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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

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**Modifications etc. (not altering text)**

C1 mod. by SR 2004/307

*Offences of fraud, deception, etc.*

#### **Fraud, etc., in anticipation of winding up**

**170.**—(1 <sup>F1</sup> When a company is ordered to be wound up by the High Court, or passes a resolution for voluntary winding up, any person who, being a past or present officer of the company, has, within the 12 months immediately preceding the commencement of the winding up—

- (a) concealed any part of the company's property to the value of £500 or more, or concealed any debt due to or from the company, or
- (b) fraudulently removed any part of the company's property to the value of £500 or more, or
- (c) concealed, destroyed, mutilated or falsified any book or paper affecting or relating to the company's property or affairs, or
- (d) made any false entry in any book or paper affecting or relating to the company's property or affairs, or
- (e) fraudulently parted with, altered or made any omission in any document affecting or relating to the company's property or affairs, or
- (f) pawned, pledged or disposed of any property of the company which has been obtained on credit and has not been paid for (unless the pawning, pledging or disposal was in the ordinary way of the company's business),

shall be guilty of an offence.

(2) Such a person as is mentioned in paragraph (1) shall be guilty of an offence if within the period mentioned in that paragraph he has been privy to the doing by others of any of the things mentioned in sub#paragraphs (c), (d) and (e) of that paragraph; and he shall be guilty of an offence if, at any time after the commencement of the winding up, he does any of the things mentioned in

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sub#paragraphs (a) to (f) of that paragraph, or is privy to the doing by others of any of the things mentioned in sub#paragraphs (c) to (e) of that paragraph.

(3) For the purposes of this Article, “officer” includes a shadow director.

(4) It is a defence—

(a) for a person charged under sub#paragraph (a) or (f) of paragraph (1) (or under paragraph (2) in respect of the things mentioned in either of those sub#paragraphs) to prove that he had no intent to defraud, and

(b) for a person charged under sub#paragraph (c) or (d) of paragraph (1) (or under paragraph (2) in respect of the things mentioned in either of those sub#paragraphs) to prove that he had no intent to conceal the state of affairs of the company or to defeat the law.

(5) Where a person pawns, pledges or disposes of any property in circumstances which amount to an offence under paragraph (1)(f), every person who takes in pawn or pledge, or otherwise receives, the property knowing it to be pawned, pledged or disposed of in such circumstances, shall be guilty of an offence and shall, on conviction on indictment, be liable to the same penalty as if he had been convicted of handling stolen goods.

(6) The money sums specified in sub#paragraphs (a) and (b) of paragraph (1) are subject to increase or reduction by order under Article 362(1)(a).

**F1** mod. by SR 2004/307

### **Transactions in fraud of creditors**

**171.**—(1 <sup>F2</sup> When a company is ordered to be wound up by the High Court or passes a resolution for voluntary winding up, a person who, being at the time an officer of the company,—

(a) within the 5 years immediately preceding the commencement of the winding up, has made or caused to be made any gift or transfer of, or charge on, or has caused or connived at the enforcement of a judgment against, the company's property, or

(b) has concealed or removed any part of the company's property since, or within the 2 months immediately preceding, the date of any unsatisfied judgment or order for the payment of money obtained against the company,

shall be guilty of an offence.

(2) It is a defence for a person charged under paragraph (1) to prove that, at the time of the conduct constituting the offence, he had no intent to defraud the company's creditors.

**F2** mod. by SR 2004/307

### **Misconduct in course of winding up**

**172.**—(1) When a company is being wound up, whether by the High Court or voluntarily, any person who, being a past or present officer of the company,—

(a) does not to the best of his knowledge and belief fully and truly discover to the liquidator all the company's property, and how and to whom and for what consideration and when the company disposed of any part of that property (except such part as has been disposed of in the ordinary way of the company's business), or

(b) does not deliver up to the liquidator (or as he directs) all such part of the company's property as is in his custody or under his control, and which he is required by law to deliver up, or

- (c) does not deliver up to the liquidator (or as he directs) all books and papers in his custody or under his control belonging to the company and which he is required by law to deliver up, or
- (d) knowing or believing that a false debt has been proved by any person in the winding up, fails to inform the liquidator as soon as practicable, or
- (e) after the commencement of the winding up, prevents the production of any book or paper affecting or relating to the company's property or affairs,

shall be guilty of an offence.

(2) Any person mentioned in paragraph (1) who, after the commencement of the winding up, attempts to account for any part of the company's property by fictitious losses or expenses shall be guilty of an offence; and if he so attempts at any meeting of the company's creditors within the 12 months immediately preceding the commencement of the winding up he shall be guilty of an offence.

(3) For the purposes of this Article, "officer" includes a shadow director.

(4) It is a defence—

- (a) for a person charged under sub#paragraph (a), (b) or (c) of paragraph (1) to prove that he had no intent to defraud, and
- (b) for a person charged under sub#paragraph (e) of that paragraph to prove that he had no intent to conceal the state of affairs of the company or to defeat the law.

#### **Falsification of company's books**

**173.** When a company is being wound up, an officer or contributory of the company who destroys, mutilates, alters or falsifies any books, papers or securities, or makes or is privy to the making of any false or fraudulent entry in any register, accounting records or document belonging to the company with intent to defraud or deceive any person shall be guilty of an offence.

#### **Material omissions from statement relating to company's affairs**

**174.—**(1) When a company is being wound up, whether by the High Court or voluntarily, any person who, being a past or present officer of the company, makes any material omission in any statement relating to the company's affairs shall be guilty of an offence.

(2) <sup>F3</sup> When a company has been ordered to be wound up by the High Court, or has passed a resolution for voluntary winding up, any person mentioned in paragraph (1) who, prior to the winding up, has made any material omission in any such statement shall be guilty of an offence.

(3) For the purposes of this Article, "officer" includes a shadow director.

(4) It is a defence for a person charged under this Article to prove that he had no intent to defraud.

**F3** mod. by SR 2004/307

#### **False representations to creditors**

**175.—**(1) When a company is being wound up, whether by the High Court or voluntarily, any person who, being a past or present officer of the company,—

- (a) makes any false representation or commits any other fraud for the purpose of obtaining the consent of the company's creditors or any of them to an agreement with reference to the company's affairs or to the winding up; or
- (b) prior to the winding up, has made any false representation, or committed any other fraud, for the purpose mentioned in sub#paragraph (a);

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shall be guilty of an offence.

(2) For the purposes of this Article, “officer” includes a shadow director.

### *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>F4</sup>, administrator 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>F4</sup> or administrator 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>F4</sup> or administrator 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>F4</sup> or administrator of the company is not exercisable, except with the leave of the High Court, after<sup>F5</sup> that person 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.

(6) In this Article “company” includes a building society within the meaning of the Building Societies Act 1986<sup>F6</sup> and “officer” includes a director (but not a shadow director) of a building society.

<b>F4</b>	prosp. rep. by <a href="#">2005 NI 10</a>
<b>F5</b>	prosp. subst. by <a href="#">2005 NI 10</a>
<b>F6</b>	<a href="#">1986 c. 53</a>

#### **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>F7</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—

- (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>F8</sup>;

“director”

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

**F7** mod. by SR 2004/307

**F8** 1986 c. 53

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**F9** mod. by SR 2004/307

### Proceedings under Articles 177 and 178

**179.**—(1 <sup>F10</sup> On the hearing of an application under Article 177 or 178, the liquidator may himself give evidence or call witnesses.

(2 <sup>F10</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>F11</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.

(4 <sup>F10</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>F10</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>F12</sup>.

**F10** mod. by SR 2004/307

**F11** 2004 c. 33

**F12** 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>F13</sup>;

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

**F13** 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.

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(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>F14</sup>;

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

**F14** 1986 c. 53

### *Investigation and prosecution of malpractice*

#### **Prosecution of delinquent officers and members of company**

**182.**—(1 <sup>F15</sup> If it appears to the High 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 any offence in relation to the company for which he is criminally liable, the Court may (either on the application of a person interested in the winding up or of its own motion) direct the liquidator to refer the matter to<sup>F16</sup> the Department].

(2 <sup>F15</sup> If in the case of a winding up by the High Court it appears to the liquidator, not being the official receiver, that any past or present officer of the company, or any member of it, has been guilty of any offence in relation to the company for which he is criminally liable, the liquidator shall report the matter to the official receiver.

(3 <sup>F15</sup> If it appears to the liquidator in the course of a voluntary winding up that any past or present officer of the company, or any member of it, has been guilty of any offence in relation to the company for which he is criminally liable, he shall—

<sup>F16</sup>(a) forthwith report the matter to the Department, and

(b) furnish to the Department such information and give to it such access to and facilities for inspecting and taking copies of documents (being information or documents in the possession or under the control of the liquidator and relating to the matter in question) as the Department requires.]

<sup>F16</sup>(4) Where a report is made to the Department under paragraph (3), the Department may, for the purpose of investigating the matter reported to it and such other matters relating to the affairs of the company as appear to it to require investigation, exercise any of the powers which are exercisable by inspectors appointed under Article 424 or 425 of the Companies Order to investigate a company's affairs.]

(5 <sup>F15</sup> If it appears to the High Court in the course of a voluntary winding up that—

(a) any past or present officer of the company, or any member of it, has been guilty of any offence in relation to the company for which he is criminally liable, and

(b) no report with respect to the matter has been made by the liquidator<sup>F17</sup>. . . under paragraph (3),

the Court may (on the application of any person interested in the winding up or of its own motion) direct the liquidator to make such a report.



(6) On a report being made under paragraph (5), this Article has effect as though the report had been made in pursuance of paragraph (3).

F15 mod. by SR 2004/307

F16 2002 NI 6

F17 2002 NI 6

### Obligations arising under Article 182

**183.**—(1) For the purpose of an investigation by the Department<sup>[F18]</sup> in consequence of a report made to it under Article 182(3)], any obligation imposed on a person by any provision of the Companies Order to produce documents or give information to, or otherwise to assist, inspectors appointed as mentioned in<sup>[F18]</sup> Article 182(4)] is to be regarded as an obligation similarly to assist the Department in its investigation.

(2) An answer given by a person to a question put to him in exercise of the powers conferred by Article 182(4) may be used in evidence against him.

<sup>[F19]</sup>(2A) However, in criminal proceedings in which that person is charged with an offence to which this paragraph applies—

- (a) no evidence relating to the answer may be adduced, and
- (b) no question relating to it may be asked,

by or on behalf of the prosecution, unless evidence relating to it is adduced, or a question relating to it is asked, in the proceedings by or on behalf of that person.

(2B) Paragraph (2A) applies to any offence other than an offence under Article 7 or 10 of the Perjury (Northern Ireland) Order 1979 (NI 19) (false statements made on oath otherwise than in judicial proceedings or made otherwise than on oath).]

(3) Where criminal proceedings are instituted by<sup>[F18]</sup> the Director of Public Prosecutions for Northern Ireland] or the Department following any report or reference under Article 182, the liquidator and every officer and agent of the company past and present (other than the defendant) shall give to<sup>[F18]</sup> the Director of Public Prosecutions for Northern Ireland] or the Department (as the case may be) all assistance in connection with the prosecution which he is reasonably able to give.

(4) In paragraph (3), “agent” includes any banker or solicitor of the company and any person employed by the company as auditor, whether that person is or is not an officer of the company.

(5) If a person fails or neglects to give assistance in the manner required by paragraph (3), the High Court may, on the application of the<sup>[F18]</sup> Director of Public Prosecutions for Northern Ireland] or the Department (as the case may be) direct the person to comply with that paragraph; and if the application is made with respect to a liquidator, the Court may (unless it appears that the failure or neglect to comply was due to the liquidator not having in his hands sufficient assets of the company to enable him to do so) direct that the costs shall be borne by the liquidator personally.

F18 2002 NI 6

F19 2002 NI 6

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