committee of creditors to assist in the performance of his or her functions and to transact such business as may be necessary. Such a committee will consist of not more than five members and include the holders of the three largest unsecured claims.

Compromise or Scheme of Arrangement⁵²

An examiner, on appointment by the court, will formulate proposals for a compromise or scheme of arrangements with creditors and members. A copy of the compromise proposals will be given to the creditors committee for an opinion on behalf of creditors.

Where an examiner formulates proposals, they are put to meetings of each class of members and creditors. The compromise proposals are deemed to be accepted by a class of creditors when a majority in number representing a majority in value of the claims represented at the meeting has voted in favour of the proposals.

⁴⁸ Section 520 Companies Act.

⁴⁹ Section 534(3) Companies Act.

⁵⁰ Section 533 Companies Act.

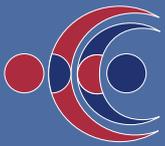
⁵¹ Section 538 Companies Act.

⁵² Section 539 Companies Act.



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

- at least one class of creditors whose interests or claims would be impaired by implementation of the proposals has accepted the proposal, and
- the court is satisfied that the proposals are fair and equitable in relation to any class of members or creditors that has not accepted the proposals and whose interests or claims would be impaired by implementation and the proposals are not unfairly prejudicial to the interests of any interested party.



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