

COMPANIES (AMENDMENT) ACT 2009

AN ACT TO REMOVE CERTAIN EXCEPTIONS CONTAINED IN THE COMPANIES ACTS THAT APPLY IN THE CASES OF COMPANIES HOLDING LICENCES UNDER SECTION 9 OF THE CENTRAL BANK ACT 1971 (OR HOLDING COMPANIES OF SUCH COMPANIES) REGARDING DISCLOSURE OF LOANS TO DIRECTORS AND TRANSACTIONS OF AN ANALOGOUS NATURE, TO OTHERWISE AMEND THE COMPANIES ACTS IN RESPECT OF LOANS BY COMPANIES (OF WHATEVER TYPE) TO DIRECTORS OR CERTAIN RELATED PARTIES AND TRANSACTIONS OF AN ANALOGOUS NATURE AND, IN PARTICULAR, TO AMEND SECTION 40 OF THE COMPANIES ACT 1990 CONCERNING CRIMINAL LIABILITY IN THAT REGARD, TO CONFER ADDITIONAL POWERS ON THE DIRECTOR OF CORPORATE ENFORCEMENT WITH RESPECT TO ACCESS TO INFORMATION IN THE POSSESSION OF COMPANIES, INCLUDING INFORMATION KEPT BY THEM IN CERTAIN REGISTERS OR BOOKS, OR IN THE POSSESSION OF THIRD PARTIES, TO AMEND SECTIONS 20 AND 23 OF THE COMPANIES ACT 1990 IN RELATION TO SEARCH WARRANTS AND PROCEDURES TO BE FOLLOWED IN CASES OF CLAIMS OF LEGAL PROFESSIONAL PRIVILEGE, TO AMEND SECTIONS 43 AND 44 OF THE COMPANIES (AMENDMENT) (NO. 2) ACT 1999 AND TO PROVIDE FOR RELATED MATTERS.

[12th July, 2009]

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

1.—In this Act—

“Act of 1990” means the Companies Act 1990;

“Act of 2001” means the Company Law Enforcement Act 2001;

“Act of 2003” means the Companies (Auditing and Accounting) Act 2003;

“Principal Act” means the Companies Act 1963.

2.—Section 194 (as amended by the Act of 2003) of the Principal Act is amended—

(a) in subsection (5) (b), by substituting “fails to comply with this subsection or subsection (5A)” for “fails to comply with this subsection” ; and

(b) by inserting the following subsection after subsection (5):

“(5A) A company shall, if required by the Director, produce to the Director for inspection the book kept by it in accordance with subsection (5) (a) and shall give the Director such facilities for inspecting and taking copies of the contents of the book as the Director may require.” .

3.—Section 371A (inserted by the Act of 2001) of the Principal Act is amended, in subsection (1), by substituting “section 19(3) (c)” for “section 19(3) (b)” .

4.—(1) Section 19 (inserted by the Act of 2001) of the Act of 1990 is amended—

(a) by substituting the following subsections for subsection (3):

“(3) Where by virtue of subsection (1) the Director has power to require the production of any books or documents from any body, the Director shall have power to require the production of—

(a) those books or documents from any person who appears to the Director to be in possession of them,

(b) copies of any books or documents of the body from any person who appears to the Director to be in possession of them, and

(c) subject to subsection (4), other books or documents (whether the originals of them or

otherwise) which may relate to any books or documents of the body from any person who appears to the Director to be in possession of such other books or documents,

but where any such person claims a lien on books or documents produced by him, the production shall be without prejudice to the lien.

(3A) Any requirement under subsection (3) shall be made by the giving by the Director of a direction to the person of whom the requirement is being made that specifies—

(a) the books or documents to be produced by the person, and

(b) the time and place at which they are to be produced.” ;

(b) in subsection (4), by substituting “subsection (3) (c)” for “subsection (3) (b)” in each place where it occurs; and[2009.] [Companies (Amendment) Act 2009. No. 20.]

(c) in subsection (9), by substituting “a direction under subsection (1) or

(3A)” for “a direction under subsection (1)” .

(2) Nothing in subsection (1) shall be construed to mean that, but for the amendment effected by it, a direction given by the Director of Corporate Enforcement, before the passing of this Act, under section 19(3) of the Act of 1990 was limited in any way as to its effect or extent of operation or that any books or documents produced on foot of it to the Director of Corporate Enforcement were not lawfully produced to him.

5.—Section 20 of the Act of 1990 is amended—

(a) in subsection (2), by substituting “at any time or times within the period of validity of the warrant” for “at any time or times within 1 month from the date of issue of the warrant” ;

(b) by inserting the following subsections after subsection (2):

“(2A) Without prejudice to subsection (2B), where—

(a) the officer finds anything at, or in the custody or possession of any person found on, the premises named in the warrant that the officer has reasonable grounds for believing may be or may contain material information, and

(b) it is not reasonably practicable for a determination to be made on the premises—

(i) whether what he has found is something that he is entitled to seize under the warrant (whether as mentioned in subsection

(2) (d) or subsection (2B)), or

(ii) the extent to which what he has found contains something that he is entitled to seize

under the warrant in either of those cases, the officer’ s powers of seizure under the warrant shall include power to seize so much of what he has found as it is necessary to remove from the premises to enable that to be determined (in subsections (2D) to (2G) referred to as an ‘extended power of seizure’).

(2B) Where—

(a) the officer finds anything at, or in the custody or possession of any person found on, the premises named in the warrant being a book, document or other thing constituting material information (‘seizable information’) which he would be entitled to seize but for its being comprised in something else that he has (apart

from this subsection) no power to seize, and

(b) it is not reasonably practicable for the seizable

information to be separated, on those premises, from that in which it is comprised,

the officer's powers of seizure shall include power to seize both the seizable information and that from which it is not reasonably practicable to separate it (in subsections (2D) to (2G) also referred to as an 'extended power of seizure').

(2C) Where, for the purposes of subsection (2A) or (2B), an issue arises as to either of the following matters, namely—

(a) whether or not it is reasonably practicable on particular premises for something to be determined, or

(b) whether or not it is reasonably practicable on particular premises for something to be separated from something else, the issue shall be decided by reference solely to the following matters:

(i) how long it would take to carry out the determination or separation on those premises;

(ii) the number of persons that would be required to carry out that determination or separation on those premises within a reasonable period;

(iii) whether the determination or separation would (or would if carried out on those premises) involve damage to property;

(iv) the apparatus or equipment that it would be necessary or appropriate to use for the carrying out of the determination or separation;

(v) the costs of carrying out the determination or separation on those premises as against the costs of carrying out the determination or separation in another place (being a place in which

the Director can show it would be appropriate to do the thing concerned and in which the Director intends to arrange, or does arrange, for the thing to be done), and

(vi) in the case of separation, whether the separation—

(I) would be likely, or

(II) if carried out by the only means that are reasonably practicable on those premises, would be likely,

to prejudice the use of some or all of the separated seizable information for a purpose for

which something seized under the warrant is capable of being used.

(2D) Save where the officer is of opinion that compliance with this subsection

could result in the concealment, falsification, destruction or the disposal otherwise of material information, an extended power of seizure shall [2009.] [Companies (Amendment) Act 2009. No. 20.] not be exercised unless the officer has first made the following arrangements in relation to the thing or things, the subject of the proposed exercise of that power, namely reasonable arrangements—

(a) providing for the appropriate storage of that thing or those things,
(b) allowing reasonable access, from time to time, to that thing or those things by the owner, lawful custodian or possessor thereof (including, in the case of documents or information in nonlegible form, by the making of copies or the transmission of matter by electronic means),
and
(c) providing for confidentiality to be maintained as regards any confidential matter comprised in that thing or those things,
being arrangements to apply pending the making of the foregoing determination or the carrying out of the foregoing separation and the consequent return of anything to the owner, lawful custodian or possessor that is not material information; in deciding what the terms of those arrangements shall be, the officer shall have regard to any representations reasonably made on the matter by the owner, lawful custodian or possessor of the thing or things and endeavour, where practicable, to secure the agreement of that person to those terms.

(2E) Where—

(a) by reason of the officer being of the opinion referred to in subsection (2D), the arrangements referred to in paragraphs (a) to (c) of

that subsection are not made in relation to the thing or things the subject of the proposed exercise of the extended power of seizure, or

(b) circumstances arise subsequent to the exercise of the extended power of seizure that make it appropriate to vary the arrangements made under that subsection,

the officer shall, as the case may be—

(i) make, as soon as practicable after the exercise of that power of seizure, the arrangements referred to in subsection (2D) (a) to (c) in

relation to the thing or things concerned, or
(ii) vary the arrangements made under that subsection in a manner he considers appropriate,
and, in deciding what shall be the terms of those arrangements or that variation, the officer shall have regard to any representations on the matter reasonably made by the owner, lawful custodian or possessor of the thing or things concerned and endeavour, where practicable, to secure the agreement of that person to those terms.

(2F) Where an extended power of seizure is exercised, it shall be the duty of the officer—

(a) to carry out the determination or separation concerned as soon as practicable, and, in any event, subject to subsection (2G), within the prescribed period, after its exercise, and
(b) as respects anything seized in exercise of the power found not to be material information or, as the case may be, anything separated from another thing in the exercise of the power that is not material information, to return, as soon as practicable, and, in any event, subject to subsection (2G), within the prescribed period, after that finding or separation, the thing to its owner or the person appearing to the officer to be lawfully entitled to the custody or possession of it.

(2G) On application to the court by the Director or any person affected by the exercise of an extended power of seizure, the court may, if it thinks fit and having had regard, in particular, to any submissions made on behalf of the Director with regard to the progress of any investigation being carried on by the Director for the purpose of which the powers under this section had been exercised, give one or more of the following:

(a) a direction that the doing of an act referred to in subsection (2F) (a) or (b) shall be done within such lesser or greater period of time than that specified in that provision as the court determines,
(b) a direction with respect to the making, variation or operation of arrangements referred to in subsection (2D) (a) to (c) in relation to a thing concerned or a direction that such arrangements as the court provides for in the direction shall have effect in place of any such arrangements that have been or were

proposed to be made,

(c) a direction of any other kind that the court considers it just to give for the purpose of further securing the rights of any person affected by the exercise of an extended power of seizure, including, if the exceptional circumstances of the case warrant doing so, a direction that a thing seized be returned to its owner or the person appearing to the court to be lawfully entitled to the custody or possession of it, notwithstanding that the determination or separation concerned has not occurred, and any such direction may—

(i) relate to some or all of the things the subject of the exercise of the extended power of seizure,
(ii) be expressed to operate subject to such terms and conditions as the court specifies, including, [2009.] [Companies (Amendment) Act 2009. No. 20.]

in the case of a direction under paragraph (c), a condition that an officer of the Director be permitted, during a specified subsequent period, to re-take and retain possession of the thing returned for the purpose of carrying out the determination or separation concerned (and, retain after the expiry of that period, that which is found to be material information or is material information).

(2H) An application under subsection (2G) shall be by motion and may, if the court directs, be heard otherwise than in public.

(2I) In subsection (2F) 'prescribed period' means—

(a) in the case of paragraph (a) of it—

(i) unless subparagraph (ii) applies, 3 months,

or

(ii) such other period as the Minister prescribes in consequence of a review that may, from time to time, be carried out by or on behalf of the Minister of the operation and implementation of the amendments effected by section 5 of the Companies

(Amendment) Act 2009,

(b) in the case of paragraph (b) of it—

(i) unless subparagraph (ii) applies, 7 days, or

(ii) such other period as the Minister prescribes in consequence of such a review that may,

from time to time, be carried out by or on behalf of the Minister, but no regulations made to prescribe such a period shall be read as operating to affect any direction given by the court under subsection (2G) (a) in force on the commencement of those regulations.

(2J) The Minister may make regulations providing for such supplementary, consequential and incidental matters to or in respect of subsections (2A) to (2F) as he considers necessary or expedient.” ;

and

(c) by adding the following subsections after subsection (7):

“(8) The period of validity of a warrant shall be 1 month from its date of issue but that period of validity may be extended in accordance with subsections (9) and (10).

(9) The officer may, during the period of validity of a warrant (including such period as previously extended under subsection (10)), apply to a judge of the District Court for an order extending the period of validity of the warrant and such an application shall be grounded upon information on oath laid by the officer stating, by reference to the purpose or purposes for which the warrant was issued, the reasons why he considers the extension to be necessary.

(10) If the judge of the District Court is satisfied that there are reasonable grounds for believing, having regard to that information so laid, that further time is needed so that the purpose or purposes for which the warrant was issued can be fulfilled, the judge may make an order extending the period of validity of the warrant by such period as, in the opinion of the judge, is appropriate and just; where such an order is made, the judge shall cause the warrant to be suitably endorsed to indicate its extended period of validity.

(11) Nothing in the preceding subsections prevents a judge of the District Court from issuing, on foot of a fresh application made under subsection (1), a further search warrant under this section in relation to the same premises.” .

6.—Section 23 of the Act of 1990 is amended by substituting the following subsections for subsection (1):

“(1) In this section—

‘computer’ has the same meaning as it has in section 20;

‘information’ means information contained in a document, a

computer or otherwise;

'privileged legal material' means information which, in the opinion of the court, a person is entitled to refuse to produce on the grounds of legal professional privilege.

(1A) Subject to subsection (1B), nothing in this Part shall compel the disclosure by any person of privileged legal material or authorise the taking of privileged legal material.

(1B) The disclosure of information may be compelled, or possession of it taken, pursuant to the powers in this Part, notwithstanding that it is apprehended that the information is privileged legal material provided the compelling of its disclosure or the taking of its possession is done by means whereby the confidentiality of the information can be maintained (as against the person compelling such disclosure or taking such possession) pending the determination by the court of the issue as to whether the information is privileged legal material.

(1C) Without prejudice to subsection (1D), where, in the circumstances referred to in subsection (1B), information has been disclosed or taken possession of pursuant to the powers in this Part, the person—

(a) to whom such information has been so disclosed, or

(b) who has taken possession of it,

shall (unless the person has, within the period subsequently mentioned in this subsection, been served with notice of an

application under subsection (1D) in relation to the matter

concerned) apply to the court for a determination as to whether

the information is privileged legal material and an application[2009.] [Companies (Amendment) Act 2009. No. 20.]

under this subsection shall be made within 7 days after the disclosure or the taking of possession.

(1D) A person who, in the circumstances referred to in subsection (1B), is compelled to disclose information, or from

whose possession information is taken, pursuant to the powers

in this Part, may apply to the court for a determination as to

whether the information is privileged legal material.

(1E) Pending the making of a final determination of an application under subsection (1C) or (1D), the court may give such

interim or interlocutory directions as the court considers appropriate

including, without prejudice to the generality of the foregoing, directions as to—

(a) the preservation of the information, in whole or in

part, in a safe and secure place in any manner specified by the court,

(b) the appointment of a person with suitable legal qualifications possessing the level of experience, and the

independence from any interest falling to be determined between the parties

concerned, that the court considers to be appropriate for the purpose of—

- (i) examining the information, and
- (ii) preparing a report for the court with a view to assisting or facilitating the court in the making by the court of its determination as to whether the information is privileged legal material.

(1F) An application under subsection (1C), (1D) or (1E) shall be by motion and may, if the court directs, be heard otherwise than in public.” .

7.—The following section is substituted for section 40 of the Act of 1990:

“Criminal penalties for breach of section 31.

40.—If a company enters into a transaction or arrangement that contravenes section 31, every officer of the company who is in default shall be guilty of an offence.” .

8.—(1) Section 41 of the Act of 1990 is amended—

(a) by substituting the following subsection for subsection (6):

“(6) Subsections (1) and (2) do not apply for the purposes of any accounts prepared by any company which is a licensed bank, or the holding company of a licensed bank, in relation to—

(a) a transaction or arrangement of a kind described in section 31 entered into for a person who at any time during the relevant period was connected with a director of that company or that holding company; or

(b) an agreement to enter into such a transaction or arrangement for a person so connected, to which the licensed bank is a party.” ;

and

(b) by adding the following subsections after subsection (9):

“(10) Nothing in this section or sections 42 to 45 prejudices the operation of any—

(a) rule or other instrument; or

(b) direction or requirement,

made, issued, granted or otherwise created under the Central Bank Acts 1942 to 1998, the Central Bank and Financial Services Authority of Ireland Acts 2003 and 2004 or

any other enactment requiring a licensed bank, or a holding company of a licensed bank, to disclose particulars,

whether in accounts prepared by it or otherwise, of transactions, arrangements or agreements (whether of the kind

described in section 31 or not) entered into by the licensed bank.

(11) Where a company makes default in complying with this section, the company and every person who at the time of that default is a director of the company shall be guilty of an offence.

(12) It shall be a defence in proceedings for an offence under subsection (11) for the defendant to prove that he took all reasonable steps for securing compliance with the requirements of this section.” .

(2) Section 43 of the Act of 1990 is amended by substituting the following subsections for subsections (5) and (6):

“(5) The following, namely—

(a) the group accounts of a company which is, or is the holding company of, a licensed bank prepared in accordance with the requirements of section 150 of the Principal Act; and

(b) the accounts of any other company which is a licensed bank prepared in accordance with the requirements of section 148 of the Principal Act, in respect of the relevant period shall contain a statement in relation to transactions, arrangements and agreements made by—

(i) the company preparing the accounts, if it is a licensed bank; and

(ii) in the case of a holding company, by any of its subsidiaries which is a licensed bank,

for persons who at any time during the relevant period were connected with a director of the company of—

(I) the aggregate amounts outstanding at the end of the relevant period under transactions, arrangements [2009.] [Companies (Amendment) Act 2009. No. 20.]

and agreements coming within any paragraph of subsection (1) (which

transactions, arrangements and agreements, coming within any particular such paragraph, are referred to

subsequently in this section as ‘relevant transactions, arrangements and agreements’);

(II) the aggregate maximum amounts outstanding during the relevant period under relevant transactions, arrangements and agreements made for persons so connected;

(III) the number of persons so connected for whom relevant transactions, arrangements and agreements that subsisted at the end of the relevant period were

made; and

(IV) the maximum number of persons so connected for whom relevant transactions, arrangements and agreements that subsisted at any time during the relevant period were made.

(6) A transaction, arrangement or agreement to which subsection (5) applies need not be included in the statement referred to in that subsection if—

(a) it is entered into by the company concerned in the ordinary course of its business, and

(b) its value is not greater, and its terms no more favourable, in respect of the person for whom it is made,

than that or those which—

(i) the company ordinarily offers, or

(ii) it is reasonable to expect the company to have offered,

to or in respect of a person of the same financial standing but unconnected with the company.

(6A) In reckoning the aggregate maximum amounts or the maximum number of persons referred to in subsection (5) (II) or (IV), as appropriate, there shall not be counted, as the case may be—

(a) relevant transactions, arrangements and agreements made by the company, or a subsidiary of it, referred to in subsection (5) and which is a licensed bank for any person connected as mentioned in that subsection if the aggregate maximum amount outstanding during the relevant period under relevant transactions, arrangements and agreements made for that

person does not exceed \3,174.35; or

(b) a person so connected for whom the aggregate maximum amount outstanding as mentioned in paragraph (a) does not exceed the amount there mentioned.” .

(3) Section 43 of the Act of 1990 is further amended—

(a) in subsection (7), by substituting “subsection (2) or (5)” for “subsection (2), (5) or (6)” ;

(b) in subsection (8), by substituting “subsections (2) and (5)” for “subsections (2), (5) and (6)” ;

(c) by deleting subsection (9); and

(d) by adding the following subsections after subsection (10):

“(11) Where a company makes default in complying with this section, the company and every person who at the time of that default is a director of the company shall be guilty of an offence.

(12) It shall be a defence in proceedings for an offence under subsection (11) for the defendant to prove that he took all reasonable steps for securing compliance with the requirements of this section.” .

9.—Section 44 of the Act of 1990 is amended—

(a) in subsection (1), by substituting “are required by subsection (1) or (2) of section 41 or would, but for section 41(6), be required by subsection (1) or (2) of that section” for “would, but for section 41(6), be required by subsection (1) or (2) of that section” ;

(b) by inserting the following subsections after subsection (4):

“(4A) Subsection (3) shall not require the inclusion in the statement of particulars of any transaction, arrangement or agreement if, by reason of—

(a) the company’ s not taking advantage of section 41(6); or

(b) the company’ s being required by a rule, instrument, direction or requirement referred to in section 41(10) to disclose such information in the following manner,

the company has included in the group accounts or accounts referred to in section 41(1) or (2), as the case may be, for the last complete financial year mentioned in subsection (3) particulars of the transaction, arrangement or agreement which, but for either of those reasons, it would not have disclosed in those accounts by virtue of section 41(6).

(4B) Where subsection (1) falls to be applied to a company which is the holding company of a licensed bank, each of the references in subsection (2) to the company, other than the first such reference, shall be deemed to be a reference to the licensed bank.

(4C) A company shall, if required by the Director, produce to the Director for inspection the register kept by it in accordance with subsection (1) and shall give the Director such facilities for inspecting and taking copies of the contents of the register as the Director may require.” ; [2009.] [Companies (Amendment) Act 2009. No. 20.]

(c) in subsection (8), by substituting “subsection (1), (3) or (4C)” for “subsection (1) or (3)” ; and

(d) by substituting the following subsection for subsection (9):

“(9) It shall be a defence in proceedings for an offence under subsection (8) (being an offence consisting of a failure to comply with subsection (1) or (3)) for the defendant to prove that he took all reasonable steps for securing

compliance with subsection (1) or (3), as the case may be.” .

10.—(1) Section 43 of the Companies (Amendment) (No. 2) Act 1999 is amended—

(a) in subsections (1), (2), (8) and (9), by substituting “a Member State of the EEA” for “the State” ;

(b) by repealing subsection (12); and

(c) by substituting the following subsection for subsection (16) (inserted by the Act of 2003):

“(16) In this section—

‘director’ does not include an alternate director;

‘Member State of the EEA’ means a state that is a contracting party to the Agreement on the European Economic Area signed at Oporto on 2 May 1992, as amended

for the time being.” .

(2) Section 44 of the Companies (Amendment) (No. 2) Act 1999 is amended—

(a) in subsection (8), by substituting “So far as it is the person’ s residence in the State that falls to be determined

for the purposes of that section, for the purposes of

section 43,” for “For the purposes of section 43,” ; and

(b) by adding the following subsection after subsection (11):

“(12) For the purposes of this section a company has a real and continuous link with an economic activity that is being carried on in the State if one or more of the following conditions are satisfied by it:

(a) the affairs of the company are managed by one

or more persons from a place of business established in the State and that person or those persons is or are authorised by the company to act on its behalf;

(b) the company carries on a trade in the State;

(c) the company is a subsidiary or a holding company of a company or another body corporate

that satisfies either or both of the conditions specified in paragraphs (a) and (b);

(d) the company is a subsidiary of a company, another subsidiary of which satisfies either or both of the conditions specified in paragraphs

(a) and (b).” .

11.—(1) This Act may be cited as the Companies (Amendment) Act 2009.

(2) The Companies Acts and this Act shall be read as one.