



Oifig an Stiúrthóra um  
Fhorfheidhmiú Corparáideach

Office of the Director  
of Corporate Enforcement

Decision Notice D/2011/1

The Principal Duties and Powers of

# Creditors

under the Companies Acts 1963-2009



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## 1.0 Introduction

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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 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 Powers of Creditors

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### 2.1 What is a Creditor

A creditor of a company is a person or company to whom the company owes a debt. Broadly speaking, there are two types of creditor, namely;

- **Secured creditor:** a secured creditor is a person whose debt is secured on one or more of the company'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. See Information Book 7 – Liquidators, Receivers & Examiners for further information on Receivers.
- **Unsecured creditor:** an unsecured creditor's debt is not secured on any of the company's assets. Accordingly, 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 Acts 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 High Court and by way of a creditors' voluntary liquidation.

##### By Order of the High Court

A creditor can petition the High Court for the winding up of a company where it is unable to pay its debts<sup>1</sup>. A company is deemed to be unable to pay its debts where:

- a creditor has not been paid a debt of €1,269 or more within three weeks of a written demand, or;
- where a Court judgement is unsatisfied, or;
- where it is otherwise proved to the satisfaction of the Court that it is unable to pay its debts<sup>2</sup>.

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 Liquidation

Where the members of a company resolve in general meeting of the company that it (i.e. the company) cannot by reason of its liabilities continue its business and that it should 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<sup>3</sup>.

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1 Section 213 Companies Act, 1963 as amended.  
 2 Section 214 Companies Act, 1963 as amended.  
 3 Section 266 Companies Act, 1963 as amended.

It must advertise this meeting and give ten days notice to the creditors. The directors must prepare a full statement of the position of the company's affairs, a list of its creditors and the estimated amount of their claims. This statement must be presented to the creditors' meeting.

A nominated director will preside at the creditors' meeting and will generally outline reasons for the failure of the company and answer questions. The meeting will consider the statement of affairs prepared by the directors, may appoint a Committee of Inspection<sup>4</sup> and will consider the appointment of a liquidator nominated at the members' meeting and his or her possible replacement. The members' nominee for liquidator will be replaced by a creditors' nominee, if a majority of creditors by value wish to do so.

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 – Liquidators, Receivers & Examiners for further detail on Receivers.

### **2.2.3 Creditors' Powers to Seek the Appointment of an Examiner**

Examinership is a process whereby a company is placed under the 'protection' of the Court. In that context, protection refers to protection from the company's creditors. The topic of examinerships is dealt with in more detail in Information Book 7 – Liquidators, Receivers & Examiners.

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

- a company is, or is likely to be, unable to pay its debts, and;
- there is no winding up (i.e. liquidation) in being, 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<sup>5</sup>.

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

### **2.2.4 Creditors' Powers to Seek Court Judgements in Respect of Debts Owed**

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

### **2.2.5 Creditors' Powers where Default Exists<sup>6</sup>**

Where a company or any of its officers is in default in complying with any provision of the Companies Acts, 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 High 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 Company<sup>7</sup>**

A creditor of the company can apply to the High 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

<sup>4</sup> A Committee of Inspection oversees the liquidator in the discharge of his or her functions. Where a Committee of Inspection is established, it also fixes the remuneration to be paid to the liquidator.

<sup>5</sup> Section 2 Companies (Amendment) Act, 1990.

<sup>6</sup> Section 371 Companies Act 1963.

<sup>7</sup> Section 7 Companies Act, 1990 as amended.

matters to be enquired into. Where a creditor makes such an application, they may be required to give security for payment of the costs of the investigation.

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

### **2.2.7 Creditors' Powers where a Company is not in Liquidation**

Where it is proved to the High Court that a company is unable to pay its debts or where a creditor of the company has obtained a judgment for a debt but has been unsuccessful in attempting to execute it and the company is not in liquidation due to the insufficiency of its assets, creditors can apply to the Court for the exercise of a number of powers which are normally exercised in the context of a liquidation pursuant to section 251 of the 1990 Act.

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

- (a) the inspection of the books and papers of the company;
- (b) the arrest of a contributory<sup>8</sup>, director, shadow director, secretary or other officer of a company and for the seizure of his books, papers and movable property;
- (c) an order directing that a related company contribute to the assets of the insolvent company;
- (d) the return of assets improperly disposed of;
- (e) the imposition of personal liability on a director for fraudulent or reckless trading;
- (f) the assessment of damages for wrongdoing;
- (g) the imposition of personal liability on a director where the company has not maintained proper books;
- (h) the examination of the officers of the company on oath in relation to the affairs of the company.

### **2.2.8 Creditors' Power to Seek the Restoration of a Company to the Register of Companies**

Where a company has been struck off the register of companies for failure to make an annual return or for failure to make a statement of its particulars to the Revenue Commissioners, 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.

Where a company has been struck off the register of companies due to its not carrying on business, a creditor can apply to the High Court for an order restoring the company to the register. The Court will make such an order if it is satisfied that it is just that the company be restored. 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.

<sup>8</sup> A contributory is any person liable to contribute to the assets of a company in the event of its being wound up (section 208 Companies Act, 1963).

## 3.0 Penalties Under the Companies Acts

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### 3.1 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).

### 3.2 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<sup>9</sup> 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.

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<sup>9</sup> A liquidator's function is to collect and realise the assets of the company, to discharge the company's debts, to distribute any remaining surplus, investigate the company's affairs and to legally dissolve the company. The function of a receiver is to dispose of certain assets of the company in order to allow the repayment of a debt to a creditor e.g. a bank. See Information Book 7 for further information on liquidators and receivers.

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<sup>10</sup>.

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

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<sup>10</sup> Section 12B(1) Companies (Amendment) Act, 1982 as amended.

## 4.0 Useful Addresses

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### **Office of the Director of Corporate Enforcement**

16 Parnell Square  
Dublin 1  
Tel: 01 858 5800  
Web: [www.odce.ie](http://www.odce.ie)

### **Companies Registration Office**

14 Parnell Square  
Dublin 1  
&  
O'Brien Road  
Carlow  
Tel: 01 804 5200  
Web: [www.cro.ie](http://www.cro.ie)

### **Department of Jobs, Enterprise & Innovation**

Kildare Street  
Dublin 2  
Tel: 01 631 2121  
Web: [www.djei.ie](http://www.djei.ie)

### **Company Law Review Group**

Earlsfort Centre  
Hatch Street Lower  
Dublin 2  
Tel: 01 631 2763  
Web: [www.clrg.org](http://www.clrg.org)

### **Basis**

*Business Access to State  
Information & Services*  
Web: [www.basis.ie](http://www.basis.ie)

### **Irish Auditing & Accounting Supervisory Authority**

Willow House  
Millennium Park  
Naas  
Co. Kildare  
Tel: 045 983600  
Web: [www.iaasa.ie](http://www.iaasa.ie)

## Appendix A

### Creditors' Participation in a Liquidation

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

- A creditor can apply to the High Court for inspection of the books and papers of the company<sup>11</sup>.
- A creditor can apply to the High Court for an examination of the officers of the company under oath in relation to the affairs of the company<sup>12</sup>.
- 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 Court<sup>13</sup>.
- 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 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 company<sup>14</sup>.
- 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 up<sup>15</sup>.
- 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 fit<sup>16</sup>.
- 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 debts<sup>17</sup>. Criminal liability can also be imposed on a person found guilty of fraudulent trading<sup>18</sup>.
- 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, receiver or examiner has misapplied or wrongfully received money or is accountable to the company or has been guilty of negligence or misfeasance (wrongdoing) for which they are answerable to the company, it is possible for a creditor to institute misfeasance proceedings for recovery of such money<sup>19</sup>.
- A creditor can also apply to impose personal liability on a director where the company has not maintained proper books<sup>20</sup>.

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11 Section 243 Companies Act, 1963 as amended.

12 Section 245 Companies Act, 1963 and section 282B Companies Act, 1963.

13 Section 55 Company Law Enforcement Act, 2001.

14 Section 46 Company Law Enforcement Act, 2001 and section 282D Companies Act, 1963.

15 Section 140 Companies Act, 1990.

16 Section 139 Companies Act, 1990.

17 Section 297A Companies Act, 1963.

18 Section 297 Companies Act, 1963 as amended.

19 Section 298 Companies Act, 1963 as amended.

20 Section 204 Companies Act, 1990.

## Appendix B

### Creditors' Participation in an Examinership

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Examinership is a process whereby a company is placed under the 'protection' of the Court. In this context, protection refers to protection from the company's creditors. The topic of examinership is dealt with in more detail in Information Book 7 – Liquidators, Receivers & Examiners.

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.

On appointment by the Court, an examiner attempts to formulate proposals for a compromise or 'scheme of arrangement'. For the purpose of formulating such proposals, an examiner may appoint a committee of creditors to assist him and may convene meetings of creditors.

Where an examiner formulates proposals, they are put to meetings of each class of members and creditors. They 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 have voted in favour of the proposals.

The proposals are then brought before the Court, which decides whether to confirm the proposals (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.





Oifig an Stiúrthóra um  
Fhorfheidhmiú Corparáideach  
Office of the Director  
of Corporate Enforcement

*For Further Information contact:*

✉ **Office of the Director of Corporate Enforcement**

16 Parnell Square

Dublin 1

Ireland

☎ 01 858 5800

Lo-call 1890 315 015

☎ 01 858 5801

@ info@odce.ie

🌐 www.odce.ie

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