



INSTITUTE OF DIRECTORS
IN IRELAND

In partnership with
McCANN FITZGERALD



Áine Murphy
Senior Associate,
McCann FitzGerald



Ciara O'Herlihy
Senior Associate,
McCann FitzGerald

Live Webinar

Directors' Duties in Uncertain Times and Navigating the 'Twilight Zone'

Tuesday, 22 June 2021 | Session commences at 9.30am

Overview

- Refresher on key directors' duties under Irish company law
- Key challenges facing directors of Irish companies over the last 12 months
- Practical tips and advice to navigate coming months



Current Challenges

- Very challenging trading environment for Irish businesses
 - COVID-19
 - BREXIT
- Greater trend towards enforcement
- Difficulties in obtaining D&O insurance



ODCE Response

- ODCE Guidance - June 2020
 - No change to insolvency rules ...
 - But ODCE will have regard to impact of COVID-19 pandemic and extent to which directors acted “honestly and responsibly” during period of financial difficulty

THE IRISH TIMES

Wed, May 5, 2021

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ODCE offers comfort to firms facing insolvency amid Covid-19

Stance on responsible behaviour of directors will take into account coronavirus havoc

© Mon, Jun 22, 2020, 05:26

Joe Brennan



The ODCE will have due regard to the impacts of the pandemic as it examines and adjudicates upon liquidators' reports. Photograph: Dara Mac Donailt

Key Directors' Duties

- Directors' Duties in ordinary course
 - Non-exhaustive list of fiduciary duties in Companies Act 2014
 - Duties of competence
 - Duties of probity
- Duties during financial uncertainty
 - Critical shift - duty to creditors to preserve assets
- NB: Structures to support and underpin decision making



Recent Experience in Corporate Transactions Group

- Wide range of issues reflecting breadth of issues affecting clients
- <https://www.mccannfitzgerald.com/knowledge/covid-19>
- Companies (Miscellaneous Provisions) (Covid-19) Act 2020
- AGMs
- Board meetings
- Execution of documents
- Dividends



Recent Experience in Corporate Transactions Group (contd.)

- COVID-19/BREXIT issues in context of sales processes
 - Material Adverse Change clauses
 - Pre-completion undertakings
 - Enhanced warranties and disclosure
 - Reliance on hold-backs / rep & warranty insurance
 - Pricing structures



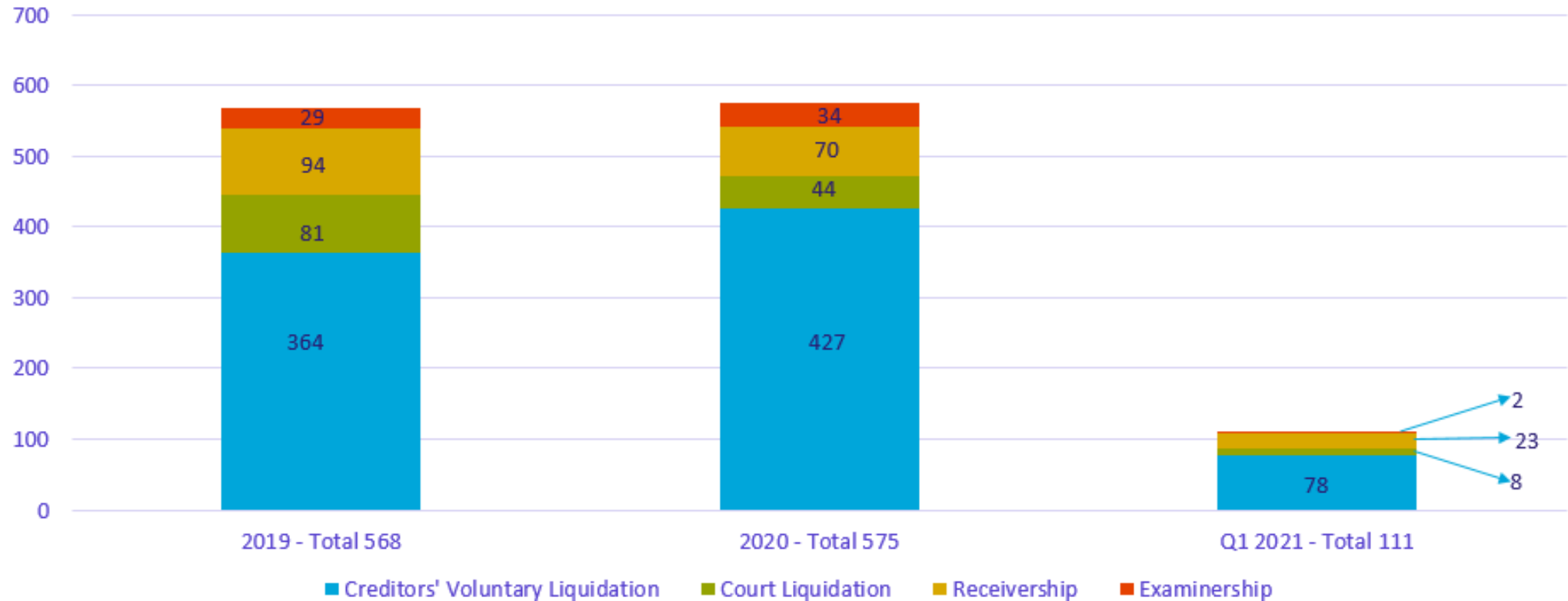
Key Takeaway

- No change to core directors' duties
- Some additional flexibilities in terms of corporate governance and, given business disruption, extra onus on directors to keep company's financial position under review
- But basic company law rules remain the same



Corporate Insolvencies – Recent Trends

Insolvencies in Ireland



Data Source: Deloitte

What is the “Twilight Zone”?

- Questions arise regarding a company’s ability to trade on solvent basis
- Assessment of the company’s solvency:
 - Balance Sheet Test
 - Cash Flow Test
- Cash Flow Test key for trading businesses
- Directors’ duty shifts to Creditors
- Decision to continue to trade is critical



Decision to Continue to Trade

- If insolvent under either test, decision to continue to trade must be kept under constant review
- Monthly, weekly and even daily assessments
- Directors should look at all options:
 - Restructuring
 - Lender support e.g. standstills, covenant waivers and/or new lending
 - Shareholder or Group support e.g. letters of support or additional investment
 - New Investment e.g. equity or debt-financing
 - Formal rescue and insolvency procedures
- Directors should not assume the safest course is to stop trading



Sanctions for Directors

- Sanctions apply equally to shadow directors or de facto directors
- Sanctions likely to be of most concern to directors:
 - Reckless or Fraudulent Trading – Section 610 of the Companies Act 2014
 - Restriction Order – Section 819 of the Companies Act 2014
 - Disqualification Order – Section 842 of the Companies Act 2014
- Directors must act honestly and responsibly



Practical steps Directors should take

Financial



Governance



Practical steps Directors should take (contd.)

Communication with Key Stakeholders

- Shareholders
- Lenders
- Payment processing banks
- Creditors
 - Landlords
 - Suppliers
- Partners
- Advertisers
- Revenue Commissioners

Compliance

- Accounts/Financial Returns
- Tax Returns

Other Supports/Options

- Government Supports
- Business Interruption Insurance
- Directors' & Officers' (D&O) Insurance

Key Takeaways

- Decision to continue to trade is critical – keep under constant review
- Consider all options to restore the company to a more solid financial footing
- Monitor the company's operations, trading and financial performance
- Implement key financial and governance mitigating measures
- Continue trade while directors honestly believe that there will be a successful outcome for the company and its creditors
- If that opinion changes, directors should take steps to cease trading and liquidate the company

Questions?



Ciara O'Herlihy
Senior Associate
+353 1 607 1386
Ciara.OHerlihy@mccannfitzgerald.com



Áine Murphy
Senior Associate
+353 1 511 1553
Aine.Murphy@mccannfitzgerald.com

