

COMPANIES ACT INVESTIGATIONS

CONTINUING LEGAL EDUCATION

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COMPANIES ACT INVESTIGATIONS

1.1 Introduction

During the course of this paper I propose to outline the provisions of the Companies Acts which govern the circumstances in which inspectors may be appointed to investigate the affairs of a company or companies. When parts II and III of the Company Law Enforcement Act 2001 ("the Act of 2001") are brought into effect the Director of Corporate Enforcement will exercise the powers previously exercised by the Minister pursuant to the provisions of part II of the Companies Act, 1990 ("the 1990 Act"). I will draw particular attention to any significant changes effected to those provisions by virtue of the Act of 2001. However, before doing so I believe it may be of assistance to place the appointment of inspectors generally in context.

1.2 Background

For present purposes suffice it to say that provisions for the appointment of inspectors, to investigate private companies, were previously contained in Sections 166 – 173 of the Companies Act, 1963 ("the 1963 Act"). Prior to that similar provisions were contained in the Companies Act, 1908. Pursuant to the 1963 Act provisions, the Minister (then the Minister for Industry and Commerce) had the power to appoint inspectors without requiring the approval of the High Court.

The provisions contained in the 1963 Act were rarely used in practice. It has been suggested¹ that those provisions may have been so rarely used as a result of concerns, of a constitutional nature, with regard to the power of the Minister to appoint inspectors. However, their rarity of use may also be explained by the relatively limited circumstances in which inspectors could be appointed by the Minister pursuant to the provisions of the 1963 Act.²

¹ McGrath Irish Law Times December 1993 p. 264

² In essence the Minister could appoint inspectors upon the application of a proportion of the shareholders of the company to be investigated, on application by the company by special resolution or on foot of a Court Order.

The provisions of the 1963 Act were substantially revised by the 1990 Act. In essence Part II of the 1990 Act made provision for three different scenarios:-

1. the investigation of a company's affairs by inspectors appointed by the High Court,
2. the provision to the Minister of powers enabling the Minister to ascertain the ownership of limited companies, and
3. the provision to the Minister of powers enabling the Minister to require information from a company or companies without the need to have a formal investigation into its or their affairs.

The Act of 2001 provides that these powers are to be transferred from the Minister to the Director of Corporate Enforcement.

2.1 The investigation of a company's affairs by inspectors appointed by the High Court

The relevant provisions of the 1963 Act were replaced by Sections 7 and 8 of the 1990 Act. The effect was to remove from the Minister the power to appoint inspectors and to vest that power in the High Court.

In addition Sections 7 and 8 of the 1990 Act extended the range of parties who could seek the appointment of an inspector. Pursuant to the provisions of Sections 7 and 8 inspectors could be appointed to investigate the affairs of a company on the application, to the High Court, of:

- (a) the company itself
- (b) its shareholders³
- (c) one or more of its directors
- (d) one or more of its creditors

³ In the case of a company having a share capital, on the application either of not less than 100 members or of a member or members holding not less than one tenth of the paid up share capital of the company, and in the case of a company not having a share capital, on the application of not less than one fifth in number of the person on the company's register of members

- (e) The Minister (as a result of the Act of 2001⁴, the powers of the Minister are to be transferred to the Director of Corporate Enforcement).

It is to be noted that in respect of an application made by any of the parties at (a) – (d) above it is provided that the application shall be supported by such evidence as the Court may require, including such evidence as may be prescribed by law. In the case of an application by the Director of Corporate Enforcement the Court is required to be satisfied that there is evidence suggesting the existence of certain specified circumstances before acceding to the application.

Previously, pursuant to the terms of the 1990 Act, the Court could require the applicant to give security for an amount of between £500 and £10,000 in respect of the costs of the investigation. The Act of 2001 now provides that (in respect of an application by the parties set out at (a) to (d) above) the Court may require the applicant to provide security for the costs of the investigation of between £5,000 and £250,000. These provisions are likely to continue to dissuade Court applications from frivolous applicants.

2.2 Application by the Director of Corporate Enforcement

For the balance of my talk, and for the sake of convenience, I will proceed on the basis that part III of the Act of 2001 has been implemented and that the Director of Corporate Enforcement has been given the powers provided for in Part III.

The application for the appointment of an inspector by the Director of Corporate Enforcement is (as a result of the Act of 2001) governed by Section 8 of the 1990 Act.

The High Court may accede to an application made by the Director of Corporate Enforcement if the Court is satisfied that there are circumstances suggesting:-

- (a) that the company's affairs are being or have been conducted with intent to defraud its creditors or the creditors of any other person or otherwise, for a fraudulent or unlawful purpose or, in an unlawful manner or in a manner which is

⁴ Section 21

- (b) unfairly prejudicial to some part of its members, or that any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial, or that it was formed for any fraudulent or unlawful purpose, or
- (b) that persons connected with the company's formation or the management of the company's affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards it or its members, or
- (c) that its members have not been given all the information relating to its affairs which they might reasonably expect.

It should also be noted that the Act of 2001 makes clear⁵ that the Director of Corporate Enforcement may apply to the High Court to seek the appointment of an officer or officers of his office as an inspector to investigate the affairs of a company. From the perspective of the Director of Corporate Affairs such a provision has obvious advantages and may enable him to seek the appointment of a member of his staff who may already be in receipt of relevant background or other information as a result of the exercise by the Director of Corporate Enforcement of the other powers provided to him by the Act of 2001.

It should also be borne in mind that⁶ the power to apply to the High Court for the appointment of an inspector is exercisable even if the company, the subject matter of the application, is in liquidation. In this regard it should be borne in mind that part V of the Act of 2001 will give the Director of Corporate Enforcement significant powers in relation to companies which are in the course of being wound up. For example, the Director of Corporate Enforcement may⁷ seek a Court Order for the inspection by him of the books and papers of companies which are the subject matter of a winding up order. It is conceivable that such an inspection by the Director of Corporate Affairs could provide him with evidence to commence a Section 8 investigation of the affairs of the company and, perhaps, companies with which it has a commercial relationship.

⁵ Section 21

⁶ Section 8(2)(a) of the 1990 Act

⁷ Section 43 of the Act of 2001

Finally, it is noteworthy that, contrary to the situation that pertained under the relevant provisions of the 1963 Act, there are no longer circumstances in which the High Court is obliged to appoint inspectors to investigate the affairs of a company.⁸

The function of an inspector is to investigate and report. The investigation is essentially a fact finding exercise. However the Court may make such Order as it deems fit in relation to matters arising from an inspector's report including ordering the winding up of the company being investigated or making an Order for the purpose of remedying any disabilities suffered by a person whose interests were adversely affected by the conduct of the affairs of the company under investigation.

While an inspector's functions are more administrative in nature than judicial inspectors are obliged to observe the constitutional requirements of fair procedures. The nature of the fair procedures to be applied by the investigators will depend upon the nature of their particular investigation. As has been remarked by the Chief Justice⁹

It would seem essential for the inspectors to give a person or company in respect of whom they intend to make a critical finding an opportunity of answering the "charge" before they present their report to the Court.

2.3 The Power of an Inspector to extend investigation into affairs of related company

Pursuant to the provisions of the 1990 Act¹⁰ it was provided that an inspector appointed by the Court, upon application by any of the parties mentioned at paragraphs (a) – (e), was entitled, with the approval of the High Court, to investigate the affairs of a company related to the company under investigation if he considered it necessary for the

⁸ Pursuant to the provisions of 166 of the Companies Act, 1963 the Minister was obliged to appoint an inspector(s) if the company by special resolution or the Court by order declared that the company's affairs ought to be investigated by an inspector appointed by the Minister.

⁹ Keane, Company Law 3rd edition 2000 - Butterworths

¹⁰ Section 9

purposes of his investigation. It was also

provided that the inspector had the power to report on the affairs of the related company in so far as he thought the results of his investigation of the related company were relevant to the investigation of the affairs of the company under investigation.

The purpose of this section was to ensure that if the inspector, during the course of his investigation, became aware of a related company (of which he was unaware at the time of his appointment), he would be in a position to seek to extend his investigation to investigate the affairs of the related company. For the purposes of Section 9 the term "related company" was as defined by Section 140 of the 1990 Act which essentially meant that a company was a related company where it was the holding company or subsidiary of the company being investigated.

Section 9 was the subject of judicial interpretation on a number of occasions. In the case of *Lyons –v- Currans*¹¹ the Respondent, an inspector appointed pursuant to Section 14 of the 1990 Act to investigate the Greencore affair, was the subject matter of an application to have his report quashed on the grounds that he lacked power to investigate the company Talmino as it was not one of the companies he was appointed to investigate and as, it was contended, he had not sought authorisation from the High Court to investigate it pursuant to the provisions of Section 9 of the 1990 Act. The application was unsuccessful. In essence the High Court appears to have drawn a distinction between cases where an inspector "thinks it necessary for the purposes of his investigation to investigate also the membership of another body corporate" and those where he knows it to be necessary for the purposes of his investigation to investigate also the membership of another body corporate. The High Court held that it was only in cases where the inspector thought (as opposed to knew) that it was necessary for the purposes of his investigation to investigate also the membership of another body corporate that an application under Section 9 under the 1990 Act was required. It has

¹¹ Unreported High Court May 27, 1992

been suggested that the subtleness of this distinction (between "thinking" and "knowing") will allow inspectors greater freedom in the discharge of their functions¹²

Be that as it may the Act of 2001 has greatly extended the powers of an inspector to widen his investigation as a result of the redefinition of what constitutes a related company. Section 22 of the Act of 2001 amends Section 9 of the Act of 1990 by providing:-

For the purposes of this section, a body corporate which is related to a company includes a body corporate with which the company has a commercial relationship, and a commercial relationship exists where goods or services are sold or given by one party to another.

As a result of the Act of 2001 an inspector will be entitled to seek Court approval to investigate the affairs of a company with which the company under investigation has a commercial relationship. A commercial relationship exists in any case where goods or services are sold or given by one party to another.

2.4 Production of Documents

Section 10(1) of the 1990 Act provides as follows:

It shall be the duty of all officers and agents of the company and of all officers and agents of any other body corporate whose affairs are investigated by virtue of Section 9 to produce to the inspectors all books and documents of or relating to the company or, as the case may be, the other body corporate which are in their custody or power, to attend before the inspectors when required to do so and otherwise to give to the inspectors all assistance in connection with the investigation which they are reasonably able to give.

Pursuant to the provisions of Section 10(2) of the 1990 Act similar provisions apply with regard to third parties (i.e. parties who are neither officers nor agents) where the inspector considers that the third party may be in possession of any information

¹² McGrath Irish Law Times, December 1993

concerning the affairs of the company (or related company) under investigation.

The Act of 2001 does not in any way alter these obligations on the part of officers and/or agents of the company under investigation or of third parties. However the Act of 2001 provides that where an officer, agent or third party claims a lien on books or documents produced to the inspectors, the production of those books or documents is without prejudice to the lien claimed.

Two obligations are created by sub-sections 10(1) and (2). Firstly, the officers, agents and third parties are required to produce to the inspectors "books or documents". It is clear that the "books and documents" required to be produced extend beyond merely the books and records a company is obliged to maintain in accordance with the provisions of the Companies Acts.

Difficulties may arise where an individual is required by to produce books and documents to an inspector. The party, the subject matter of the inspector's request, will not necessarily be aware of all of the information the inspector is aware of and might not accordingly be aware of the importance of documents or information in his/her possession. It has been held¹³ that the obligation upon the party who is required to produce books and records is to produce "books and records which in their honest opinion may be of assistance to the inspector". It is the case that one of the factors to be considered in the formation of that "honest opinion" as to the relevance of documentation is the information that has been furnished to the party by the inspector.

As regards the failure of a party to co-operate with the inspector, whether as regards the production of books and records or as regards answering questions posed by the inspectors, the Act of 2001 now provides that where an officer, agent or third party refuses or fails within a reasonable time to co-operate with the inspector the High Court

may, following enquiry, make any order or direction it thinks fit including directing the person to produce the books or documents or answer questions put to him by the inspectors.

It should also be noted that the Act of 1990 defined officers or agents as including past, as well as present, officers or agents and provided that "agents" included bankers and solicitors of the company or other body corporate and any persons employed by the company or other body corporate as auditors whether or not those persons were officers of the company or other body corporate. The Act of 2001 extends the definition of agents to include accountants, bookkeepers or taxation advisors whether those persons are or are not officers of the company or other body corporate.

It should also be noted that pursuant to Section 10(3) of the 1990 Act (which section has been unaffected by the Act of 2001) a Court appointed inspector may, in certain circumstances, be entitled to require a director of the company under investigation, or a director of a related company under investigation, to produce to the inspector all documents in his possession, or under his control, relating to his bank account(s). This power becomes available where the inspector has reasonable grounds for believing that money has been lodged to or paid out of the bank account(s) in question which money was a result of, or was used in, certain specified categories of transactions (for example contracts in which the director had a material interest, loans or quasi loans etc) and where details of the relevant transactions have not been fully and properly disclosed in the company's accounts or recorded in the company's register. It should also be borne in mind that the power of an inspector in this regard extends to requiring the production of such documents by past or present Directors, "connected persons", and past or present shadow directors.

Finally, in addition to the obligation imposed with regard to books and documents, officers, agents and third parties or also obliged to attend "and give viva voce evidence"¹⁴ if required to do so by the inspector.

¹³ Proberts –v- Glackin Unreported High Court May 25, 1992

¹⁴ Chestvale Properties –v- Glackin 1992 ILRM 221

2.5 The Report of an Inspector appointed by the High Court

Pursuant to the provisions of Section 11 inspectors appointed under Sections 7 or 8 of the 1990 Act may, and shall (if so directed by the High Court) make interim reports to the High Court and on the conclusion of the investigation shall make a final report to the High Court. It is also provided that a Court appointed inspector may, without the necessity of making an interim report, at any time inform the Court of matters coming to his knowledge as a result of the investigation which matters tend to show that an offence is being committed. Section 11(3) of the 1990 Act provided that a copy of the Court appointed inspector's report is to be furnished by the High Court to the Minister and, at the discretion of the High Court, to various other parties.

It should also be noted that the High Court may direct that sections of an inspector's report be omitted from a copy forwarded or furnished or from the report as printed and published.

As stated above it remains the case that, having considered the inspector's report, the High Court may make such order as it deems appropriate in relation to matters arising from the report including ordering the winding up of a body corporate or making an order for the purpose of remedying any disability suffered by any person whose interests were adversely affected by the conduct of the affairs of the company under investigation.

2.6 The Costs of the Inspection

It is provided¹⁵ that the High Court may direct a body corporate dealt with in the inspector's report or the applicant(s) for the appointment of the inspector to be liable for a sum not in excess of £250,000 in respect of the expenses of and incidental to the investigation. It is also provided by Section 13(2) that:-

1. a person convicted on indictment of an offence on a prosecution instituted as a result of an investigation,

¹⁵ Section 13 of the 1990 Act

2. a person ordered to pay damages or restore any property in proceedings brought as a result of an investigation, or
3. a person awarded damages or to whom property is restored in proceedings brought as a result of an investigation

may be ordered to repay all or part of the expenses of and incidental to the investigation.

3. Investigation of the ownership of a company

With the introduction of the Companies Act, 1990 the Minister was given the power to investigate the ownership of companies. The Minister was given the power to order one or more competent inspectors to investigate and report on a company's membership with a view to determining:-

the true persons who are or have been financially interested in the success or failure (real or apparent) of the company or able to control or materially to influence the policy of the company¹⁶

Pursuant to the provisions of the Act of 2001, these powers have also been transferred to the Director of Corporate Enforcement. These powers will be exercisable by the Director of Corporate Enforcement without the need of an Order of the High Court.

In order to validly exercise these powers the Director of Corporate Enforcement must be satisfied that there are circumstances justifying an investigation. The circumstances in question are:-

1. the effective administration of company law,
2. the effective discharge by him of his functions under any enactment,
3. the public interest¹⁷

As was the case when the powers resided in the Minister, the appointment by the Director of Corporate Enforcement may define the scope of the investigation and may,

¹⁶ Section 14(1) of the 1990 Act

¹⁷ Section 14(2) of the 1990 Act

for example, limit it to certain classes of shares or debentures. Similarly, as with the case when the powers resided in the Minister, the exercise by the Director of Corporate Enforcement of his powers may be judicially reviewed by the High Court. In that circumstance the Director of Corporate Enforcement may be required to state the reasons for the investigation.¹⁸

Where inspectors are appointed by the Director of Corporate Enforcement they have similar powers to inspectors appointed by the High Court. However they do not have the power (as discussed on page 9) to require production of documents relating to a director's bank accounts.

The Act of 2001 provides that the Court may, on an application on the part of the Director of Corporate Enforcement, direct that the company being investigated repay the Director of Corporate Enforcement the expenses of and incidental to his investigation.

The Courts have, thus far, taken an expansive view of the reach of the powers of inspectors appointed by both the High Court and of inspectors formally appointed by the Minister. There is no reason to doubt but that the Courts will take a similar expansive approach with regard to the reach of powers of inspectors appointed by the Directors of Corporate Enforcement.

4. Investigation of the ownership of shares/debentures

The Director of Corporate Enforcement has also, by virtue of the Act of 2001, been given the power to investigate the ownership of any shares in or debentures of a company without the need for the appointment of an inspector.¹⁹

Pursuant to Section 15 of the 1990 Act where it appears to the Director of Corporate Enforcement that it is necessary:-

1. for the effective administration of the law relating to companies,
2. for the effective discharge of his functions under any enactment, or

¹⁸ Dunnes Stores Ireland Co. –v- Moloney 1999 1LRM 119

3. in the public interest

The Director of Corporate Enforcement may require any person that he believes to have or to be able to obtain information as to the present and past interest in the shares or debentures in question to give to him that information. Any person who fails to give the required information, or knowingly or recklessly gives materially false information, is guilty of an offence.

The Companies Act, 1990 also contains provisions which, as a result of Section 27 of the Act of 2001, now give the Director of Corporate Enforcement powers to impose restrictions on the transfer of shares being investigated by him. Where the Director of Corporate Enforcement gives appropriate directions in writing in relation to the relevant shares then:-

- (a) any transfer of the shares is void,
- (b) no voting rights are exercisable
- (c) no rights issue can be made to the shareholders
- (d) no payment may be made to the shareholder of any sum due on the shares.

The 1990 Act contains provisions whereby both the Director of Corporate Enforcement and the High Court are empowered to lift the restrictions so imposed in certain circumstances. In addition the High Court may order the sale of shares, which are subject to restriction, on the application of the Director of Corporate Enforcement or of the company. The 1990 Act also contains provisions dealing with the lodgment in Court and payment to those entitled to the proceeds of such sale.

5. Preliminary Investigations

As a result of Section 29 of the Act of 2001 the Director of Corporate Enforcement is given powers to require the production of documents relating to companies with a view to deciding whether a formal investigation is necessary. The Director of Corporate

¹⁹ Section 15 of the 1990 Act

Enforcement may require a company,²⁰ at such time and place as may be specified in his direction, to produce such books or documents as may be specified by the Director of Corporate Enforcement.

The Director of Corporate Enforcement may give such direction if he believes that there are circumstances existing suggesting that:-

- (a) it is necessary to examine the books and documents of the body with a view to determining whether an inspector should be appointed to conduct an investigation of the body under the Companies Acts,
- (b) the affairs of the body are being or have been conducted with intent to defraud its creditors, the creditors of any other person or its members or for a fraudulent purpose
- (c) that the affairs of the body are being or have been conducted in a manner which is unfairly prejudicial to some part of its members
- (d) that any actual or proposed act or omission or series of acts or omissions of the body or on behalf of the body are or would be unfairly prejudicial to some part of its members or unlawful
- (e) that the body was formed for a fraudulent or unlawful purpose
- (f) or that the body may be in possession of books or documents containing information relating to the books or documents of a body referred to at paragraphs (a) to (e) above.

In addition to the power to require production of documents, the Director of Corporate Enforcement has also been given the power to take copies of the books and documents (or extracts from them) and to question the party producing the books or documents, or

²⁰ The term company is widely defined by Section 29 of the Act of 2001

any other person who is a past or present officer of or is or was at any time employed (including in a professional, consultancy or similar capacity) to provide an explanation for the books and records produced.

If a party is directed to produce books and records, but does not do so, the Director of Corporate Enforcement has the power to require that person to state, to the best of his knowledge and belief, the location of the books and records in question.

Once more the Court may, on application of the Director of Corporate Enforcement, make directions that various parties repay the Director of Corporate Enforcement the expenses of and incidental to his examination.

5.1 Search Warrants

Where books or documents have not been produced pursuant to Sections 14, 15 or 19 or where the Director of Corporate Enforcement (or an officer duly authorised by him) has reasonable grounds for believing that documents may provide evidence of or relating to the commission of an offence under the Companies Acts, application may be made to the District Court for a search warrant in respect of any premises (including a dwelling).

Where a search warrant is issued the Director of Corporate Enforcement (or his designated officer) may:-

- enter the named premises using force if necessary,
- search the premises,
- require any person on the premises to provide certain information and/documentation,
- seize material information found on the premises,
- take steps necessary for preserving or preventing interference with the relevant information.

On foot of a search warrant it is also provided that the Director of Corporate

Enforcement (or his designated officer) may:-

- operate or cause to be operated any computer at the place which is being searched, and
- require any person at that place to enable the Director of Corporate Enforcement (or his designated officer) to access the computer or to produce information contained on the computer in a form in which it can be removed.

Naturally it is an offence to obstruct the exercise of a right of entry or search which arises on foot of the issue of the District Court warrant.

6. Miscellaneous Provisions

6.1 Assistance to Overseas Company Law Authority

Section 33 of the Act of 2001 will enable the Director of Corporate Enforcement to exercise the powers provided to him by Part III of the Act of 2001 on foot of a request from an authority outside the State which authority performs functions of a supervisory or regulatory nature in relation to bodies corporate or undertakings or their officers. In order to exercise his powers for the purposes of assisting such authorities, the Director of Corporate Enforcement must be satisfied that his assistance is for the purpose of the discharge by the authority in question of its supervisory or regulatory functions. The Director of Corporate Enforcement may decline such a request if of the opinion that it is not appropriate to accede to it or if the authority in question does not undertake to make such contribution to the costs attendance on the request as the Director of Corporate Enforcement considers appropriate.

6.2 Minutes of proceedings of meetings of company and director

As you are aware pursuant to the provisions of Section 145(1) of the Companies Act, 1963 it is provided that

every company shall as soon as may be cause minutes of all proceedings of general meetings and all proceedings at meetings of its directors or committees of directors to be entered in its books kept for that purpose.

It is not divulging a State secret to note that this particular provision of the 1963 Act is not as frequently observed as the Oireachtas intended.

By virtue of Section 19 of the Act of 2001 the Director of Corporate Enforcement is given the power to require companies to produce the relevant books and records for his inspection and to provide him with facilities for making copies of those books and records. This is yet another piece of armoury which will no doubt be deployed to full effect by the Director of Corporate Enforcement in years to come.

7. Conclusion

Thus far the Irish Courts have taken an expansive view of the reach of the powers of inspectors appointed both by the High court and of inspectors formally appointed by the Minister. In the current prevailing climate it is likely that the Courts will take an equally expansive approach with regard to the reach of powers of inspectors appointed both by the Director of Corporate Enforcement and by the High Court on foot of an application by the Director of Corporate Enforcement. The powers available to the Director of Corporate Enforcement are likely to significantly bolster the overall effectiveness of the office of the Director of Corporate Enforcement in the discharge of the various obligations imposed upon his office by virtue of the Act of 2001.

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