LIQUIDATORS, RECEIVERS & EXAMINERS

CEA

Údarás Forfheidhmithe Corparáideach
Corporate Enforcement Authority

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1.0 Introduction

The Companies Act 2014 (hereafter 'The Companies Act') consolidated and amended the previous Companies Acts. It created new forms of company and introduced a number of changes to the roles of various parties in company law.

The Company Law Enforcement Act 2001 established the Office of the Director of Corporate Enforcement (ODCE), and its functions were carried over by the Companies Act. The Companies (Corporate Enforcement Authority) Act 2021 has established the Corporate Enforcement Authority ('The Authority') and it will now enforce company law in Ireland.

One of the functions of the Authority is to encourage compliance with company law. Accordingly, the Authority will issue a series of Information Books outlining the main roles and responsibilities of some of the key actors in company law; as well as to assist non-professionals in being better informed about their rights and obligations under the law.

The CEA Information Books concern the following topics:

Information Book 1 – A Single Guide for Companies
Information Book 2 – Companies
Information Book 3 – Company Directors
Information Book 4 – Company Secretaries
Information Book 5 – Members and Shareholders
Information Book 6 – Auditors
Information Book 7 – Creditors
Information Book 8 – 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.

The Authority 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.

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

The Authority reiterates that this guidance cannot be construed as offering its interpretation of the legal effects of the relevant provisions of the Companies Act.

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.

Corporate Enforcement Authority
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2.0 Principal Duties and Powers of Liquidators

2.1 What is Liquidation

Liquidation is the process by which a company is brought to a legal end and the assets of the company are redistributed. 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. **The various types of liquidation are explained in detail in Section 2.10 of this book.**

2.2 What is a Liquidator

A liquidator is a person appointed to conduct a winding-up of a company. The main legislative provisions concerning liquidators are set out in Part 11 Chapter 8 of the Companies Act 2014.

2.3 Qualifications for Appointment as a Liquidator[1]

A person, in order to qualify for appointment as a liquidator of a company, must fall within one of the five qualifying categories set out in the Table to Section 633 of the Companies Act 2014. The five qualifying categories are briefly listed below:

- **Category 1**
  The person must be a member of a prescribed accountancy body and hold a current practicing certificate from that body and is not prohibited by the rules of that body from acting as a liquidator.
- **Category 2**
  The person must be a practicing solicitor and hold a current practicing certificate from the Law Society of Ireland under the Solicitors Acts 1954 to 2002 and is not prohibited from acting as a liquidator.
- **Category 3**
  The person is a member of a professional body recognised by the Irish Auditing and Accounting Supervisory Authority (IAASA) and, is authorised for the time being by that professional body to pursue the activity and is not prohibited by the rules of that body from acting as a liquidator.
- **Category 4**
  The person qualified under the laws of another EEA state to act as a liquidator in insolvency proceedings and the qualifications held entitles him or her to act as a liquidator in the State.
- **Category 5**
  The person has practical experience of winding-up a company, has knowledge of the relevant law, and was authorised by IAASA (within 30 months after the commencement of section 633 of the Companies Act), in consultation with the Authority, to be authorised as a fit and proper person to act as a liquidator.

In addition, the person must have in place indemnity against losses and claims that may arise.

1. Section 633 Companies Act.

2.3.1 Ineligible for Appointment as a Liquidator[2]

The following persons are ineligible for appointment as liquidator of a company:

- a person who is an officer or employee of the company or who held those positions within 24 months of the commencement of the winding-up of the company;
- a parent, spouse, civil partner, brother, sister or child of an officer of the company, (except with the leave of the Court);
- a person who is a partner or in the employment of an officer or employee of the company;
- a person who is an undischarged bankrupt;
- a person who is not qualified for appointment as liquidator because of a link with a subsidiary or holding company or otherwise connected to the company being liquidated;
- a person who is the subject of a disqualification order.

2.4 The Principal Role and Duties of Liquidators

The general role of both voluntary and Court appointed (official) liquidators are the same, in that, both are involved in presiding over the winding-up of a company. A voluntary liquidator is an agent of the company, while a Court appointed liquidator is, in addition, an officer of the Court and takes his or her instructions from the Court.

2.4.1 Duty to Administer and Distribute the Company's Property[3]

A liquidator has a duty to administer and distribute the property[4] of the company to which he or she is appointed. This includes ascertaining the extent of the property of the company and as appropriate:

- the collection and gathering in of the company's property;
- the realisation of such property; and
- the distribution of such property

in accordance with law.

The main duties of a liquidator are to:

- take possession of the seal, books and records of the company, and all the property to which the company is, or appears to be, entitled[5];
- 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 and in accordance with Section 617 Companies Act 2014; and
- distribute any remaining surplus amongst the members in accordance with their respective entitlements.

2. Section 635 Companies Act.
3. Section 624 Companies Act.
4. Section 559 Companies Act – Interpretation – "property" means all real and personal property, and includes any right of action by the company or liquidator under the provisions of the Companies Act or any other legislation.
5. Section 596 Companies Act.

2.4.2 Meetings and Dissolution

In a voluntary winding-up (see Section 2.10 for an explanation of a voluntary winding-up) the liquidator may call meetings, including a general meeting of the company, a creditors' meeting or a meeting of the 'Committee of Inspection[6]' for the purpose of obtaining sanction by resolution or for any other reason which he or she thinks fit to convene such a meeting[7]. Where a members' voluntary winding-up continues for more than twelve months, the liquidator is obliged to call a general meeting of the company after the first anniversary of the winding-up and each subsequent anniversary, and to lay before the meeting an account of his or her acts and dealings and of the conduct of the winding-up during the preceding year[8]. In the case of a creditor's voluntary winding-up the liquidator has a similar obligation to call a meeting of creditors or a Committee of Inspection (if appointed) and lay before the meeting an account of his or her acts and dealings and of the conduct of the winding-up during the preceding year[9]. Where a meeting is not held within the time required, the Authority may direct the liquidator to convene a meeting[10].

Where the affairs of the company are fully wound up, a liquidator must prepare an account of the winding-up showing how the winding-up was conducted and how the property of the company was disposed of. When the account is completed, the liquidator must call a general meeting and, if applicable, a creditors' meeting[11]. The liquidator's report is delivered within seven days of the meeting to the Registrar of Companies and on the expiry of three months after the date of registration of the return the company is deemed to be dissolved.

In an official winding-up (ordered by the Court), meetings are held at the direction of the Court and have effect subject to any directions the Court may give[12]. The liquidator will forward to the registrar a copy certified by the liquidator of every resolution of a meeting of creditors, contributories or members within 14 days of the date of the meeting[13].

The final winding-up by the Court (official liquidation), is in the same manner as a creditors' voluntary winding-up, unless the Court orders otherwise[14]. If the Court is satisfied that the affairs of the company have been completely wound up, the Court will make an order that the company be dissolved from the date of the order.

Disposal of Accounting Records of Company in Winding-Up[15]

A liquidator is required to retain the seal, books and papers of the company for a period of at least six years after the date of the dissolution of the company. Following that timeframe they may then be disposed of as follows:

- in the case of members' voluntary winding-up as the company directs by special resolution; and
- in the case of a winding-up by the Courts or a creditors' voluntary winding-up, by the direction of committee of inspection or where no committee exists by the creditors.

6. A Committee of Inspection is a group representing the interests of creditors, and potentially also having members representing the company. The law relating to committees of inspection is set out in section 666-668 Companies Act.
7. Section 628 Companies Act.
8. Section 680(1) & (2) Companies Act.
9. Section 680(4) & (5) Companies Act.
10. Section 679 Companies Act.
11. Sections 705 & 706 Companies Act.
12. Section 689 Companies Act.
13. Section 696 Companies Act.
14. Section 704(2) Companies Act.
15. Section 707 Companies Act.

2.5 Effect of the Appointment of a Liquidator on the Business and Status of Company

A voluntary winding-up will be deemed to commence from the time of the passing of the resolution for voluntary winding-up[16]. The winding-up of a company by the Court will be deemed to commence at the time of the presentation of the winding-up petition[17]. From the commencement of the winding-up, the company must cease to carry on its business except insofar as may be required for its beneficial winding-up[18]. However, the corporate state and corporate powers of the company will, notwithstanding anything to the contrary in its constitution, continue until it is dissolved.

On the appointment of a liquidator, other than a provisional liquidator, all the powers of the directors of the company cease[19], except so far as;

- in the case of a winding-up by the Court or a creditors' voluntary winding-up, the committee of inspection or, if there is no such committee, the creditors, sanction (in either case, with the approval of the liquidator) the continuance of those powers; or
- in the case of a members' voluntary winding-up, the members in general meeting sanction the continuance of those powers.

Following the appointment of an official liquidator, the Court's permission is required before any legal proceedings can be taken against the company.

Where a company is being wound up, a floating charge on the undertaking or property of the company created in twelve months prior to the date of commencement of the winding-up shall, unless it is proved that the company was solvent immediately after the creation of the charge, be invalid[20].

2.6 Liquidators' Duties to the Corporate Enforcement Authority

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

2.6.1 Duty to Report on Conduct of Directors of Insolvent Companies

In a winding-up of an insolvent company, the liquidator is obliged to provide a report to the Authority on the conduct of its directors and to assist the Authority in carrying out its functions[21].

The liquidator of an insolvent company is also required to make an application to the High Court for the restriction of each of the directors of the company unless the Authority has relieved the liquidator of the obligation to make the application[22]. **The consequences of restriction for directors are dealt with in Appendix B to Information Book 3 – Company Directors.**

The Court may order that the person who is the subject of the declaration should pay the cost of the application and the whole (or so much of them as the court specifies) of the costs and expenses incurred by the applicant in investigating and collecting evidence in respect of those matters[23].

16. Section 590 Companies Act.
17. Section 589(1) Companies Act.
18. Section 677 Companies Act.
19. Section 677(3) Companies Act.
20. Section 597(1) Companies Act.
21. Section 682 Companies Act.
22. Section 683 Companies Act.
23. Section 820 Companies Act.

2.6.2 Liquidators' Duty to Report Criminal Offences

Where it appears to a liquidator during the course of a voluntary winding-up that any past or present officer, or any member, or the company has been guilty of an offence in relation to the company, the liquidator is required to report the matter to the Authority (and the Director of Public Prosecutions). The liquidator is required to furnish the Authority with such information and give to the Authority 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[24].

Similarly, in the case of an official liquidation, where it appears to the Court, in the course of a winding-up by the Court, that any past or present officer, or any member, of the company has been guilty of a criminal offence, the Court can instruct the liquidator to provide the Authority (and the Director of Public Prosecutions) with such information, relating to the matter. Where the liquidator is so instructed, he or she is required to furnish the Authority with such information and give to the Authority 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[25].

2.6.3 Corporate Enforcement Authority Power to Examine Books and Records[26]

Where a company is being wound up or has been dissolved, the Authority may request (setting out the reason) an appropriate person, including a liquidator, to produce to the Authority the books and records for examination, and the appropriate person must comply with the request.

The appropriate person is also required to answer any questions as to the content of the books and records and to give all reasonable assistance to the Authority.

2.7 Liquidators' Filing Duties

Liquidators are required to make certain returns to the Registrar of Companies, some of which have been outlined above. A full list of the returns required to be filed by liquidators and the circumstances can be accessed on the Companies Registration Office website – 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.

24. Section 723 (5) to (8) Companies Act.
25. Section 723 (1) to (4) Companies Act.
26. Section 653 Companies Act.

2.8.1 A Liquidators' Powers

The liquidator[27] has a range of powers, including the power to:

- take into custody and control all of the company's property;
- carry on the business of the company;
- execute all necessary documents on the company's behalf;
- commence legal proceedings;
- sell the assets of the company;
- pay creditors in full or partially by arrangement; and
- generally do all other things necessary for winding-up the affairs of a company and distributing its property.

2.8.2 Powers of a Provisional Liquidator

The powers of a provisional liquidator are defined by the High Court order of appointment. The Court may appoint a liquidator provisionally at any time after the presentation of a winding-up petition and before the first appointment of a liquidator[28].

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[29]

A liquidator has the power to ask the High Court to order an examination. Where an examination is ordered, the Court may examine on oath any person summoned before it 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. The Court may also require a person to produce any accounting records, deed, instrument, or other document or paper relating to the company that are in his or her custody or power. A failure to attend and answer questions under oath, produce documents and/or make a statement is treated as contempt of Court and liable to be punished accordingly, including committal and seizure of assets.

2.9.2 Order for Payment or Delivery of Property and Search and Seizure[30]

Where, in the course of an examination under section 671, it appears to the Court that the person being examined is indebted to the company or has in their control any money, property, books or papers of the company, the Court may order the person to pay, deliver, convey, surrender or transfer to the liquidator such money, property or books.

Where the Court has made an order in relation to a person indebted to the company, the Authority or Liquidator can make an application for a further order to enter, search and seize property of the company found on the premises of a person being examined.

27. Section 627 Companies Act.
28. Section 573 & 624(3) Companies Act.
29. Section 671 Companies Act.
30. Section 672 Companies Act.

2.9.3 Arrest and Seizure

Where it has proof of probable cause for believing that a 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 of avoiding examination about the affairs of the company, on the application of a liquidator or other interested person, the Court can issue an order of 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[31].

2.9.4 Disclaimer of Onerous Contracts

Where a company owns onerous property which is more of a liability than an asset to it (such as, for example, land or property burdened with onerous covenants, stocks or shares or an unprofitable contract), a liquidator may with the leave of the Court disclaim the property[32].

2.9.5 Pooling and Contribution Orders

Where there is a shortfall of available assets, a liquidator may apply to the Court for an order directing that a company that is or has been related to the company being wound-up, (such as a parent or subsidiary company or a company in common ownership) contribute to the assets of the company[33]. Where two or more related companies are being wound up, the liquidator can apply for an order directing that the companies be wound up together as if they were one company and the assets pooled between the creditors of all the companies[34].

2.9.6 Unfair Preference[35]

Where an insolvent company enters into a transaction[36] with a creditor, giving such creditor preference over other creditors of the company and the company commences a winding-up within six months of the deal and the company is insolvent at the date of liquidation, the transaction will be deemed an "unfair preference" and be invalid. Where such a transaction is made in favour of a person connected with the company and the company goes into liquidation within two years of the transaction, such transaction will be deemed to be an unfair preference and be invalid, unless the contrary is shown.

2.9.7 Return of Improperly Transferred Assets[37]

A liquidator can also apply to the 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 deems it just and equitable to do so, it may order the return of the property or the proceeds thereof on such terms or conditions as it thinks fit.

31. Section 675 Companies Act.
32. Section 615 Companies Act.
33. Section 599 Companies Act.
34. Section 600 Companies Act.
35. Section 604 Companies Act.
36. Transaction here means conveyance, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company.
37. Section 608 Companies Act.

2.9.8 Civil Liability for Fraudulent or Reckless Trading[38]

A liquidator may institute proceedings where an officer of the company was knowingly a party to the carrying on of any business of the company in a reckless manner or where any person was knowingly a party to the carrying on of any business of the company with intent to defraud its creditors or for any fraudulent purposes. The Court can declare that such persons are personally responsible, without any limitation of liability, for all or any part of the company's debts or other liabilities of the company. Criminal liability can also be imposed on a person found guilty of fraudulent trading.

An officer is deemed to be knowingly a party to reckless trading if the officer was:

- a party to the carrying on of such business and, having regard to the general knowledge, skill and experience that may reasonably be expected of a person in his or her position, the person ought to have known that his or her actions or those of the company would cause loss to the creditors of the company; or
- a 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 all its other debts[39].

The 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 responsibly in relation to the affairs of the company.

2.9.9 Wrongful Use of Company Property[40]

Where the directors or other officers, including past officers of a company have misapplied or retained or become liable or accountable for any money or property of the company or have wrongfully exercised their lawful authority or have breached their duty of trust to the company, the Court on application by the liquidator can compel the person or persons:

- to repay or restore the money or property or any part of it respectively with interest at such rate as the Court thinks just; or
- to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or other breach of duty or trust as the Court thinks just.

A liquidator can also apply to impose personal liability on a director where the company has not maintained adequate accounting records[41].

2.9.10 Distribution of Assets – Preferential Payments in a Winding-Up[42]

When the assets of the company have been gathered in, a liquidator's function is then to distribute them. In a winding-up, certain payments are ranked in priority and must be paid before all other debts, such as taxes and various payments owed to employees[43]. 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.

38. Section 610 Companies Act.
39. Section 610(3) Companies Act.
40. Section 612 Companies Act.
41. Section 609 Companies Act.
42. Sections 618-621 Companies Act.
43. Section 621 Companies Act.

2.9.11 Powers under the European Insolvency Regulation

The European Insolvency Regulation establishes a European framework for cross-border insolvency proceedings which gives liquidators appointed in this State the right to exercise their powers in other Member States.

2.10 Types of Winding-Up

A company can be wound up either by way of voluntary liquidation or by official liquidation. The main distinction between the two is that an official liquidation is undertaken under the supervision of the High Court (the Court appoints a liquidator to act on its behalf), while 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 Winding-Up (Liquidation)[44]

An essential feature of a members' voluntary liquidation is that the company must be solvent, (i.e. can pay its debts as they fall due) and the members decide to end its existence. The process is commenced in accordance with the Summary Approval Procedure[45] by way of a special resolution in accordance with Section 579 or where the company is of a "fixed duration" or a "specific purpose" company an alternative method is by way of ordinary resolution in accordance with Section 580 of the Companies Act. The meeting must also appoint a liquidator.

A vital element of a members' voluntary winding-up is the "Declaration of Solvency". The directors are under a duty to make an accurate Declaration of Solvency[46]. The declaration must state the total amount of the company's assets and liabilities (within the last three month period) and that a full inquiry into the affairs of the company has been carried out by the declarants (directors) who have formed the opinion that the company will be able to pay its debts and other liabilities within the next twelve month period. The declaration must be drawn up in the correct format and accompanied by a report by a person who is qualified to act as a statutory auditor of the company, who states whether, in his or her opinion, the declaration is not unreasonable[47].

Where a director of a company makes a declaration without having reasonable grounds for the opinion in relation to solvency, the Court, may declare that the director will be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company[48].

Furthermore, where a company has passed a resolution to wind up voluntarily, and the creditors of a company (representing one-fifth in number or value of creditors) are of the opinion that the company is unlikely to be able to pay or discharge its debts and other liabilities, the creditors may apply to the Court for an order that all the provisions of a creditors' voluntary winding apply to the winding-up of the company. Such an application must be made within 30 days of the date on which the resolution for voluntary winding-up has been advertised[49].

44. Section 562 Companies Act.
45. Section 202 Companies Act – (Summary Approval Procedure means the procedure whereby the authority for the carrying on of the restricted activity has been conferred by a special resolution of the company accompanied by a statutory declaration by the directors).
46. Sections 207 & 579 Companies Act.
47. Section 208 Companies Act.
48. Sections 210 & 582(7) Companies Act.
49. Section 582(2) Companies Act.

Creditors' Voluntary Winding-Up (Liquidation)[50]

A company may be wound up voluntarily as a creditors' voluntary winding-up where the following circumstances occur:

- 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 and a creditors meeting is held;
- a members' voluntary liquidation is converted to a creditors' voluntary liquidation (see preceding paragraph); or
- where a declaration in relation to a members' voluntary winding-up is not made in accordance with the relevant provisions of the Companies Act.

In the first set of circumstances as outlined above, a liquidator is usually appointed at the members' meeting[51] and the company calls a meeting of its creditors for the day on, or the day after, the winding-up resolution is proposed. The company must advertise the creditors meeting, once at least in two daily newspapers circulating in the district where the registered office or principal place of business of the company is situated, and give at least ten days' notice.

The notice for the meeting of creditors must:

- include the date, time and location of creditors' meeting;
- state the name and address of the person proposed as liquidator; and
- attach a list of creditors of the company or notify the recipient of his or her entitlements to inspect the list of creditors.

The directors must also prepare a full statement of the position of the company's affairs ('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[52].

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[53].

50. Section 585 Companies Act.
51. Section 587 Companies Act.
52. Section 587(7) Companies Act.
53. Section 666(1)(a) Companies Act.

Winding-Up by Court – Compulsory (Official) Liquidation[54]

The High Court can order the winding-up of a company on various grounds[55], including:

- 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 one year of incorporation or suspends its business for a whole year;
- where the members of the company are all deceased and no longer exist;
- where the company is unable to pay its debts;
- where the Court is of the opinion that it is just and equitable that the company should be wound up;
- 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 the Court is satisfied, on a petition of the Authority, that it is in the public interest that the company should be wound up.

A company is deemed to be unable to pay its debts in a number of circumstances including[56]:

- where a creditor to whom the company is indebted in a sum exceeding €10,000 has served a written demand on the company at its registered office to pay the sum due and the company has for 21 days failed to pay the sum due or to secure or compound for it to the reasonable satisfaction of the creditors; or
- if two or more creditors whom the company is indebted in a sum exceeding €20,000 have served a written demand on the company at its registered office to pay the sum due and the company has for 21 days failed to pay the sum due or to secure or compound for it to the reasonable satisfaction of the creditors; or
- if execution or other process issued on a judgment, decree or order of any Court in favour of a creditor of the company is returned unsatisfied in whole or in part; or
- if it is proven 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. The petition must be advertised. On hearing the petition, the Court may dismiss the petition, or adjourn the hearing or make any interim order, or any other order that it thinks fit but the Court cannot refuse a winding-up order on the ground that the company has no assets.

The Court may appoint a liquidator provisionally at any time after the presentation of the winding-up petition and before the first appointment of a liquidator[57]. Where a Court order is made to wind up a company, a liquidator will be appointed, usually on the nomination of the petitioner or, the Court may appoint a liquidator. The winding-up of a company by the Court is deemed to commence at the time of the presentation of the winding-up petition[58].

54. Section 568 Companies Act.
55. Section 569 Companies Act.
56. Section 570 Companies Act. Different thresholds apply during the Interim period prescribed by the Companies (Miscellaneous Provisions) (COVID-19) Act 2020
57. Section 573 Companies Act.
58. Section 589 Companies Act.

3.0 Principal Duties and Powers of Receivers

3.1 What is a Receiver

A receiver is a person appointed whose function is to receive a debtor's asset for a creditor who has an entitlement over the asset. The main task of a receiver is to take control of those assets that have been mortgaged or charged by the person or company in favour of a lender, to sell such assets and apply the proceeds to discharge the debt owing to the lender. A receiver has power to do, in the State and elsewhere, all things necessary for the attainment of the objectives for which the receiver was appointed[59]. The main legislative provisions concerning receivers are set out in Part 8 of the Companies Act.

3.2 Qualifications of a Receiver[60]

While it is usual that a receiver be a practising and qualified accountant, there is no requirement that a receiver have any specific qualifications. The Companies Act states that certain persons are disqualified from being appointed as a receiver, such as undischarged bankrupts, a body corporate and those who are connected with the company in question including a person who was an officer or employee of the company within twelve months of the commencement of the receivership. Similarly, persons who are the subject of a disqualification order are precluded from acting as receivers.

3.3 Appointment of a Receiver[61]

A receiver can be appointed in either of two ways on foot of the powers contained in a debenture (written loan agreement), or on foot of a Court Order. The status of a receiver will depend upon how he or she has been appointed.

A receiver appointed pursuant to a debenture (loan) is essentially a creature of contract whose status will be determined by the terms contained in the debenture. 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.

A receiver appointed by the Court has the status of an officer of the Court. 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.

59. Section 437 Companies Act.
60. Section 433 Companies Act.
61. Part 8 – Chapter 2 Companies Act.

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[62] of its accuracy (or where the receiver is appointed by instrument a statutory declaration[63]), and submit it to the receiver. This statement must then be sent (within 2 months) 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[64].

3.4 Receivers and Receiver Managers[65]

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 may 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 business. A receiver manager will, in addition to performing his or her 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[66]

A receiver appointed under the powers contained in any instrument may resign, provided that notice of at least 30 days is given to:

- the holders of charges (whether fixed or floating) over all or any part of the property of the company; and
- the company or its liquidator.

A receiver appointed by the Court may resign only with the authority of the Court and on such terms and conditions, if any, as may be specified by the Court.

62. Section 431(2) Companies Act.
63. Section 431(4) Companies Act.
64. Section 430 Companies Act.
65. Definition of receiver/manager is set out in Section 2(9) Companies Act.
66. Section 434 Companies Act.

3.7 Removal of a Receiver[67]

The Court can, on cause shown, remove a receiver of the property of a company and appoint another receiver. Seven days' notice of the proceedings in which such removal is sought must be served on the receiver and on the person who appointed the receiver.

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.

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[68].

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 contracts. Any claims arising from those contracts usually 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[69]. The receiver is however generally entitled to be indemnified (reimbursed) out of the assets of the company in respect of that personal liability[70].

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 may be liable to the debenture holder for damages for negligence.

67. Section 435 Companies Act.
68. Section 444 Companies Act.
69. Section 438(4) Companies Act.
70. Section 438(5) Companies Act.

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[71]. 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 also may be owed 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[72].

A receiver is also required when selling non-cash assets (of the requisite value[73]) to an officer or former officer of the company (by private treaty) to give 14 days' notice of his or her intention to do so to the company's creditors[74].

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, it may be appropriate that trading information after the appointment of a receiver should be given to the company's directors.

3.8.5 Receivers' Filing Duties

A receiver is obliged to send to the Registrar within 30 days of the expiration of (i) the initial period of 6 months, and (ii) each subsequent period of 6 months, and within 30 days of his or her cessation, an abstract in the prescribed form showing 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 receipts and payments during that period[75].

Where a receiver of a company ceases to act, the abstract required to be sent to the Registrar must be accompanied by a statement of opinion by the receiver as to whether the company is solvent. The Registrar is then required to forward the statement of opinion to the Corporate Enforcement Authority[76].

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.

71. Section 439(1) Companies Act.
72. Section 439(2) Companies Act.
73. Section 238(2) Companies Act.
74. Section 439(3) Companies Act.
75. Sections 441 & 430(3) Companies Act.
76. Section 430(4) Companies Act.

3.8.6 Preferential Payments when Receiver Appointed under Floating Charge[77]

Where a receiver is appointed or takes possession of company property on behalf of debenture holders of a company secured by a floating charge, the receiver, when he or she realises such assets, is obliged to make all preferential payments[78] prior to paying all other debts including debenture holder.

3.8.7 Receivers' Duties to the Corporate Enforcement Authority[79]

The Authority can request that a receiver produce for inspection his or her books, either in relation to a particular receivership or in relation to all receiverships undertaken by the receiver and answer questions concerning the content of the books, except where the receivership has concluded more than six years prior to request. 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 Authority. A receiver who fails to comply with this provision is guilty of a category 3 offence.

3.8.8 Receivers' Duty to Report Criminal Offences[80]

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, the receiver is required to report the matter to the Director of Public Prosecutions (DPP) and to provide the DPP with such information as required. Where the receiver reports a matter to the DPP, the receiver will also report the matter to the Corporate Enforcement Authority.

3.8.9 Reporting of Misconduct by Receiver[81]

Where a disciplinary committee or tribunal of a prescribed professional body finds that a member of that body while a receiver has not maintained appropriate records in relation to a receivership or has reasonable grounds for believing the member committed a category 1 or 2 offence during the course of conducting a receivership, the professional body must report the matter to the Authority giving details of the finding or the alleged offence.

Where the prescribed professional body fails to report the matter to the Authority, the body and any officer of the body to whom the failure is attributable, will be guilty of a category 3 offence.

77. Section 440 Companies Act.
78. Section 621 Companies Act.
79. Section 446 Companies Act.
80. Section 447 Companies Act.
81. Section 448 Companies Act.

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[82]. Such an application can also be made by company officers, members, employees, creditors, liquidators and all those who are liable to contribute to the assets of the company in the event of its being wound up.

3.9.3 Receivers' Powers Regarding the Return of Improperly Transferred Assets[83]

A receiver can apply to the High Court for the return of any property of the company disposed of in any way whatsoever where the effect of such disposal was to perpetrate a fraud on the company, its creditors or members. Where the Court deems it just and equitable to do so, it may order the return of the property or the proceeds of sale on such items as it sees fit.

3.9.4 Order to Restrain Directors and Others from Removing Assets[84]

A receiver may apply to the High Court for an order restraining a director or other officer of a company from removing his or her or the company's assets from the State or reducing his or her or the company's assets within or outside the State below an amount specified in the order. The Court may make the order if it is satisfied that:

- the receiver has a qualifying claim (a substantive civil cause of action or right to seek a declaration of personal liability or to claim damages against the director, officer or company); and
- there are grounds for believing that the director or officer, or the company, may remove or dispose of his or her assets or the assets of the company with a view to evading his or her obligations or those of the company and frustrating an order of the Court.

82. Section 438 Companies Act.
83. Section 443 Companies Act.
84. Section 798 Companies Act.

3.9.5 Fraudulent or Reckless Trading[85]

A receiver may institute proceedings where an officer of the company was knowingly a party to the carrying on of any business of the company in a reckless manner or where any person was knowingly a party to the carrying on of any business of the company with intent to defraud its creditors or for any fraudulent purposes. The Court can declare that such persons are personally responsible, without any limitation of liability, for all or any part of the company's debts or other liabilities of the company. Criminal liability can also be imposed on a person found guilty of fraudulent trading.

An officer is deemed to be knowingly a party to reckless trading if the officer was:

- a party to the carrying on of such business and, having regard to the general knowledge, skill and experience that may reasonably be expected of a person in his or her position, the person ought to have known that his or her actions or those of the company would cause loss to the creditors of the company; or
- a 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 all its other debts[86].

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 responsibly in relation to the conduct of the affairs of the company.

3.9.6 Court may End or Limit Receivership on Application of Liquidator[87]

Where a receiver has been appointed in respect of the property of 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.

An examiner cannot be appointed to a company where a receiver has been appointed for a continuous period of at least three days (see Section 4.0)[88].

85. Section 610 Companies Act.
86. Section 610(3) Companies Act.
87. Section 445 Companies Act.
88. Section 512(4) Companies Act.

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[89], to examine the state of a company's affairs and guide it through a restructuring process.

4.2 What is Examinership

Examinership is a process whereby the protection of the Court has been obtained to assist the survival of an insolvent company. Essentially it allows a company with a reasonable prospect of survival "protection from its creditors" for a limited period to restructure the business with the approval of the Court.

4.3 Qualifications of an Examiner[90]

A person is eligible for appointment as an examiner if they are qualified to act as liquidator of a company. The qualifications for appointment as a Liquidator[91] are set out in detail at section 2.3 of this booklet.

4.4 Power of Court to Appoint an Examiner[92]

The Court, on application by petition, may appoint an examiner to a company where it 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. The jurisdiction of a Court to hear a petition is dependent on the size of the company.

A Court may only appoint an examiner where it appears to the Court that:

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

However, the Court will not give a hearing to a petition to appoint an examiner, where a receiver stands appointed to the company for a continuous period of at least 3 days prior to the date of the presentation of the petition[93].

The Court can also appoint an examiner to a related company[94].

89. Small companies, as defined under the Companies Act, may petition the Circuit Court for the appointment of an examiner. All other companies must petition the High Court.
90. Section 519 Companies Act.
91. Section 633 Companies Act.
92. Section 509 Companies Act.
93. Section 512(4) Companies Act.
94. Section 517 Companies Act.

4.5 Petition for Appointment of an Examiner[95]

An application by way of petition to the Court for the appointment of an examiner 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. An application in relation to a credit institution or a holding company of an insurer may only be made by the Central Bank.

The Court may decline to hear a petition where the petitioner or independent expert has failed to disclose all information available to him or her where the petitioner or independent expert has in any other way failed to exercise utmost good faith in the presentation of the petition[96].

The application must be accompanied by the report of an independent expert, who is either the statutory auditor of the company or a person who is qualified to be appointed as an examiner to the company[97]. The report is required to set out relevant information concerning the company, such as names and addresses of officers, as well as a statement of affairs including an opinion in relation to whether any deficiencies between the assets and liabilities of the company have been satisfactorily accounted for.

The report should also include the independent expert's opinion on whether the company and the whole or any part of its undertaking would have a reasonable prospect of survival as a going concern and a statement of the conditions which he or she considers are essential to ensure such survival. The report must give details of the funding required to enable the company to continue trading during the protection period and the source of that funding as well as recommend as to which of the company's liabilities incurred before the presentation of the petition should be paid[98]. At the hearing, the Court is obliged to give each creditor an opportunity to be heard[99]. It will then decide whether to appoint an examiner.

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 expert 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[100].

Notification of Appointment[101]

After the presentation of the petition, notice of the petition in the prescribed form must be sent within three days to the Registrar. The examiner must also publish within 21 days of appointment in *Iris Oifigiúil* and in two daily newspapers, circulating in the district of the registered office or principal place of business of the company, of his or her appointment and the date of that appointment.

95. Section 510 Companies Act.
96. Section 518 Companies Act.
97. Section 511 Companies Act.
98. Section 511 Companies Act.
99. Section 515 Companies Act.
100. Section 513 Companies Act.
101. Section 531 Companies Act.

4.6 Effect of Petition to Appoint Examiner on Creditors and Others[102]

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 when a company is under the protection of the Court are that:

- no proceedings for the winding-up of the company may be commenced or no resolution for the winding-up the company may be passed;
- no receiver can be appointed to any part of the property or undertaking of the company;
- no attachment, sequestration, distress or execution can be put into force against the property or effects of the company, except with the consent of the examiner;
- no action may be taken to realise the whole or any part of a secured claim against the company, except with the consent of the examiner;
- no steps may be taken to repossess goods in the company's possession under any hire-purchase agreement, except with the consent of the examiner;
- no order for relief can be made against the company in respect of complaints as to the conduct of the affairs of the company or the exercise of the powers of the directors prior to the presentation of the petition; and
- no proceeding in relation to the company may be commenced except by leave of the Court.

4.7 Examiners' Duties

4.7.1 Examiners' Duties Regarding the Formulation of Proposals

An examiner will as soon as practicable after he or she is appointed, formulate proposals for a compromise or scheme of arrangement in relation to the company concerned, and perform such other functions as the Court may direct the examiner to perform[103].

The examiner will convene and preside over a meeting of members and separately a meeting of creditors to consider proposals for a compromise or scheme of arrangement in relation to the company. Within thirty five days of his or her appointment, (or such longer period as allowed by the Court[104]) 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 the examiner is unable to secure agreement or formulate proposals for compromise or scheme of arrangement, he or she may apply to the Court for the granting of directions in the matter. The Court may, give such directions or make such order as it deems fit, including, if it considers it just and equitable to do so, an order for the winding-up of the company[105].

An examiner may, and if so directed by the Court, appoint a committee of creditors to assist the examiner in the performance of his or her functions.

102. Section 520 and 534 Companies Act. Different periods of protection are prescribed during the interim period created by the Companies (Miscellaneous Provisions)(Covid-19) Act 2020

103. Section 534 Companies Act.

104. See footnote 102 above

105. Section 535 Companies Act.

The proposals for a compromise or scheme of arrangement[106] in relation to a company must:

- specify each class of members and creditors of the company;
- specify any class of members and creditors whose interests or claims will not be impaired by the proposals;
- specify any class or members and creditors whose interests or claims will be impaired by the proposals;
- provide equal treatment for each claim or interest of a particular class unless the holders of a particular claim or interest agree to less favourable treatment;
- provide for the implementation of proposals;
- if the examiner considers it necessary or desirable to do so to facilitate the survival of the company, and the whole or any part of its undertaking, as a going concern, specify whatever changes should be made in relation to the management or direction of the company;
- if the examiner considers it necessary or desirable to do so to facilitate such survival, specify any changes he or she considers should be made in the constitution of the company, whether as regards the management or direction of the company or otherwise; 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.

Consideration by Members and Creditors of Proposals[107]

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 meeting of creditors, or of 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[108]:

- they have been accepted by at least one class of creditors whose interests would be impaired by their implementation;
- the court is satisfied that 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
- the court is satisfied that the proposals are not unfairly prejudicial to the interests of any interested party.

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[109].

106. Section 539 Companies Act.
107. Section 540 Companies Act.
108. Section 541 Companies Act.
109. Section 543 Companies Act.

If the Court confirms the proposals, they are binding on everyone concerned including all members and creditors[110]. They are also binding on anyone who is liable for the debts of the company, for example, a guarantor of the company's debts. As a general rule, a guarantor's liability is not affected by the fact that the debt is the subject of a compromise or scheme of arrangement[111].

In circumstances where the Court refuses to accept the proposals, the company may be wound up by the Court.

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 Court[112].

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

Where, arising out of the presentation to it of the report of the independent expert or otherwise, it appears to the Court that there is evidence of a substantial disappearance of property of the company concerned that is not adequately accounted for, or of other serious irregularities in relation to the company's affairs having occurred, the Court shall, as soon as it is practicable, hold a hearing to consider that evidence[113].

4.8 Examiners' Powers

4.8.1 Directors' Powers

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' or liquidators 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[114].

4.8.2 Power to Dispose of Company Assets

The Court may also grant an examiner 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[115].

110. Sections 541(6)&(7) Companies Act.
111. Section 547 Companies Act.
112. Section 532(6)&(7) Companies Act.
113. Section 533(1) Companies Act.
114. Section 528 Companies Act.
115. Section 530 Companies Act.

4.8.3 Right of Access to Books and Records[116]

An examiner has the right of access at all reasonable times to the books and documents of the company. All officers and agents of the company, including the company's bankers, solicitors and auditors, must make available to the examiner all documents relating to the company in their custody or power, must attend before the examiner if requested 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.

4.8.4 Powers Relating to Meetings[117]

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.

4.8.5 Power to Repudiate Contracts[118]

An examiner cannot repudiate a contract entered into by the company prior to his or her appointment. However, an examiner may where he or she is of the opinion that the provisions of an agreement entered into by the company, were it to be enforced, would be likely to prejudice the survival of the company, serve notice on the party or parties to the agreement to repudiate the agreement.

4.8.6 Right to Seek Direction from the Court[119]

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

4.8.7 Power of Court to Order Return of Assets Improperly Transferred[120]

An examiner can apply to the 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.

116. Section 526 Companies Act.
117. Section 524(2)&(3) Companies Act.
118. Section 525 Companies Act.
119. Section 524(7) Companies Act.
120. Section 557 Companies Act.

4.8.8 Costs and Remuneration of Examiners[121]

An examiner is entitled to be paid remuneration, costs and reasonable expenses properly incurred as sanctioned by the Court. 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.

4.8.9 Civil Liability for Fraudulent and Reckless Trading[122]

An examiner may institute proceedings where an officer of the company was knowingly a party to the carrying on of any business of the company in a reckless manner or where any person 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. The Court can declare that such persons are personally responsible, without any limitation of liability, for all or any part of the company's debts or other liabilities of the company. Criminal liability can also be imposed on a person found guilty of fraudulent trading.

An officer is deemed to be knowingly a party to reckless trading if the officer was:

- a party to the carrying on of such business and, having regard to the general knowledge, skill and experience that may reasonably be expected of a person in his or her position, the person ought to have known that his or her actions or those of the company would cause loss to the creditors of the company; or
- a 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 all its other debts[123].

The 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 responsibly in relation to the conduct of the affairs of the company.

4.8.10 Powers under the European Insolvency Regulation

The European Insolvency Regulation establishes a European framework for cross-border insolvency proceedings which gives examiners appointed in this State the right to exercise their powers in other Member States.

121. Section 554 Companies Act.
122. Section 610 Companies Act.
123. Section 610(3) Companies Act.

5.0 The Small Companies Administrative Rescue Process

5.1 The Small Companies Administrative Rescue Process (SCARP)

In late 2021 the Companies (Rescue Process for Small and Micro Companies) Act 2021 was commenced. The purpose of the SCARP process is to make available a dedicated rescue process for small and micro companies which are, or which are likely to be, unable to pay their debts[124].

5.1.1 Eligibility to avail of SCARP

Eligible companies are companies which either qualify as small companies[125] or micro companies[126], and meet a number of other eligibility criteria. These are:

- the company is, or is likely to be, unable to pay its debts[127];
- there is no subsisting resolution to wind up the company;
- no order has been made for the winding up of the company;
- the company cannot have appointed an examiner or process adviser in the previous five years; and
- if a receiver has been appointed to the company, the company is eligible only if that receiver has been appointed for a period of less than three working days.

5.1.2 Preparation of a Statement of Affairs and Statutory Declaration

Once a company is eligible, a director must make a full inquiry into the affairs of the eligible company. They must provide a 'Statement of Affairs' detailing the eligible company's assets, debts and liabilities, the names and addresses of the eligible company's creditors, details of company securities and further information if required[128]. The director must also complete a statutory declaration that they have complied with the obligation to conduct this inquiry. These are submitted to the Process Adviser.

124. Section 558B(2)(a) Companies Act
125. Section 280A of the Companies Act
126. Section 280D of the Companies Act
127. Section 558B(3) defines where a company is unable to pay its debts
128. Section 558B (6). It is a Category 2 offence to provide a false or misleading statement in the Statement of Affairs. Part 6 of this Book, entitled 'Penalties Under the Companies Act' outlines the penalties for this offence.

5.1.3 The role of the Process Adviser pre appointment

The Process Adviser is the insolvency practitioner appointed by the company to oversee and run the process and must be qualified to act as a liquidator under Section 633 of the Companies Act 2014. They decide if there is a reasonable prospect of survival of the eligible company, and the whole or any part of its undertaking, as a going concern. They also notify creditors and employees that the company is using the process, prepare a rescue plan and convene and hold creditors' meetings.

In determining whether an eligible company has a reasonable prospect of survival, they must have regard to:

- the Statement of Affairs; and
- a number of other criteria including concerning the future prospects of the company[129].

Once the Process Adviser has made their decision, they must hold a meeting with the directors of the eligible company, telling them their decision and the reasons for it, and give them a copy in writing of their decision and the reasons for it[130].

Once the Process Adviser determines that an eligible company has a reasonable prospect of survival, they must prepare and submit a report to the eligible company. That report must contain information about the company's officers, its creditors, an opinion on assets and liabilities, what the process adviser considers essential for survival regarding internal management and controls within the company, whether a rescue plan would offer a reasonable prospect of survival for the company, whether continuing business is more advantageous to creditors than a winding up, the course any rescue process should take, what funding is needed during the rescue process period and where it should come from, what liabilities of the company incurred before the appointment of the Process Adviser should be paid and other matters.

Once the Process Adviser submits their report to the eligible company stating that the company has a reasonable prospect of survival the directors of the company may, within 7 days, call a meeting of its board of directors at which a resolution to appoint a process adviser shall be proposed and considered.

This passing of a resolution appoints the Process Adviser and formally commences the process.

5.1.4 Powers of the Process Adviser

Process Advisers can[131]:

- convene and preside at meetings of directors and general meetings of eligible companies;
- halt, prevent or rectify certain acts by the eligible company;
- require production of information about the eligible company's affairs from third parties;
- examine officer and agents of eligible companies under oath;
- certify refusal to produce documents, or cooperate, which leads to a court inquiry into the conduct complained of[132];
- apply to court to deal with property over which there is a charge[133]; and
- apply to the relevant court for guidance[134].

129. Section 558C (4) Companies Act
130. Section 558C (5) Companies Act
131. Section 558ZS Companies Act
132. Section 558ZT Companies Act
133. Section 558ZV Companies Act
134. Section 558ZAD Companies Act. Under section 558ZAE such application can he held otherwise than in public

5.1.5 The duties of company directors towards the Process Adviser[135]

Once a Process Adviser is appointed to an eligible company, its directors must co-operate with them, disclose any information relating to the Process Adviser's functions to them, and if a Process Adviser decides an eligible company no longer has a reasonable prospect of survival, to take steps the directors consider appropriate to protect the interests of the employees of the eligible company.

5.1.6. The role of the Process Adviser following appointment

Once a Process Adviser is appointed, they have to fulfil a number of statutory obligations:

- they must decide which court any proceedings should be brought before[136];
- they must notify certain persons and entities of their appointment as a Process Adviser;
- seek information from creditors[137];
- confirm the position regarding 'excludable debts'; The creditor is entitled to object to inclusion on a number of grounds[138]
- they can apply to court to have some contract repudiated[139];
- they can apply to the court if assets have been improperly transferred and seek delivery of the property or payment of a sum in respect of it[140].

5.1.7 The preparation of a Rescue Plan by the Process Adviser

After appointment and within 49 days[141] the Process Adviser must prepare a Rescue Plan[142].

The Rescue Plan has to specify a number of matters[143], including:

- to specify each class of members and creditors of the eligible company;
- to specify any class of members and creditors whose interests will and will not be impaired by the Rescue Plan;
- to provide equal treatment for each claim or interest of a particular class unless otherwise agreed to;
- to specify changes needed to the management or direction of the eligible company;
- it may specify changes to the constitution of the eligible company;
- provide for the implementation of the changes above and a timeframe;
- include in the Rescue Plan other matters the Process Adviser deems appropriate.

If a Process Adviser is unable to prepare a rescue plan[144] they must tell the company why and what should happen next. They must also give notice of this to the employees, members and creditors of the company and notify the Revenue Commissioners.

135. Section 558G Companies Act
136. Section 558H Companies Act
137. Section 558O Companies Act
138. Section 558L (2) and (3) Companies Act
139. Section 558P Companies Act
140. Section 558ZM Companies Act
141. Section 558T (4) Companies Act. This is because the meetings prescribed in 558T must take place on a date no later than 49 days after the date on which the Process Adviser is appointed.
142. Section 558Q (2) Companies Act
143. Section 558Q (6) Companies Act
144. Section 558S Companies Act

5.1.8 Consideration of the Rescue Plan

The Process Adviser must call the appropriate meetings of the creditors (or the class concerned of creditors) and members (or the class concerned of members) to consider the Rescue Plan they have prepared[145] giving them 7 days' notice[146] and providing certain information[147].

The Process Adviser will usually chair the meeting[148] and the meeting may not act for any purpose (except an adjournment) unless certain minimum numbers of members and creditors are present[149]. Members of the eligible company may vote on the Rescue Plan either in person or by proxy[150].

A Rescue Plan will be deemed to have been accepted by a meeting of members or creditors or a class of members or creditors when 60% in number representing a majority in value of the claims represented at that meeting have voted, either in person or by proxy, in favour of the resolution for the Rescue Plan[151].

Where the Rescue Plan is approved, and is not objected to within 21 days by at least one class of creditor who would be impaired by implementing the Rescue Plan, it becomes binding on:

- the eligible company;
- the directors of the eligible company;
- all members or class or classes of members affected by the Rescue Plan;
- all creditors or class or classes of creditors affected by the Rescue Plan.

When the Rescue Plan is approved the Process Adviser must notify the employees of the eligible company, the Revenue Commissioners and any creditor whose claim would be impaired if the Rescue Plan were implemented[152]. This notification must include a copy of the Rescue Plan, a statement explaining the effect of the Rescue Plan and information about how to object to the Rescue Plan[153].

The Rescue Plan, within 48 hours of its approval, has to be lodged with the Registrar of Companies and the office of the relevant court[154]. If the Rescue Plan is approved there is a further 21-day period in which objections may be lodged by creditors. If the Rescue Plan is rejected or an objection is lodged within the 21 days following the approval of the Rescue Plan the matter may be referred to the courts.

145. Section 558T Companies Act
146. Section 558U (2) Companies Act
147. Section 558U (3) Companies Act, these include the Rescue Plan, a statement of assets and liabilities, and a statement by the Process Adviser, information about changes in management or direction specified by the plan, the costs of the Process Adviser etc.
148. Section 558V (2) Companies Act
149. Section 558V (5) Companies Act
150. Section 558W (2) Companies Act. Section 558X contains supplemental provisions in relation to proxies.
151. Section 558Y (4) Companies Act
152. Section 558Z (3) Companies Act
153. Section 558Z (4) Companies Act
154. Section 558Z (5) and (6) Companies Act

5.1.9 The Process Adviser's Report

Within 49 days of their appointment, a Process Adviser must prepare a Report setting out the following[155]:

- the Rescue Plan that was considered at the meetings referred to in 5.1.8 above;
- any changes to the Plan arising from the meeting;
- the outcome of the meetings;
- a statement of the eligible company's assets and liabilities at the date of the Report;
- a list of creditors of the eligible company and information regarding their securities;
- a list of the officers of the eligible company;
- the Process Adviser's recommendations;
- the remuneration and costs of the Process Adviser; and
- other information the Process Adviser thinks appropriate to include in the Report.

The Report must be delivered to the eligible company, its employees, the Corporate Enforcement Authority, the office of the relevant court and any other interested party who requests a copy of the report.

5.1.10 Confirmation of the Rescue Plan[156]

The Rescue Plan becomes binding within the 21 days from the filing of the notice of approval with the office of the relevant court, provided no objection is filed by a creditor or a member within 21 days from the filing of the notice of approval.

5.1.11 Objections to the Rescue Plan

Before a Rescue Plan is confirmed, members or creditors can object to it. They can object on a number of grounds[157] and the Notice of Objection must be sent to the Process Adviser and the officer of the relevant court. This objection will be heard by a court as soon as may be after it receives it.

The Process Adviser must satisfy the relevant court that the objection should not be upheld[158].

The court can either uphold or dismiss the objection[159]. If it upholds the objection it can either modify the Rescue Plan or make certain orders regarding meetings.

5.1.12 The Conclusion of the Rescue Process

The appointment of a Process Adviser ends when:

- a Rescue Plan for the eligible company takes effect;
- where no Rescue Plan is approved at the relevant meeting; or
- the relevant court upholds an objection to the Rescue Plan and no Rescue Plan takes effect[160].

155. Section 558ZA (2) Companies Act
156. Section 558ZB (1) Companies Act
157. Section 558ZC (3) Companies Act
158. Section 558ZD (4) Companies Act
159. Section 558ZD (5) Companies Act
160. Section 558ZK Companies Act

5.2 The Corporate Enforcement Authority and Enforcement generally

5.2.1 The Authority's Power to examine books and records[161]

The Corporate Enforcement Authority can request a process adviser, an officer or a receiver appointed to property of an eligible company to produce books and records to the Authority for examination. If the request is addressed to a Process Adviser it can concern a particular eligible company or all eligible companies where that Process Adviser has so acted.

A person or company of whom the request is made must also answer questions and give the Authority such assistance as they are reasonably able to give. The request cannot concern a rescue process that ended more than six years prior to the date of the request. Failure to comply with these provisions is a category 2 offence.

5.2.2 Reports to the Corporate Enforcement Authority of misconduct[162]

If a disciplinary committee of a prescribed professional body finds that a member of that body acting as a Process Adviser did not maintain appropriate records or has reasonable grounds for suspecting they have committed a category 1 or category 2 offence while so acting, they must report the matter to the Corporate Enforcement Authority immediately.

5.2.3 Prosecution of officers and members of the eligible company[163]

If it appears to the Process Adviser that a past or present officer of the eligible company has committed any offence in relation to the company, they must report it to the Director of Public Prosecutions and the Corporate Enforcement Authority.

5.2.4 Offences

The SCARP Act creates a number of criminal offences:

- Acting as a Process Adviser when unqualified – category 2 offence[164]
- Director of an eligible company concealing or offering misleading information to Process Adviser – category 2 offence[165]

161. Section 558ZN Companies Act. Process Advisers are required to retain papers for six years under section 558ZAH.
162. Section 558ZO Companies Act
163. Section 558ZR Companies Act
164. Section 558ZP Companies Act
165. Section 558ZQ Companies Act

6.0 Penalties Under the Companies Act

6.1 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 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 A[166] 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 breach[167].

166. "Class A fine" at the date of publication means a fine not exceeding €5,000 (Source: Fines Act 2010).
167. Section 872 Companies Act.

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

- Transparency Directive[168] – a fine of up to €1 million and/or 5 years imprisonment on conviction on indictment under transparency (regulated markets) law[169];
- Prospectus Directive[170] – a fine of up to €1 million and/or 5 years imprisonment on conviction on indictment under Irish Prospectus Law[171];
- Market Abuse Directive[172] – a fine of up to €10 million and/or 10 years imprisonment on conviction on indictment under Irish market abuse law[173].

6.2 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 company[174].

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 Disqualification[175]

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 persons[176].

168. Transparency (Directive 2004/109/EC) Regulations 2007 – S.I. No. 277 of 2007.
169. Section 1382 Companies Act.
170. Prospectus (Directive 2003/71/EC) Regulations 2005 – S.I. No. 324 of 2005.
171. Section 1356 Companies Act.
172. Market Abuse (Directive 2014/57/EU) Regulations 2016 – S.I. No. 349 of 2016 (as amended by S.I. No. 11 of 2017 and S.I. No. 375 of 2017).
173. Section 1368 Companies Act.
174. Section 838 Companies Act.
175. Section 839 Companies Act.
176. Sections 863 & 864 Companies Act.

The Authority can also apply to the Courts seeking the disqualification of any person on a number of grounds[177] 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.

Disqualification Undertaking[178]

This is an administrative procedure that provides a person (where the Authority 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 Authority 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 person[179]. The Authority may, at its 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 Authority, they are deemed to be a disqualified person. The Authority is obliged to send details of the disqualification to the Registrar of Companies, for inclusion in the public register of disqualified persons[180].

Restriction

The provisions relating to the restriction of company directors[181] apply to insolvent companies, i.e. companies that are unable to pay their debts[182] 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 Authority or the Court that he or she has acted honestly and responsibly may be restricted for a period of up to five years.

Restriction Undertaking[183]

This is an administrative procedure that provides the person with an opportunity to submit to a restriction without the need for a court hearing. The Authority may, at its 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 Authority forming the belief that restriction is appropriate.

Where the person accepts the restriction, and returns the restriction acceptance document, duly signed, the Authority will send details of the "restriction undertaking" to the Registrar of Companies, for inclusion in the register of restricted persons[184].

177. Section 842 Companies Act.
178. Section 849 Companies Act.
179. 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.
180. Section 864 Companies Act.
181. Section 819 & 820 Companies Act.
182. Section 570 Companies Act.
183. Section 852 Companies Act.
184. Section 823 Companies Act.

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 capitalised[185]. 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 3 – Company Directors.**

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 offence[186].

Strike Off[187]

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 director[188]; 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 enforced[189] 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 2 – Companies. Specific and detailed information on restoring a company to the Register is available on the CRO website – www.cro.ie

185. Section 819(3) Companies Act.
186. Section 855 Companies Act.
187. Section 725 Companies Act.
188. Section 137 Companies Act.
189. Section 734 Companies Act.

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Tá leagan Gaeilge den leabhrán seo ar fáil

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