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CHAPTER 15

Mitigating the Effects of Strike-off  
for Creditors

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## 15.1 Background

- 15.1.1 In 1999 the CRO began an intensive process of enforcing compliance with the requirement of companies to file annual returns. On foot of this process there has been a dramatic improvement in the proportion of companies filing a current annual return – up from 44% (of those due to file) in 1998 to 98% in 2000.<sup>1</sup> One of the main reasons why the rate of compliance has increased so much has been the deterrent effect of strike-off from the register of companies. The CRO has been striking-off the companies register all companies in arrears with their filing requirements. There were approximately 33,000 such strike-offs in 2000.<sup>2</sup> The Review Group examined issues raised as a consequence of strike-off in the light of submissions about the effects of strike-off on creditors. The Revenue Commissioners also drew attention to the difficulties in this regard. The focus of the Review Group was to identify measures that would minimise the effect of strike-off on creditors.
- 15.1.2 In its consideration of the issues involved with regard to strike-off the Review Group had regard to existing relevant provisions of company law which might be utilised by creditors, to the powers conferred on the Director of Corporate Enforcement in the 2001 Act and also to proposed changes in CRO procedures following the enactment of the 2001 Act. These aspects of strike-off are discussed below.

## 15.2 The absence of a State-funded public interest liquidation service

- 15.2.1 The greater use of strike-off can give rise to circumstances which are certainly more problematical for creditors than they would be if there was a State-funded public interest liquidation service in existence. Unlike the UK and a number of other common law jurisdictions Ireland does not have an official receiver or insolvency trustee. The Review Group notes that the McDowell Report recommended against the establishment of such a service. Although the McDowell Report did not set out an analysis on which this conclusion was based, the Group understands that the rationale for recommending against the establishment of such a service was: (a) the cost to the taxpayer of establishing such a service; and (b) that the scale of the Irish economy would not warrant such a service.<sup>3</sup>
- 15.2.2 The Review Group noted that the absence of a State-funded liquidation service meant that specific solutions often have to be devised to particular problems arising which in other jurisdictions are dealt with by an official receiver. For example, within the McDowell Report it had been observed that company directors could avoid personal consequences from the appointment of a liquidator by running the company into debt so that there would be insufficient funds to remunerate a liquidator. Such action would ensure that directors would not run the risk of being brought to task by subsequent court action. On foot of changes to the law implemented by the 2001 Act, as a result of recommendations by this Group, the Director can apply to court to have such persons disqualified<sup>4</sup> from being a director of any other company or to have them made liable for fraudulent or reckless trading.<sup>5</sup>
- 15.2.3 Notwithstanding the enhanced protections provided by establishment of the ODCE and the awarding of substantial powers of investigation and prosecution to the Director, the Review Group considers that the absence of a public liquidation service raises such fundamental and complex issues with regard to the application of company law and the protection of creditors and shareholders that this is an issue which the Review Group believe should be assigned to it for consideration in its second two-year work programme.

1 Current Position at the Companies Registration Office (15 March, 2001), p 2.

2 *ibid.*

3 See 13.4.3.

4 Part 4 of the 2001 Act empowers the Director to apply for to court for the restriction and disqualification of directors.

5 Part 5 of the 2001 Act empowers the Director to apply to court to make persons liable for fraudulent and reckless trading.

### 15.3 Current developments on strike-off

- 15.3.1 The Review Group understands that the CRO wishes to move to a position whereby the strike-off process would be used only in rare cases but would be a powerful deterrent against non-filing of returns. In this context a clear distinction is envisaged between a company that has genuinely ceased to trade without leaving debts and a company that refuses to comply with its statutory responsibilities.
- 15.3.2 While the CRO reserves the right to use the enforcement provisions of the legislation in any manner necessary to meet a changing compliance environment, it proposes to pursue the following procedures on foot of the implementation of the 2001 Act,<sup>6</sup> viz.:
- (i) allow the late filing fee to run for six months;
  - (ii) use the "on-the-spot" fines provisions and prosecutions for any repeat late filings;<sup>7</sup>
  - (iii) commence the strike-off process after six months. The Registrar will also write to the directors at their home address (per CRO records) at the initiation of the strike-off process enclosing a copy of the strike-off notice which is being sent to the company at its registered office.
- 15.3.3 Given the extensive enforcement measures contained in the 2001 Act, the CRO is hopeful that implementation of this procedure will render strike-off for non-filing of annual returns the enforcement weapon of last resort. It should be noted in this regard that the strike-off campaign designed to address the long-standing problem of non-compliance with the obligation to file annual returns with the CRO is almost at an end. The campaign targeted the very large volume of non-compliant companies on the CRO register. For the future, it is envisaged that most strike-offs will arise from requests from the Revenue Commissioners pursuant to s 12A of the 1982 Act.<sup>8</sup> Under s 12A, the Revenue Commissioners can request the Registrar to activate the strike-off process against any company which has failed to deliver a statement to the Revenue pursuant to s 882 of the Taxes Consolidation Act 1997. This requirement was introduced to combat the problem of Irish-registered non-resident companies. The resultant strike-off procedures will not impact to any significant extent on the problems complained of by creditors.
- 15.3.4 Strike-off is also designated as an appropriate enforcement mechanism where a company fails to comply with the requirement (pursuant to s 43 of the 1999 (No 2) Act) to have at least one resident director, or where a company has no director recorded for the time being at the CRO consequent upon a Form B69 being filed pursuant to ss 195(11A) and 195(11B) of the 1963 Act. To date, no companies have been struck off as a result of the foregoing breaches, but, depending upon the level of compliance, it may prove to be necessary in the future to run "strike-off lists" as an enforcement mechanism. The CRO, however, does not expect such lists to contain large numbers of companies.

### 15.4 Legal consequences of strike-off

- 15.4.1 A summary of the law governing strike-off and the legal consequences is set out below.

#### **Strike-off**

- 15.4.2 The Registrar may strike off companies which are not carrying on business<sup>9</sup> and companies which have failed to make an annual return.<sup>10</sup> A further ground for strike-off is the failure to deliver certain information to the Revenue Commissioners<sup>11</sup> under the provisions designed to combat the Irish registered non-resident company problem.

<sup>6</sup> Part 6 of the 2001 Act contains wide-ranging measures to improve compliance with filing obligations.

<sup>7</sup> Section 66 of the 2001 Act enables the Registrar to impose fines for default in the delivery, filing or making of a return or document to the Registrar in accordance with the requirements of the Companies Acts. The section further refers obliquely to prosecutions for "an offence to which this section applies" but does not expressly create an offence of default in delivery; the offence is created in ss 125 and 127 of the 1963 Act as amended by ss 59 and 60 of the 2001 Act.

<sup>8</sup> Inserted by s 46 of the 1999 (No 2) Act.

<sup>9</sup> See s 311 of the 1963 Act as amended by s 11 of the 1982 Act and s 8 of the 1983 Act.

<sup>10</sup> See s 12 of the 1982 Act as amended by the 1999 Act.

<sup>11</sup> See s 12A of the 1982 Act as inserted by s 46 of the 1999 No 2 Act.

Companies can be struck off where they do not have an Irish resident director<sup>12</sup> or for not having any director.<sup>13</sup> The procedure for strike-off involves written notice to the company followed by a notice in *Iris Oifigiúil* giving the company a further month to comply. If the default persists the company will be struck off the register and a notice of strike-off will be published in *Iris Oifigiúil*.<sup>14</sup>

#### **Restoration of a company to the register**

15.4.3 Companies may be restored in two ways. First, application to the Registrar<sup>15</sup> involves making an application within 12 months of dissolution. Only a member or officer of the company may make such an application, and the company must make good any default in relation to all outstanding returns.

15.4.4 Secondly, an application can be made to court.<sup>16</sup> The most common strike-off process is under s 12 of the 1982 Act for failure to make returns. Where a company has been struck off in this way, any member, officer or creditor of the company may make an application to court for restoration within 20 years of dissolution.<sup>17</sup> In the case of an application by a creditor the application may be brought in the Circuit Court, otherwise it must be brought in the High Court. Notice of the application must be given to the Registrar, the Revenue Commissioners and the Minister for Finance.

#### **General position – effects of strike-off/restoration**

15.4.5 When a company is struck off: (a) the company is dissolved and ceases to exist as a legal person; and (b) the initiation of legal proceedings by creditors to recover debts due to them by the company or the continuation of existing legal proceedings is not appropriate as a defendant to proceedings must have legal capacity on the date upon which those proceedings are being heard by the relevant court.

15.4.6 When a company is restored, it is deemed to have continued in existence as if its name had not been struck off the register.<sup>18</sup> However, the Circuit Court or the High Court (as appropriate) may order that one or more of the officers of the company shall be liable for the whole or a part (as the court thinks just) of a debt or liability incurred by or on behalf of the company during the period when it was struck off.<sup>19</sup>

## **15.5 Existing remedies for creditors**

15.5.1 The Review Group recognised that there are a number of provisions in the Companies Acts which provide some protection or redress for creditors. These are:

- (i) section 297 of the 1963 Act which provides for the concept of fraudulent trading;
- (ii) the 1990 Act, which enables creditors to petition for a company to be placed under court protection;
- (iii) provisions in the 1990 Act, which permit a court, in the course of winding up a company or of a petition for examinership, to withdraw the protection of limited liability from directors;
- (iv) possibly the most high profile provision is s 138 which introduced the concept of reckless trading and introduced a civil liability whereby an officer of a company responsible for continuing to operate in this manner can be made liable by the courts for the debts or other liabilities of the company;
- (v) section 204 of the 1990 Act which provides for personal liability where a company is wound up and has not maintained proper books of account and such contraventions are considered by the court to have contributed to the company's inability to pay all of its debts, or have resulted in substantial uncertainty as to its assets and liabilities or have impeded the orderly winding up thereof.

12 1999 (No 2) Act, s 43(15).

13 1999 (No 2) Act, s 48.

14 The dissolution occurs on the publication of the notice in *Iris Oifigiúil*: see s 12(3) of the 1982 Act, as amended.

15 The procedure is set out in s 311A of the 1963 Act and s 12C of the 1982 Act as amended by the 2001 Act.

16 The procedure is set out in s 12B of the 1982 Act as amended by the 2001 Act.

17 The date of publication in *Iris Oifigiúil* is the reference date.

18 See ss 12B(3) and 12C(2) of the 1982 Act as inserted by s 46 of the 1999 (No 2) Act.

19 *ibid.*, s 12B(4).

15.5.2 Creditors have been slow to use these provisions and it may be that they are unwilling to take this route because taking a court action can be expensive with no certainty as to the outcome. The Review Group sought to identify a simple and cost-effective avenue for creditors of companies struck off the register.

15.5.3 Section 54 of the 2001 Act gives the Director extended powers under s 251 of the 1990 Act to deal with companies whose directors are effectively running them into the ground with no assets available to pay the creditors, i.e. "the scorched earth syndrome". (see 13.8.1) The new provisions will enable the Director to take a number of different actions against the directors of such companies, including applying to have them made personally liable for fraudulent or reckless trading or failure to keep accounts.

## 15.6 Mitigating effect of strike-off for creditors

15.6.1 The Review Group examined ways of minimising the effect of strike-off on creditors. The Group discussed this issue at length, noting the difficulty in coming up with proposals that would improve the real position of creditors having regard to company assets and legal costs. The Group considered whether a company could be deemed to continue in existence so that creditors could continue to pursue debts against it but concluded that this would not make sense in light of the fact that the effect of strike-off was to remove the company's legal existence. The Group then explored the possibility of allowing creditors to pursue directors in respect of the debts of a dissolved company. The effectiveness of the restoration process was also examined.

### *Contingent transfer of companies' debts to directors*

15.6.2 Under the current procedures creditors do not have any way of collecting debts from a dissolved company without first applying to have the company restored to the register. The Review Group considered whether it would be worthwhile to allow collection to proceed against the directors. The proposal would involve: (a) an application by a creditor to Court (High Court, Circuit Court or District Court) to substitute the directors as defendants in place of the company in proceedings to recover a debt due by the company; and (b) the court making an order declaring the director personally responsible in respect of a particular debt for as long as the company remains dissolved. It was envisaged that protection would be built in for directors, as follows: (a) CRO to notify them by registered letter one month before strike-off; (b) the court would decline to make an order if it considered that an individual director acted honestly and responsibly; (c) directors would be permitted to seek an adjournment of the proceeding to allow them time to have the company restored; and (d) the court would put a further stay on any order for one month to allow further time for restoration.

15.6.3 The arguments in favour of this procedure were that it would provide a simple avenue for a creditor to pursue debts of a dissolved company since the procedure would be integrated into the ordinary debt collection process and that the procedure would be less expensive from the creditor's point of view. Such a procedure would ensure that a creditor's right to litigate would not be affected by a technical failure on the part of companies to comply with their obligations under the Companies Acts.

15.6.4 The debt collection process involves standard costs which are usually awarded against the plaintiff where judgment is made in favour of the creditor. In applying for restoration the creditor takes a risk that restoration costs might be awarded against him. The minimum costs of restoration for the creditor would amount to some £1,500 (€1904.61). Notice parties and the company would also incur costs. There is no guarantee that the creditor would be awarded costs as these are within the discretion of the court and further costs may arise if the taxation procedure<sup>20</sup> has to be invoked.

15.6.5 Following a full consideration of this proposal the Group decided against recommending it as a solution. It was considered to involve a far more fundamental change in the company law principle of limited liability than it was

prepared to recommend. To impose the sanction against each director could be disproportionate in the particular circumstances. Failure to lodge a return might not necessarily be evidence of deliberate failure that should result in the loss of limited liability. Instead, the Group recommends that power be given to the Director to enable him to pursue individual directors as appropriate (see below).

***Simplification of the restoration process***

15.6.6 The Review Group considered that the most appropriate way for a creditor to pursue debts of a dissolved company is through the restoration process. An amendment to the law in 1999<sup>21</sup> permits an application by a creditor to the Circuit Court to have a dissolved company restored. Previously these cases could be heard only in the High Court. Until recently there was no large-scale demand from creditors for company restorations. For this reason there are no clearly defined procedures and this causes confusion particularly for the smaller creditor. As already pointed out, creditors take a risk that fairly substantial costs of restoration may be awarded against them. The Review Group considers that procedures should be introduced to make the restoration process more user-friendly to creditors. Legislation is required to ensure that the costs of restoration are borne by the company concerned and not by the creditors.

15.6.7 The Review Group recommends that:

- (i) the Circuit Court Rules Committee should draw up rules (a) to simplify procedures for applications to have a company restored; and (b) to facilitate a reduction in the costs of restoration by the establishment of a scale of measured costs.
- (ii) section 311(8) of the 1963 Act and s 12(B)3 of the 1982 Act should be amended to provide that the court shall award the applicant the costs of restoration against the company unless to do so would be in breach of the constitutional rights of any person.

***Disqualification of directors where company is struck off***

15.6.8 The Review Group came to the conclusion that there should be some sanction for directors who permit their companies to be struck off the register leaving creditors unpaid. Accordingly, the Group recommends that the Director of Corporate Enforcement should be given discretion to bring cases to court for the disqualification of such directors. A provision to this effect is contained in Part 4 of the 2001 Act.

15.6.9 The Review Group recommends that the Registrar should notify the Director of the names of persons who were recorded in the CRO as being directors of a company as at the date of initiation of the strike-off procedure under s 12 of the 1982 Act, where the name of that company was subsequently struck off the register pursuant to s 12(3).

15.6.10 The Director has the power to apply to have those directors disqualified in accordance with the terms of s 160 of the 1990 Act.<sup>22</sup> It would be a matter for the Director of Corporate Enforcement in his discretion to determine whether it was appropriate to bring the matter before the court. He would exercise a role similar to that proposed regarding the requirement that a liquidator must apply to the court for a restriction order under s 150 of the 1990 Act "unless the Director has relieved the liquidator of the obligation to make such an application". Accordingly, the Director would not be obliged to apply for a disqualification order in respect of each and every director of a company which was struck off and dissolved pursuant to s 12(3). The Director would be guided by the need to satisfy the court that he had good cause and he may decide not to proceed against individual directors, depending on the circumstances.

15.6.11 An important point to emphasise in this respect is that it will be the intention of the CRO to notify company directors that the strike-off procedure is likely to be commenced if a company does not file its annual returns,

21 See s 12B(8) and (9) of the 1982 Act as inserted by the 1999 (No 2) Act.

22 2001 Act, s 42.

and that the CRO will bring that matter to the attention of the Director of Corporate Enforcement which may result in an application for disqualification. The stark message that this will convey to directors of such companies may be such that they will take the action necessary to avoid being struck off, i.e. they will file returns. On the one hand, it is acknowledged that the quality of the returns that may be filed may be less than adequate, but if that is the case then the CRO will take action for that offence. If they do not file the necessary returns and they are struck off then action for disqualification can be taken. The net effect will be that it is likely that directors will no longer consider the option of pursuing a "scorched earth" policy seeking to use up all the assets of the company to ensure that no liquidator is appointed, because they will then run the risk of either being disqualified from being a director of any other company or they will run the risk that the Director may take an action against them for fraudulent or reckless behaviour. The likely consequence will be to bring about a situation where advisers to companies will convey the message that if a company is getting into difficulty it would be better either to have an examiner appointed to see if the matter could be redressed or to have it wound up.

***Personal liability of a director where a company is struck off***

- 15.6.12 A constant consideration in the Review Group's assessment of remedies for creditors in the event of strike-off was if, to what extent and in what circumstances the principle of limited liability should be deemed to be superseded by the personal liability of directors. In dealing with this issue the Group was conscious that limited liability is the cornerstone of company law and that it is essential to retain a sense of proportionality with regard to appropriate penalties. Nonetheless, the Group noted that the court can remove limited liability in instances of fraudulent and reckless trading and where proper books of account have not been maintained and this gives rise to serious consequences. The Group concluded that the circumstances of strike-off and the contributions of individual directors to strike-offs were so particular that it would not be appropriate to have an across-the-board application against all the directors of a company. However, the Group also considers that it would be important to accord to the Director powers such that in the event of strike-off he could require each person who was a director of the company at the time of strike-off to produce a statement of affairs as at the date preceding the strike-off and on foot of this decide if an investigation and consequent application to court for disqualification or loss of limited liability was warranted. The Group recommends accordingly.

***Encourage companies which cease to trade to liquidate***

- 15.6.13 The lack of an orderly system for the winding up of companies which cease to trade causes difficulties for creditors and the Registrar. The costs of liquidation are prohibitive for those directors in general business failures who might be anxious to do the right thing. As indicated above the Review Group is conscious of difficulties caused by the absence of a State liquidation service. Accordingly, the Review Group recommends that the case for and against a State-funded liquidation service should be assigned to it as an issue for consideration in its second work programme 2002 to 2003

**15.7 Debts incurred post strike-off**

- 15.7.1 The Review Group considered if any issues arose for creditors in pursuing debts in the post strike-off period. While creditors may be confused about the status of companies post strike-off the law is clear. Company directors or other officers who continue to trade can be pursued for any debts arising in the post strike-off period. These debts may revert to the company if the company is restored. However, when seeking a judgment against the company directors or other officers prior to restoration, a creditor may request the court to order that such judgment would not be affected by a subsequent restoration of the company.
- 15.7.2 The Review Group noted that s 98 of the 2001 Act sets out a replacement s 381 of the 1963 Act which provides a means whereby the court may issue an injunction against persons trading under a name ending with the word "limited" when not duly incorporated with limited liability. The application for such an injunction may be made by the Director or the Registrar prohibiting them from continuing so to trade.

## 15.8 Other developments

15.8.1 The 2001 Act introduces a number of important measures with regard to the failure of a company to file returns. Section 66 of the Act provides a means whereby the Registrar may levy fines in respect of a failure to file returns without institution of court proceedings. The section enables the Registrar to impose specified payment in respect of failure to file returns without denying the person accused of an offence the right to be heard in court. The section provides that the Registrar may give to a person, who has failed to file a return, a notice to the effect that the offence is alleged against him and that, unless a fine is paid within 21 days and the return is filed, proceedings will be instituted.<sup>23</sup> This gives the accused the option of settling the specified payment and avoiding a court case and possible conviction. The responsibility for proving that a specified payment imposed under this section has been paid is placed on the defendant in any subsequent proceedings.<sup>24</sup> This is to ensure that a defendant cannot simply rely on the defence that he remitted the relevant amount and that it is up to the Registrar to prove the contrary.

## 15.9 Provisions for "voluntary" strike-off

15.9.1 The CRO has introduced new requirements for the voluntary strike-off of a company pursuant to s 311 of the 1963 Act. These requirements are:

- (i) a declaration by the directors that the company has no assets or liabilities;
- (ii) the placing of a notice in a national newspaper that the company proposes to apply to be struck off;
- (iii) all annual returns and accounts to be filed up-to-date; and
- (iv) a letter of agreement from the Revenue Commissioners.

The Review Group welcomes the introduction of this policy.

## 15.10 Right of company to seek extra time to file

15.10.1 It should be possible to have some mechanism to cater for the truly difficult problems a company might have in completing accounts or preparing the annual return. There will be significant late filing fees and severe penalties if struck off. It would be beneficial to put in place a formal system to allow a company more time in deserving cases. To that end, on foot of a recommendation of the Review Group, a provision permitting the court to extend the time for filing was inserted into s 127(3) and (4) of the 1963 Act, by s 60 of the 2001 Act.

15.10.2 This provision affords an important protection for companies which have genuine difficulties with compliance. Such cases can arise, for example, due to the death of a director or a dispute between company officers so that it is simply not possible to prepare accounts or to complete returns in a reasonable time-scale. If the court were persuaded of the merits of the case, automatic sanctions, such as the late filing fee, would not arise.

## 15.11 Preparing annual accounts for dissolved companies

15.11.1 Where a company that has been struck off the register of companies seeks to be reinstated, it will most commonly be required to file outstanding annual returns, including company accounts. One of the difficulties for the directors and the auditors is that, although an application for reinstatement may ultimately be successful whereby the company will be deemed never to have been struck off, at the time of the preparation of the accounts (before the reinstatement) the company will not in fact exist.

23 2001 Act, s 66 (1).

24 2001 Act s 66(3).

15.11.2 The Review Group accepts that it is implicit from s 311(3) of the 1963 Act that the company has an implicit shadow existence (and its directors have implicit shadow office) for the purpose of achieving restoration. The Group is, however, of the view that such an implicit position be made explicit in the application for restoration process. Accordingly, the Group recommends that it be expressly provided in statute that all actions necessary to restore a company to the register may be taken on the basis that the company is treated, for this purpose only, as if it has an existence. Such permitted actions should include directors' preparing or arranging for the preparation of the company's annual accounts, the approval and auditing of those annual accounts and the preparation and submission of outstanding annual returns to the CRO.



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15.12 Summary of Recommendations

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### 15.12 Summary of recommendations

- The Circuit Court Rules Committee should draw up rules: (a) to simplify procedures for applications to have a company restored; and (b) to facilitate a reduction in the costs of restoration by the establishment of a scale of measured costs. **(15.6.7)**
- Section 311(8) of the 1963 Act and s 12(B)(3) of the 1982 Act should be amended to provide that the court shall award the applicant the costs of restoration against the company unless to do so would be in breach of the constitutional rights of any person. **(15.6.7)**
- The Registrar should notify the Director of the names of persons who were recorded in the CRO as being directors of a company as at the date of initiation of the strike-off procedure under s 12 of the 1982 Act, where the name of that company was subsequently struck off the register pursuant to s 12(3). **(15.6.9)**
- The Director should be accorded the powers such that in the event of strike-off he could require each person who was a director of a company at the time of strike-off to produce a statement of affairs for the company as at the date of strike-off and on foot of this decide if an investigation and consequent application to court for adisqualification order under s 160 of the 1990 Act or some other order under s 251 of the 1990 Act to have the directors made personally liable for the company's debts was warranted. **(15.6.12)**
- The case for and against a State-funded public interest liquidation service should be considered in the Review Group's second work programme. **(15.6.13)**
- It should be expressly provided in statute that all actions necessary to restore a company to the register may be taken on the basis that the company is treated, for the limited purpose of achieving restoration, as if it has an existence. Such permitted actions should include directors preparing or arranging for the preparation of the company's annual accounts, the approval and auditing of those annual accounts and the preparation and submission of outstanding annual returns to the CRO. **(15.11.2)**

