

## **Chartered Accountants Ireland or CCAB-I material**

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### **Technical Releases**

#### **TR 03/2021 - Companies Act 2014 Receivers and Discharge of Receivers**

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Issued December 2021

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## INTRODUCTION

I-1 This technical release is in substitution for TR07-2015 entitled "Companies Act 2014- Receivers" and TR04-2016 entitled "Discharge of receivers". The contents of the technical releases are combined and updated in this release. Chapter 2, Part 8, Receivers, Companies Act, 2014, ("Part 8" and "the 2014 Act") contains the statutory framework within which receivers are appointed. Chapter 3 specifies the powers and duties of the receiver. The provisions of Part 8 came into force on Monday, 1 June 2015. Statutory references are to the relevant sections of Part 8, unless otherwise indicated.

I-2 This Technical Release is intended to assist members in understanding the changes made to company legislation governing receivers and their discharge and to outline some other relevant matters. However, it does not purport to be a detailed analysis of the provisions of Part 8 or the law.

I-3 Unless otherwise stated, all references to the Companies Act 2014 in this document refer to the Companies Act 2014 as enacted together with all subsequent amendments thereto as at the date of this release, including but not limited to the Companies (Accounting) Act 2017, the Companies (Statutory Audits) Act 2018 and the Companies (Miscellaneous Provisions) (COVID-19) Act 2020.

I-4 This technical release summarises key changes made by Part 8 to previous company legislation which include

- expanded requirements applicable to company's notification of receiver's appointment.

- statutory prescription of certain powers of the receiver.

- ability of the High Court ("Court") to order return of assets.

- reporting of offences to the Director of Public Prosecutions

I-5 It also deals with the ceasing of the receiver's functions when the debenture or charge under which he or she was appointed is paid, or when the assets over which the receiver was appointed have been realised or disposed of.

## RECEIVERS

### RECEIVER'S APPOINTMENT AND AUTHORITY TO ACT

1.1 The existing requirement that various company documents bear a notice that a receiver has been appointed is extended by *Section 429* to cover the company's website and e-mails issued by it. If the receiver is appointed to the property of a company and the company is being wound up (whether it commenced before or after appointment of the receiver) those circumstances must also be specified in such notices.

1.2 The contents of the company statement of affairs, to be provided to the receiver within 14 days of appointment, is unchanged in section 430.

1.3 Note should be taken of the decision in a case against the Registrar of Companies where a receiver was appointed over the assets of a company. The company was the legal but not the beneficial owner of the assets. The prescribed form E8 was filed pursuant to what is now section 436 (1) of the Companies Act 2014. The company objected to the filing of the form seeking to restrain the companies' office from changing the company's designation from "normal" to "receivership". The objection was upheld in the supreme court. As a result, when companies office searches are being reviewed the list of recently registered documents should be scrutinised in addition to the designation of the company.

A 2015 High Court decision listed several principles governing the appointment of the receiver in accordance with debentures (receivers can also be appointed by court) and the authority of the receiver to act. Those principles are:

(a). The receiver's authority to act is derived from the contracts, or mortgages, or deeds of charge, entered into between the Bank and the borrower.

(b). The receiver is to be appointed according to the terms of the contract between the parties.

(c). Because a receiver's authority is derived from the instrument under which he is appointed, an appointment is not valid unless it is made in accordance with the terms of that instrument.

(d). The consequence of non-compliance with the formalities for the appointment of a receiver, in accordance with the terms of the instrument, is that the appointment is void.

(e). If the instrument provides that the appointment is required to be by deed, or under seal, that formality must be observed.

(f). If the instrument requires that the appointment is to be made in writing under hand, that formality must also be observed.

(g). An invalidly appointed receiver may be a trespasser on company property.

(h). Considerations of basic fairness and contractual interpretation mean that the appointer should be obliged to comply with the terms it chooses to impose in the instrument involved.

### QUALIFICATION OF RECEIVER

1.4 As in earlier legislation, *Section 433* lists the categories (unchanged) of persons who are disqualified – rather than qualified – to act as receiver. Should a receiver subsequently find themselves disqualified by virtue of the section after their initial appointment, they have a duty to vacate their position and provide notice in writing within 14 days to the company, the Registrar of Companies, and either the debenture holder or court, depending on the way they were appointed. Failure to provide written notice is a category 2 offence under *Section 433 (6)* of the Companies Act 2014.

### RESIGNATION OR REMOVAL

1.5. *Sections 434* and *435* restate earlier legislation.

### POWERS

1.6 Subject to any provision of the court order by which, or of the instrument under which, he or she is appointed, *Section 437(1)* provides the receiver " ... has power to do, in the State and elsewhere, all things necessary or convenient to be done ..." to achieve the objectives of the receivership.

1.7 Additionally, following the recommendation of the Company Law Review Group, *Section 437(3)* lists various specific powers of the receiver. The following powers are included in the list of powers in that section (see the section for full list)

and the powers listed there are in addition to any powers in a court order or in any other law:

- (a) to enter into possession and take control of the company's property;
- (b) to borrow money on the security of property of the company;
- (c) to carry on any business of the company;
- (d) to engage or discharge employees;
- (e) to appoint an agent to do any business the receiver cannot do, or would not be expected to do, in person;
- (f) to refer to arbitration or mediation any question affecting the company.

1.8 One or more of the receiver's powers can be limited by a provision to that effect of the court order by which, or of the instrument under which, he or she is appointed (*Section 437(4)*).

## **DUTIES**

1.9 The receiver continues to be obliged, when selling property of the company, to " ... exercise all reasonable care to obtain the best price reasonably obtainable for the property as at the time of sale." (*Section 439(1)*).

1.10 As was the case prior to the Companies Act 2014, if the company is not being wound up, *Section 440* requires the receiver appointed under any charge created as a floating charge<sup>e</sup> to pay out of the asset realisations, in priority to all other debts, those preferential debts specified in *Section 621, Part 11, Winding Up, Companies Act, 2014*.

## **LIABILITY**

1.11 *Section 438(4)* of the Companies Act 2014 provides that the Receiver is personally liable on foot of any contract entered into by him/her in the performance of his/her functions (irrespective of whether such a contract is entered into by the Receiver in the name of such company or in his/her own name as Receiver or otherwise) unless the contract provides that s/he is not to be personally liable on such contract. In those circumstances, the Receiver will be entitled in respect of that liability to indemnity out of the assets of the company.

## **ENFORCEMENT**

1.12 Where "it deems it just and equitable to do so", the Court can order the return to the receiver of company assets which were improperly transferred (*Section 443*).

1.13 *Section 447* concerns the role of receivers in the prosecution of criminal offences committed by officers and members of the company. It is a new section in the 2014 Act which draws on existing provisions of various legislation. "If it appears to the receiver...", during the course of the receivership, that an officer, past officer, or a member, of the company "...has been guilty of any offence in relation to the company...", the receiver must report (*Section 447*) the matter to the Director of Public Prosecutions and to the Director of Corporate Enforcement ("DCE").

1.14 If either director initiates proceedings following receipt of such report, the receiver must "...give all assistance in connection with the prosecution which he or she is reasonably able to give".

1.15. *Section 446* re-enacts previous legislation whereby the DCE can request production of the receiver's books and the obligation on the liquidator, if requested, to provide the books and records of the company, as well as his or her own books and records, to the DCE is extended by *Section 653* to the company's receiver where one was appointed to the company prior to the winding up.

## **PART 2**

### **DISCHARGE OF RECEIVERS**

## **INTRODUCTION**

2.1 This part of the Technical Release summarises the appropriate procedures followed by the receiver seeking discharge on completion of the receivership.

2.2 The receiver's functions cease when the debenture or charge under which s/he was appointed is paid or when the assets over which the receiver was appointed have been realised or disposed of.

## **RECEIVERS APPOINTED UNDER THE COMPANIES ACT 2014**

2.3 *Section 441* of the 2014 Act requires the receiver to submit "an abstract in the prescribed form (currently *Form E 9*) ...within 30 days after the date on which he or she ceases to act as receiver...", with *Section 436(2)* obliging the receiver to "... on so

ceasing, deliver to the Registrar a notice in the prescribed form.” (Currently *Form E 11*).

2.4 However, the 2014 Act does not address the discharge of the receiver. The receiver seeks a deed of discharge from the charge holder.

2.5 Although charging instruments will incorporate the power to appoint or remove a receiver, in the past they have rarely addressed formal discharge of the receiver. When approached to act as receiver, the practitioner asks that the instrument specifically provide for issuance of a deed of discharge on completion of the assignment.

2.6 The deed of discharge should acknowledge that the receiver has duly and properly accounted for assets under his or her control and for the receipts and payments arising during the receivership.

2.7 Apart from receivers appointed by the High Court, Section 434 of the 2014 Act entitles a receiver to resign having given thirty days prior notice of that intention.

2.8 In circumstances where the charging instrument does not provide for issuance of a formal deed of discharge and/or the appointer is unwilling to provide one, the receiver documents the steps he or she has taken to obtain it and the alternative approach then adopted.

2.9 Where it was not possible to obtain a deed of discharge, the receiver formally notifies both the appointer and the borrower of his or her intention to resign in 30 days' time, having duly and properly accounted for assets under his or her control and for the receipts and payments arising during the receivership.

2.10 The notification to the lender is in duplicate, requesting it to sign and return one copy as formal consent to the receiver being discharged.

#### **OTHER RECEIVERS**

2.11 There is no equivalent provision in the Land and Conveyancing Reform Act, 2009, to Section 434 of the 2014 Act for a receiver to resign. On the other hand, Section 148, National Asset Management Agency Act, 2009, provides that a statutory receiver appointed under that Act “... has the powers, rights and obligations that a receiver has under the Companies Acts ...”.

2.12 Where the receiver is appointed other than under the 2014 Act, if the charging instrument does not provide for issuance of a formal deed of discharge, he or she will follow the procedures set out in Paragraphs 2.8 to 2.10 above.

<sup>1</sup> Wording substituted by section 98 Companies (Accounting) Act 2017 following the case of *Re J.D. Brian Ltd.* [2015] IESC 62.