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*Status: Point in time view as at 27/03/2006.*

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## STATUTORY INSTRUMENTS

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# 1989 No. 2405

## The Insolvency (Northern Ireland) Order 1989

### <sup>F1</sup>PART V

#### WINDING UP OF COMPANIES REGISTERED UNDER THE COMPANIES ORDERS

##### CHAPTER X

#### MALPRACTICE BEFORE AND DURING LIQUIDATION; PENALISATION OF COMPANIES AND COMPANY OFFICERS; INVESTIGATIONS AND PROSECUTIONS

##### *Penalisation of directors and officers*

#### **Summary remedy against delinquent directors, liquidators, etc.**

**176.**—(1) This Article applies if in the course of the winding up of a company it appears that a person who—

- (a) is or has been an officer of the company,
- (b) has acted as liquidator<sup>F1</sup> . . . or administrative receiver of the company, or
- (c) not being a person falling within sub#paragraph (a) or (b), is or has been concerned, or has taken part, in the promotion, formation or management of the company,

has misapplied or retained, or become accountable for, any money or other property of the company, or been guilty of any misfeasance or breach of any fiduciary or other duty in relation to the company.

(2) The reference in paragraph (1) to any misfeasance or breach of any fiduciary or other duty in relation to the company includes, in the case of a person who has acted as liquidator<sup>F2</sup> . . . of the company, any misfeasance or breach of any fiduciary or other duty in connection with the carrying out of his functions as liquidator<sup>F2</sup> . . . of the company.

(3) The High Court may, on the application of the official receiver or the liquidator, or of any creditor or contributory, examine into the conduct of the person falling within paragraph (1) and order him—

- (a) to repay, restore or account for the money or property, or any part of it, with interest at such rate as the Court thinks just, or
- (b) to contribute such sum to the company's assets by way of compensation in respect of the misfeasance or breach of fiduciary or other duty as the Court thinks just.

(4) The power to make an application under paragraph (3) in relation to a person who has acted as liquidator<sup>F3</sup> . . . of the company is not exercisable, except with the leave of the High Court, after<sup>F4</sup>he] has had his release.

(5) The power of a contributory to make an application under paragraph (3) is not exercisable except with the leave of the High Court, but is exercisable notwithstanding that he will not benefit from any order the Court may make on the application.

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(6) In this Article “company” includes a building society within the meaning of the Building Societies Act 1986<sup>F5</sup> and “officer” includes a director (but not a shadow director) of a building society.

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| <b>F1</b> | Words in art. 176(1)(b) repealed (27.3.2006) by <a href="#">Insolvency (Northern Ireland) Order 2005 (S.I. 2005/1455 (N.I. 10))</a> , arts. 1(3), 3(3), 31, Sch. 2 para. 29(a), Sch. 9 (with art. 4); S.R. 2006/21, <b>art. 2</b> (with S.R. 2006/22, <b>arts. 2 - 7</b> ) |
| <b>F2</b> | Words in art. 176(2) repealed (27.3.2006) by <a href="#">Insolvency (Northern Ireland) Order 2005 (S.I. 2005/1455 (N.I. 10))</a> , arts. 1(3), 3(3), 31, Sch. 2 para. 29(b), Sch. 9 (with art. 4); S.R. 2006/21, <b>art. 2</b> (with S.R. 2006/22, <b>arts. 2 - 7</b> )    |
| <b>F3</b> | Words in art. 176(4) repealed (27.3.2006) by <a href="#">Insolvency (Northern Ireland) Order 2005 (S.I. 2005/1455 (N.I. 10))</a> , arts. 1(3), 3(3), 31, Sch. 2 para. 29(c)(i), Sch. 9 (with art. 4); S.R. 2006/21, <b>art. 2</b> (with S.R. 2006/22, <b>arts. 2 - 7</b> ) |
| <b>F4</b> | Word in art. 176(4) substituted (27.3.2006) by <a href="#">Insolvency (Northern Ireland) Order 2005 (S.I. 2005/1455 (N.I. 10))</a> , arts. 1(3), 3(3), Sch. 2 para. 29(c)(ii) (with art. 4); S.R. 2006/21, <b>art. 2</b> (with S.R. 2006/22, <b>arts. 2 - 7</b> )          |
| <b>F5</b> | 1986 c. 53   |

### Fraudulent trading

**177.** If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, the High Court, on the application of the liquidator, may declare that any persons who were knowingly parties to the carrying on of the business in such manner are to be liable to make such contributions (if any) to the company's assets as the Court thinks proper.

### Wrongful trading

**178.—(1)** Without prejudice to Article 177 and subject to paragraph (3), if in the course of the winding up of a company it appears that paragraph (2) applies in relation to a person who is or has been a director of the company, the High Court, on the application of the liquidator, may declare that that person is to be liable to make such contribution (if any) to the company's assets as the Court thinks proper.

(2) <sup>F6</sup> This paragraph applies in relation to a person if—

- (a) the company has gone into insolvent liquidation,
- (b) at some time before the commencement of the winding up of the company, that person knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation, and
- (c) that person was a director of the company at that time,

but the High Court shall not make a declaration under this Article in any case where the time mentioned in sub#paragraph (b) was before the coming into operation of this Article.

(3) The High Court shall not make a declaration under this Article with respect to any person if it is satisfied that after the condition specified in paragraph (2)(b) was first satisfied in relation to him that person took every step with a view to minimising the potential loss to the company's creditors as (assuming him to have known that there was no reasonable prospect that the company would avoid going into insolvent liquidation) he ought to have taken.

(4) For the purposes of paragraphs (2) and (3), the facts which a director of a company ought to know or ascertain, the conclusions which he ought to reach and the steps which he ought to take are those which would be known or ascertained, or reached or taken, by a reasonably diligent person having both—

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(a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried out by that director in relation to the company, and

(b) the general knowledge, skill and experience that that director has.

(5) The reference in paragraph (4) to the functions carried out in relation to a company by a director of the company includes any functions which he does not carry out but which have been entrusted to him.

(6) For the purposes of this paragraph a company goes into insolvent liquidation if it goes into liquidation at a time when its assets are insufficient for the payment of its debts and other liabilities and the expenses of the winding up.

(7) In this Article—

“company” includes a building society within the meaning of the Building Societies Act 1986<sup>F7</sup>;

“director”

(a) includes a shadow director; and

(b) includes a director (but not a shadow director) of a building society.

**F6** mod. by SR 2004/307

**F7** 1986 c. 53

.....<sup>F8</sup>

**F8** mod. by SR 2004/307

### Proceedings under Articles 177 and 178

**179.**—(1 <sup>F9</sup> On the hearing of an application under Article 177 or 178, the liquidator may himself give evidence or call witnesses.

(2 <sup>F9</sup> Where under either Article the High Court makes a declaration, it may give such further directions as it thinks proper for giving effect to the declaration; and in particular, the Court may—

(a) provide for the liability of any person under the declaration to be a charge on any debt or obligation due from the company to him, or on any mortgage or charge or any interest in a mortgage or charge on assets of the company held by or vested in him, or any person on his behalf, or any person claiming as assignee from or through the person liable or any person acting on his behalf, and

(b) make such further order as may be necessary for enforcing any charge imposed under this paragraph.

(3) For the purposes of paragraph (2), “assignee”

(a) includes a person to whom or in whose favour, by the directions of the person made liable, the debt, obligation, mortgage or charge was created, issued or transferred or the interest created, but

(b) does not include an assignee for valuable consideration (not including consideration by way of marriage<sup>F10</sup> or the formation of a civil partnership) given in good faith and without notice of any of the matters on the ground of which the declaration is made.

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(4)<sup>F9</sup> Where the High Court makes a declaration under either Article in relation to a person who is a creditor of the company, it may direct that the whole or any part of any debt owed by the company to that person and any interest thereon shall rank in priority after all other debts owed by the company and after any interest on those debts.

(5)<sup>F9</sup> Articles 177 and 178 have effect notwithstanding that the person concerned may be criminally liable in respect of matters on the ground of which the declaration under the Article is to be made.

(6) In this Article “company” includes a building society within the meaning of the Building Societies Act 1986<sup>F11</sup>.

<b>F9</b>	mod. by SR 2004/307
<b>F10</b>	2004 c. 33
<b>F11</b>	1986 c. 53

### Restriction on re#use of company names

**180.**—(1) This Article applies to a person where a company (“the liquidating company”) has gone into insolvent liquidation on or after the coming into operation of this Article and he was a director or shadow director of the company at any time within the period of 12 months immediately preceding the day before it went into liquidation.

(2) For the purposes of this Article, a name is a prohibited name in relation to such a person if—

- (a) it is a name by which the liquidating company was known at any time in that period, or
- (b) it is a name which is so similar to a name falling within sub#paragraph (a) as to suggest an association with that company.

(3) Except with the leave of the High Court or in such circumstances as may be prescribed, a person to whom this Article applies shall not at any time within 5 years from the day on which the liquidating company went into liquidation—

- (a) be a director of any other company that is known by a prohibited name, or
- (b) in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of any such company, or
- (c) in any way, whether directly or indirectly, be concerned or take part in the carrying on of a business carried on (otherwise than by a company) under a prohibited name.

(4) If a person contravenes this Article he shall be guilty of an offence.

(5) On an application for leave under paragraph (3), the Department or the official receiver may appear and call the attention of the High Court to any matters which seem to be relevant.

(6) References in this Article, in relation to any time, to a name by which a company is known are to the name of the company at that time or to any name under which the company carries on business at that time.

(7) For the purposes of this Article a company goes into insolvent liquidation if it goes into liquidation at a time when its assets are insufficient for the payment of its debts and other liabilities and the expenses of the winding up.

(8) In this Article—

“company” includes a company which may be wound up under Part VI or a building society within the meaning of the Building Societies Act 1986<sup>F12</sup>;

“director” includes a director (but not a shadow director) of a building society.

F12 1986 c. 53

### Personal liability for debts, following contravention of Article 180

**181.**—(1) A person is personally responsible for all the relevant debts of a company if at any time—

- (a) in contravention of Article 180, he is involved in the management of the company, or
- (b) as a person who is involved in the management of the company, he acts or is willing to act on instructions given (without the leave of the High Court) by a person whom he knows at that time to be in contravention in relation to the company of Article 180.

(2) Where a person is personally responsible under this Article for the relevant debts of a company, he is jointly and severally liable in respect of those debts with the company and any other person who, whether under this Article or otherwise, is so liable.

(3) For the purposes of this Article the relevant debts of a company are—

- (a) in relation to a person who is personally responsible under sub#paragraph(a) of paragraph (1), such debts and other liabilities of the company as are incurred at a time when that person was involved in the management of the company, and
- (b) in relation to a person who is personally responsible under sub#paragraph (b) of paragraph (1), such debts and other liabilities of the company as are incurred at a time when that person was acting or was willing to act on instructions given as mentioned in that sub#paragraph.

(4) For the purposes of this Article, a person is involved in the management of a company if he is a director of the company or if he is concerned, whether directly or indirectly, or takes part, in the management of the company.

(5) For the purposes of this Article a person who, as a person involved in the management of a company, has at any time acted on instructions given (without the leave of the High Court) by a person whom he knew at that time to be in contravention in relation to the company of Article 180 is presumed, unless the contrary is shown, to have been willing at any time thereafter to act on any instructions given by that person.

(6) In this Article—

“company” includes a company which may be wound up under Part VI or a building society within the meaning of the Building Societies Act 1986<sup>F13</sup>;

“director” includes a director (but not a shadow director) of a building society.

F13 1986 c. 53

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