COMPANY LAW REVIEW GROUP

REPORT ON THE PROTECTION OF EMPLOYEES AND UNSECURED CREDITORS

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Chairperson's Letter to the Tánaiste

Dear Tánaiste,

I am pleased to submit for your consideration the Company Law Review Group *Report on the Protection of Employees and Unsecured Creditors*.

The establishment of new enterprises drives innovation and competitiveness within an economy. In order to foster economic growth, legislators and policy-makers seek to create an open business environment which encourages entrepreneurship by minimising barriers to market access and ensures that funding is available to companies. In turn these businesses hire and retain employees and create opportunities for suppliers and traders. However, the need for an open business environment must be balanced against the necessity of protecting the most vulnerable market actors, employees and unsecured creditors. In particular, business failure and insolvency can often result in unsecured creditors and employees being unable to recover the money which they are lawfully entitled to. The focus of this report was to consider how to offer better protection for employees and unsecured creditors in insolvency.

The recommendations contained in the Report intend to make the liquidation process more transparent. These include more detailed requirements for the reporting on the treatment of employees during the liquidation process to the Courts and the Office of the Director of Corporate Enforcement. Under the recommendation for the introduction of deemed restriction for directors who fail to arrange for the appointment of a liquidator, the circumstances of business failure that result in insolvent liquidation would face greater scrutiny. A new process for a self-administered liquidation is also proposed although this will require further work by the Review Group so as to ensure that it cannot be misused by dishonest directors. Finally, it is proposed to introduce a statutory duty for directors of insolvent companies to consider the interests of creditors reflecting the common law duty expressed by the Supreme Court in *Re Fredrick Inns (1994)*.

In preparation of the Report, the Review Group undertook a wide-ranging review of the provisions of the Companies Act 2014 and identified those provisions which can be utilised to protect the interests of employees and unsecured creditors. Each of these sections was considered in turn and its particular relevance for the safeguarding of the interests of employees and unsecured creditors in insolvency was examined and this is set out in the Report. In general, the existing protections and remedies for employees and unsecured creditors in company law were found to be comprehensive.

This finding of the Review Group may be difficult to reconcile with the fact that relatively few actions are taken against directors for breach of their duties. However, in order for civil actions, as opposed to criminal proceedings, to be taken against directors, there are two essential pre-requisites that must be present.

The first of these is that there must be sufficient monies available to fund proceedings against the director of an insolvent company. Employees and unsecured creditors who have lost money as a result of insolvency will rarely be in a financial position to fund litigation against a director. While many of the remedies available to employees and unsecured creditors are also available to liquidators, liquidators will not always initiate actions against directors for breach of their duties. Liquidators are accountable to the creditors of the insolvent company for any company funds they utilise in the course of the liquidation. Accordingly, even where there are monies available to litigate, a liquidator will be reluctant to engage the limited resources available to them in lengthy, expensive or speculative

litigation which could result in further depletion of the funds available for dispersion to all creditors including employees.

The second pre-requisite for the taking of any action against a director relates to whether there would be any resulting tangible benefit. Even when there are funds available to bring litigation against a director for breach of director's duties, there may not be any real possibility of recovering an award of damages from a director of an insolvent company. Where the director's failings have not involved the misappropriation of corporate property, their personal resources will often be insufficient to pay any award. In contrast, there are relatively more successful actions where directors have misappropriated or redirected the insolvent company's property and this may account for why actions for unfair preference and improper transfer are the actions which a liquidator is most likely to instigate.

Accordingly, irrespective of how comprehensive company law is, it is likely that there will always be a dearth of actions against directors in circumstances where there are insufficient finances available to fund litigation or where the prospective defendant would have insufficient funds to meet any award that might be made against them. The issue of litigation funding is further considered in Chapter 6 of this report.

As you will see from our report, the deliberations that form its conclusions were conducted over a 18 month period during which there were 14 meetings of a working committee chaired by Mr. Vincent Madigan, formerly of your Department, but now retired. I would like to thank Vincent for his meticulous approach to the task and to every member of that committee (named in the report) who worked so hard to provide a comprehensive, balanced and measured report which the Review Group adopted. While every effort was made to achieve consensus, ultimately that did not prove possible and so where there were divergent views these are reflected in the Report. I must also acknowledge the tremendous work of our secretary, Ms. Síona Ryan and legal researcher Lisa Maher B.L. who provided essential support to the committee and the Review Group.

Finally, I would like to take this opportunity on behalf of the Review Group to wish you well in your new portfolio. The Review Group remains available to advising you on how it considers it best to update and improve company law.
Yours sincerely,

____

Dr Thomas B Courtney
Chairperson

Executive Summary

In the preparation of this report, a root and branch review was carried out of all provisions of the Companies Act 2014 relevant to the treatment of employees and unsecured creditors in insolvency and in particular, whether new provisions should be proposed. In general, the current provisions of the Companies Act 2014 were found to provide a comprehensive framework which seeks to strike a balance between the interests of the members of a company and the sometimes conflicting interests of other stakeholders, including employees and unsecured creditors.

Recommendations for legislative change are proposed which, while not representing a panacea, could potentially address some of the difficulties experienced by employees and unsecured creditors. The following matters are presented by the Review Group as recommendations:

- The imposition of a statutory obligation on directors of companies to consider the interests of creditors where it appears that a company is, or is likely to be, unable to pay its debts as they fall due.
- A requirement that where it is the intention of a provisional liquidator to cease trading and/or terminate employees' contracts of employment, the provisional liquidator must seek the specific power to do so from the High Court.
- Directors of insolvent companies who fail to arrange for the appointment of a liquidator will be automatically deemed to be restricted in accordance with section 819.
- The inclusion of a new question on the questionnaire used to compile the section 682 liquidator's report. The liquidator of an insolvent company will be required to specifically address the consideration given to employees by the directors of the company in the period immediately prior to liquidation.
- The consideration of a scheme to help directors of insolvent companies who want to wind up their company but cannot afford to pay a liquidator to do so. The Self-Administered Liquidation is designed for small companies with relatively minor amounts of debt and aims to offer an inexpensive way for directors to dissolve companies.
- A legislative change to allow for access to the Social Insurance Fund for employees whose employer has not entered into formal insolvency.

While other proposals for amendments to company law were submitted, the members of the Review Group, with the exception of ICTU, felt that these changes were not workable solutions to the concerns raised. The Review Group felt it would be instructive that where specific proposals for reform of company law had been made by stakeholders, but ultimately not recommended, it was important to record the reasons why it was not considered appropriate to change the law and to clearly set out the rationale behind each determination.

Introduction

Request from Minister for Jobs, Enterprise and Innovation

The Chair of the Company Law Review Group (CLRG) received a request from the then Minister for Jobs, Enterprise and Innovation, Richard Bruton, T.D. on 14th January 2016 proposing a review regarding the protection of employees and unsecured creditors. The Minister requested that the Company Law Review Group:

> *"..examine and recommend ways in which company law and indeed the wider legislative code could be potentially amended to ensure better safeguards for a company's employees and unsecured creditors. In this context, the following areas may merit particular consideration: corporate governance; corporate insolvency; share capital; directors' duties and personal liability along with more general provisions in company law.*
>
> *I consider that limited liability is a privilege and not an absolute right. I am concerned that there are potential contexts in which the privilege of limited liability for a company could be used to avoid a company's obligations to its employees and to unsecured creditors. In the consideration of this matter, it would be useful to explore, inter alia:*
>
> *-Instances where the corporate veil can and should be lifted that could be adopted in statute.*
>
> *-The potential strengthening of obligations on Directors to a company's employees as part of Directors' duties.*
>
> *-Building-in checks and balances in statute which would strengthen obligations to employees for better protection in company restructuring.*
>
> *-Circumstances in a liquidation of an insolvent company where the debts or liabilities of that company can be met from solvent companies in the same group or in related companies."*

A copy of the letter from Minister Bruton to the Company Law Review Group can be found in Appendix 1.

An ad-hoc committee of the Company Law Review Group was convened on the 4th February 2016, chaired by Mr. Vincent Madigan and comprising members of the Company Law Review Group who volunteered to participate on the ad-hoc committee as well as officials from relevant government departments. In preparation of this report, the ad-hoc committee met on 14 occasions over a period of 18 months. A full list of members is set out in Appendix 2.

As part of a twin track approach on 14th January 2016, the Minister for Jobs, Enterprise and Innovation and the Minister for Business and Employment also commissioned Nessa Cahill B.L. and Kevin Duffy, the then Chairman of the Labour Court, to conduct an expert examination of legal protections for workers with a particular focus on ways of ensuring limited liability and corporate restructuring are not used to avoid a company's obligations to its employees. The examination was to look specifically at situations where assets of significant value are separated from the operating entity, being the employer, and how the position of employees can be better protected in such situations. The experts submitted their report to the Minister on 11th March 2016 and the report "*Expert Examination and Review on Laws for the Protection of Employee Interests When Assets Are Separated from the Operating Entity*"was subsequently published[1]. On the 7th June 2016, the ad-hoc committee met with the Ms. Nessa Cahill and Mr. Kevin Duffy, to discuss in depth the recommendations of the report and any commonality in the respective reviews.

[1] "*Expert Examination and Review on Laws for the Protection of Employee Interests When Assets Are Separated from the Operating Entity*" https://www.djei.ie/en/Publications/Publication-files/Duffy-Cahill-Report.pdf accessed 5th May 2017.

This report explores the matters raised in Minister Bruton's letter and contains the findings and recommendations of the Review Group arising from its deliberations on these matters.

Chapter 1. General Legal Landscape

1.1 Introduction

In order to explore the matters contained in the Minister's request, it is useful to start out with some elementary principles of company law with a particular focus on insolvency situations that are pertinent to the subject matter of this review. The concepts of separate legal personality and limited liability could be described as the cornerstones upon which company law has been built. In the context of this report, it is also worthwhile to outline the primary insolvency mechanisms which distressed companies may be subject to and how this affects the entitlements of the employees and the creditors of those companies. In addition, the concepts of share capital and corporate governance are also briefly described in this chapter.

1.2 Employees and Unsecured Creditors

1.2.1 Definition of Employees and Unsecured Creditors

Employees

There is no definitive definition of an employee in Irish law. A general understanding would be that an employee is someone who is working, or has worked under a contract of employment (contract of service) for an employer. Categories of employees can include permanent, fixed term or temporary/casual full time staff or part-time workers in those categories. The existence of an employer/employee relationship is not always easy to identify. Directors of companies can be considered employees of a company[2]. In addition, individuals who at first might appear to be working as independent contractors can sometimes also be employees of a company when certain criteria are fulfilled[3].

Unsecured Creditors

An unsecured creditor is a person who is a creditor but is not a secured creditor. A secured creditor is one who holds a mortgage or charge or lien on a debtor's property. An unsecured creditor is one who does not hold any such security. In practice, unsecured creditors are commonly understood as a person or company who has supplied goods or services and has not received payment. However, unsecured creditors can also include employees, local authorities and the Revenue Commissioners.

1.2.2 Entitlements of Employees and Unsecured Creditors

Employees

1. In an ongoing trading operation, employees have an entitlement to be paid what is owed to them in accordance with agreed terms, contractual and statutory rights, collective agreements and those rights arising from custom and practice.
2. In an insolvency situation, employees are entitled to be paid whatever is owing to them in accordance with their contractual and statutory rights, collective agreements, custom and practice up to the period when the relevant insolvency event occurred or whenever their employment is terminated. They are also entitled to

[2] *Catherine Lee v Lee's Air Farming Limited (New Zealand)* [1960] 3 All ER 420

[3] The existence of certain factors (such as control, set hours, the absence of independent insurance, absence of multiple clients, availability of statutory entitlement like sick pay and overtime) can result in an independent contractor being treated as an employee.

certain awards made under employment protective law as well as payments into occupational pensions and PRSAs.

Unsecured Creditors

1. In an ongoing trading operation, unsecured creditors have an entitlement to be paid what they are owed in accordance with their contractual and statutory rights[4].

2. In insolvency situations, where trading ceases, unsecured creditors are entitled to be paid whatever is owing to them as of the date of the insolvency. However, unsecured creditors usually only receive a small proportion of what is owing to them by reference to the total liabilities of the company in question on the date of the insolvency.

1.3 Priority of Payments for Creditors in Liquidations

In the Companies Act 2014, the priority of payment for creditors in liquidations is set out in Part 7 of Chapter 11. The Company Law Review Group has previously considered the priority of payments in its 2007 Report.

1.3.1 Employees

Employees whose employers become insolvent are protected as a class of unsecured creditors by virtue of being accorded preferential status in relation to some of their claims in a winding-up. This is addressed by sections 619 and 621 respectively of the Companies Act 2014.

Upon a company's liquidation, section 619 of the Companies Act 2014 provides that the order of priority of payments to creditors shall be the same as those which apply in bankruptcy insofar as those rules relate to (a) the respective rights of secured and unsecured creditors, (b) debts provable and (c) the valuation of annuities and contingent liabilities.

The effective priority of payments made to creditors is generally as follows:

- First, payments out of assets subject to a fixed charge to the fixed charge holder (on the grounds that such assets have been effectively assigned to the chargeholder and do not form part of the assets available to the receiver or liquidator[5]).
- Secondly, payments in respect of certain social welfare payments i.e. unpaid employee PRSI.
- Thirdly, the expenses, fees and costs to the Insolvency practitioner.
- Fourthly, certain payments to what are known as preferential creditors, principally the Revenue Commissioners, local authorities for rates, and employees each with regard to certain specific liabilities.
- Fifthly, payments out of the assets the subject of the floating charge to the floating charge holder.
- Sixthly, unsecured creditors.
- Seventhly, subordinated creditors.
- Finally shareholders.

[4] Under the European Communities (Late Payment in Commercial Transactions) Regulations 2012 - S.I. 580 of 2012 it is an implied term of every commercial transaction that where a purchaser does not pay for goods or services by the relevant payment date, the supplier shall be entitled to interest.

[5] Thomas B. Courtney, *The Law of Companies*, (4th edn, Bloomsbury Professional, 2016), 1983 para 26.184

Section 621 of the Companies Act 2014 sets out that employees of insolvent companies are entitled to submit claims, subject to specified statutory limits and meeting the defined criteria, for:

- Arrears of wages and salaries for the 4 months prior to winding up (including commission and piece work) and not exceeding €10,000.
- Arrears of holiday pay (no money or time limit).
- Payments in lieu of notice.
- Unfair dismissal awards.
- Arrears of sick pay (no money or time limit).
- Arrears of superannuation contributions (in the previous 12 months).
- Amounts due to an employee in connection with an accident which happened in the course of his or her employment and prior to the winding up.
- Compensation awarded to an employee by an adjudication officer or the Labour Court.

Notably employees' priority status for their arrears of wages and salaries extends back 4 months prior to the liquidation or receivership and is capped at €10,000 per employee. Accordingly, employees rank as unsecured creditors (with no preferential status) in the order of priority for any wages which are owed in excess of €10,000.

1.3.2 Other Unsecured Creditors

Apart from employees, there are other creditors that also hold preferential status in certain circumstances; most notably Revenue has preferential status in respect of certain outstanding taxes and the Local Authorities in respect of rates. Section 621 (2)(a) provides further details as to the exact taxes and rates in question and this is further detailed in Appendix 3.

The Revenue Commissioners' debts in respect of employment contributions (PRSI) which have actually been deducted from employees' remuneration but which have not been paid over to them, have preference by virtue of section 19(2) of the Social Welfare (Consolidation) Act 2005. This status gives these claims preference for priority of payments in the event of distributions over other preferential creditors

Like employees, the Revenue Commissioners and Local Authorities can still find themselves as unsecured creditors for tax liabilities which are not afforded preferential status. Both are limited by the 12 month rule (further detailed at Appendix 3) meaning that in a significant number of cases, they hold debt that is not afforded preferential status and in these instances are unsecured creditors for the purposes of these debts.

In practice, the effectiveness of preferential status or the likelihood of a dividend to unsecured creditors depends on the amount of money left in the company once the costs and expenses of the insolvency process and the fixed charge holders have been fully paid. Anecdotal evidence from insolvency experts suggests that in the majority of insolvencies, recoveries for unsecured creditors are very low.

There can also be other forms of security interests which may affect the monies available for distribution, for example, retention of title claims and solicitors' liens.

1.4 Relevant Principles of Company law

1.4.1 Separate Legal Personality

A company registered in accordance with the Companies Act 2014 is a legal entity separate and distinct from the members of which it is composed. The principle that members of a limited company are not liable for its debts applies not only to companies controlled by individual members, but also to wholly owned subsidiaries of other companies.[6] The very essence of a company is that once it has been created or 'incorporated' it is considered in law to be a separate entity from its shareholders. This doctrine stems from the House of Lord's decision of *Saloman v A Saloman & Co Ltd*[7] where the House of Lords ruled that:

> *"The company is at law a different person altogether from the [shareholders] …and, though it may be that after incorporation the business is precisely the same as before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the [shareholders] or trustee to them. Nor are the [shareholders], as members, liable in any shape or form, except to the extent and the manner provided for by the Act."*

So, in general, a parent company is not liable for the debts of its wholly owned subsidiary, nor does it incur a liability merely because it exercises overall control of the subsidiary through a group structure, although it could, if it exerts direct control, be held to be a shadow director. In certain limited circumstances Irish courts will disregard the separate legal personality of a company where to do otherwise would result in the use of the corporate personality as a cloak to conceal impropriety, or if to do otherwise would lead to an injustice.

1.4.2 Limited Liability

Limited liability refers to the benefit enjoyed by certain types of bodies corporate that enjoy legal personality separate from that of their members. The liability of members of a limited company may, for example, be limited to the amount, if any, unpaid on the shares respectively held by them. Alternatively, liability may be limited to the amount which the members respectively undertake to contribute to the assets of the company in the event that the company is wound up.

The doctrine of limited liability is now enshrined in the Companies Act 2014. Section 17(2) limits the liability of the members of a private company limited by shares and limited liability is bestowed on the different types of limited liability companies throughout the 2014 Act[8].

Thus, the shareholders of a company are not liable to the company's creditors. This fact, that companies are separate from their shareholders, as well as the consequences that stem from that fact, is one of the many reasons as to why the corporate form is used.

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[6] Section 1228 of the Companies Act 2014 also allows for three types of unlimited companies (private unlimited companies having a share capital, public unlimited companies with a share capital and public unlimited companies without a share capital) the members of which have no limit on their liability.

[7] *Saloman v A Saloman & Co Ltd* [1896] UKHL 1

[8] DACs enjoy limited liability by virtue of section 965 of the Companies Act 2014. PLCs are limited in their liability by virtue of section 1004, and the limited liability of CLGs is set out in section 1172.

Limited liability of companies has been a means of incentivising and encouraging entrepreneurs to overcome aversion to risk and to make investments in business ventures that might be beneficial to the economy at large. It is clear that limited liability could potentially be open to abuse, and that companies, particularly those companies in a group structure, could use the corporate form to evade debts that they are liable to pay.

1.4.3 Piercing the Corporate Veil

Limited liability is a privilege, not a right. Thus, both the common law and statute provide remedies to address misuse of limited liability. One of the most important of these safeguards is the common law doctrine of 'piercing the corporate veil'. This occurs where the veil of incorporation is used fraudulently to shield the owners and/or directors of a company from liability, and where the subsidiary company is merely an unlawfully operated façade of its parent company. In such circumstances, the owners or directors of the company can be made liable by the courts for money owed by the subsidiary to its creditors. The courts are rightly hesitant to apply this doctrine: much of the beneficial effect of limited liability would be compromised if veil-piercing occurred on a regular basis. However, it does give creditors recourse where they prove themselves to have been defrauded.

1.4.4 Corporate Governance

Corporate governance can be defined as the system by which companies are directed and controlled and made accountable to shareholders and other stakeholders. The ODCE has stated[9] that the principles underlying corporate governance are based on conducting the business with integrity and fairness, transparency with regard to its operations, making all the necessary disclosures and decisions and complying with all the laws of the land.

The model corporate governance structure specifies the distribution of rights and responsibilities among the different participants in the organisation – such as the board, managers, shareholders and other stakeholders – and lays down the rules and procedures for decision-making. Other stakeholders include creditors and employees.

Corporate governance is dealt with in Part 4 of the Companies Act 2014 which sets out in 92 sections the law relating to the governance and administration of companies. One of the major innovations of the 2014 Act in respect of corporate governance was the codification of the rules of internal management which would previously have been found in a company's articles of association. In addition, all laws relating to meetings, voting and resolutions have been put on a statutory footing save where companies elect to specify other mechanisms, requirements or replacements.

The introduction of section 228 of the Companies Act 2014 sets out the fiduciary duties owed to a company by its directors and codifies the essence of common law decisions relating to directors duties.

Section 1373 of the 2014 Act requires that a corporate governance statement be included in the section 325 director's report of traded companies[10]. The corporate governance statement should include references to the

[9] ODCE, 'What is corporate governance?' Retrieved on 5 May 2017 from http://www.odce.ie/en-gb/companylawyou/corporategovernance.aspx

[10] A traded company is defined in section 1372 as any public limited company, designated activity company, company limited by guarantee or public unlimited companies with shares or debentures that is admitted to trading on a regulated market in the EEA. This requirement is repeated in discrete sections in respect of each type of traded company, in relation to DACs (Section 992), PLCs (Section 1115) CLGs (Section 1212), PUCs and PULCs (Section 1266) and investment companies (Section 1401).

company's corporate governance code and practices. When the company departs from its corporate governance code or has not applied the provision of its code, the statement must explain and give reasons for this departure.

While company law regulates how companies should be structured, governed and managed, there are also a number of regulatory agencies each of which is charged with particular enforcement powers. These agencies include the Office of the Director of Corporate Enforcement, the Irish Auditing and Accounting Supervisory Authority, the Companies Registration Office, the Irish Stock Exchange, the Competition and Consumer Protection Commission, and various other sectoral regulators. Each of these State agencies has an interest in enforcing corporate governance standards. On the broader global stage, the European Commission also sets standards for corporate governance as does the OECD and the IMF.

1.4.5 Share Capital

Share capital is the part of the capital of a company that comes from the issue of shares. The Companies Act 2014 requires that the minimum issued share capital for a PLC in the Companies Act 2014 is €25,000 but does not impose minimum requirements on any other form of company.

Minimum share capital requirements are often cited as a potential method of protecting creditors. In theory the share capital is reflected in the value of the assets. The difficulty is that money paid in as share capital is not required to be kept separate, but is mingled with the other funds of the company and/or used by it. Thus, even if minimum thresholds of share capital were to be required, there would still not be a readily available cash fund equivalent to the share capital from which to cover creditors' claims against the company in an insolvency situation. A requirement to have such a cash fund could represent a significant obstacle to the conduct of commerce through company structures.

Minimum share capital requirements are however much more stringent in respect of their application to companies where a director of the company has been restricted. Section 819(3) of the Companies Act 2014 requires that any company which has a director who is subject to a restriction order must have an allotted share capital of nominal value not less than €500,000 in the case of a public unlimited company and €100,000 in the case of any other company type. These requirements can be difficult to meet. However, perhaps more importantly, the fact that a director is subject to a restriction order can make it much more difficult for a company to obtain credit and as a result, the threat of restriction acts as a powerful disincentive.

1.5 Overview of Insolvency Regime in Ireland

1.5.1 Examinership

Examinership is a legal mechanism for the rescue or restructuring of ailing, but potentially viable companies. Section 509 of the Companies Act 2014 sets out the court's power to appoint an examiner and the circumstances in which the court may appoint an examiner on application to it by a petitioner.

The company must be, or likely to be, unable to pay its debts. However, a winding up of the company cannot be in progress. The central feature of examinership is the protection of jobs by the appointment by the court of an examiner and the placing of the company concerned under the protection of the court for 70-100 days. While the

company is so protected, it may not be wound up, a receiver may not be appointed, and generally debts or security may not be executed against it.

Anecdotal evidence suggests that examinership may be abused by companies seeking to be released from burdensome contractual obligations. In recent years, examinership has been viewed as a way of avoiding leasehold agreements with upward only rent reviews. Unsecured creditors can often suffer as a result of these planned examinerships where following a company's exit from examinership they may only recover a fraction of their debts.

Section 518 of the Companies Act 2014 obliges the petitioner and the independent expert to act in utmost good faith when presenting a petition to the court or when preparing the report of the independent expert. The court is entitled to decline to continue hearing the petition if it believes that this requirement has not been complied with. The court is also entitled to set aside the appointment of an *interim* examiner in circumstances where there has been a lack of candour at the *ex parte* stage. However, in practice the court will often also consider the interests of other stakeholders, and in particular, employees.

1.5.2 Receivership

A receiver is a person appointed, typically by secured creditors of a company, to realise or manage secured assets of the company in question. Often a debenture will authorise the appointment of a receiver on certain conditions being satisfied. The court has an inherent jurisdiction to appoint a receiver.

The appointment of a receiver operates to suspend the directors' authority in relation to the assets covered by the receivership. The appointment of a receiver by the court operates to dismiss the company's existing employees, although they may subsequently become employed by the receiver under new contracts of employment[11]. The appointment of a receiver out of court, however, does not generally of itself automatically terminate employment contracts with the company[12]. A receiver has an obligation to pay preferential creditors in priority to the claims of holders of charges which were originally created as floating charges[13]. However, the court may order that this requirement does not to apply to a company where an examiner has been or is about to be appointed.

A receiver of a company is required to send a statement to the CRO, which in turn forwards it to the Director of Corporate Enforcement as to whether, in his or her opinion, the company is solvent at the end of the receivership[14].

1.5.3 Liquidation

The law on the winding up and liquidation of companies in Ireland is set out in comprehensive detail in Part 11 of the Companies Act 2014. Currently, there are two categories of liquidation:

1) Compulsory or court liquidation
2) Voluntary liquidation, which can be either:
    (i) a members' voluntary winding up, or
    (ii) a creditors' voluntary winding up.

[11] *Reid v Explosives Co. Ltd* (1887) 19 Q.B.D. 264.
[12] *Foster Clark Ltd's Indenture Trust* [1966] 1 All E.R. 43, Nicoll v Cutts [1985] BCLC 322.
[13] Companies Act 2014, s440.
[14] Companies Act 2014, s430(4)

The procedure governing compulsory winding up is contained in section 572 of the Companies Act 2014. It involves the presentation of a petition to the High Court for a winding up order.

Compulsory Liquidation

In a compulsory liquidation, a winding-up order is made by the High Court, usually on foot of an application by a creditor of the company, on the grounds that the company is unable to pay its debts as they fall due. The Court appoints a liquidator, who may be nominated by the petitioning creditor. The most frequent ground on which orders for a winding up are sought is that the company is unable to pay its debts. A company is deemed to be unable to pay its debts if either:

> (a) a creditor proves that the company owes that creditor more than €10,000, that the demand for payment was made in writing and that the company has for three weeks failed to comply, or
>
> (b) two or more creditors prove that the company owes those creditors more than €20,000, that the demand for payment was made in writing and that the company has for three weeks failed to comply, or
>
> (c) a judgment creditor of the company has levied execution and has remained unsatisfied, or
>
> (d) if it is proved to the satisfaction of the court that the company is unable to pay its debts, and in determining whether a company is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the company[15].

Voluntary Liquidation

Voluntary liquidation is more common than compulsory liquidation. It is only possible to have a members' voluntary winding up where the company is solvent. A members' voluntary winding up is commenced by a special resolution of the members of the company.

A creditors' voluntary winding up is used where the company is unable to pay its debts as they fall due and the members resolve that the company ought, on that basis, to be wound up[16]. In such cases, a meeting of creditors is convened and a Statement of Affairs, prepared by the directors, is presented to creditors. The creditors may nominate their own choice of liquidator or may endorse a liquidator chosen by the members.

1.5.4 Abuse of insolvency

While Part 11 of the Companies Act 2014 provides the basis for winding up insolvent companies, these requirements are not always pursued or fulfilled by companies. Two different manifestations of this are the phoenix syndrome and the unliquidated company which are described hereunder.

Phoenix Companies

Typically, the term 'phoenix company' involves a person trading through successive companies with similar names, leaving unpaid creditors behind as each company becomes insolvent. In the words of the Cork Committee:

> *''It has been made evident to us that there is a widespread dissatisfaction at the ease with which a person trading through the medium of one or more companies with limited liability can allow such a company to become insolvent, form a new company, and then carry on trading much as before, leaving behind him a trail of unpaid creditors, and often repeating the process several times. The dissatisfaction is greatest where the*

[15] Companies Act 2014, s570.
[16] Companies Act 2014, s586.

director of an insolvent company has set up business again, using a similar name for the new company, and trades with assets purchased at a discount from the liquidator of the old company."[17]

Phoenix activity does not have a statutory or legal definition. However, fraudulent or unlawful phoenix activity can be regarded as typically involving:

1. the unlawful transfer of assets (such as the stock) of a company (the previous company) to a subsequent company in circumstances where the previous company was unable to pay its debts; and may have been conducted in a manner so as to deprive unsecured creditors of access to its assets; and
2. there is a connection between the management and/or shareholding of the previous company and the subsequent company.

Unliquidated Insolvent Companies

Unfortunately, directors of an insolvent company can simply cease trading and abandon the company without putting it into liquidation or otherwise arranging for the company to be wound up. This is often done without addressing the outstanding liabilities which could potentially be significant. This gives rise to several undesirable outcomes:

(i) creditors are not paid what they are owed;
(ii) creditors are not given an opportunity to enquire into the demise of the company or any other accounting for the circumstances giving rise to the insolvency;
(iii) employees are not able to access the State Insolvency or Redundancy Funds for their statutory entitlements;
(iv) the directors are not subject to any scrutiny of their stewardship of the company.

The ODCE can, and does, seek to disqualify directors who abandon companies with outstanding debts in this manner in accordance with section 842(h) of the Companies Act, 2014. However, there is a limit to the number of such cases that the ODCE is in a position to pursue. It is not possible to estimate how many companies are abandoned in this manner each year.

1.6 General Approach to the Provisions of the Companies Act 2014

The Review Group noted that the Committee had deliberated extensively on the provisions of the Companies Act 2014 that could be potentially availed of by unsecured creditors and employees. The Committee reviewed a large number of sections and found the vast majority of the provisions to be fit for purpose. Each of these sections, along with a brief synopsis of the purpose of the section and its application for unsecured creditors and employees is set out in Chapter 5.

Other provisions contained in the Companies Act 2014 gave rise to prolonged and detailed evaluation in circumstances where the Committee considered the section was particularly relevant to the protection of creditors and employees. These sections were evaluated on the basis of whether they were fit for purpose, and if not, whether there was scope to amend the sections so as to improve their effectiveness. The results of the evaluation on these specific sections are set out thematically in the remainder of the report along with any recommendations for change, as appropriate.

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[17] Report of the Review Committee on Insolvency Law and Practice under the chairmanship of Sir Kenneth Cork (1982) Cmnd 8558, para 1813. See also para 1741: '*Companies are formed, debts run up, the assets milked and the company put into liquidation. Immediately a new company is formed and the process is repeated ad infinitum.*'

Given the depth and breadth of the deliberations over many months about the issues addressed in this Report, there were dissenting views and opinions on some matters, these have been indicated under the relevant sections. ICTU prepared a submission following discussion of the Report at the CLRG Plenary Meeting 13th June 2017. The submission has been included in this report as Appendix 10.

Chapter 2. Directors' Duties and Personal Liability

2.1 Introduction

Part 5 of the Companies Act 2014 contains the general and fiduciary duties of company directors, including many duties which have been codified from previous common law and equitable duties. The business of a company is managed by its directors for all matters except those to be determined at a company's general meeting[18]. It is the duty of each director of a company to ensure full compliance by the company with the provisions of the Act [19]. This chapter examines the duties of directors in the Companies Act 2014 which are relevant to employees and creditors during the normal course of business, the shift in priority of directors' duties in the vicinity of insolvency and the instances in which personal liability can be imposed on a company's director(s).

Although outside the ambit of this report, it should be noted that breach of directors' duties can have wider consequences beyond the imposition of personal liability on a director. Company law provides for the retrospective review of the behaviour of directors of insolvent companies through two forms of sanction; restriction and disqualification of directors. Restriction applications are brought by liquidators in the event of a company's insolvency and the onus of proof is on the director to show he or she has acted honestly and responsibly and should not be restricted. With the inclusion of directors' duties in Section 228 of the Companies Act 2014, the court will now take any breach of these duties into account when deciding whether or not a director has acted responsibly for the purposes of Section 819 restriction proceedings.

Disqualification orders can occur automatically or on application to the court by the liquidator or the ODCE. Disqualification orders are far more restrictive on sanctioned directors than restriction orders and the conduct necessary to justify the making of an order would have to be '*much more grave and blameworthy than the conduct which justifies a restriction*'[20]. The overall rationale for both schemes is public protection against the potential future conduct of company directors whose past record as directors of insolvent companies have shown them to be a danger to creditors and others. The courts have noted that the purpose of disqualification is protective as opposed to punitive[21].

2.2 The Director's Duty to the Company's Employees

2.2.1 Introduction

Section 224 of the Companies Act 2014 creates a statutory duty which the director of a company owes to his or her employees. In Ireland, the duty to employees was first included in the Companies Act 1990. The intent of legislators at that time was to ensure directors had regard to the interests of employees as well as members' interests when making decisions. The Dáil debates prior to the introduction of the legislation record that there was a lot of concern at the time that the duty would not go any further than that. The duty to employees is not directly enforceable by employees - rather it is owed to, and enforceable by, the company.

[18] Companies Act 2014, s158.
[19] Companies Act 2014, s223(3).
[20] *Re NIB v Byrne* [2009] IESC 57, Denham J.
[21] *Re Kentford Securities Ltd v McCann* [2007] IEHC 1,Peart J.

Section 224 repeats the obligation to employees in the same terms as section 52 of the Companies Act 1990. It states that:

> *(1) The matters to which the directors of a company are to have regard in the performance of their functions shall include the interests of the company's employees in general, as well as the interests of its members.*
>
> *(2) Accordingly, the duty imposed by this section on the directors shall be owed by them to the company (and the company alone) and shall be enforceable in the same way as any other fiduciary duty owed to a company by its directors.*

Section 224 remains silent as to how, in practice, the balance required is met where there is a conflict between the interests of shareholders and employees. As Courtney notes[22], In the case of section 224, what the legislature gives by virtue of subsection (1) to employees, it takes away in subsection (2).

A similar duty had been imposed in the United Kingdom in section 46 of the Companies Act 1980 and the position was retained in the consolidated 1985 Act. The section was introduced to rectify a situation which arose in *Parke v Daily News*[23] where the court held that there was no authority to support the proposition advanced by one of the parties that the board of directors must take into account its duty to employees. The duty imposed by section 46 was owed to the company alone and was only enforceable by the company and not the employees. The House of Commons' debates showed that the rationale in introducing the duty to employees was to allow directors, in making decisions, to consider the interest of the company's employees along with what is best for the company. It was not the intention of the legislature to create a new actionable remedy in company law for employees against directors of a company in that jurisdiction[24].

2.2.2 Proposal to Strengthen Duty to Employees in Section 224

There was a proposal put before the Review Group by ICTU, seeking to explore whether this section should have a greater dissuasive effect on the behaviour of company directors by being directly enforceable by employees, and not just the company. The effect of the current provisions is that there is no cause of action under this section for employees.

There was concern that section 224 was being misconstrued as a positive duty to employees when, in reality, it was a permissive section, like its United Kingdom equivalent, which permits directors to consider employees when making commercial decisions which may not strictly be in the best interests of the company's shareholders.

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[22] Thomas B. Courtney, The Law of Companies, (2016), 4th edn, p1028-1029.

[23] *Parke v Daily News* [1962] Ch 927

[24] The liability in negligence of a parent company to the employees of a subsidiary who failed to protect its employees from the risk of injury arising out of exposure to asbestos at work has recently been examined in *Chandler v Cape Plc* [2012] EWCA Civ 525., The Court of Appeal held a duty of care can be imposed if the threefold test enunciated in *Caparo v Dickman* [1990] 2 AC 605 was satisfied. The judge held that the claimant had established a sufficient degree of proximity to the defendant company for it to be fair, just and reasonable to impose a duty of care on the defendant to protect the claimant from harm from the asbestos atmosphere.

The Review Group questioned whether a new right of action for employees only would undermine how directors' duties are currently enforced in Ireland. Presently, the enforcement of directors' duties takes place in both public and private spheres. The role of the ODCE in indirectly bringing restriction and disqualification proceedings represents the public enforcement of company law duties by the State. Private civil enforcement of directors' duties is currently limited to an action taken by minority members or shareholders to enforce directors' duties through a derivative action.

The creation of a new action that could be taken by an individual employee against a director for failing to consider his or her duty to employees in section 224 could have serious ramifications for the enforcement of company law generally, which would go far beyond the common law duty to consider all creditors which was found in *Re Frederick Inns*[25]. If the duty owed to employees was strengthened any further it would result in employees having more rights than not just all other creditors, but also shareholders who must rely on a derivative action to enforce the duties owed to them.

The effectiveness of any such remedy for employees was also cast into doubt. If a directly enforceable duty to employees was contained in Part 5 of the Companies Act 2014, any proceeds would go to a general fund for the benefit of all the company's creditors. These funds would then be distributed, in accordance with section 621, in order of priority and therefore, only a percentage of any award would be made available for the benefit of the employees of the company.

Finally, it was noted that where a company's board of directors is displaced by a liquidator in an insolvent liquidation, the liquidator can commence proceedings against the directors where it is suspected that they acted in breach of their duty to the company under section 224 to have regard to the interests of the company's employees.

Conclusion and Recommendation

In light of the above arguments, the Review Group, with the exception of ICTU, rejected the proposal to amend section 224 to give a direct right of action to the employees of an insolvent company.

2.2.3 Proposed Reforms of the Director's Duty to Employees in the United Kingdom

In the United Kingdom, the Department of Business, Energy and Industrial Strategy has recently released a Green Paper on Corporate Governance Reform. As part of that review, the paper looks at the ways in which company law recognises and encourages that account be taken of wider stakeholder interests. The paper suggests that currently stakeholder interests are represented by the 'enlightened shareholder value' provision[26] which gives directors a responsibility to create successful businesses for the benefit of the company's shareholders, whilst having a regard to the interests of a range of other stakeholders, which includes employees. Prior to the introduction of the 'enlightened shareholder value' provision, the duty to employees had been previously set out, in identical terms as the Irish provision, in section 309 of the Companies Act 1985[27].

The issues which the United Kingdom's Green Paper considers are not new questions in company law; rather there has always been a balance to be struck between the interests of members of a company and the sometimes conflicting interests of other stakeholders, like employees and unsecured creditors. Recent high profile liquidations,

[25] *Re Frederick Inns Ltd* [1994] 1 I.L.R.M. 387
[26] Companies Act 2006, s172 (UK).
[27] Section 309 of the Companies Act 1985 applied to England, Scotland and Wales but not Northern Ireland.

both nationally and internationally, have served to highlight the problem of how to balance these contradictory interests. The Review Group has from time to time considered these contested interests in previous reports.

The adoption of 'enlightened shareholder value' in Ireland

In its First Report, the Review Group considered the arguments for and against the adoption of the 'enlightened shareholder value' model which had then just recently been included in the United Kingdom's Company Law Steering Group Report of 2001[28]. The Review Group stated that:

> *"Starting on the assumption that directors' fiduciary duties ought to be stated in statute, the choices available are to go for a general statement of duties or to seek to expand them along the lines of the UK Report of 2001. In view of the novelty of the proposal, and with a view to keeping a light touch in the drafting of statements of what are fundamentally straightforward duties, the Review Group recommends that the fiduciary duties of a director to his company should be stated in general rather than specific terms, and on the basis that the statement of duties is not exhaustive. The Review Group is not convinced that the UK Company Law Review Steering Group's approach is the appropriate way to go and sees inherent conflicts concerning interpretation. Moreover, whereas this Group is primarily concerned with the consolidation of duties that have been well established in the Irish courts, the UK Company Law Review Steering Group is not content with this and seeks to impose additional duties and expand traditional duties to include matters that are currently in vogue. Such a prescriptive approach is susceptible to fossilisation and inappropriate application on particular facts and the Review Group prefers a more general statement which gives the judiciary interpretational latitude."* [29]

It could be said that in the years which have followed since the introduction of the 'enlightened shareholder value' model of directors' duties in 2006, the supposed expansion of traditional duties and expansion of additional duties have not transpired. The opening clause of the 'enlightened shareholder value' provision, that directors must create successful businesses for the benefit of shareholders, has become the real legacy of the model. Some commentators[30] have noted that under the Companies Act 2006 there is no longer any room for a distinction between the interests of the shareholders and those of the company. The effect of the provision is that where there is a conflict between the shareholders' profits and the duty owed to the continuing success of the company, its employees and other stakeholders, the duty owed to shareholders is the primary mandatory consideration and this duty ranks in priority to the mere regard which is to be given to other stakeholders[31].

The 'enlightened shareholder value' model has in effect created a hierarchy of rights in which employees, the environment and other stakeholders rank last. Some commentators[32] have noted that this shareholder centric interpretation of directors' duties is in conflict with the fundamental company law doctrine that a company enjoys a separate legal personality from its members.

In contrast, the general statement of the law on directors' duties has been maintained in this jurisdiction in the Companies Act 2014. As noted above, the Review Group previously stated that "a more general statement which gives the judiciary interpretational latitude" was to be preferred over the United Kingdom's approach which, in the

[28] CLRSG, Modern Company Law for a Competitive Economy: Developing the Framework (DTI, 1999)
[29] Company Law Review Group, First Report, p239 para 11.3.6.
[30] Alistair Alcock, "An Accidental Change to Directors' Duties" (2009) 30 Comp. Law. 362, 367.
[31] CLRSG, Modern Company Law for a Competitive Economy: Developing the Framework (DTI, 1999) para. 355
[32] Dr. John Quinn, "What it Means to Act in the Interest of a Company", Irish Law Times 2016, 34(15), 218-222

view of the Review Group, could lead to "inherent conflicts concerning interpretation" [33]. While in the United Kingdom the duty to act in the interests of the company has been interpreted as being synonymous with acting in the interests of the shareholders, the general nature of the Irish provisions means that this duty can be interpreted more broadly and on a case by case basis. Quinn has pointed out the dangers of spelling out the duty owed to the company as being a duty primarily owed to shareholders:

> *"if the company's interests are seen as synonymous with the shareholders', then directors may take an excessively short term approach and be more likely to prioritise the short term wealth of the shareholders rather than the long term health of the company".* [34]

With the inclusion of section 228(1)(h) of the Companies Act 2014, a liquidator should now consider a director's duty to have regard to the interests of employees in general under section 224 when providing his liquidators report to the ODCE. The treatment of employees is one of many factors that the ODCE will take into account when determining whether or not the liquidator should be relieved of his or her duty to bring restriction or disqualification proceedings. The Review Group considered it may be appropriate to reflect this inclusion of the duty to employees in the form provided to liquidators prior to their completion of their report to the ODCE. This issue is considered later in the Report[35].

Ultimately, the Green Paper found that:

> *..the requirement for directors to "have regard to" other stakeholders and considerations is lacking in clarity and strength and is not realistically enforceable by shareholders in the courts, even if they were minded to take action against their own company directors.*[36]

However, the Green Paper did not recommend that the law be reformed at this time, rather it stated that increased reporting and robust enforcement of reporting requirements would lead to increased compliance with director's duties.

2.2.4 Fiduciary Duties of Directors

Section 228 of the Companies Act 2014 is a new section which codifies the fiduciary duties owed by a director to a company which had previously been set out only by case law.

Briefly, the following fiduciary duties are owed by a director to the company:

> *(a) act in good faith in what the director considers to be the interests of the company;*
>
> *(b) act honestly and responsibly in relation to the conduct of the affairs of the company;*

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[33] Company Law Review Group, First Report, p239 para 11.3.6.
[34] Ibid p.222
[35] See Section 4.3 Proposal 2
[36] Business, Energy and Industrial Strategy Committee Green Paper on Corporate Governance, 5th April 2017, HC702 para 29.

(c) act in accordance with the company's constitution and exercise his or her powers only for the purposes allowed by law;

(d) not use the company's property, information or opportunities for his or her own or anyone else's benefit unless—

(i) this is expressly permitted by the company's constitution; or

(ii) the use has been approved by a resolution of the company in general meeting;

(e) not agree to restrict the directors' power to exercise an independent judgment unless—

(i) this is expressly permitted by the company's constitution;

(ii) the case concerned falls within subsection (2); or (iii) the directors' agreeing to such has been approved by a resolution of the company in general meeting;

(f) avoid any conflict between the directors' duties to the company and the directors' other (including personal) interests unless the director is released from his or her duty to the company in relation to the matter concerned, whether in accordance with provisions of the company's constitution in that behalf or by a resolution of it in general meeting;

(g) exercise the care, skill and diligence which would be exercised in the same circumstances by a reasonable person having both—

(i) the knowledge and experience that may reasonably be expected of a person in the same position as the director; and

(ii) the knowledge and experience which the director has; and

(h) in addition to the duty under section 224 (duty to have regard to the interests of its employees in general), have regard to the interests of its members.

Section 228 is linked to section 224 by section 228(1)(h) and the director's duty to have regard to the interests his/her employees is encompassed as part of the director's fiduciary duties to the company. Section 228(1)(h) provides that a director shall, in addition to the general duty owed to employees under section 224, have regard to the interests of its members. This section, along with section 228 (1) (a), that is the duty to act in the interests of the company, sets the stage for the uncertain position a director can find himself in when the interests of the company's members are in conflict with the long term interests of the continuing existence of the company and the relationship with its employees. As Ahern has noted, "existing shareholders may be happy with short term profit maximisation at the expense of the future state of the company". [37]

Pursuant to section 227(1) of the Act, in common with the other duties outlined in this section, this duty is also enforceable by the company alone. As Courtney notes:

"Only where an altruistic liquidator is appointed to the company may the duty to employees be vindicated; only where the aggrieved members can muster sufficient voting power in a general meeting to compel the directors to have regard to them, may the duty owed to them by s224 be vindicated. "[38]

[37] Deirdre Ahern, *Directors' Duties: Law and Practice* (Dublin: Round Hall, 2009), 158.
[38] Thomas B. Courtney, *The Law of Companies*, (4th edn, Bloomsbury Professional, 2016), 1029

2.2.5 Alternative Enforcement of Fiduciary Duties - Derivative Actions

Derivative actions are claims brought by individual shareholders, acting on behalf of the company, against the company's directors. They are brought in respect of wrongs committed against the company that, for whatever reason, the company is not willing to pursue of its own volition. Only the company and not the shareholder may obtain damages in a derivative action.

Both Ireland and the United Kingdom rely on shareholders to enforce directors' duties through the private law derivative action. The traditional rule at common law was that only the company has power to redress a wrong against it (this is known as the rule *in Foss v Harbottle*[39]). In Ireland, this rule is reflected in subsection (1) of section 227, which states that the duty is owed "to the company (and the company alone)". However, this provision does not exclude the possibility of minority shareholders bringing a derivative action in the name of the company by way of one of the recognised exceptions to the rule in *Foss v Harbottle*.

The conditions for the bringing of an ordinary derivative action are most easily to be found in the Court of Appeal's decision *in Prudential Assurance Co. Ltd v Newman Industries & ors*[40]. The proposed plaintiff must show a *prima facie* case (i) that the company is entitled to the relief claimed and (ii) that the claim falls within the proper boundaries of the relevant exception to the rule in *Foss v Harbottle*. That exception arises where:

> *"what has been done amounts to fraud and the wrongdoers are themselves in control of the company. In this case the rule is relaxed in favour of the aggrieved minority, who are allowed to bring a minority shareholders' action on behalf of themselves and all others. The reason for this is that, if they were denied that right, their grievance could never reach the court because the wrongdoers themselves, being in control, would not allow the company to sue."*[41]

In a derivative action, "fraud" includes a variety of forms of equitable wrong, including breach of fiduciary duty, although it does not encompass a claim of mere negligence. The rationale for the derivative action, namely to enable justice to be done where the wrongdoer is in control of the entity in which the cause of action is vested, is stated in numerous authorities on the derivative action. In *Wallersteiner v Moir* (No 2)[42] Lord Denning said, describing the derivative action generally:

> *"In one way or another some means must be found for the company to sue. Otherwise the law would fail in its purpose. Injustice would be done without redress."*

The Review Group discussed the efficacy of the method of enforcement of fiduciary duties through the derivative action. The procedures by which derivative actions are brought are not encompassed as part of the Companies Act 2014, but are the primary method by which a shareholder can enforce a director's fiduciary duties when the company refuses to sue the director for breach of duty.

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[39] *Foss v Harbottle* (1843) 2 Hare. 461
[40] *Prudential Assurance Co. Ltd v Newman Industries & ors (No. 2)* [1982] Ch 204 ,
[41] *Prudential Assurance Co. Ltd v Newman Industries & ors (No. 2*) [1982] Ch 204 , at pages 211 A-B and 221H-222B
[42] *Wallersteiner v Moir (No 2)* [1975] 1 QB 373 at 390

No distinction is made between a shareholder who wishes to remedy some diminution of the value of his/her shareholding or erosion of his or her right and a shareholder who seeks to remedy a wrong done to the company through a derivative action brought on behalf of the company. Thus Sealy states:

> *"A shareholder cannot bring a personal claim against a wrongdoer, even in a claim based on fraud or deceit, when the loss which he claims that he has suffered is the diminution in the value of his investment in the company as a consequence of the effect of the fraud on the company. The company alone can sue for such a wrong."*[43]

The only way this corporate action can be taken where the controlling majority in the company refuse to act is through a derivative action. The requirement for leave to bring such an action adds to the expense of creditor litigation so that for many creditors in Ireland and the United Kingdom the bringing of a derivative action is not always an accessible remedy.

In Ireland, Order 15, Rule 39 of the Rules of the Superior Courts 1986, requires a party intending to bring a derivative action to first obtain leave of the court by way of originating notice of motion grounded on affidavit. Following the leave stage, the court may give detailed directions in relation to the manner in which the matter should proceed (if at all) and stating whether the company should be required to indemnify the applicant in respect of some or all of his/her costs and expenses.

Statutory Footing of the Derivative Action in Other Jurisdictions

As noted above, the derivative action does not appear in the Companies Act 2014[44], rather the procedures for bringing a derivative action are to be found in the Rules of the Superior Courts. In contrast, the derivative action has been on a statutory footing in the United Kingdom since 2006[45]. A streamlined statutory procedure for the derivative actions has also been introduced in Canada, Australia, New Zealand, South Africa and Singapore.

Conclusion and Recommendation

Ultimately, the Review Group saw no compelling reason to recommend moving the procedures for the bringing of a derivative action from the Rules of the Superior Court, into the Companies Act 2014.

2.2.6 Directors' Compliance Statement

Section 225 of the Companies Act 2014 requires certain directors to sign a statement acknowledging that they are responsible for securing the company's compliance with its relevant obligations under company and taxation law. This statement is referred to as a directors' compliance statement.

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[43] L.Sealy, Cases and Materials on Company Law (6th ed, 2001) pg 502

[44] Although there is an express reference to a party other than the company bringing "derivative proceedings" in s. 797(5) of the Act. The procedures needed for shareholders to bring a derivative action are set out in Order 15 of the Rules of the Superior Court.

[45] Section 261 of the Companies Act 2006, (which applies to England & Wales) and 266 (which applies to Scotland) put derivative actions on a statutory footing. The Companies Act 2006 has also simplified the law on derivative actions by creating more flexible criteria, for instance, a derivative action is permitted in respect of an actual or proposed breach of directors' duties including a breach which amounts to mere negligence. However, a prima facie case must still be established.

The statement is required to be made by directors of PLCs, as well as large LTDs, DACs and CLGs.

The form of the section 225 statement is an amended version of the statement required by section 205E of the Companies Act 1990 (as inserted by section 45 Companies (Auditing and Accounting) Act 2003). Section 205E was never commenced.

The section 225 director compliance statement is more refined than the uncommenced section. The Review Group debated whether the current provisions under section 225 go far enough in terms of their reach

The proposal from the CLRG in the Report on Directors' Compliance Statements (2005) had been more onerous than what was finally included in the Companies Act 2014.

Conclusion and Recommendation

There was a proposal from ICTU that an exception should be made in the case of directors' statutory duties under section 224 so that directors of companies would be obliged to report annually on their compliance. To this end a specific duty to employees should be included in the directors' compliance statement. Ultimately, this proposal did not attract sufficient support to recommend change.

2.3 Directors' Duties to Creditors Where the Company is, or is Likely to be Insolvent

2.3.1 Directors' Duty to Creditors

Civil liability can be imposed on a director in the period approaching insolvency based on his responsibility for causing insolvency or for failing to take appropriate action to minimise potential losses to creditors. Liability may be imposed when directors enter into transactions with a purpose other than ameliorating financial difficulty and preserving the value of the company. It can also be imposed if the directors knew that insolvency could not be avoided, but nonetheless continued to carry on business that involved, for example, obtaining goods and services on credit, without any prospect of payment and without disclosing the company's financial situation to those creditors.

The 'period approaching insolvency' is often referred to as the 'Twilight Zone' and is intended to describe a period in which there is a deterioration of the company's financial stability to the extent that insolvency has become imminent (i.e. where the company will generally be unable to pay its debts as they fall due), or unavoidable. Determining exactly when the obligations arise is a critical issue for directors seeking to make decisions in a timely manner consistent with their duty to creditors.

A director's duty to creditors in the period approaching insolvency is a common law duty only and this duty is not provided for in the Companies Act 2014, or indeed, in any statute[46]. In Ireland in *Re Frederick Inns Ltd*[47], the Supreme

[46] The law in this area originates from a number of Australian cases which established that the directors of an insolvent company are obliged to have regard to the interests of its creditors. In *Kinsela v Russell Kinsela Pty Ltd* 53 ALR 557 a company which was facing imminent collapse granted a lease of a premises to two of its directors at an undervalue and without a rent review clause, along with an option to purchase at any stage at a price below the market valuation. Shortly after the grant the company went into liquidation and the liquidator sought to have the lease set aside as a breach of a directors duty. Street C.J held that the

Court held, in the particular circumstances of that case, that a duty to act in the creditors' best interests was owed, not just to the company itself, but also to individual creditors. More generally, the Court found that where the company is, or is most likely to be, insolvent, then in exercising their powers, the directors must give due regard to the interests of the company's creditors and, in particular, not subordinate those interests to their own or to the shareholders' interests.

The decision in *Re Fredericks Inns* was followed by the High Court by McGuinness J in *Jones v Gunn*[48], where the Court found that individual creditors could have a claim against directors for breach of this duty to creditors in circumstances where the company was clearly insolvent. In *Hughes v Hitachi Koki Imaging Solutions Europe*[49] Clarke J regarded *Re Frederick Inns Ltd* as authority for the proposition that the directors owe a duty to the creditors to preserve the assets so as to enable them to be applied in discharge of the company's liabilities.

Courtney has summarised the common law duty to creditors in those circumstances as encompassing the following obligations:

> *"Where the directors of a company become aware that it is insolvent, there is authority for the following propositions:*
>
> *(i)The directors have a duty to have regard to the interests of creditors;*
> *(ii)The directors have a duty to put the company into creditors' voluntary liquidation;*
> *(iii)The directors have a duty to preserve the company's assets so that they can be applied pro tanto in discharge of its liabilities; and*
> *(iv)The directors have a duty not to make payments directly or indirectly to themselves to the detriment of the general and independent creditors."*[50]

2.3.2 To Whom is this Duty Owed?

Considerable debate has arisen as to whether the failure to consider the interests of creditors constitutes a breach of a director's fiduciary duty, not to the creditors as such but to the company itself or whether this duty is owed to the creditors directly. While there is authority that the director does not owe a direct fiduciary duty towards an individual creditor and an individual creditor is not entitled to sue for breach of duty owed by the director of a company[51], there is little consensus when the general body of creditors is concerned.

Some commentators contend that there is no directly enforceable creditors' right of action against a director for breach of the director's duties to creditors[52]. Courtney contends that as with the statutory duties owed to employees and members these duties are owed to the company and enforceable by the company alone.

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purpose of the transaction was to put a company asset beyond the reach of the creditors. The requirement to consider creditors' interests was founded on their prospective entitlements on insolvency.

[47] *Re Frederick Inns Ltd* [1994] 1 I.L.R.M. 387

[48] *Jones v Gunn* [1997] 3 I.R. 1

[49] *Hughes v Hitachi Koki Imaging Solutions Europe* [2006] IEHC 223

[50] Thomas B. Courtney, The Law of Companies, (4th edn, Bloomsbury Professional, 2016), 1021

[51] *Yukong Line Ltd of Korea v Rendsburg Investments Corp of Liberia et al* (No 2) [1998] 4 All ER 82.

[52] Deirdre Ahern, *Director's Duties Law and Practice*, (Round Hall, 2009) 186, Thomas B. Courtney, *The Law of Companies*, (4th ed, Bloomsbury Professional, 2016) 1021

In the United Kingdom, Goode has stated that:

> *"…the true principle is not that the directors owe duties to creditors as well as to the company but that when the company is insolvent or approaching insolvency the directors, in discharging their duty to act in the best interests of the company by promoting its success, must have regard predominately to the interests of the creditors, who now have the primary interest in the proper application of the company's assets and whose interest is mediated through the company."* [53]

Accordingly the proprietary interest which had been held by the members of the company through the value of their shareholdings is replaced as the company approaches insolvency by the proprietary rights of the creditors of the almost insolvent company. An exchange of interests takes place as the company moves to insolvency, as the value of the shareholdings become worthless, the members' interests decline and the creditors come to hold the primary proprietary interest in the company through the debts owed to them.

This theory of duties based on proprietary interest would seem to accord with the decision in *Re Frederick Inns* where Blaney J quoted with approval from the Australian case of *Kinsella* and stated:

> *"[i]n a solvent company the proprietary interests of the shareholders entitle them as a general body to be regarded as the company when questions of the duty of directors arise."*[54]

This interpretation would be in accord with the more recent United Kingdom decision of *Colin Gwyer & Associate Ltd and another v London Wharf (Limehouse) Ltd et al*[55]. That case dealt with the decision of two directors to settle litigation involving an insolvent company and it was contended that they did not have regard to the duty owed to the creditors of the company in their actions. This case is of particular relevance because the duty owed to creditors in the United Kingdom was at the time of the decision a common law duty only and had yet to be put on a statutory footing. The Court found:

> *"Where a company is insolvent or of doubtful solvency or on the verge of solvency and it is the creditors' money which is at risk the directors, when carrying out their duty to the company, must consider the interests of the creditors as paramount and take those into account when exercising their discretion."* [56]

This interpretation of the duty owed to creditors was recently cited with approval by the Singaporean High Court in the 2013 decision of *Dynasty Line Ltd v Sia Sukamto*[57] and in the United Kingdom decision of *Kevin Hellard & Anor v Horacio Luis De Brito Carvalho*[58].

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[53] Roy Goode, *Principles of Corporate Insolvency Law*, (4th edn. Sweet & Maxwell, 2011) 657
[54] *Re Frederick Inns Ltd* [1994] 1 I.L.R.M. 387
[55] *Colin Gwyer & Associate Ltd and another v London Wharf (Limehouse) Ltd et al* [2002] EWHC 2748 (Ch), [2003] 2 BCLC 152
[56] *Colin Gwyer & Associate Ltd and another v London Wharf (Limehouse) Ltd et al* [2002] EWHC 2748 (Ch), [2003] 2 BCLC 152 para 74
[57] *Dynasty Line Ltd v Sia Sukamto* [2013] 4 SLR 253
[58] *Kevin Hellard & Anor v Horacio Luis De Brito Carvalho* [2013] EWHC 2876 (Ch)

In Ireland, the language of section 227(1) means that persons other than the company will not be entitled to enforce the fiduciary duties set out in section 228 irrespective of the circumstances[59]; however as the duty to creditors has not been included in section 228, the duty to creditors remains a common law duty.

Section 612 of the Companies Act 2014 may provide a remedy for creditors in the form of a claim for misfeasance against any officer of the company. Section 612 can be invoked against an officer who has been guilty of a breach of duty which has caused the company to suffer a pecuniary loss. Only losses occasioned by breaches of directors' duties can be pursued under section 612.

Forde states[60] that the failure to give consideration to creditors as the company approaches insolvency could constitute misfeasance, though it will depend entirely on the facts of the case. The details as to at what stage this duty would arise and what consideration should be given to the creditors has not been commented on. The remedy for misfeasance is an order to repay the misappropriated funds to the company or an order for compensation to the company.

However, the effectiveness of misfeasance to enforce the duty to creditors is far from clear where that duty is not included in the Companies Act 2014. Courtney would seem to cast further doubt on whether the duty to creditors could be enforced by way of an action for misfeasance. He notes that section 612 of the Companies Act

> *"is merely a procedural measure and does not impose any additional duties on officers, nor confer any additional remedies on creditors. Section 612 enables existing duties of officers to be enforced."*[61]

While creditors may encounter some difficulties in seeking to enforce remedies where they consider that the directors have not properly discharged their duty to the creditors, any such failures are likely to be carefully considered by the ODCE when determining whether the directors should face restriction or disqualification proceedings.

2.3.3 The Codification of the Duty Owed to Creditors

The CLRG did recommend that the duty owed by directors to creditors in an insolvency situation be set out in the Act, referring to *Re Frederick Inns*. The First Report stated fiduciary duties should be codified and should include the following duty to consider the interests of third parties:

> *"Duty to consider interests of third parties*
>
> *A director must have regard to the interests of the company's employees in general and [to those of] its members, and where the company is insolvent, its creditors."* [62]

[59] This is subject to the rules in relation to derivative actions.
[60] Michael Forde, *The Law of Company Insolvency*, (Round Hall, 2015) 438
[61] Thomas B. Courtney, The Law of Companies, (4th edn, Bloomsbury Professional, 2016),1091
[62] See para.11.3.7 of the First Report of the CLRG.

However, this recommendation was not adopted in the Companies Act 2014. The absence of this duty from section 228 has created some academic debate[63] as to whether a direct duty to creditors exists under the Act, unlike the prior position at common law as recognised in *Re Frederick Inns.*

In the United Kingdom, it is understood that the general principle in statutory interpretation is that, where a statute sets out what purports to be a comprehensive code in relation to causes of action, other causes of action that could otherwise be regarded as applying are implicitly excluded.[64] In the United Kingdom the courts have held in relation to the Companies Act 2006 that, as a matter of statutory construction, the prior common law will only be regarded as having been displaced where this is the clear express or implied statutory intention. Accordingly a similar situation has arisen, where it is accepted that section 172 of the Companies Act 2006 effectively codifies the pre-existing common law position, and that s.172(3) simply preserves the common law position with regard to considering or acting in the interests of creditors, whatever that was and is[65].

It is notable that section 227(4) states that the duties set out in section 228 "shall have effect in place of those rules and principles as regards the duties owed to a company by a director". Some commentators have suggested that this form of words leaves open the possibility that there may remain certain extra-statutory duties owed by directors to persons other than the company[66]. In *Keane on Company Law*[67], Hutchinson notes that if the list of fiduciary duties was intended to be exhaustive, then the absence of an explicit duty to have regard to the interests of creditors in such a list would cast doubt on whether such a duty continued to exist. However, the author notes that there is an alternative explanation for the omission of such a duty from section 228 and that the duty owed is to creditors and therefore has no place in a list of duties owed solely to the company[68]. On the other hand, The Law of Companies, suggests that the "*inexorable conclusion has to be that the duties to creditors...are owed to the company*" and suggests that the codification of directors' fiduciary duties being owed to the company and to the company alone "*underscores the principle that directors' duties are owed to the company, and the company alone*"[69].

At least insofar as the fiduciary duties listed in section 228 are concerned, the language of subsection (1) dictates that persons other than the company will not be entitled to enforce those duties irrespective of the circumstances. This is subject to the rules in relation to derivative actions[70].

The table below illustrates some of the arguments for and against imposing further statutory obligations on directors to consider the interests of creditors in the period prior to insolvency:

Potential Benefits	Possible Concerns
Clarifies the duty to creditors.	Directors could potentially prematurely close a viable business.
Protects the interests of creditors and	Some creditors could have a remedy open to

[63] Brian Conroy, *Annotated Companies Act 2014* (Thomson Reutors, 2015) s.227.
[64] *Felix v Shiva* [1983] Q.B. 82; *Payne v Lord Harris of Greenwich* [1981] 1 W.L.R. 754.
[65] *Re HLC Environmental Projects Ltd* [2013] EWHC 2876 (Ch).
[66] Brian Conroy, Annotated Companies Act 2014 (Thomson Reutors, 2015) s.228.
[67] G. Brian Hutchinson, *Keane on Company Law* (5th edn, Bloomsbury, 2016).
[68] G. Brian Hutchinson, *Keane on Company Law* (5th edn, Bloomsbury, 2016) 439.
[69] Courtney, *The Law of Companies*, (4th edn, Bloomsbury Professional, 2016) 1026
[70] *Re Fort Gillicker Ltd* [2013] 3 All E.R. 546.

incentivises timely action by directors.	them under contract law[71].
May raise awareness of the existence and extent of the duty.	Could affect successful business reorganisation.
Incentivises directors to obtain professional advice when financial difficulties loom.	Potential increased risk for banks who might be deemed to be directors by reason of their involvement with the company.
May reduce shareholders' incentives to incorporate with inadequate legal capital.	Could lead to a more risk adverse business environment.
Dissuades directors from taking excessively risky courses of action in the vicinity of insolvency.	May cause directors to leave financially distressed companies.

2.3.4 Proposed Codification of the Directors' Duty to Creditors

As discussed above, the director owes his/her duty to consider the interests of the members of the company. However, as the company becomes insolvent and the company's members' proprietary interest shifts from the shareholders to the creditors, the directors of the company must consider the interests of creditors ahead of all other stakeholders. This duty, if it is to be enforced, could be enforced not by the creditors themselves but by a liquidator taking an action on their behalf. The liquidator could examine the facts of the insolvency and adjudicate on the director's behaviour and any adverse decisions he or she made in the period approaching insolvency. It is not proposed that creditors, as a group would be able to take an action against the directors for failing to take their interests into account in the period approaching insolvency. It is of course open to creditors to effectively fund a liquidator to bring such an action on their behalf.

The principal justification for pursuing directors is to recover some of the value lost as a result of the director's actions. It is thus for the benefit of all, rather than individual creditors, and any proceeds from such an action would benefit the company and ultimately, through distribution, the general body of creditors.

Civil liability imposed on a director is typically based on responsibility for causing insolvency or failing to take appropriate action to avoid or ameliorate financial difficulty and minimise potential losses to creditors. Liability may arise when directors enter into transactions with a purpose other than ameliorating financial difficulty and preserving the value of the company.

Directors generally might be expected in the circumstances outlined above, to act reasonably and take adequate and appropriate steps to monitor the situation so as to remain informed and thus be able to act to minimise losses to creditors and to the company. Where they fail to do so, they expose themselves to the possibility of being made subject to an order for their restriction or disqualification.

[71] However, not all creditors have a contract, for instance trade creditors, will rarely be willing and able and have the resources to monitor the activities of a company.

Conclusion and Recommendation

Company law, through liquidators, examines the reasons for a company's insolvency, and in particular the conduct of the directors of the company in the period before insolvency proceedings commence. However, as discussed above, the nature of the obligations a director might have in the run up to insolvency, and to whom those duties are owed to, would benefit from clarification. Accordingly, it is the view of the Review Group that there is a need to bring certainty to the area. The Review Group recommends that a specific duty of directors to creditors should be provided in statute.

The Review Group noted, however, that care was needed not to create a situation whereby directors of companies which might recover would feel compelled (under pain of breach of duty) to bring an end to the company and wind it up. Striking the right balance can be very difficult when moving from a common law duty to a statutory duty.

Viable companies can often be balance sheet insolvent when, for example, the value of their assets is on paper less than their borrowings and other liabilities. Imposing duties on the directors of such companies may go too far and for that reason the test as to when the duty comes to be owed is suggested to be when the directors of a company believe, or have reasonable cause to believe, that a company is unable or likely to be unable to pay its debts as they fall due.

Although the new duty, is in effect a liquidator's action, and could be located in Part 11 of the Companies Act 2014, it is recommended that it is better located in Part 5, Duties of Directors and other officers, being the primary touchstone for ascertaining the duties owed by directors. The proposed duty could read as follows:

> ***224A Directors of insolvent company to have regard to interests of creditors***
>
> *(1) The directors of a company who believe, or who have reasonable cause to believe, that a company is unable or likely to be unable to pay its debts as they fall due, shall–*
>
> *(a) have regard to the interests of the company's creditors; and*
>
> *(b) preserve the company's property.*
>
> *(2) The duty in subsection (1) shall be owed to the company (and the company alone) and shall be enforceable in the same way as any other fiduciary duty owed to a company by its directors.*
>
> *(3) Where a director of a company acts in breach of his or her duty under subsection (1) and the company goes into insolvent liquidation then the director shall be liable to indemnify the company for any loss or damage resulting from that breach.*
>
> *(4) For the purposes of subsection (3), a company shall be taken to have suffered loss or damage where, upon its insolvent liquidation, its creditors do not recover the sums which they would have received had there been no breach of the duty in subsection (1).*

The directors of a company have an overriding duty *to act* in the best interests of the company. The existing duty concerning employees and members is *to have regard to their interests*, as is the proposed new statutory duty concerning creditors. In terms of hierarchy, the director's overriding duty is to act in the best interests of the company; when a company is solvent this is generally considered to be seen as being for the benefit of the company's members; when a company is insolvent, as being for the benefit of its creditors. The Review Group does not consider that it is either necessary or desirable to seek to create a hierarchy in relation to the interests to which regard must be had, because discharging fiduciary duties is ultimately a subjective deliberation, the outcome of which may vary in particular circumstances.

2.4 Circumstances Where Personal Liability can be Imposed on Directors

2.4.1 Introduction

In general, under company law, the corporate veil can be lifted and a director can be held personally liable for the debts of the company in a range of circumstances including where:

.

1. there is fraudulent trading under section 610 Companies Act 2014.
2. there is reckless trading under section 610 Companies Act 2014.
3. a director has made a false declaration of solvency under section 207 of the Companies Act 2014 in a voluntary member's liquidation.
4. a director has made a false declaration of solvency under section 203 of the Companies Act 2014 when a company gave financial assistance for the purchase of a company's shares.
5. a director acts while restricted.
6. any officer (including a director) acts on the instructions of a restricted director[72].
7. the company failed to keep proper books of account which contributed to the company going into insolvent liquidation.
8. the company made a prohibited loan to a director which contributed to the company going into insolvent liquidation.
9. a director was disqualified and the company was liquidated within twelve months of the disqualification.

A 'shadow director' can also be made liable for acting in any of the above circumstances.[73]

As can be seen from the above, the majority of instances where personal liability can be imposed on a director relate to the commission of an offence under the Companies Act 2014. Section 872 states that following a conviction for an offence under the Companies Act 2014[74], a court may order that the convicted person should remedy any breach in respect of which they were convicted. The remedying of any breach could require a director to make financial contributions to the company to restore it to the position it enjoyed prior to the commission of the offence. It will be noted that some of these arise while a company continues to trade, while others arise where a company is in the course of liquidation.

For the purposes of this Report particular consideration was given to the following topics:

- Fraudulent trading
- Reckless Trading

[72] Companies Act 2014, s836.
[73] Companies Act 2014, s221.
[74] Directors may also be made personally liable outside of the Companies Act 2014 for example section 997A of the Taxes Consolidation Act 1997 can impose personal liability on directors who cannot show (through documentary evidence) that the PAYE which was deducted from the salaries paid by the company was remitted to the Collector General.

2.4.2 Fraudulent Trading

The Companies Act 2014 specifically sets out that personal liability can also be imposed on a director for any losses suffered by a company following a finding of fraudulent or reckless trading. Fraudulent trading through the vehicle of a company is a criminal offence and attracts the penalties set out in section 722 of the 2014 Act. It can be particularly difficult to prove to a criminal standard of proof that an individual has knowingly carried on a business with the intention of defrauding creditors. As a result, there have been very few criminal prosecutions for fraudulent trading to date.

In addition to the criminal sanction outlined above, fraudulent trading can also attract civil liability sanctions, in particular personal liability for a company's debts, under section 610. To be guilty of an offence of fraudulent trading a person must "knowingly" carry on the business with *intent* to defraud creditors.

The application may be made by the receiver, examiner, liquidator or any creditor or contributory of the company who suffered loss as a result of the impugned activity, but only if the company is at the time in the course of being wound up or under the protection of the court. There is no definition of fraud in the Companies Act 2014; this was done deliberately to allow for a broad range of circumstances which can be considered to encompass fraudulent behaviour.

2.4.3 Reckless Trading

Section 610 (1)(a) and (3) of the Companies Act 2014 set out the provisions in respect of reckless trading which considers the behaviour of persons in a situation where they ought to have known the effect of their actions.

Reckless trading was introduced into Irish company law as a lesser civil sanction to fraudulent trading to capture situations where there was no actual intent to defraud. If, in the course of the winding up of a company, or in the course of examinership proceedings or where an insolvent company is not being wound up, it is found that any officer of the company was knowingly a party to the carrying on of the business in a reckless manner, then pursuant to section 610 of the Companies Act 2014, such person may be personally liable for all or any part of the debts or other liabilities of the company. Where it can be shown the business was carried on with the intent to defraud (actual dishonesty), an action for fraudulent trading may be more appropriate. An order imposing personal liability for reckless trading can also be made.

An officer of a company is knowingly a party to the carrying on of any business of the company in a reckless manner if:

> *"having regard to the general knowledge, skill and experience that might reasonably be expected of a person in that position he ought to have known that his actions or those of the company would cause loss to any creditor of the company, or he was a party to the contracting of new company debt and did not honestly believe on reasonable grounds that the company would be able to pay that/other debts when falling due".*[75]

[75] Companies Act 2014, s610(3).

The defendant director must have knowledge or imputed knowledge that his actions would cause loss to creditors; it is not sufficient that there was a concern or uncertainty about the ability to pay all creditors. It is, however, a defence to show that a director had acted in an honest and responsible manner.

The Review Group noted that both fraudulent trading and reckless trading are designed to analyse the state of mind of the individual director and act as a deterrent against trading while insolvent. Reckless trading in particular endeavours to make directors face up to their company's insolvency and not to continue contracting new company debts. The Review Group noted that, in practice, the intention to defraud is particularly hard to prove.

Consideration is being given separately to the introduction of a criminal offence of reckless trading[76].

Conclusion and Recommendation

The Review Group's examination of fraudulent and reckless trading did not result in it concluding that any recommendation for change to the current provisions was necessary.

[76] The creation of the offence is currently being considered by the CLRG as part of Item 3 of the CLRG 2016-2018 Work Programme.

Chapter 3 Lifting the Corporate Veil

3.1 Introduction

The separate legal personality of a company is a fundamental tenet of company law. It provides an incentive to promote entrepreneurship and to encourage new and existing businesses to continue to innovate while contributing to economic growth and employment. This protection from personal liability is not a right, nor is it absolute. This chapter explores how separate legal personality can be set aside by the courts and the relevant provisions in the Companies Act 2014 which provide for these circumstances.

3.2 Circumstances where Separate Legal Personality is Set Aside

Irish courts have shown that they will disregard the separate legal personality of a company where to do otherwise would result in the use of the corporate personality as a cloak to conceal impropriety, or if to do otherwise would lead to an injustice. The single entity doctrine was first set out in *Power Supermarkets Ltd v Crumlin Investments Ltd*[77]. Costello J stated at paras 8 and 9:

> *"It seems to me to be well established….that a court may, if the justice of the case so requires, treat two or more related companies as a single entity so that the business notionally carried on by one will be regarded as the business of the group, or another member of the group, if this conforms to the economic and commercial realities of the situation. It would, in my view, be very hard to find a clearer case than the present one for the application of this principle. I appreciate that Crumlin Investments is a property owning not a trading company but it is clear that the creation of the new company and the conveyance to it of the freehold interest in a unit in the shopping centre were means of carrying out the commercial plans of the Dunne family in the centre. The enterprise had a twofold aspect (a) the creation of a new retail outlet for the Dunnes Stores Group in the shopping centre and (b) the enhancement of the rents in the centre as a whole which the creation of such an outlet would hopefully produce. To treat the two companies as a single economic entity seems to me to accord fully with the realities of the situation. Not to do so would involve considerable injustice to the plaintiffs as their rights under the covenant might be defeated by the mere technical device of the creation of a company with a £2 issued capital which had no real independent life of its own. If it is established that the covenant is breached there should in my opinion be an injunction against both defendants."*

In *Lac Minerals Ltd v Chevron Mineral*[78] Murphy J stated at p 187:

> *"However, the fact that the corporate veil may be lifted in the sense that the acts of one corporate body may be treated as those of another is now well established within this jurisdiction. It is clear from the decisions in Power Supermarkets Ltd. v. Crumlin Investments Ltd. (Unreported, High Court, Costello J., 22nd June, 1981) … and the decision in The State (McInerney) v. Dublin County Council [1985] I.R. 1. In the latter case Carroll J. laid down the following principle at p. 1:-*
>
> *"In my opinion the corporate veil is not a device to be raised and lowered at the option of the parent company or group. The arm which lifts the corporate veil must always be that of justice. If justice requires, as it did*

[77] *Power Supermarkets Ltd v Crumlin Investments Ltd* (Unreported, High Court, Costello J, 22nd June, 1981).
[78] *Lac Minerals Ltd v Chevron Mineral* [1995] 1 ILRM 161.

> *in D.H.N. Ltd. v. Tower Hamlets [1976] 1 W.L.R. 852, the courts will not be slow to treat a group of subsidiary companies and their parent company as one.[79]"*

The seminal case in this jurisdiction is *Fyffes v DCC*[80], Laffoy J held that, in the case of a group of companies, the court might treat the group as a single entity where to do otherwise would have unjust consequences for outsiders dealing with companies in the group. Having reviewed the authorities and commentary on the authorities on this question, Laffoy J noted:

> *"In addition to the broad requirement of justice, it is clear that in both of the cited cases the allegation was that the affairs of associated companies were being carried on in such a manner that the decisions of one body corporate were dominated by the other so that there was no reality in the distinction between them. These two ingredients are required, first, the factual identification of the acts of one body corporate with those of another and, secondly, the requirement that justice would be served only if the court ignores the distinction between the separate corporate entities."*[81]

These aspects of Laffoy J's judgment were upheld on appeal by the Supreme Court[82].

3.2.1 Evasion of Legal Obligations

An important element in the decision of whether to disregard the separate legal personality of a company for evasion of legal obligations is whether, as a matter of fact, the company was incorporated for that purpose, and/or whether the true facts of the company's group structure were concealed.

In *Allied Irish Coal Supplies Ltd v Powell Duffryn International Fuels Ltd* [83] the plaintiff alleged that the defendant, a wholly-owned subsidiary, was in breach of a commercial contract to supply coal. When the plaintiff became aware that the parent company was about to sell the subsidiary, it sought an order joining the parent as a co-defendant. Laffoy J in the High Court rejected the application, noting that the plaintiff had traded with the defendant knowing that it was a subsidiary, and that there was no suggestion of any privity of contract between the plaintiff and the parent company. The judge concluded that the mere fact alone that the defendant subsidiary was financially dependent on its parent was insufficient to render the parent responsible for the contractual obligations of the subsidiary.

On appeal, the Supreme Court upheld Laffoy J's decision. The Court pointed to the fact that the defendant subsidiary company was more than a mere shell; it carried on a very substantial business and its employees reported to the board of the subsidiary rather than directly to the board of the parent.

3.2.2 Frustration of Statute

The courts have shown themselves willing to disregard the separate legal personality of a company where it has been used to avoid statutory obligations, or where it would otherwise frustrate the purpose of a statute.

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[79] *Lac Minerals Ltd v Chevron Mineral* [1995] 1 ILRM 161 at 189.
[80] *Fyffes plc v DCC plc* [2009] 2 IR 417
[81] *Fyffes plc v DCC plc* [2009] 2 IR 417
[82] *Fyffes plc v DCC plc* [2009] 2 IR 417 at paras 685 and 756.
[83] *Allied Irish Coal Supplies Ltd v Powell Duffryn International Fuels Ltd* [1998] 2 IR 519

In *Fyffes v DCC*[84] Laffoy J referred to the fact that treating the subsidiary company as a separate entity would allow the evasion of obligations contained in the Companies Acts:

> *"(2) As a matter of law, Lotus Green and DCC may be treated as a single entity as regards the sale of the shares in Fyffes and the generation of the profit therefrom for the purpose of preventing the avoidance of the availability of an effective remedy under s. 109 and thus preventing an injustice to parties with a remedy under s. 109, if DCC is liable to account. It should be so treated if the plaintiff has established that:*
>
> *(i) an evidential basis exists for finding that, as regards the holding and disposal of the shares, to borrow the terminology used by Murphy J. in the Lac Minerals Limited case, there was a factual identification of the acts of Lotus Green and DCC; and*
>
> *(ii) not to so treat the companies would allow the DCC Group to evade its obligations under Part V"*[85].

3.2.3 Lifting the Veil in an Enterprise Group

The principle that members of a company are not liable for its debts applies not only to companies controlled by individual members, but to wholly owned subsidiaries of other companies. In general, a parent company is not liable for the debts of its wholly owned subsidiary, nor does it incur a liability merely because it exercises overall control of the subsidiary through a group structure and group management and financial control. However, if it interferes in day to day management it could be held to be a 'shadow director'. There are situations in which the court is willing to pierce the corporate veil, as where the company has been used as an engine of fraud[86]; but such cases are not common.

Internationally, regulation of enterprise groups is generally based on one of two approaches or, in some cases, a combination of the two. These two approaches are the separate entity approach and the single enterprise approach. The separate entity approach relies on several basic principles foremost of which is the separate legal corporate personality of each member of the group. The single enterprise approach in comparison relies on the economic integration of enterprise group members, treating the group as a single economic unit that operates to further the interests of the group as a whole, or of the dominant group member, rather than of individual group members.

The subject of insolvency proceedings has always been and continues to be, the particular corporate entity that has become insolvent. However, there are notable exceptions for instance; where there is proof that the separate corporate personality of the company is being used for the perpetrating of a fraud or for the avoidance of a legal duty or a corporate group is in fact a façade for a single economic entity or that an agency relationship exists.

Whereas preparation and filing of group accounts has long been required, when it comes to insolvency, the distinct legal personality of each individual company within the group is respected, with separate proceedings for each company. The insolvency of one member of the group can however threaten the viability of previously solvent members and where the group activity is integrated, a co-ordination of the management of the group as a whole may be highly desirable.

[84] Fyffes plc v DCC plc [2009] 2 IR 417.
[85] *Fyffes plc v DCC plc* [2009] 2 IR 417 at 496.
[86] *Gilford Motor Co v Horne* [1933] Ch. 935.

The Companies Act 2014 reflects this fact in providing for contribution orders and pooling orders in section 599 and 600 respectively. Contribution orders and pooling orders are linking tools which deal specifically with the use (or misuse) of the corporate form with the potential result of prejudicing creditors in the context of insolvency.

3.3 Contribution Orders

3.3.1 Introduction

The contribution order is a mechanism which attempts to tackle the scenario of related companies in insolvency and the possibility of unfair behaviour within the group. Accordingly, it gives discretion to courts to hold a related company liable for the debts of a company being wound up in circumstances of involvement with or misconduct towards the debtor in question. To this end, the court should consider whether it is just and equitable, as well as desirable for the protection of creditors, to impose what is, in effect, group liability.

3.2.2 The Statutory Provisions

The contribution order remedy is a exceptional feature of New Zealand and Irish company law. Section 140 of the 1990 Act (now section 599 of the Companies Act 2014) was based on section 30 of the New Zealand Companies Amendment Act 1980 (now section 271a of the Companies Act 1993). The original contribution order provision, Head 90 of the Bill for the Companies Act 1990, replicated the equivalent New Zealand provision in its entirety. However, owing to political concerns at the time that the provisions were 'anti-business', a number of changes were made in the drafting process to increase the onus of proof for any party seeking a contribution order. Perhaps the most important change was made by the then Minister for Industry, John Bruton, where he decided that s140 (2) – which sets out matters which ought to be considered prior to the making of a contribution order, should be split into two sub-sections. The latter of these sub-sections would have a compulsory element, so that no order could be made unless the court was satisfied that the circumstances giving rise to the liquidation were attributable to the actions or omission of the related company. The factors which influenced this policy decision included the political and industrial climate, unprecedented unemployment and reliance on foreign direct investment at that time.

The New Zealand provisions and the Irish provisions are set out in full at Annex A of Appendix 5 of this document.

As noted above, contribution orders have been on a statutory footing in Ireland since the Companies Act 1990. Section 599 of the Companies Act 2014 repeats the provisions of the Companies Act 1990 and accordingly, provides a remedy for creditors (including preferential creditors like employees) who, through the use of company structures, have been deprived of their rightful entitlements. The section, in effect, provides a statutory mechanism for piercing the corporate veil and making a related company accountable for the debts of the insolvent company. It states:

> *"(1) On the application of the liquidator or any creditor or contributory of a company that is being wound up, the court, if it is satisfied that it is just and equitable to do so, may make the following order.*
>
> *(2) That order is one that any company that is or has been related to the company being wound up shall pay to the liquidator of that company an amount equivalent to the whole or part of all or any of the debts provable in that winding up.*

Section 599(4) goes on to set guidelines for the use of the contribution order and states that:

In deciding whether it is just and equitable to make an order the court shall have regard to the following matters:

(a) the extent to which the related company took part in the management of the company being wound up;

(b) the conduct of the related company towards the creditors of the company being wound up;

(c) the effect which such order would be likely to have on the creditors of the related company concerned".

In addition, section 599(5) sets out that:

"No order shall be made under this section unless the court is satisfied that the circumstances that gave rise to the winding up of the company are attributable to the acts or omissions of the related company".

Accordingly, under Irish company law a contribution order will not be made, unless the court is satisfied that the circumstances that gave rise to the winding up of the company are attributable to the acts or omissions of the related company.

3.3.3 The Substantive Differences between the New Zealand and Irish Provisions

Arising out of the aforementioned political concerns, a number of changes were made to the previous section 140 to ensure contribution orders were only available in particular circumstances. As a result, there are now some differences between the provisions in the two jurisdictions.

The most significant of the differences between the Irish and New Zealand provisions is that in New Zealand, the extent to which the circumstances giving rise to the liquidation may be attributed to the related company is only one of four factors which the court may have regard to. Under the equivalent Irish provision, the court is expressly prohibited from making a contribution order unless the court is satisfied that that the circumstances giving rise to the liquidation are attributable to the actions or omission of the related company.

In addition, a New Zealand court is given an express discretion by virtue of section 272(1)(d) to consider 'any other matters it sees fit' when deciding whether it is just or equitable to make the contribution order.

Finally, section 140 of the Companies Act was amended at the Seanad stage to include section 140 Subsection (2)(c). Section 140(2)(c) requires that the court have regard to the question as to what effect the making of an order would have on the solvent related company. This amendment was introduced to ensure the related company was not forced into liquidation by virtue of the making of the contribution order.

3.3.4 Consideration by the New Zealand Courts as to the Factors which Merit the Making of a Contribution Order

In 2015, a contribution order was sought in the New Zealand courts in *Lewis Holdings Ltd v Steel & Tube Holdings Ltd*[87]. *Lewis Holdings* represents the first substantial analysis of the law on contribution orders in recent times and considers in detail the guidelines to be utilised by the court prior to the making of a contribution order.

[87] *Lewis Holdings Ltd v Steel & Tube Holdings Ltd* [2015] NZCCLR 5.

In *Lewis Holdings,* the Plaintiff was the owner of a property which was the subject of a perpetually renewable ground lease. The lessee at the time the Plaintiff purchased the property was Stube Industries Limited ("Stube"), a wholly owned subsidiary of the Defendant parent company. In May 2013, the directors of the Defendant recommended that Stube be put into liquidation following a decision to cease providing financial support to Stube and noting that the directors of Stube had made unsuccessful efforts to exit Stube from the lease.

The Plaintiff and the liquidators claimed that the parent company should be ordered to pay to the liquidators the whole of the sum of the Plaintiff's claim in the liquidation. The Judge, MacKenzie J, noted that Ireland was the only country other than New Zealand in the common law world which had a statutory provision allowing for the making of contribution orders against related companies.

The Judge held that an unyielding application of the principle of separate corporate entity would defy the legislative policy behind the provisions, and the rationale for the principle of separate corporate entity is to enable a business to be carried on by a separate legal entity so as not to expose the shareholders to the liabilities which the business may incur. It was inherent in this rationale that the company must be not only a separate legal entity but also a "separate commercial entity", and that its business will not be carried on in such a way that this company is not a mere "front" or "façade" for business actually carried on by others.

The guidelines considered by MacKenzie J were as follows:

(a) The extent to which the Defendant took part in the management of the subsidiary

MacKenzie J held that the Court must consider whether the directors of Stube had acted in that capacity or rather as senior employees of the Defendant parent company. The two directors of Stube were also the CEO and CFO of the Defendant parent company. The Court found the following factors were relevant in their finding that there was no evidence of the exercise of independent management functions:

- (i) The directors did not distinguish between the best interests of Stube and the Defendant parent company
- (ii) Stube did not have the financial capacity to continue to trade separately.
- (iii) Stube had no employees of its own.
- (iv) There was a degree of financial intermingling

(b) The conduct of the Defendant towards the Plaintiff as a creditor of the subsidiary

The Judge noted that this was not a case where a creditor was confused as to the entity with which it was contracting. Rather, the Defendant's conduct in providing financial support during the period from 2003 to 2013 indicated that it supported Stube.

(c) The extent to which the circumstances that gave rise to the liquidation were attributable to the actions of the Defendant

The Defendant parent company had ceased funding Stube and then caused the necessary resolution to be passed appointing a liquidator. Stube could not continue following the withdrawal of funding. MacKenzie J held that the liquidation of Stube was entirely attributable to the actions of the Defendant parent company.

(d) Such other matters as the Court thinks fit

Under this heading, MacKenzie J addressed a number of other factors. He found that the extent to which the corporate veil is lifted so as to make a related company liable for the claims against a company in liquidation is determined principally by a consideration of the actions of the related company. When the extent of involvement of the related company has been limited, the extent of the contribution may also be limited to only part of the claims. The Defendant took part in the management of Stube to an extent which was, in principle, total so that it was just and equitable that the Defendant should pay the total amount of Plaintiff's claim.

3.3.5 Consideration of Proposal to Replicate New Zealand's Provisions in Section 599 of the Companies Act 2014

The Review Group noted that the law on contribution orders had been developed during the period of 1983-1987, in the run up to the introduction of the Companies Act 1990 and section 140 (now section 599 in the Companies Act 2014) was modelled on a similar section in New Zealand company law. Consideration was given to whether there were some elements of the New Zealand legislation which could be adapted for further consideration in an Irish context and whether a realignment of the two sections might make the section more accessible to potential litigants. The Review Group reflected on the fact that while exceptional circumstances would need to be present to merit a contribution order, section 599 had never been tested before the Irish courts, while the New Zealand legislation had been utilised on several occasions.

One of the primary differences between the legislation in each country was the requirement that an applicant in Ireland must show that the related company had caused the subsidiary to become insolvent. In particular, the Review Group considered the 'attributable test' - that is the extent to which the circumstances that gave rise to the winding-up of the company are attributable to the actions or omissions of the related company.[88]

It was considered whether this test creates too high of an evidential burden on a litigant and would make any application for a contribution order very easy to resist. There was a proposal that the section could be tempered by replacing the phrase 'attributable' for 'substantially attributable'. However, whether this change in language would have any effect was unclear, as the section does not require that the action of the solvent company must be 'wholly attributable' but that it merely 'attributable'. A court could apportion a percentage of liability on the related company which would reflect the degree of responsibility that the court had attached to their actions.

The second significant difference between the two jurisdictions is the ability of the New Zealand courts to consider 'any other matters' which it believes to be relevant. There was a proposal that there would be a benefit in increasing the court's discretion so that it could consider 'any other matters it deems fit' to reflect the level of discretion given to the New Zealand courts. The Review Group considered that the reference in the Irish legislation to the exercise of the making of the order in a 'just and equitable manner' gives an Irish court a similar freedom to consider any such matters it sees fit to.

The more liberal language in the New Zealand legislation has not resulted in their courts experiencing any flood of claims for contribution orders. Accordingly, the text of the legislation was not considered to be the main disincentive in pursuing a claim. Rather it was felt, the primary causes for the absence of applications were:

[88] Further detailed analysis of the differences between the two sections is available at Appendix 4.

a) The difficulty in funding the litigation for contribution orders in circumstances where liquidators consider such an application to be speculative and where there could be potential ramifications for the liquidator in utilising an insolvent company's remaining assets to fund perilous litigation;
b) The difficulty when there was a general absence of funds in the liquidation; or
c) Where there was an absence of a related company which was perceived as a 'mark' for any award of damages that might be made by a court.

In general, the liquidator would have to consider the adverse consequences for the company's creditors if the application was unsuccessful. While the number of such applications might increase if there was a publicly funded liquidator available to prosecute such claims in the public interest, a private liquidator would only utilise section 599 in an exceptional case as any instigation of speculative litigation by a liquidator is often difficult to justify to creditors.

Conclusion and Recommendation

In order to substantiate the need to change the section the Review Group had to be convinced that that change was merited. The following criteria were applied in this evaluation:

1. Does the section say what it is supposed to say?
2. Does what the section says achieve the policy which it aims to achieve?
3. Is there a policy that isn't being achieved which ought to be pursued?
4. Is there some defect in the section that needs to be cured?

The Review Group agreed that in the absence of a mistake of language, policy change or perceived deficiency there was no clear rationale to recommend an amendment to section 599.

Given the dearth of any case law, the Review Group (with the exception of ICTU who recommended replication of the New Zealand provisions[89]) did not consider that it could recommend an amendment of section 599 in circumstances where there is no deficiency to address. While the possibility of the making of contribution orders in Irish company law has a dissuasive effect in the insolvency landscape, the Review Group considered that section 599 provides an exceptional remedy that will only be used where very rare circumstances are present.

3.3.6 Consideration of Proposed Amendments to Section 599

During the passage of the Companies Accounting Bill 2016 through the Houses of the Oireachtas, amendments to section 599 were tabled during the Seanad Committee and Report Stages. The Review Group was at a late stage in its deliberations when these amendments were tabled in April and May 2017 but recognised that there would be merit in setting out its views on the proposed amendments. The amendments were as follows:

Seanad Committee Stage Companies (Accounting Bill)

Amendment of section 599 of Principal Act

Section 599 of the Principal Act is amended by the substitution of the following for subsection (4)(c)—

[89] see Appendix 10.

"(c) whether an action of the related company or of any subsidiary of the related company caused the liquidation;
(d) whether the directors of the company acted at all times in their capacity as such or as directors or employees of a related company;
(e) whether the directors of the company distinguished at all times between the best interests of the company and those of any related company;
(f) whether the related company's prior conduct led creditors to believe that it stood behind the company;
(g) the intermingled nature of the business carried on by the companies;
(h) where a group structure enabled a company with assets insufficient to meet its liabilities to trade while using assets belonging to a related company, whether the structure was calculated unfairly to defeat the interests of creditors in a winding up or to impose any liabilities on the Exchequer or other public funds;
(i) the effect which such order would be likely to have on the creditors of the related company concerned.".

—Senators Gerald Nash, Ivana Bacik, Kevin Humphreys, Denis Landy, Aodhán Ó Ríordáin.
12 April 2017

Seanad Report Stage Companies (Accounting Bill)

Proposed Amendment to section 599, Companies Act 2014

Section 599 of the Principal Act is amended by the substitution of the following for subsection (4)(c)—

"(c) whether an action of the related company or of any subsidiary of the related company resulted in liquidation;
(d) whether the directors of the company demonstrated that they fulfilled their duties to work in the best interest of the company or of a related company;
(e) whether the directors of the company distinguished at all times between the best interests of the company and those of any related company;
(f) whether the creditors of the primary company were led to believe that related companies stood behind the company;
(g) where a group structure enabled a company with assets insufficient to meet its liabilities to trade while using assets belonging to a related company, whether the structure was calculated unfairly to defeat the interests of creditors in a winding up or to impose any liabilities on the Exchequer or other public funds;
(h) the effect which such order would be likely to have on the creditors of the related company concerned."

—Senators Alice-Mary Higgins, Lynn Ruane.
09 May 2017

The Review Group explored the proposed amendments against the criteria which were used for the consideration of the New Zealand provisions as set out in 3.3.5 above. Both sets of amendments are similar and will be dealt with together subsection by subsection below.

Proposed Amendment Paragraph (c)

The Review Group earlier recommended that the distinction between the Irish and New Zealand law should be retained. Section 599 (5) provides that no order shall be made unless the court is satisfied that the circumstances that caused or resulted in the winding up of the company are attributable to the acts or omissions of the related company. The Review Group believes this should remain the test that the court must apply and acceptance of (c) would be contrary to the maintenance of subsection (5).

Proposed Amendment Paragraph (d)

599 4(a) provides that the court should have regard to the extent to which the related company took part in the management of the company being wound up. The existing provisions already include the consideration by the court of the matters in the proposed terms of the amendments either at Committee or Report Stage. The proposed amendments could introduce vicarious liability for directors for acts of the company whereby liability could be attributed to directors without direct knowledge of the actions of the related company and result in a situation where any breach by any director of directors' duties without a causal link to the company insolvency could result in an action under section 599.

Proposed Amendment Paragraph (e)

This matter is also covered by the requirements of section 599 (4)(a) and the proposed amendment is therefore unnecessary.

Proposed Amendment Paragraph (f)

The requirements of existing sections 599 (4)(b) and (c) and (6)(b) covers consideration of the proposals at paragraph (f) in both Committee and Report Stage amendments.

Proposed Amendment Paragraph (g)

This paragraph, tabled at Committee Stage is also covered by 599 (4)(a). This provision was not included in the Report Stage amendment tabled.

Proposed Amendment Paragraph (h)

This paragraph at Committee Stage equates with (g) at Report Stage. Consideration of the policy in this amendment would appear to undermine the very essence of separate legal personality of individual companies in a group structure. The Review Group considers the precise nature and wording of the existing provision reflects the correct basis on which contribution orders can be sought and made and accordingly would not support the inclusion of the proposed amendment in section 599.

Proposed Amendment Paragraph (i)

This paragraph in Committee Stage is the same as (h) in Report Stage and equates with the existing section 599(4)(c).

Conclusion and Recommendation

As such, arising from the consideration of the proposed amendments to section 599 which were tabled, the Review Group did not change its position on the necessity to amend section 599 as set out in 3.3.5 above with ICTU dissenting.

3.3.7 Irish Case Law in Respect of Separate Legal Personality for Groups

We make the recommendation immediately preceding in the knowledge that while there is no case law in the Irish courts in respect of section 599, there is case law relevant to piercing the corporate veil in groups, which has already been considered in section 3.2.3 above[90], which could assist the courts in determining when it would be appropriate to set aside the separate legal personality of individual group members in corporate groups.

3.4 Pooling Orders

3.4.1 Introduction

A 'pooling' mechanism (or substantive consolidation) is a tool that is available in certain legal regimes, and may be very useful in tackling certain types of insolvency processes within corporate groups. The fundamental aim in applying pooling orders is to achieve a just and equitable result while dealing with the inefficiency of handling separate proceedings in cases of strongly integrated corporate groups. This is done by addressing the companies as a single unit in the course of their insolvencies. In some jurisdictions this can lead to the disregarding of intra-group claims.

Internationally, the existence of a statutory remedy granting a pooling order is relatively rare. New Zealand courts utilise section 271(1) (b) of the New Zealand's Companies Act 1993, to order that winding up proceedings of two or more related companies will proceed together as if they were one company. American bankruptcy courts have been using their general 'equity powers' provided in section 105 of the Title 11 of the United States Code to make orders providing for 'substantive consolidation'[91].

In the United Kingdom, courts do not have an equivalent wide discretion to enact pooling orders or substantive consolidation. However, their courts have expressed some flexibility in this regard in exceptional cases of extreme intermingling.[92]

3.4.2 Statutory Provisions

In Ireland, pooling orders have been on a statutory footing since their introduction in section 141 of the Companies Act 1990. Section 600 of the Companies Act 2014 replicates the earlier provision and provides that:

[90] See section 3.2.3

[91] 11 U.S.C.A. §105

[92] See *Re BCCI (No. 3*) [1992] B.C.C. 1490; see also *Re Exchange Securities & Commodities Ltd (In Liquidation)* [1987] B.C.L.C. 425, in which the liquidator proposed a scheme under section 425 of the English Companies Act 1985 that involved pooling all the assets and then distributing proceeds to creditors according to percentages agreed with them.

> *"Where 2 or more related companies are being wound up and the court…is satisfied that it is just and equitable to do so, it may make the following order…. the companies shall be wound up together as if they were one company,"*

Guidelines for the use of pooling orders are set out at Section 600(6):

> *"In deciding whether it is just and equitable to make an order under this section, the court shall have regard to the following matters:*
>
> *(a) the extent to which any of the companies took part in the management of any of the other companies;*
>
> *(b) the conduct of any of the companies towards the creditors of any of the other companies;*
>
> *(c) the extent to which the circumstances that gave rise to the winding up of any of the companies is attributable to the acts or omissions of any of the other companies;*
>
> *(d) the extent to which the businesses of the companies have been intermingled."*

The reference in section 600(6) to the extent to which the businesses of the companies have been combined is explicable by the need, in cases under section 600, to have regard to the position of the creditors of all the companies in liquidation. The extent to which the businesses have been combined is a relevant consideration in determining what is just and equitable as between the separate creditors of each of those insolvent companies.

3.4.3 Consideration of Pooling Orders

The Review Group noted that pooling orders although rare, were more common than contribution orders. In practice, the use of pooling orders can simplify the work of the liquidator and ultimately save time and reduce costs. The American and Canadian joint liquidation of the Nortel group was cited as a recent international example of the use of pooling orders. In this case, it was agreed that the assets of the group should be realised as if a single entity which maximised the return from the assets, resulting in total realisations of over $7billion. However, the orders made did not include a pooling of liabilities and the international distribution of funds raised following Nortel's liquidation has resulted in lengthy international litigation which resulted in a legal costs bill in excess of $1.9 billion.

Pooling orders are sometimes used in Ireland in circumstances where it is prudent to seek a pooling order in an insolvency situation. This tends to be for smaller companies owned by one individual rather than for larger firms. Larger multinational companies are more likely to utilise the UNICITRAL Model law, yet to be adopted by Ireland[93], to facilitate the pooling of large group assets across borders. Pooling arrangements can increase a liquidator's eventual distribution for the benefit of all creditors, however in general, to date, in the cases in which they are known to have been used; they have had a minimal impact on the outcome for employees.

Conclusion and Recommendation

Anecdotal evidence suggests that where pooling orders have been made by the Irish courts, that this was done as a matter of procedural efficiency and that there was very little discussion on the qualifying criteria for the making of

[93] A review of the desirability of the adoption by Ireland of UNCITRAL Model Law is on the Company Law Review Group Work Programme 2016-2018 and is being examined separately by the CLRG.

such orders. There is evidence that, unlike contribution orders, pooling orders are being sought and granted in Irish courts. This may be because of the relatively non-contentious nature of pooling orders versus contribution orders. As both parties to a pooling application would have liquidators appointed and the application for pooling would most likely be supported by both liquidators, the likelihood of a contest and the resulting enlarged burden of legal costs would be remote. In some instances, the same liquidator will be appointed over both companies which simplifies the application to an even greater extent. This is in contrast to a contribution order where the solvent company against which the order is sought would most likely contest the application.

Given the fact that there is evidence that pooling orders are being utilised by liquidators when the appropriate circumstances are present, the Review Group did not consider that it could recommend an amendment of Section 600 in circumstances where there is no deficiency to address.

3.5 Overall Conclusion - Exceptional Remedies in Company Law

While limited liability remains a pillar of company law, subtle variations have been developed as to how it is applied in a group context. As we have seen, the common law has developed to allow liability to be imposed on a parent company when the doctrine of separate legal personality is being abused for an ulterior purpose.

The presence of contribution orders is an unusual feature of Irish company law and should be seen as a particularly progressive method of preventing the abuse of limited liability. In this regard Ireland is, in terms of its statutory protections against the abuse of limited liability, unusual in having these exceptional remedies available. Where the criteria for the making of an order are met, contribution orders can provide a far less circuitous method of preventing the misuse of separate legal personality in a group context than pursuing a case under general contractual or equitable principles. Pooling orders are also an unusual feature present in Irish company law and can be an efficient tool in reducing costs in the context of a group winding up.

While in practical terms, these mechanisms, and in particular contribution orders, have only rarely, if ever been used, it must be understood that they are exceptional remedies which would require exceptional circumstances to be present for them to apply. While there can sometimes be administrative benefits in the granting of pooling orders, the imposition of a contribution order onto a parent company is an extremely severe remedy which no court would grant lightly, as it strikes at the heart of limited liability and ultimately how companies carry out their business. It is in this context that the Review Group (with the exception of ICTU) concluded that both provisions are in fact, fit for purpose.

Chapter 4 Proposed Reforms in the Liquidation Process

4.1 Introduction

As previously explained, liquidation is a procedure by which the assets of the company are realised and distributed to creditors in the statutory order of priority. The company is then dissolved. There are two types of liquidation:

- compulsory liquidation following a court order; and
- voluntary liquidation following a resolution of shareholders[94].

The company itself, the company's creditors and the ODCE can petition the High Court for the winding up of a company. The circumstances in which a company may be wound up by a court are strictly defined as liquidation has severe consequences. Section 569(1) of the Companies Act 2014 states:

> *"A company may be wound up by the court–*
>
> *(a) if the company has by special resolution resolved that the company be wound up by the court,*
>
> *(b) if the company does not commence its business within a year after the date of its incorporation or suspends its business for a continuous period of 12 months,*
>
> *(c) if the members of the company are all deceased or no longer exist,*
>
> *(d) if the company is unable to pay its debts,*
>
> *(e) if the court is of the opinion that it is just and equitable that the company should be wound up,*
>
> *(f) if the court is satisfied that the company's affairs are being conducted, or the powers of the directors are being exercised, in a manner oppressive to any member or in disregard of his or her interests as a member and that, despite the existence of an alternative remedy, winding up would be justified in the general circumstances of the case but this paragraph is subject to subsection (2),*
>
> *(g) if the court is satisfied, on a petition of the Director, that it is in the public interest that the company should be wound up, or*
>
> *(h) in the circumstances referred to in section 535(2) or 542(5)".*

Court liquidation can be a slow process as the petition must be advertised, and a number of parties must be put on notice of the application and given the opportunity to take part in the hearing. The court may have regard to these concerns but is not bound by them.[95] There can often be a delay of a number of weeks between the time when the petition to wind up is first presented and the making of the winding up order. At any time after the presentation of the petition and the making of the winding up order[96], the court may appoint a provisional liquidator to carry out such functions and to have such powers as the court may give him/her[97].

A provisional liquidator will usually be appointed where there is a concern that assets may be disposed of prior to the making of the winding up order. The purpose of the provisional liquidator, therefore, is to maintain the status quo

[94] See earlier information contained in section 1.4.3.
[95] Companies Act 2014, s566.
[96] Companies Act 2014, s573.
[97] Companies Act 2014, s626.

and prevent any creditor getting any priority pending the hearing of the petition. Hence, a winding-up petition may be presented, possibly accompanied by an application seeking the appointment of provisional liquidators, in order to protect the assets of the company. His or her appointment does not completely discharge the power of the board; the board may still cause the company to oppose the winding-up petition or to apply to discharge the provisional liquidator.

The appointment of a provisional liquidator results in a freeze on any action or proceeding against the company or its property except with leave of the court.

4.2 Powers of the Provisional Liquidator

As noted above, at any time after the presentation of the petition and the making of the winding up order, the court may appoint a provisional liquidator to carry out such functions and to have such powers as the court may give him/her.

Part V of Order 74, Schedule 1 of the Rules of the Superior Courts 1986 to 2015 elucidates further:

> *"After the presentation of a petition for the winding up of a company, the Court, upon the application of a person entitled by law to present a petition, and upon proof by affidavit of sufficient ground for the appointment of a provisional liquidator and without advertisement or notice to any person (unless the Court shall otherwise direct) may, upon such terms as in the opinion of the Court shall be just and necessary, appoint a provisional liquidator".*

The provisional liquidator is to be given such powers as, in the opinion of the Court are just and necessary.

The appointment of a provisional liquidator does not automatically terminate the company's employee's contracts of employment. Where a provisional liquidator is authorised to carry on the business of the company, the employment contract is not terminated. The effect of the appointment of such a liquidator on the contracts of employment of employees working for a company was the main issue considered by Hamilton J in *Donnelly v Gleeson*[98], where the learned judge held:

> *"In my opinion, the appointment of a provisional liquidator who has been given liberty by the Court to carry on the business of the company, whatever the purpose, and who does in fact carry on the business of the company, cannot and does not operate to determine the contracts of employment of the employees of the company"[99].*

This judgment was followed by Murphy J in *Re Evanhenry Ltd*[100] and relied upon more recently by Finlay Geoghegan J in *Re Swedex & Ors*[101]. In *Donnelly* and *Evanhenry*, the employees continued on in their employment after the

[98] This is in contrast to appointment of a liquidator; in *Donnelly v Gleeson* (Unrep, HC, Hamilton J, 11/7/1978) it was held that in the ordinary case, 'an order for the winding-up of a company is notice of discharge to all persons in the employment of the company'.
[99] *Donnelly v Gleeson* (Unrep, HC, Hamilton J 11/7/1978) p. 7.
[100] *Re Evanhenry Ltd (*Unrep, HC, Murphy J 15/5/1986).
[101] *Re Swedex & Ors* [2010] IEHC 237.

appointment of the provisional liquidator, and neither judge addressed the possibility that the appointment of a provisional liquidator might have constituted a repudiatory breach of the contract of employment.

In case of doubt as to the scope of his or her powers, a provisional liquidator can apply to the court for directions under Section 631 (1) of the Companies Act 2014.

Proposal: Requirement for Express Powers of a Provisional Liquidator in Respect of the Termination of Employee Contracts

The Review Group examined a proposal whereby an applicant when bringing an application to have a provisional liquidator appointed, must advise the court as to how many employees the company has in its employment. It was noted that the court should be informed of the relevant notice periods which are in operation and/or what consultation period is in operation where there are going to be redundancies. It also considered that that the provisional liquidator should be required to seek permission from the court for any proposed actions in respect of those employees' continuing employment during the course of the provisional liquidator's appointment.

These proposals would also dovetail with the proposal made in the Cahill Duffy expert report that employees will have the opportunity to consult with their employer for a period of not less than 30 days before any collective redundancy can take effect, whether the employer is insolvent or not.

Recommendation

It is a recommendation of the Review Group that where it is the intention of the provisional liquidator to end contracts of employment and/or to cease trading, the provisional liquidator must seek the specific power to terminate the employees' contracts from the court.

4.3 Avoidance of Transactions in the Companies Act 2014

When ascertaining what property is available to the creditors of an insolvent company that is being wound up, a liquidator will pay particular attention to transactions entered into prior to the winding up in which a creditor was provided with some benefit by the company. The liquidator will examine such transactions carefully to see if, for example, they constitute preferences or fraudulent transfers. The ability to avoid these transactions is usually regarded as the primary weapon in the arsenal of a liquidator in recovering property for the benefit of the creditors of the company.

Section 604 provides that a transaction which shows a preference to one particular creditor over other creditors of a company shall be deemed to be an unfair preference of its creditors and be invalid if certain conditions are fulfilled. Section 608 allows a liquidator or creditor of an insolvent company to reverse any improper transfer of company assets where the effect is to perpetrate a fraud on the creditors of the company. Both sections are helpful in dissuading directors from unlawfully asset stripping a company in the run up to insolvency.

4.3.1 Unfair Preference

The avoidance of preferences is designed, ostensibly, to prevent an unsecured creditor skipping the queue of the general body of unsecured creditors, all of whom should be treated equally. The recipient of the preference obtains an advantage over other creditors in that the preferred creditor is receiving payment for his or her debt (or part

thereof) before the other creditors. In many cases he or she receives full payment while the members of the general body of creditors receive nothing or a small portion of their debts.

Section 604 of the Companies Act 2014 repeats the fraudulent preference provisions as provided for in section 286 of the Companies Act 1963[102] but removes any use of the word 'fraudulent' to avoid the possible misunderstanding that fraud is an element of the burden of proof for an unfair preference.

The onus of proof in an application under section 604 differs depending on whether the beneficiary of the transfer is a connected person or an unconnected person. Where the beneficiary is a connected person, the applicant is effectively only required to prove that the transfer took place within two years of the commencement of the winding up, at which point the burden of rebutting the inference that the transfer is an unfair preference shifts to the beneficiary.

Where the beneficiary of the transfer is not a connected person, the burden on the applicant is to prove not only that the transfer took place within the last 6 months, but that the dominant intention of the transferor was to unfairly prefer the respondent over the other creditors of the company. This is often a heavy burden of proof to establish in court.

The jurisprudence on establishing an intention to prefer is succinctly summarised in the following passage in MacCann and Courtney's Companies Act 1963 - 2009: A Guide to Irish Law:

> *"In order to prove that a transaction is a preference, it is not sufficient to show that the effect of the transaction was to give a preference; rather the phrase 'with a view to giving …' has been interpreted as meaning that the transaction must have been entered into with a dominant intention to prefer. It is not enough to prove that there was actual preferment from which an intention to prefer can, with hindsight, be inferred. The liquidator must prove an intention to prefer at the time the payment is made. Where there is no direct evidence of intention, the court can draw an inference of an intention to prefer in a case where some other possible explanation is open. The method of ascertaining the state of mind of the payer is the ordinary method of evidence and inference, to be dealt with on the same principles which are commonly employed in drawing inferences of fact"[103].*

A court will not make an order under this section where it is proved that the transfer was made with the *bona fide* intention of continuing to trade the company[104].

In *Re Leo Getz Ltd* [105] Charleton J examined the boundaries of the previous requirement of 'fraudulent intent' under Section 286 of the Companies Act 1963:

> *"..since what is involved here is a fraudulent preference, solid grounds are needed since what is required is an inference of something which has the taint of dishonesty about it at the very least and which in extreme cases may be very much more than that. While in Re Patrick and Lyon Limited, Maugham J had doubted that moral*

[102] Section 286, prior to its amendment by the Act of 1990, necessitated applying section 53 of the Bankruptcy (Ireland) Amendment Act 1872, which, as amended by the Act of 1963, was set out in the Eleventh Schedule to the Act of 1963.
[103] MacCann and Courtney Companies Act 1963 – 2009: A Guide to Irish Law (2010 E Book, Bloomsbury) section 286.
[104] *Re O'Connor's Nenagh Shopping Centre Ltd* [2011] IEHC 508*, Re Kerr Aluminium Ltd (In Voluntary Liquidation)* [2012] IEHC 386.
[105] *Re Leo Getz Ltd* [2014] IEHC 356.

blame was a necessary proof to make out a fraudulent preference, the later Kushler case establishes that the onus on a liquidator is not discharged where the state of facts established is consistent with both an unfavourable and a favourable inference; doubts as to the probable inference to be resolved against the party bearing the burden of proof. In both Re M Kushler Limited and Station Motors Limited v Allied Irish Banks Limited, the High Court was compelled to infer an intention to prefer because the purpose of the payments had been proven to be to reduce the amount of an overdraft on the bank accounts of both companies, which had been personally guaranteed in each instance by the directors. Thus the approach is to seek out the state of mind of the officer or officers of the company making the disposition judged from the circumstances as a whole and drawing such inferences as are appropriate; Re Clasper Group Services Limited [1989] BCLC 143."

In the few reported cases where the court has been faced with applications under both section 604 and section 608 of the 2014 Act, the courts have typically made an order under section 608, due to the lower burden of proof that arises since the focus in the later section is on the effect of the transfer, rather than on the intention of the transferor[106].

Other Jurisdictions

United Kingdom – British bankruptcy law has long had provisions allowing transactions to be set aside in the run up to bankruptcy in favour of a particular creditor which were designed to prefer him over all other creditors. Fraudulent preferences, as they were known, were struck down by the courts long before there was legislation enacted.

Prior to the Insolvency Act 1986 the law relating to fraudulent preference was set out in the Bankruptcy Act of 1914, which was made applicable to companies in the Companies Act 1948. The term fraudulent preference was not in fact used in the 1914 Act, rather any transactions by a person unable to pay his debts with a view to giving a creditor a preference were deemed to be fraudulent if the transferor became bankrupt in the following 6 months. Accordingly, It was not necessary to prove fraudulent intent and all that was required was that the debtor had made a voluntary transfer with the dominant intention of favouring a particular creditor over other creditors.

The Cork Committee[107] considered whether the intention requirement should be removed and an effects test (like that in Australia and the United States) should be adopted. The majority view came out against making such a change on the grounds that without the intention to prefer the element of impropriety on which the existing statutory provisions were based would be missing. In addition, they felt that creditors who were active in the pursuit of payment should be rewarded and retain the fruit of their diligence.

Critics have noted that the Cork Committee's rationale flies in the face of the *pari passu* principle which underpins all insolvency law, that is, that once a company becomes insolvent all creditors of identical rank should share equally any available assets of the company, or any proceeds from the sale of any of those assets, in proportion to the debts due to each of those creditors.

The Insolvency Act 1986 removed all references to fraud although this reform, as was the case in respect of the Companies Act 2014, had no substantive effect as fraud was never in issue. The 'dominant intention to prefer' was

[106] *Le Chatelaine Thudicum Ltd v Conway* [2010] 1 I.R. 529; *Re Leo Getz Ltd* [2014] IEHC 356.

[107] Report of the Review Committee on Insolvency Law and Practice under the chairmanship of Sir Kenneth Cork (1982) Cmnd 8558, para 1813

also replaced by a less stringent requirement that in giving the preference, the company was influenced by a desire to place 'a person into a position which, in the event of the company going into insolvent liquidation, will be better than the position he would have been in if that thing had not been done'.

The onus of proof on the liquidator is the same as it is in Ireland, with a rebuttable presumption arising where the preferential treatment is to a connected person.

Germany – Unfair preferences, referred to as incongruent coverage transactions, can be challenged *per se* if they take place within one month prior to the filing for insolvency. If the transaction occurs in the second or third month prior to the insolvency filing, then the transaction can be challenged if the debtor was illiquid at the time the transaction was effected, or if the creditor was aware at that time that the transaction places the other insolvency creditors at a disadvantage. The creditor is deemed to have such knowledge if, based on his information on the economic situation of the debtor, he could not assume that the debtor's assets were sufficient to pay off all creditors in the foreseeable future. It is assumed that related parties have knowledge of the placement of creditors at a disadvantage.[108]

Australia and United States – There is no requirement to prove a company had an intention to give a preference, rather both countries adopt an 'effects' based test, where it is sufficient that the transaction had the effect of improving a particular creditor's position in the period prior to insolvency.[109]

4.3.2 Fraudulent Transfer

Section 608 sets out the power of the court to order the return of assets which have been improperly transferred. It states that:

> *"(1) The court has the following power where, on the application of a liquidator, creditor or contributory of a company which is being wound up, it can be shown to the satisfaction of the court that—*
>
> *(a) any property of the company of any kind whatsoever was disposed of either by way of conveyance, transfer, mortgage, security, loan, or in any way whatsoever whether by act or omission, direct or indirect, and*
>
> *(b) the effect of such disposal was to perpetrate a fraud on the company, its creditors or members".*

Prior to the enactment of section 608 of the Companies Act 2014, Section 139 of the Companies Act 1990 dealt with the making of a fraudulent disposition. There is relatively limited case law on section 139 of the Companies Act 1990. In *Le Chatelaine Thudichum (In liq.) Ltd v Conway*, Murphy J considered what comprises fraud for the purposes of the burden of proof of section 139:

[108] Section 130 German Insolvency Code (InsO).

[109] Since the decision in *S Richards and Co Ltd v Lloyd* (1933) 49 CLR 49 it has not been necessary for liquidators in Australia to prove any mental element on the part of either the debtor or the creditor in order to establish the existence of a preference. The liquidator's only task has been to prove that a transaction covered by the legislation occurred within a certain time frame before winding up when the debtor was insolvent and the transaction favoured a creditor with the effect that the creditor received an advantage over other creditors. To gain protection creditors must establish, inter alia, that they acted in good faith and that there were no reasonable grounds for suspecting insolvency.

" … the fraud criterion in s. 139 of the Companies Act 1990 , merely requires that the company, its creditors or members be deprived of something to which it is, or to which they are, lawfully entitled…I would adopt this proposition as a correct statement of the law" [110].

In *Devey Enterprises Ltd v Devey* [111]company monies had either been paid gratuitously to, or used to discharge the personal liabilities of, the respondent directors of the company. In the course of her judgment Laffoy J stated:

"[I]n reality, the respondents procured a gratuitous disposition of the company's money in their own favour. I am satisfied that the effect of the making of the payments identified by the liquidator, which were made by the company to the respondents or in discharge of the respondents' liabilities, was to perpetrate a fraud on the company and its creditors… It seems to me that it is just and equitable that the respondents, who procured benefits from the depletion of the assets of the company to the extent assessed by the liquidator, should be directed to repay an equivalent sum to the liquidator on behalf of the company in liquidation"[112].

Recently, Hunt J in *Tucon Process Installations (In Vol. Liq.) v Bank of Ireland* summarised the types of behaviour which Irish courts had found to be fraudulent:

"The courts in Ireland have held that the following behaviour has had the effect of constituting a fraudulent disposition for the purposes of s. 139:-

Entry on to company premises and the taking of possession of a cash sum and the entire stock of an insolvent company in lieu of rent owed: Le Chatelaine Thudichum Ltd. v. Conway [2010] 1 I.R. 529 .

Personal expenditure by company directors which had been recorded as business expenditure on behalf of the company: Devey Enterprises Ltd. v. Devey [2012] 1 I.R. 127 .

Payment of the proceeds of company sales at a restaurant to a related company: Kirby (as liquidator of Citywest Hire Limited v. Petrolo Limited and Stokes [2014] IEHC 279 .

The use of company funds to settle the private debts of a company director: Kirby (as official liquidator of MPS Global Limited) v. Muldowney [2014] IEHC 318. "[113]

Hunt J reviewed the case law to date in respect of section 139 and noted the standard of proof for relief under the section:

"..the availability of relief under this section requires proof of a disposal of property accompanied by the effect of the perpetration of a fraud on the company, or its creditors or members. It does not require proof of an intention to defraud, merely that the impugned transaction has that effect."

On a review of the relevant case law, Hunt J described the principles to be discerned in relation to section 139 as follows:

[110] *Le Chatelaine Thudichum (In liq.) Ltd. v Conway* [2010] 1 I.R. 529.
[111] *Devey Enterprises Ltd. v Devey* [2012] 1 I.R. 127.
[112] *Devey Enterprises Ltd. v Devey* [2012] 1 I.R. 127 at 137.
[113] *Tucon Process Installations (In Vol. Liq.) v Bank of Ireland* [2015] IEHC 312

> *"Improper dispositions or misapplications of company property will be caught by the section, but payments or dispositions in favour of creditors or employees for the benefit of the company concerned will not be included in an order made under the section. A simple payment made to an unsecured creditor when the company is insolvent will not, without more, trigger the operation of the section. It is not the case that every otherwise lawful payment made by an insolvent company to a legitimate unsecured creditor will automatically amount to a fraudulent disposition….The additional ingredient must amount to an impropriety before the provisions of the section are engaged."*

The requirement for some actual impropriety therefore, is the only limiting aspect of section 608.

Review Group Discussions

While the Companies Act 2014 has changed the title of the section 604 so that any reference to fraud has been removed, this has not had any substantive effect on the burden of proof in the section. The section is still very difficult to prove as an applicant must show there was an actual intention to improperly give a preference to a particular creditor. Showing a transaction has had a fraudulent effect as in section 608 is much less burdensome to prove than finding evidence of an actual intention to prefer under section 604. It was argued that section 604 does however retain a deterrent effect to prevent unfair preference which cannot be quantified by the number of actions taken under section 604.

There were divided views on whether the requirement to prove an intention to prefer should be adapted in line with the fraudulent effect provision which is currently in section 608, so that any action which has the effect of giving an unfair preference to one creditor over other creditors could be set aside if the required level of proof was met.

There was some concern that a change in the burden of proof could lead to unintended consequences whereby a company which was experiencing financial difficulties would find it difficult to find third parties willing to enter into contracts for goods or services with them, lest they be set aside or declared void at a later date. Any change to the burden of proof would increase the risks associated with dealing with companies approaching insolvency. Accordingly, any such change may make it more difficult for distressed companies to trade through their difficulties and ultimately, could drive companies into liquidation and threaten the solvency of third parties who have entered into contracts with distressed companies.

In addition the Review Group questioned the necessity for such an amendment. In particular it felt that the interaction between two sections should remain in its present formulation as it is based on the fact that section 608 (fraudulent transfer) involves unlawful and improper conduct and so the intention of the perpetrator does not matter. In section 604 (unfair preference), intent was an important aspect of the formal burden of proof and marked out an unfair preference from other innocent transactions.

Recommendation

On balance and following discussion, the Review Group (with the exception of ICTU) did not agree to recommend a change to the burden of proof in section 604 which would involve the substitution of effect for intent.

4.4 Proposed Reforms of the Liquidation Process

In this section, we deal with a number of issues which arise in the liquidation process where we believe some improvements are warranted

Proposal 1: Deemed Restriction

In recent years resolutions have been passed by the members of companies placing companies into liquidation but without making any nomination of a liquidator. In the absence of a willingness on the part of creditors to appoint a liquidator (which usually requires an indemnity from them to the liquidator in respect of his fees and costs), this can lead to the most unsatisfactory position where a company is put into liquidation but not being actively liquidated. For example, more than 100 companies were treated in this manner in 2010. In many cases, it would appear that it was genuinely the case where neither the company nor the directors having sufficient resources to fund the appointment of a liquidator but nonetheless the directors wishing to do the right thing and, at a minimum, provide the creditors with an opportunity to recover some of their debts, should they proceed to appoint a liquidator.

However, there is a concern that in some cases this situation is being deliberately engineered in order to avoid the scrutiny of directors' behaviour by liquidators, the ODCE or the courts. The legislative framework provides that the primary mechanism for scrutinising the behaviour of directors of insolvent companies is by the section 682 report that is required to be filed where a liquidator is appointed and restriction or disqualification proceedings can flow from such scrutiny in appropriate cases. The legislation also provides that where an insolvent company is not put into liquidation and is struck off (as typically happens when directors "abandon" companies that are insolvent), the ODCE can take disqualification proceedings under section 842(h). In cases where a company resolves to liquidate but no liquidator is appointed, neither of these prescribed mechanisms are available and the director's behaviour can escape any scrutiny[114].

Recommendation: Deemed Restriction

In order to address the difficulties caused when directors of companies walk away without putting a company into liquidation or companies purport to be in liquidation without a liquidator actually being appointed, it is recommended that the law should be changed. In proposing the introduction of deemed restriction periods for directors of insolvent companies to which no liquidator is appointed, it is important to remember that it is the shareholders, rather than the directors themselves, who have the power to appoint a liquidator to an insolvent company. Directors must be encouraged to facilitate this vote by convening a meeting of shareholders to deal with the appointment of a liquidator.

Accordingly, the Review Group is recommending that directors of insolvent companies who fail to convene a general meeting for the purpose of putting a proposal to the company's shareholders, that a named person be appointed as a liquidator should be automatically deemed to be restricted in accordance with section 819.

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[114] While section 567 of the Companies Act 2014 provides that certain actions can be brought against insolvent companies to which no liquidator has been appointed it is not possible for general creditors to utilise this section to trigger restriction or disqualification proceedings, That section provides that a person who would have standing otherwise to apply for an order or judgment under such a section shall have such standing to make an application under that section as it applies. Section 820 of the Companies Act 2014 provides that an application for restriction can only be brought by a liquidator, receiver or the ODCE. The person who may bring a disqualification order varies according to which ground is relied upon. In practice while creditors have the power to bring disqualification proceedings under section 844, this power has never been used.

Under this proposal it would be envisaged that it would be open to the directors to apply to the High Court under section 822 for the terms of the restriction to be reconsidered. Section 822 provides that any time after a restriction order is made; a director may apply to the High Court to seek relief (in whole or in part). That relief may be a reduction in the period of time in which he or she is to be subject to restriction or a reduction of the minimum capitalisation requirements required by the order. In some cases it may involve the overturning of the decision to restrict in its entirety.

The proposed section could read as follows:

> ***819A Deemed Restriction of Certain Directors of Insolvent Companies.***
>
> *(1) A person is deemed to be subject to a restriction order if that person is a person who was a director of an insolvent company and*
>
> *(i) failed to convene a general meeting of shareholders for the purpose of nominating a named liquidator ;*
>
> *(ii) or at such a meeting fails to table a motion to nominate a named liquidator;*
>
> *(2) A person deemed to be restricted under subsection (1) is restricted for a period of 5 years after the date of such restriction or for such other shorter period, and subject to such conditions, as the court, on the application of the restricted director and having regard to all the circumstances of the case, may order.*
>
> *(3) A person restricted under subsection (1) is deemed, for the purposes of this Act, to be subject to a restriction order for the period of his or her restriction.*

Proposal 2: Enhanced focus on Directors' Duties to Employees.

Section 682 provides that liquidators of insolvent companies must prepare a report on the reasons for the failure of the company and the conduct of the directors in the run up to the insolvency of the company. The compiling of the report takes place following the examination of books and records and consultation with the directors of the company and possibly with the Revenue Commissioners. The liquidator makes a recommendation as to whether the directors of the company acted in accordance with their duties under the Companies Act 2014. The ODCE decides on foot of this report whether the liquidator is obliged to bring restriction proceedings.

The second reform proposed relates to the questionnaire used to compile the section 682 liquidator's report. While the Review Group decided that it should not propose any change to Section 224 (see 2.2.2. ante), the Review Group also noted that consideration of directors' duties towards their employees can already form part of the review conducted into director behaviour by the ODCE in the case of companies in liquidation. However, there is no explicit requirement on liquidators to cover this issue in their section 682 reports.

Recommendation

It is recommended that the form could be amended to specifically include a reference to the consideration of employees by the director in the insolvent company. This reform aims to ensure that the liquidator must specifically address the consideration given to employees by the directors of the company in the vicinity of insolvency. This will also ensure that the ODCE is informed of the manner in which employees have been dealt with by the company. This information would go towards informing the ODCE's decision to relieve or not to relieve the liquidator from bringing restriction proceedings against the director of the insolvent company. A liquidator's report form with the proposed amendment is included at Appendix 6.

Proposal 3: Self-Administered Liquidation (SAL)

Considerable difficulties can arise for creditors and employees where directors fail to make arrangements for insolvent companies to be wound up in an appropriate manner. Sometimes this happens because the directors concerned have no regard for proper governance or appropriate behaviour. However, the Review Group acknowledged that the high cost of liquidation can also be an obstacle, particularly in the case of very small businesses. In recognition of these difficulties and taking into account the limited threat that very small businesses will generally pose to other stakeholders, the Review Group is proposing, in principle, the introduction of a new form of liquidation for very small businesses. These liquidations would be self-administered by the directors of the company and thus avoid the expense of having to appoint a liquidator. Given the moral hazard that would arise in such cases, appropriate safeguards and anti-avoidance provisions would have to be built into the new process. The following is a brief outline of the concept.

To be eligible for the SAL, the company would have to:

a) Have estimated gross liabilities as per the statement of affairs of not more than a certain prescribed amount (where there are connected companies, the liabilities of the connected companies shall be taken into account in estimating the gross liabilities); and
b) None of the directors of the company may have availed of a SAL within the preceding 3 years; and
c) None of the directors of the company may be subject to a Restriction/Disqualification order at the time of the application.

This proposal is designed to help directors who want to have an orderly wind down of their insolvent companies' affairs but who are unable to fund the appointment of a liquidator either through the company's assets or their own. It reflects the high cost of a liquidation which must be completed through the High Court. Although the Companies Act 2014 introduced reforms to reduce the number of applications[115] that need to be brought in a court, regrettably liquidation costs remain high.

Through the combination of the introduction of an automatic deemed restriction for directors who choose not to ensure the appointment of a liquidator to wind up their insolvent companies to avoid the scrutiny of their actions and the introduction of the Self-Administered Liquidation for cases of genuine hardship, the Review Group hopes to decrease the number of insolvent companies to which no liquidator is appointed. The problems that these informal insolvencies present for employees and unsecured creditors are considered further in Chapter 5 of this report.

Recommendation

Further details of the terms of this proposal are included in Appendix 7. It was recommended that the proposal on the SAL will be referred for further consideration as part of the review of winding up envisaged in Item 4 of the CLRG

[115] The Companies Act 2014 permits greater creditor participation though a committee of inspection. This is indicative of a move away from judicial oversight in liquidations generally and is consistent with one of the objectives of the Act, which is to align court initiated liquidations with voluntary liquidations so as to reduce the court's supervisory involvement in the liquidation process. A committee of inspection may now be established in a court liquidation without court sanction at the instigation of the liquidator or a minimum proportion in value of the creditors. Prior to the introduction of the Companies Act 2014 it was relatively rare to see a committee of inspection in a court ordered liquidation because the interests of the creditors are generally seen as protected by the court.

Work Programme for 2016-2018 for a more in-depth review of Part 11 of the Companies Act 2014 which contains the provision dealing with liquidation.

Chapter 5: Sections of the Companies Act 2014 Deemed Fit for Purpose

The Committee examined a number of sections of the Companies Act 2014 which are of particular relevance to the areas of inquiry identified by the Minister in his request of the Company Law Review Group. The Review Group concurred that the following sections were fit for purpose. In this chapter, each section is set out as it appears in the Companies Act 2014 along with a brief description of its application to employees and unsecured creditors.

5.1 Section 567 Application of certain provisions to companies not in liquidation

567 *(1) This section applies in relation to a company that is not being wound up where–*

(a) execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part, or

(b) it is proved to the satisfaction of the court that the company is unable to pay its debts, taking into account the contingent and prospective liabilities of the company,

and, in either case, it appears to the court that the reason or the principal reason for its not being wound up is the insufficiency of its assets.

(2) The sections specified in the Table to this section apply, with the necessary modifications, to a company to which this section applies, notwithstanding that it is not being wound up; accordingly, a person who would have standing otherwise to apply for an order or judgment under a section so specified shall have such standing to make an application under that section as so applied, but this does not affect the Director's power under subsection (3).

(3) The Director may apply to the court pursuant to this subsection for an order or judgment, as the case may be, under any of the sections which apply to a company to which this section applies.

(4) References in the sections specified in the Table to this section to–

(a) the commencement of the winding up of a company,

(b) the appointment of a provisional liquidator,

(c) the making of a winding-up order, or

(d) the relevant date,

shall, for the purposes of this section, be read as references to the date–

(i) of the judgment, decree or order mentioned in subsection (1)(a), or

(ii) on which the court determines that the company is unable to pay its debts.

(5) Where, by virtue of this section, proceedings are instituted under section 599, 608, 609, 610, 612 or 672, sections 610(6) and 611 shall apply in relation to any order made as a result of those proceedings except that an order made as a result of an application by the Director pursuant to subsection (3) shall not be made in favour of the Director, otherwise than as to his or her costs and expenses.

(6) Subject to subsection (7), a person having a claim against the company may apply to the court for such order as is appropriate by way of enforcement of any right the court on the application finds to arise on the person's part to payment of a share of any sums or assets recovered or available following a successful application by the Director pursuant to subsection (3), and, on the hearing of an application under this subsection, the court may make such an order accordingly.

(7) An application under subsection (6) shall be made within a period of 30 days after the date of judgment or order given on behalf or in favour of the Director pursuant to subsection (3).

(8) Where section 721 applies by virtue of this section, it shall so apply as if the words "which is subsequently ordered to be wound up by the court or subsequently passes a resolution for voluntary winding up" were deleted from it.

Table
Sections to which this section applies

Section	***Subject***
Section 286(3)	*Particular case of category 1 offence arising where adequate accounting records not kept, etc.*
Section 599	*Related company may be required to contribute to debts of company being wound up*
Section 608	*Power of court to order return of assets which have been improperly transferred*
Section 609	*Personal liability of officers of company where adequate accounting records not kept*
Sections 610 and 611	*Civil liability for fraudulent trading*
Section 612	*Power of court to assess damages against certain persons*
Section 613	*Directors of holding company: power of court to assess damages against them*
Section 671	*Power of court to summon persons for examination*
Section 672	*Order for payment or delivery of property against person examined under section 671*
Section 675	*Order for arrest and seizure, etc.*
Section 684	*Inspection of books by creditors and contributories*
Section 721	*Other frauds by officers of companies which have gone into liquidation: offence*
Section 722	*Fraudulent trading of company: offence*
Section 751	*Order for inspection of books or documents of company in liquidation*
Section 818	*Interpretation and application (Chapter 3 of Part 14)*

5.1.1 Application for the Protection of Employees and Unsecured Creditors

The section permits the Director of Corporate Enforcement and individual creditors and contributories to invoke various remedies (listed in a table accompanying the section) against delinquent directors and officers which would otherwise be exercisable only in a winding up where the company is not in liquidation but the other requirements set forth in the section are satisfied.

5.1.2 Committee Discussions

While the range of powers made available to creditors under Section 567 could be useful, they are not often employed in practice by creditors or the ODCE.

The burden of proof was discussed and the ODCE noted that, the starting point is often a complaint from a creditor. There can be a lack of available evidence to meet the requirement that there were insufficient assets in the company to appoint a liquidator. The section can have a dissuasive effect in so far as this section can be a useful tool to encourage a director to appoint a liquidator.

5.2 Section 569 Circumstances in which company may be wound up by the court

569. *(1) A company may be wound up by the court—*

(a) if the company has by special resolution resolved that the company be wound up by the court,
(b) if the company does not commence its business within a year after the date of its incorporation or suspends its business for a continuous period of 12 months,
(c) if the members of the company are all deceased or no longer exist,
(d) if the company is unable to pay its debts,
(e) if the court is of the opinion that it is just and equitable that the company should be wound up,
(f) if the court is satisfied that the company's affairs are being conducted, or the powers of the directors are being exercised, in a manner oppressive to any member or in disregard of his or her interests as a member and that, despite the existence of an alternative remedy, winding up would be justified in the general circumstances of the case but this paragraph is subject to subsection (2),
(g) if the court is satisfied, on a petition of the Director, that it is in the public interest that the company should be wound up, or
(h) in the circumstances referred to in section 535(2) or 542(5).

(2) The court may dismiss a petition to wind up a company under subsection (1)(f) if it is of the opinion that proceedings under section 212 would, in all the circumstances, be more appropriate.

(3) Subsection (1) is in addition to the special cases (namely those provided under sections 455(2)(d), 760 and 761) in which a company may be wound up by the court.

5.2.1 Application for the Protection of Employees and Unsecured Creditors

Section 569 sets out the circumstances in which a company may be wound up by the court. Section 569(g) gives the Director of Corporate Enforcement the entitlement to seek to have a company wound up on the grounds that it is in the public interest to do so.

The Secretary of State for Trade and Industry in the UK has had a similar power since 1989 pursuant to Section 124A Insolvency Act 1986.

It would appear that the matters to be taken into account by the court in deciding whether to exercise this jurisdiction are similar to those which arise in relation to the just and equitable ground for winding up under Section 569(1)(e). In *Re Connemara Mining Co. Ltd*[116] Laffoy J emphasised that "the Oireachtas clearly intended that the Court should have a broad discretion" in exercising the latter jurisdiction.

5.2.2 Committee Discussions

The following submissions from ICTU were considered by the Committee:

- Section 569 deals with the circumstance under which a company can be wound up by a court and section 572 further deals with the power of the court to hear a petition to wind up a company.
- The extent of compliance of the directors of the company with their statutory duty to the interests of employees under section 224 should be included under both sections for consideration by the court when making a decision.

The submission was discussed by the Committee, however section 569 was considered to be fit for purpose and no recommendation for change was adopted.

[116] *Re Connemara Mining Co. Ltd* [2013] IEHC 225

5.3 Section 570 Circumstances in which company deemed to be unable to pay its debts

570. *For the purposes of this Act, a company shall be deemed to be unable to pay its debts—*

(a) if—

(i) a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding €10,000 then due, has served on the company (by leaving it at the registered office of the company) a demand in writing requiring the company to pay the sum so due, and

(ii) the company has, for 21 days after the date of the service of that demand, neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor,

or

(b) if—

(i) 2 or more creditors, by assignment or otherwise, to whom, in aggregate, the company is indebted in a sum exceeding €20,000 then due, have served on the company (by leaving it at the registered office of the company) a demand in writing requiring the company to pay the sum so due, and

(ii) the company has, for 21 days after the date of the service of that demand, neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of each of the creditors,

or

(c) if execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part, or

(d) if it is proved to the satisfaction of the court that the company is unable to pay its debts, and in determining whether a company is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the company.

5.3.1 Application for the Protection of Employees and Unsecured Creditors

Section 570 sets out the four circumstances in which a company will be deemed to be unable to pay its debts. Once a petitioner has proved to the satisfaction of the court that the company is unable to pay its debts, he or she will ordinarily be entitled to a winding up order. Section 570(a) amends the equivalent provision in section 214(a) Companies Act 1963 to the extent that the minimum amount of indebtedness to entitle a creditor to serve a statutory demand is increased to a figure in excess of €10,000. The CLRG previously recommended an increase (to a figure of in excess of €5,000) on the basis that the previous level of €1,269.74 was too low[117].

5.3.2 Committee Discussions

A proposal was made by ICTU that the monetary threshold for applications under section 567 for employees should be lowered. The likelihood of an employee bringing an action for the recovery for a smaller amount in the High Court seemed remote. If the threshold was to be lowered it would have to be accompanied by a lowering of the jurisdiction from the High Court to the Circuit Court.

Using the examinership model it was proposed that the Circuit Court would be able to commence liquidations where the value of the liquidation was within the limited jurisdiction of the Circuit Court (€75,000). It was suggested that this could be a potential avenue for SME liquidations. If the value of any action taken by the liquidator in a liquidation commenced in the Circuit Court was in excess of that Court's limited jurisdiction then that part of the liquidation could be transferred to the High Court.

[117] Company Law Review Group, Second Report, para.4.15.22

At Report Stage in the Dáil on April 2nd 2014, Deputy Peadar Tóibín sought to move an amendment that would permit an employee or group of employees to issue a petition where a sum exceeding €1,500 was due and owing, stating that the increase would "impact unfairly on lower income employees who obviously do not have €10,000 of indebtedness and will render them unable to act". The Minister responded by expressing the view that such debts were a matter for employment law, stating that "a greater balance and proportionality must be achieved in circumstances where the severe sanction of winding up is concerned".

However, even if such reforms were carried out the reduction of legal costs would not be guaranteed. There was anecdotal evidence that the costs of examinership in Circuit Court had remained quite high despite the lowering of the jurisdiction from the High Court. The reality was that there were only a limited number of practitioners in the field of examinership and this had the effect of keeping costs high. While this would not necessarily be the case for liquidations there was no guarantee that the reforms would lower the costs of liquidation.

The proposal was discussed by the Committee, however section 670 was considered to be fit for purpose and no recommendation for change was adopted.

A further point was made by ICTU under this general heading with reference to obligations under Article 2.4 of Directive 2008/94/EC in order to cover employees of unliquidated insolvent companies currently prevented from availing of protections and entitlements under the Insolvency Act.

5.4 Section 572 Powers of court on hearing petition

572. *(1) On the hearing of a winding-up petition, the court may—*

(a) dismiss the petition, or

(b) adjourn the hearing conditionally or unconditionally, or

(c) make any interim order, or any other order that it thinks fit,

but the court shall not refuse to make a winding-up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets, or that the company has no assets.

(2) The court shall not make an order for the winding up of a company unless—

(a) the court is satisfied that the company has no obligations in relation to a bank asset that has been transferred to the National Asset Management Agency or a NAMA group entity, or

(b) if the company has any such obligation—

(i) a copy of the petition has been served on that Agency, and

(ii) the court has heard that Agency in relation to the making of the order.

(3) In subsection (2) "bank asset" and "NAMA group entity" have the same respective meanings as in the National Asset Management Agency Act 2009.

(4) Upon the making of an order to wind up a company, based on a ground referred to in paragraph (a), (b), (c), (e) or (f) of section 569(1), the court may order that the company be wound up as if it were a members' voluntary winding up and, in such event, the provisions of this Part shall apply as if the company were being so wound up.

(5) Where a petitioner does not proceed with his or her winding-up petition, the court may, upon such terms as it shall deem just, substitute as petitioner any person who would have a right to present a petition in relation to the company, and who wishes to proceed with the petition.

5.4.1 Application for the Protection of Employees and Unsecured Creditors

Section 572 details the powers of the court on hearing the petition to wind up a company. While a winding up order will usually follow where a petitioner has proved to the satisfaction of the court that the company is unable to pay its debts, the court has an overriding discretion on a winding up petition and may refuse an order in circumstances where evidence is adduced that a majority of creditors oppose an order or where a case is made that the petition is made for an ulterior purpose.

5.4.2 Committee Discussions

The following proposals from ICTU were considered by the Committee:

a) Section 569 deals with the circumstance under which a company can be wound up by a court and section 572 further deals with the power of the court to hear a petition to wind up a company.
b) The extent of compliance of the directors of the company with their statutory duty to the interests of employees under section 224 should be included under both sections for consideration by the court when making a decision.

The proposal was discussed by the Committee, however section 572 was considered to be fit for purpose and no recommendation for change was adopted.

5.5 Section 612 Power of court to assess damages against certain persons

612 *(1) Subsection (2) applies if in the course of winding up a company it appears that—*

(a) any person who has taken part in the formation or promotion of the company, or

(b) any past or present officer, liquidator, provisional liquidator or examiner of the company, or receiver of the property of the company,

has misapplied or retained or become liable or accountable for any money or property of the company, or has been guilty of any misfeasance or other breach of duty or trust in relation to the company.

(2) The court may, on the application of the Director or the liquidator or any creditor or contributory of the company, examine into the conduct of the promoter, officer, liquidator, examiner or receiver, and compel him or her—

(a) to repay or restore the money or property or any part of it respectively with interest at such rate as the court thinks just, or

(b) to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or other breach of duty or trust as the court thinks just.

(3) This section shall have effect notwithstanding that the person in respect of whom an order has been sought under it may be criminally liable in respect of the matters on the ground of which the order is to be made.

5.5.1 Application for the Protection of Employees and Unsecured Creditors

Section 612 provides that on the application of the Director of Corporate Enforcement or the liquidator or any creditor, the Court may examine into the conduct of the promoter, officer, liquidator, examiner or receiver, and return any assets which have been improperly transferred or applied or has been guilty of misfeasance or breach of duty or trust.

5.5.2 Committee Discussions

Section 612, although it is not used regularly, may have a deterrent effect. The section was discussed by the Committee, was considered to be fit for purpose and no recommendation for change was adopted.

5.6 Section 613 Directors of holding company: power of court to assess damages against them

***613 (**1) Subsection (2) applies if, in the course of winding up a company which is a subsidiary of another company, it appears that any director of the subsidiary's holding company has—*

(a) misapplied or retained or become liable or accountable for any money or property of the subsidiary, or

(b) been guilty of any misfeasance or other breach of duty or trust in relation to the subsidiary.

(2) The court may, on the application of the liquidator or any creditor, contributory or member of the subsidiary, examine into the conduct of the director concerned and compel him or her—

(a) to repay or restore the money or property or any part of it respectively with interest at such rate as the court thinks just, or

(b) to contribute such sum to the assets of the subsidiary by way of compensation in respect of the misapplication, retainer, misfeasance or other breach of duty or trust as the court thinks just.

(3) This section—

(a) shall have effect notwithstanding that the person in respect of whom an order has been sought under it may be criminally liable in respect of the matters on the ground of which the order is to be made, and

(b) is without prejudice to any other basis for imposing liability on any person (whether related to the company or not) in respect of the person's acts or defaults in relation to the company or its property.

5.6.1 Application for the Protection of Employees and Unsecured Creditors

This section allows for the setting aside of separate legal personality in a group. This can be done where, in the course of a winding up of a subsidiary, it appears to a liquidator or creditor of the subsidiary that the director of the holding company has transferred assets from the subsidiary to the holding company, or has been guilty of misfeasance or breach of duty or trust in respect of the subsidiary.

5.6.2 Committee Discussions

Section 613 can be linked with Section 599, in so far as it makes the director personally liable for the debts of the insolvent company as opposed to making the holding company liable.

The Committee noted that this section wasn't used very often but may be considered for use by a liquidator depending on the circumstances. The section was discussed by the Committee, and was considered to be fit for purpose and no recommendation for change was adopted.

5.7 Section 621 Preferential Payments in a Winding Up

***621** (1) In this section the "relevant date" means—*

(a) where the company is ordered to be wound up, the date of the appointment (or first appointment) of a provisional liquidator or, if no such appointment was made, the date of the winding-up order, unless, in either case, the company had commenced to be wound up voluntarily before that date, and

(b) where paragraph (a) does not apply, the date of the passing of the resolution for the winding up of the company.

(2) In a winding up there shall be paid in priority to all other debts—

(a) the following rates and taxes:

(i) all local rates due from the company at the relevant date and having become due and payable within the period of 12 months before that date;

(ii) each tax assessable on, in relation to, or by the company under the Taxes Consolidation Act 1997 in respect of, or apportioned on a time basis to, a period ending on or before the relevant date, for which the tax concerned is due and payable, but the particular period (in respect of which priority under this subparagraph for the tax concerned is claimed) shall not be of more than 12 months' duration;

(iii) any amount due at the relevant date in respect of sums which an employer is liable under Part 18D or Chapter 4 of Part 42 of the Taxes Consolidation Act 1997 and regulations thereunder to deduct from emoluments to which that Part or Chapter applies paid by that employer during the period of 12 months next ended on or before the relevant date reduced by any amount which that employer was under that Part or Chapter and regulations thereunder liable to repay during that period, with the addition of interest payable under section 991 of that Act;

(iv) any tax and interest for which the company is liable under the Value-Added Tax Consolidation Act 2010 in relation to taxable periods which shall have ended within the period of 12 months next ended before the relevant date;

(v) any local property tax that the company is liable to remit to the Revenue Commissioners under section 74 of the Finance (Local Property Tax) Act 2012 during the period of 12 months next ended before the relevant date and any interest payable in relation to that tax under section 149 of that Act;

(vi) an amount of local property tax payable, under section 16 of the Finance (Local Property Tax) Act 2012 , by the company at the relevant date to the extent that such tax is payable in respect of any one liability date (within the meaning of section 2 of that Act) falling before the relevant date and any interest payable in relation to that tax under section 149 of that Act,

(b) all wages or salary—

(i) whether or not earned wholly or in part by way of commission, or

(ii) whether payable for time or for piece work,

of any employee in respect of services rendered to the company during the period of 4 months before the relevant date,

(c) all accrued holiday remuneration becoming payable to any employee (or, in the case of the person's death, to any other person in his or her right) on the termination of the employee's employment before or by the effect of the winding up order or resolution,

(d) unless the company is being wound up voluntarily merely for the purposes of reconstruction or of amalgamation with another company—

(i) all amounts due in respect of contributions which are payable during the 12 months before the relevant date by the company as the employer of any persons under the Social Welfare Acts, and

(ii) all amounts due in respect of contributions which would have been payable under the provisions of section 13 (2)(d) of the Social Welfare Consolidation Act 2005 by the company as the employer of any persons in respect of any remuneration in respect of any period of employment during the 12 months before the relevant date even if such remuneration is paid after the relevant date,

(e) unless the company is being wound up voluntarily merely for the purposes of reconstruction or of amalgamation with another company, all amounts due from the company in respect of damages and costs or liability for damages and costs, payable to a person employed by it in connection with an accident, being an accident occurring—

(i) before the relevant date, and

(ii) in the course of the person's employment with the company,
save to the extent that the company is not effectively indemnified by insurers against such damages and costs,
(f) all sums due to any employee pursuant to any scheme or arrangement for the provision of payments to the employee while he or she is absent from employment due to ill health,
(g) any payments due at any time by the company pursuant to any scheme or arrangement for the provision of superannuation benefits to or in respect of employees of the company whether such payments are due—
(i) in respect of the company's contribution to that scheme or under that arrangement, or
(ii) in respect of such contributions payable by the employees to the company under that scheme or arrangement which have been deducted from the wages or salaries of employees.

(3) Subsection (2) is in addition to any other enactment providing for the priority of a particular debt or sum in a winding up.

(4) Subject to subsection (5), and notwithstanding anything in subsection (2)(b), the sum to which priority is to be given under subsection (2)(b) shall not, in the case of any one claimant, exceed €10,000.

(5) Where a claimant under subsection (2)(b) is a farm labourer who has entered into a contract for payment of a portion of his or her wages in a lump sum at the end of the year of hiring, he or she shall have priority in respect of the whole of such sum, or such part thereof as the court may decide to be due under the contract, proportionate to the time of service up to the relevant date.

(6) Where any payment has been made—
(a) to any employee of a company, on account of wages or salary, or
(b) to any employee or, in the case of his or her death, to any other person in his or her right, on account of accrued holiday remuneration, or
(c) to any employee while he or she is absent from employment due to ill health or pursuant to any scheme or arrangement for the provision of superannuation benefit to or in respect of him or her,
out of money advanced by some person for that purpose, the person by whom the money was advanced shall, in a winding up, have a right of priority in respect of the money so advanced and paid up to the amount by which the sum, in respect of which the employee or other person in his or her right, would have been entitled to priority in the winding up has been diminished by reason of the payment having been made.

(7) The foregoing debts shall—
(a) rank equally among themselves and be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions, and
(b) so far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures under any floating charge created by the company, and be paid accordingly out of any property comprised in or subject to that charge.

(8) Subject to the retention of such sums as may be necessary for the costs and expenses of the winding up, the foregoing debts shall be discharged forthwith so far as the assets are sufficient to meet them, and in the case of debts to which priority is given by subsection (2)(d), formal proof of them shall not be required except in so far as is otherwise provided by rules of court.

5.7.1 Application for the Protection of Employees and Unsecured Creditors

Section 621(2)(b) gives preferential status to all wages and salary owed to employees in the 4 months prior to insolvency and is capped at €10,000 per employee. Accordingly, employees rank as unsecured creditors (with no

preferential status) in the order of priority for any wages which are owed in excess of €10,000 or extending back greater than 4 months.

There are other creditors that also hold preferential status in certain circumstances; most notably Revenue enjoys preferential status in respect of certain outstanding taxes and the Local Authorities in respect of rates. Section 621 (2) (a) provides further details as to the exact taxes and rates in question. Like employees, Revenue and Local Authorities can still find themselves as unsecured creditors for tax liabilities which are not afforded preferential status. Both are limited by a 12 month rule.

The Revenue Commissioners' claims in respect of employment contributions (PRSI) which have actually been deducted from employees' remuneration but which have not been paid over to them have superior preference by virtue of section 19(2) of the Social Welfare (Consolidation) Act 2005. This status effectively gives these claims super preference for priority of payments in the event of distributions over preferential creditors.

In practice, the effectiveness of preferential status depends on the amount of money left in the company once the costs and expenses of the insolvency process and the fixed charge holders have been fully paid. Preferential status has been reviewed by the CLRG on a number of occasions.

Floating charge holders rank next in priority before unsecured non-preferential creditors. Anecdotal evidence from insolvency experts suggests that in the majority of insolvencies, non- preferential unsecured creditors recover on average less than 10% of what is owed to them by the insolvent company. In the United Kingdom, the recovery rates are similarly low.

There are also other forms of security interests which may affect the monies available for distribution, for example, retention of title claims and solicitors' liens.

5.7.2 Committee Discussions

In 2007 the CLRG made recommendations providing for a distinction between fiduciary taxes and general taxes.[118] Those recommendations were not subsequently adopted.

The section was discussed by the Committee, and was considered to be fit for purpose and no recommendation for change was adopted.

5.8. Section 653 Director's power to examine books and records

653 *(1) In this section—*

"appropriate person", in relation to the company referred to in subsection (3), means any of the following:

(a) the company;

(b) irrespective of the time at which he or she holds or held such status (but subject, in the case of subparagraph (iii), to subsection (2))—

(i) a liquidator of the company,

(ii) an officer or statutory auditor of the company, or

(iii) a receiver appointed to any property of the company;

"books and records" means the books and records of the company and, in addition, in the case of a request under subsection (3) made of a liquidator, statutory auditor or receiver, the books and records of the liquidator, statutory auditor or receiver;

[118] Company Law Review Group Annual Report 2007 pages 109-118. See Appendix 4.

"liquidator" includes a provisional liquidator.

(2) For the avoidance of doubt, the powers under this section do not extend to a case in which a receivership alone has been conducted in relation to any property of the company (which case is governed by section 446 (Director may request production of receiver's books)).

(3) Where a company is being wound up or has been dissolved, the Director may—

(a) on his or her own motion, or

(b) where a complaint is made to the Director by a member, contributory or creditor of the company,

request (specifying the reason why the request is being made) an appropriate person to produce to the Director the books and records for examination, and the appropriate person shall comply with the request.

(4) In the case of a request of a liquidator or a receiver under subsection (3), the request may relate to a particular winding up or receivership process or to all windings up or receiverships conducted by the liquidator or receiver.

(5) An appropriate person shall—

(a) answer any questions of the Director concerning the content of the books and records requested to be produced under subsection (3),

(b) if he or she is a liquidator or receiver, answer any questions of the Director concerning the conduct of a particular winding up or receivership, or all windings up or receiverships conducted by the appropriate person, as the case may be, and

(c) give to the Director such assistance in the matter as the appropriate person is reasonably able to give.

(6) An appropriate person shall give to the Director such access and facilities as are necessary for inspecting and taking copies of books and records requested to be produced by him or her under subsection (3).

(7) A request under subsection (3) may not be made in respect of books and records relating to a winding up or receivership that has concluded more than 6 years prior to the date of the request but nothing in this subsection is to be read as requiring a liquidator to keep any books or records for a period longer than that specified in section 696 (2).

(8) An appropriate person who—

(a) fails to comply with a request under subsection (3),

(b) fails to answer any question under subsection (5)(a) or (b),

(c) fails to give the Director the assistance referred to in subsection (5)(c), or

(d) without lawful excuse, fails to give the Director the access or facilities referred to in subsection (6),

shall be guilty of a category 2 offence.

(9) Nothing in this section shall be taken as excluding or restricting any statutory rights of the Government, a Minister of the Government or a person acting under the authority of the Government or a Minister of the Government, or the powers of any person under Part 13 .

5.8.1 Application for the Protection of Employees and Unsecured Creditors

Section 653 contains a useful investigatory power for the ODCE. It requires the production of an insolvent company's books and records and requires an appropriate person to co-operate with the ODCE investigation by answering questions and providing assistance. A successful investigation by the ODCE can result in the return of assets to a

company which can increase the amount available for distribution for the entire body of creditors and this benefit may in turn filter down to the employees and unsecured creditors of the company.

5.8.2 Committee Discussions

The section was discussed by the Committee, and was considered to be fit for purpose and no recommendation for change was adopted.

5.9. Section 683 Obligation (unless relieved) of liquidator of insolvent company to apply for restriction of directors

683. *(1) In this section—*

(a) "insolvent company" has the same meaning as it has in Chapter 3 (restrictions on directors of insolvent companies) of Part 14 ; and

(b) a reference to a director of the insolvent company is a reference to a person who was a director or shadow director of the company at the date of, or within 12 months before, the commencement of its winding up.

(2) In a winding up of an insolvent company, where this subsection applies, the liquidator shall apply under section 819 (1) for a declaration under that provision in respect of each of the directors of the company.

(3) As respects subsection (2)—

(a) that subsection applies unless the Director has relieved the liquidator of the obligation to make the application under section 819 (1) in relation to the winding up concerned or a particular director or directors (which power to so relieve is conferred on the Director by this paragraph), and

(b) where the Director relieves the liquidator of that obligation in respect of one or more but not all of the directors, that subsection shall be read as applying to the director or directors as respects whom the liquidator has not been relieved of that obligation.

(4) An application in respect of a director under section 819 (1), in compliance with subsection (2), shall be made not later than the expiry of—

(a) 2 months after the date on which the Director has notified the liquidator that the Director has not relieved the liquidator of the obligation to make the application in respect of the director, or

(b) such greater period of time as the Director may allow for the purposes of the application

(5) A liquidator who fails to comply with subsection (2) shall be guilty of a category 3 offence.

5.9.1 Application for the Protection of Employees and Unsecured Creditors

Section 683 creates a positive obligation on a liquidator to apply for the restriction of any directors or shadow directors of insolvent companies (unless they are relieved by that obligation by the ODCE). Restriction proceedings can often shed light on the affairs of the company and the conduct of the directors and can be an important source of information for employees and unsecured creditors of an insolvent company. Restriction orders also protect against "phoenix activity" in so far as restricted directors are subject to minimal capitalisation requirements (under Section 819 of the Companies Act 2014) if they wish to be directors of any future companies during the period of their restriction.

5.9.2 Committee Discussions

The section was discussed by the Committee, and was considered to be fit for purpose and no recommendation for change was adopted.

5.10 Section 717 Certain fraudulent acts within 12 months preceding winding up or any time thereafter: offences

717. *A relevant person who, within the period of 12 months ending on the commencement of the winding up or at any time thereafter—*

(a) subject to section 720 (2)(a), conceals any part of the property of the company to the value of €20.00 or more, or conceals any debt due to or from the company,
(b) fraudulently removes any part of the property of the company to the value of €20.00 or more,
(c) subject to section 720 (2)(b), conceals, destroys, mutilates or falsifies any book or paper affecting or relating to the property or affairs of the company,
(d) subject to section 720 (2)(b), makes any false entry in any book or paper affecting or relating to the property or affairs of the company, or
(e) fraudulently parts with, alters or makes any omission in any document affecting or relating to the property or affairs of the company,

shall be guilty of a category 2 offence

5.10.1 Application for the Protection of Employees and Unsecured Creditors

Section 717 creates a category 2 offence for the fraudulent disposal or assets or books and records. It focuses on transactions and book keeping in the 12 months prior to the commencement of insolvency. If a director attempts to remove assets from a failing company in the 12 months prior to insolvency will be guilty of an offence. Directors may try to conceal any perceived wrongdoing on their part prior to a liquidator's appointment. The liquidator will scrutinise the company's affairs to determine if restriction or disqualification proceedings are required, This section makes it an offence to tamper with the books and records of the company in order to discourage directors from attempting to conceal their actions in the run up to insolvency

5.10.2 Committee Discussions

The section was discussed by the Committee, and was considered to be fit for purpose and no recommendation for change was adopted.

5.11 Section 722 Fraudulent trading of company: offence

722. *If any person is knowingly a party to the carrying on of the business of a company with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the person shall be guilty of a category 1 offence*

5.11.1 Application for the Protection of Employees and Unsecured Creditors

Section 722 creates a category 1 offence for fraudulent trading; this is separate from the civil liability for fraudulent trading which is contained in Section 610 of the Companies Act 2014. In addition, any such person may be personally responsible for all or any of the debts of the company as the Court may direct. Diverting monies payable to the

company to a director or shareholder, incurring credit at a time when to the knowledge of the director there is no prospect of that credit being repayable, non-payment of monies to employees or to pension funds would all constitute fraudulent trading.

5.11.2 Committee Discussions

The section was discussed by the Committee, and was considered to be fit for purpose and no recommendation for change was adopted.

5.12 Section 735 Power of Director to obtain information

735. *(1) Where a company has been struck off the register under section 733 (1) on any of the grounds set out in section 726 (a) to (c), the Director may, by notice to the directors of the company, require those persons to produce to the Director a statement of affairs of the company in accordance with this section.*

(2) The persons to whom a notice is sent under subsection (1) shall, within the period specified in the notice in that behalf, produce to the Director a statement of affairs of the company that complies with subsection (3).

(3) The statement of affairs shall—

(a) be in the prescribed form (if any);
(b) be verified by an affidavit;
(c) contain the following information in respect of the company as at the date of dissolution

(i) particulars of its assets, debts and liabilities;
(ii) the names and addresses of its creditors;
(iii) particulars of securities given by the company, including the name of the secured creditor in each case and the date on which the security was given;
(iv) such further or other information as may be prescribed or that the Director may reasonably require.

(4) On the application of the Director, the court may require a person who has made a statement under subsection (2) to appear before it and answer on oath any question relating to the content of the statement.

(5) A person who fails to comply with subsection (2) shall be guilty of a category 3 offence.

5.12.1 Application for the Protection of Employees and Unsecured Creditors

Section 735 gives the Director of the Office of Corporate Enforcement the power to require directors of a company which has been struck off to prepare a statement of affairs of their company. Once submitted, the director of the company can be questioned under oath in respect of the contents of the statement of affairs. This section could be useful where a deemed insolvency has taken place as it could provide some insight into a business which has failed where no liquidator was appointed (whether as a result of inaction or inadequacy of funds).

5.12.2 Committee Discussions

The section was discussed by the Committee, and was considered to be fit for purpose and no recommendation for change was adopted.

5.13. Section 747 Investigation of company's affairs by court appointed inspectors on application of company etc.

747. *(1) On the application of a person or persons specified in subsection (2), the court may appoint one or more competent inspectors to investigate the affairs of a company in order to enquire into matters specified by the court and to report on those matters in such manner as the court directs.*

(2) The court may make the appointment on the application of any of the following persons:

(a) the company;

(b) not less than 10 members of the company;

(c) a member or members holding one-tenth or more of the paid up share capital of the company (but shares held as treasury shares shall be excluded for the purposes of this paragraph);

(d) a director of the company; or

(e) a creditor of the company.

(3) The court's power of appointment under subsection (1) is exercisable notwithstanding that the company is in the course of being wound up.

(4) The court may require the applicant or the applicants to give security for payment of the costs of the investigation.

(5) A person who intends making an application under this section shall give not less than 14 days' notice in writing of his or her intention to apply to the Director, and the Director shall be entitled to appear and be heard on the hearing of the application.

(6) In this section "court" means—

(a) save in the case of a company referred to in paragraph (b), the High Court, or

(b) in the case of a company that, in respect of the latest financial year of the company that has ended prior to the date of the making of the application under this section, fell to be treated as a small or medium company by virtue of section 350, the Circuit Court, and, subject to subsection (8), all subsequent references to the court in this Part shall, as respects the powers and jurisdiction of the court with respect to an investigation on foot of an appointment made under this section by the Circuit Court, be read accordingly.

(7) For the purpose of paragraph (b) of subsection (6), if the latest financial year of the company concerned ended within 3 months prior to the date of the making of the application concerned, the reference in that paragraph to the latest financial year of the company shall be read as a reference to the financial year of the company that preceded its latest financial year (but that reference shall only be so read if that preceding financial year ended no more than 15 months prior to the date of the making of the application concerned).

(8) Subsection (6) does not confer jurisdiction on the Circuit Court to wind up any body corporate; however, that court, in exercise of its jurisdiction under this Part, may refer an inspectors' report made to it under this Part to the High Court which shall have the same jurisdiction to wind up any body corporate concerned as if the inspectors' report had been made to it in the first instance.

(9) In the case of an application under this section by a creditor or member to the Circuit Court, the application shall be made to the judge of the Circuit Court—

(a) for the circuit in which the registered office of the company is situated at the time of the making of the application, or

(b) if there is no registered office of the company at that time, for the circuit in which the creditor or member resides, or

(c) if there is no registered office of the company at that time and the creditor or member resides outside the State, for the Dublin Circuit.

(10) In the case of an application under this section by the company or a director of it to the Circuit Court, the application shall be made to the judge of the Circuit Court—

(a) for the circuit in which the registered office of the company is situated at the time of the making of the application; or

(b) if there is no registered office of the company at that time, for the Dublin Circuit.

5.13.1 Application for the Protection of Employees and Unsecured Creditors

This section provides for the appointment of inspectors by the court on the application of a company, a member or members, a director or a creditor, to investigate into the affairs of a company and to report on those matters.

The Circuit Court has jurisdiction to deal with an application for the appointment of an investigator and consequential court hearings where a small or medium company is concerned. However, the Circuit Court will not be entitled to make a winding up order on foot of the inspectors' report. A Circuit Court judge can refer the report on to the High Court which will have jurisdiction to make a winding up order in respect of the company concerned.

5.13.2 Committee Discussions

The following proposal was made by ICTU to the Committee:

There are a number of potential barriers to the exercise of this right to appoint an inspector by employee creditors and these are the possible requirement by a court for the lodgement of security for payment of the costs of an investigation as well as the High Court (or in certain circumstances, the Circuit Court) costs of the proceedings themselves.

To recognise the particular difficulties faced by employee creditors and statutory duty owed by directors to them and reflected in section 224, consideration should be given to allow for such an application in the District Court with the investigation being carried out by the officers of the ODCE with no requirement for payment or security for costs by the employee creditor applicants.

The section was discussed by the Committee, and was considered to be fit for purpose with the exception of ICTU. No recommendation for change was adopted.

5.14 Section 748 Investigation of company's affairs by court appointed inspectors on application of Director

748 *(1) On the application of the Director, the court may appoint one or more competent inspectors to investigate the affairs of a company and to report on those affairs in such manner as the court directs, if the court is satisfied that there are circumstances suggesting that—*

(a) the affairs of the company are being or have been conducted with intent to defraud—

(i) its creditors;

(ii) the creditors of any other person; or

(iii) its members;

(b) the affairs of the company are being or have been conducted for a fraudulent or unlawful purpose other than described in paragraph (a);

(c) the affairs of the company are being or have been conducted in an unlawful manner;

(d) the affairs of the company are being or have been conducted in a manner that is unfairly prejudicial to some part of its members;
(e) the affairs of the company are being or have been conducted in a manner that is unfairly prejudicial to some or all of its creditors;
(f) any actual or proposed act or omission of the company (including an act or omission on its behalf) was, is or would be unfairly prejudicial to some part of its members;
(g) any actual or proposed act or omission of the company (including an act or omission on its behalf) was, is or would be unfairly prejudicial to some or all of its creditors;
(h) the company was formed for a fraudulent or unlawful purpose;
(i) persons connected with its formation or the management of its affairs have, in that connection, been guilty of fraud, misfeasance or other misconduct towards the company or its members; or
(j) the company's members have not been given all the information relating to its affairs which they might reasonably expect.

(2) The court's power of appointment under this section is without prejudice to its powers under section 747 and is exercisable notwithstanding that the company is in the course of being wound up.

(3) Inspectors appointed under this section may be or include an officer or officers of the Director.

(4) A reference in subsection (1) to the members of a company shall have effect as if it included a reference to any person who is not a member but to whom shares in the company have been transferred or transmitted by operation of law.

(5) In this section "court" means—
(a) save in the case of a company referred to in paragraph (b), the High Court, or
(b) in the case of a company that, in respect of the latest financial year of the company that has ended prior to the date of the making of the application under this section, fell to be treated as a small or medium company by virtue of section 350, the Circuit Court,
and, subject to subsection (7), all subsequent references to the court in this Part shall, as respects the powers and jurisdiction of the court with respect to an investigation on foot of an appointment made under this section by the Circuit Court, be read accordingly.

(6) For the purpose of paragraph (b) of subsection (5), if the latest financial year of the company concerned ended within 3 months prior to the date of the making of the application concerned, the reference in that paragraph to the latest financial year of the company shall be read as a reference to the financial year of the company that preceded its latest financial year (but that reference shall only be so read if that preceding financial year ended no more than 15 months prior to the date of the making of the application concerned).

(7) Subsection (5) does not confer jurisdiction on the Circuit Court to wind up any body corporate; however, that court, in exercise of its jurisdiction under this Part, may refer an inspectors' report made to it under this Part to the High Court which shall have the same jurisdiction to wind up any body corporate concerned as if the inspectors' report had been made to it in the first instance.

(8) An application under this section to the Circuit Court shall be made to the judge of the Circuit Court—
(a) for the circuit in which the registered office of the company is situated at the time of the making of the application, or
(b) if there is no registered office of the company at that time, for the Dublin Circuit.

(9) Nothing in this section shall be taken as excluding or restricting any statutory rights of the Government, a Minister of the Government or a person acting under the authority of the Government or a Minister of the Government.

5.14.1 Application for the Protection of Employees and Unsecured Creditors

Section 748 allows for the appointment of inspectors on the grounds that a thorough investigation of a company's affairs is required if there are circumstances suggesting fraudulent or unlawful behavior on the part of the company or which suggest misfeasance or a fraudulent preference towards a particular creditor.

In *The Director of Corporate Enforcement v DCC plc and others*[119], the ODCE had sought to appoint an investigator 'in the public interest' to investigate matters arising out of the Fyffes –v- DCC litigation which resulted in DCC paying some €37 million to Fyffes following a finding of insider dealing.

Kelly J held that a court could not appoint an inspector, unless it was satisfied that:

(i) there were circumstances suggesting that the affairs of the company had been conducted in an unlawful manner and,

(ii) such appointment would be likely to achieve its proper purpose, namely to uncover facts not already known.

However, even where those conditions were fulfilled, a court retained discretion as to whether or not an appointment should be made. In exercising its discretion, it was appropriate for the court to take into account the public interest and whether or not the appointment of inspectors would be disproportionate having regard to the information before the court.

5.14.2 Committee Discussions

The section was discussed by the Committee, and was considered to be fit for purpose and no recommendation for change was adopted.

5.15 Section 761 Director may present petition for winding up following consideration of report

761. *The Director may present a petition for the winding up of a body corporate on the ground that it is just and equitable to do so if the Director considers that such a petition should be presented having regard to—*

(a) a report made under section 758 by inspectors appointed under section 747 (1) or 748 (1); or

(b) any information or document obtained by the Director by virtue of the performance by him or her of functions (whether under this Part or otherwise).

5.15.1 Application for the Protection of Employees and Unsecured Creditors

Section 761 allows the Director to petition to wind up a company if in the opinion of the Director it is just and equitable, based on information obtained by the Director of Corporate Enforcement in the performance of his duties. While the Director had such a power previously, it was available on a much more limited basis.

5.15.2 Committee Discussions

The section was discussed by the Committee, and was considered to be fit for purpose and no recommendation for change was adopted.

[119] *The Director of Corporate Enforcement v DCC plc and others* [2008] IEHC 260

5.16 Section 819 Declaration by court restricting director of insolvent company in being appointed or acting as director etc.

819 *(1) On the application of a person referred to in section 820(1) and subject to subsection (2), the court shall declare that a person who was a director of an insolvent company shall not, for a period of 5 years, be appointed or act in any way, directly or indirectly, as a director or secretary of a company, or be concerned in or take part in the formation or promotion of a company, unless the company meets the requirements set out in subsection (3).*

(2) The court shall make a declaration under subsection (1) unless it is satisfied that—

(a) the person concerned has acted honestly and responsibly in relation to the conduct of the affairs of the company in question, whether before or after it became an insolvent company,
(b) he or she has, when requested to do so by the liquidator of the insolvent company, cooperated as far as could reasonably be expected in relation to the conduct of the winding up of the insolvent company, and
(c) there is no other reason why it would be just and equitable that he or she should be subject to the restrictions imposed by an order under subsection (1).

(3) The requirements referred to in subsection (1) are—

(a) the company shall have an allotted share capital of nominal value not less than—
(i) €500,000 in the case of a public limited company (other than an investment company) or a public unlimited company, or
(ii) €100,000 in the case of any other company,
(b) each allotted share shall be paid up to an aggregate amount not less than the amount referred to in paragraph (a), including the whole of any premium on that share, and
(c) each allotted share and the whole of any premium on each allotted share shall be paid for in cash.

(4) In the application of subsection (3) to a company limited by guarantee, paragraphs (a) to (c) of it shall be disregarded and, instead, that subsection shall be read as if it set out both of the following requirements:

(a) that the company's memorandum of association specifies that the amount of the contribution on the part of the member of it, or at least one member of it, being the contribution undertaken to be made by the member as mentioned in section 1176(2)(d), is not less than €100,000;
(b) that the member whose foregoing contribution is to be not less than that amount is an individual, as distinct from a body corporate.

(5) In the application of subsection (3) to an investment company, paragraphs (a) to (c) of it shall be disregarded and, instead, that subsection shall be read as if it set out both of the following requirements—

(a) that the value of the issued share capital of the company is not less than €100,000,
(b) that an amount of not less than €100,000 in cash has been paid in consideration for the allotment of shares in the company.

5.16.1 Application for the Protection of Employees and Unsecured Creditors

Section 819 sets out the consequences of a finding of restriction against a director. Certain minimal capitalisation requirements have to be met by any restricted director for a period of 5 years, if he wishes to be appointed or act in any way, directly or indirectly, as a director or secretary of a company, or be concerned in or take part in the formation or promotion of a company.

5.16.2 Committee Discussions

The following submissions were made by ICTU to the Committee:

a) The restriction of directors of insolvent companies for up to 5 years is too limited period and is not dissuasive enough and that the court should have discretion to make a declaration for lengthier periods of restriction in the more serious cases of abuse, particularly of the interests of employees, with a minimum period of restriction of 5 years.
b) The non-compliance of directors with their statutory duty to have regard to the interests of employees under section 224 should be specifically included in the criteria for declaration by the court.

The Committee considered the submissions and noted the inclusion in the Report of a proposed reform to the liquidator's form which is submitted to the ODCE for its consideration prior to the granting relief in respect of restriction proceedings. This reform would ensure that where it was applicable, liquidators would put information in respect of the treatment of employees and compliance with section 224 before the ODCE.

It was noted that there had been a High Court decision of Finlay Geoghegan J, *Director of Corporate Enforcement v McDonnell*[120], which had indicated that there was no minimum sentence for disqualification and a longer period than 5 years could be applied for by the prosecution. While 5 years is the standard time period for disqualification orders, in practice, where a custodial sentence is being imposed, judges may also consider the effect of the imprisonment on the director and impose less than 5 years. The automatic disqualification period for directors who have committed certain criminal offences is 5 years.

The proposal in respect of the increased periods of restriction was considered. The Review Group (with the exception of ICTU) considered the section was fit for purpose. No recommendation for change was adopted.

5.17 Section 820 Application for declaration of restriction

820. *(1) An application for a declaration under section 819 (1) may be made by—*

(a) the Director,

(b) the liquidator of the insolvent company, or

(c) a receiver of the property of the company.

(2) The court may order that the person who is the subject of the declaration shall pay—

(a) the costs of the application, and

(b) the whole (or so much of them as the court specifies) of the costs and expenses incurred by the applicant—

(i) in investigating the matters that are the subject of the application, and

(ii) in so far as they do not fall within paragraph (a), in collecting evidence in respect of those matters,

including so much of the remuneration and expenses of the applicant as are attributable to such investigation and collection.

5.17.1 Application for the Protection of Employees and Unsecured Creditors

Section 820 sets out the procedure for an application for restriction of a director. Costs may be awarded against the director. Together with section 682, section 683 and section 819 it sets out the final part of the restriction regime.

[120] *Director of Corporate Enforcement v McDonnell* [2005] 1 IR 503.

5.17.2 Committee Discussions

The section was discussed by the Committee, and was considered to be fit for purpose and no recommendation for change was adopted.

5.18 Section 842 Court may make disqualification order

842. *On the application of a person specified in section 844 or of its own motion, the court may make a disqualification order in respect of a person for such period as it sees fit if satisfied—*

(a) that the person has been guilty, while a promoter, officer, statutory auditor, receiver, liquidator or examiner of a company, of any fraud in relation to the company, its members or creditors,

(b) that the person has been guilty, while a promoter, officer, statutory auditor, receiver, liquidator or examiner of a company, of any breach of his or her duty as such promoter, officer, auditor, receiver, liquidator or examiner,

(c) that a declaration has been granted under section 610 in respect of the person,

(d) that the conduct of the person as promoter, officer, statutory auditor, receiver, liquidator or examiner of a company makes him or her unfit to be concerned in the management of a company,

(e) that, as disclosed in a report of inspectors appointed by the court or the Director under this Act, the conduct of the person makes him or her unfit to be concerned in the management of a company,

(f) that the person has been persistently in default in relation to the relevant requirements,

(g) that the person has been guilty of 2 or more offences under section 286 ,

(h) that the person was a director of a company when a notice was sent to the company under section 727 and the company, following the taking of the other steps under Chapter 1 of Part 12 consequent on the sending of the notice, was struck off the register under section 733 , or

(i) that—

(i) the person is disqualified under the law of another state (whether pursuant to an order of a judge or a tribunal or otherwise) from being appointed or acting as a director or secretary of a body corporate or an undertaking, and

(ii) it would have been proper to make a disqualification order against the person otherwise under this section if his or her conduct or the circumstances otherwise affecting him or her that gave rise to the foreign disqualification had occurred or arisen in the State.

5.18.1 Application for the Protection of Employees and Unsecured Creditors

Section 842 sets out the circumstances under which the Court can make a disqualification order against a director following an application under this section or consequent to a successful application for fraudulent or reckless trading under section 610.

5.18.2 Committee Discussions

The section was discussed by the Committee, and was considered to be fit for purpose and no recommendation for change was adopted.

5.19 Section 872 Court may order that convicted person remedy breach

872 Personal liability can be imposed on directors following the commission of an offence under the Companies Act 2014

The court in which a conviction for an offence under this Act is recorded or affirmed may order that the person convicted shall remedy the breach of this Act in respect of which that person was convicted.

5.19.1 Application for the Protection of Employees and Unsecured Creditors

Following conviction for a company law offence, personal liability can be imposed on the director's for the breach, and they may be obliged to make significant reparations to the company. This can result in further monies being available for the meeting of creditor debts without the necessity of bringing a separate civil action.

5.19.2 Committee Discussions

The section was discussed by the Committee, and was considered to be fit for purpose and no recommendation for change was adopted.

Chapter 6 Potential Avenues for Employees and Creditors

6.1 Introduction

This Chapter provides information which is important to the overall consideration of potential avenues open to employees and unsecured creditors for enhancing their outcomes and interests when a company is insolvent.

6.2 The Department of Social Protection's Right of Subrogation

From an early stage in the Committee's deliberations, it became apparent that provisions protecting the interest of employees, particularly in insolvency situations, are primarily legislated for in employment and social protection law. The employees of insolvent companies are compensated for certain pay-related entitlements under the insolvent payments scheme and paid from the Social Insurance Fund. Responsibility for the administration of the Social Insurance Fund rests with the Department of Social Protection (DSP). In these circumstances, officials from DSP have participated in the discussions and considerations leading to the preparation of the present report, and their insights and inputs were particularly relevant in the consideration of those situations where either there is a failure to put a company into liquidation or to appoint a liquidator, thus denying employees of such entities access to the benefits of the Social Welfare funds.

6.2.1 Insolvency Payments Scheme payments from the Social Insurance Fund

The Protection of Employees (Employer's Insolvency) Act 1984 transposed Directive 80/987[121] into Irish law. Directive 80/987 has now been replaced by Directive 2008/94/EC[122] and is commonly referred to as the Employer's Insolvency Directive. The directive is designed to provide a minimum level of protection throughout the EU for employees affected by their employer's insolvency.

Certain wage-related debts owed to employees by their employer which remain unpaid because of the employer's insolvency may be paid by the Minister for Social Protection in accordance with sections 6 and 7 of the 1984 Act. Compulsory and voluntary liquidations and receivership come within the ambit of the Act, while examinership is not included.

Entitlements paid through the insolvency payments scheme include:

- Arrears of pay.
- Holiday and sick pay.
- Entitlements under the minimum notice and terms of employment, employment equality and unfair dismissals legislation.
- Court orders in respect of wages, holiday pay or damages at common law for wrongful dismissal.
- Certain unpaid pension scheme and personal retirement savings account (PRSA) contributions are also covered.

[121] Council Directive (EC) 80/987 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer [1980] OJ L 283/23

[122] Council Directive (EC) 2008/94 on the protection of employees in the event of the insolvency of their employer [2008] OJ L 283/36.

Payments are made from the Social Insurance Fund which is funded by employees PRSI contributions. Section 10 of the 1984 Act provides that any payments made by the Minister out of this fund are afforded preferential status under section 285 of the Companies Act 1963 (now section 621 of the Companies Act 2014). The Minister for Social Protection has a right to have employee claims subrogated by the liquidator or receiver and it is accepted that the Minister for Social Protection should be treated no less favourably in the order of priority than the employees would have been treated. The principal of subrogation also passes the legal right of the employee to try and recover any claim they may have against the insolvent company to the Department of Social Protection.

Laffoy J considered the limits of the Minister's right of subrogation for payments made from the Social Insurance Fund to employees in insolvency in *Red Sail Frozen Foods Limited (In Receivership)*[123]. She concluded that the Department was entitled to be compensated in respect of the payments it had made to the employees.

6.2.2 Limitations of the Insolvency Payments Scheme in Respect of Informal Insolvencies

If a company is never formally wound-up or if a receiver is never appointed, or even if the company in question is eventually struck off the register, the employees are denied access to the Social Insurance Fund that the Act is designed to provide. The lack of legislative provision for these 'informal insolvencies' has been the subject of some disquiet amongst academics[124] and in the courts[125] as well as of direct representation to government by the ICTU.

Most recently in *Glegola v The Minister for Social Protection & Ors*[126], the Court of Appeal held that the State had failed to correctly transpose Article 2(1)(b) of Directive 2008/94/EC. Finlay Geoghegan J, in delivering judgement on the 24th of February 2017, held:

> *"I have concluded that the breach by the State in failing to transpose fully Directive 2008/94/EC by failing to provide a procedure whereby a person, such as the present appellant, who is owed a debt by her employer, a company which is insolvent, but where no steps have been taken by the directors to wind up voluntarily and there are no assets available in the company to satisfy the probable costs to be incurred by a liquidator, to obtain the alternative type of order identified in Article 2(1)(b), is sufficiently serious in accordance with the principles set out above, to warrant an award of damages "*[127]

The Department of Social Protection informed the Review Group that this matter is under review, in consultation with other interested parties. It proposed amendments to the Companies Act 2014 including to the definition of insolvency with a view to broadening access to the Social Insurance Fund for employees[128]. These proposals were not supported by the Review Group as a change to the definition of insolvency in the Companies Act 2014 could have much broader and unintended repercussions. The Review Group considered that access to the fund should be available to all employees irrespective of whether or not the employer is incorporated and should be considered for inclusion in the Protection of Employee (Employer's Insolvency) Act 1984 or other relevant enactment.

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[123] *Red Sail Frozen Foods Limited (In Receivership)* (an unreported judgement of October 20, 2006)
[124] Maeve Regan, *Employment Law (*1st edn, Bloomsbury, 2009) para 12.23.
[125] *Davis Joinery Ltd* [2013] IEHC 353 (Laffoy J).
[126] *Glegola v The Minister for Social Protection & Ors* [2017] IECA 37.
[127] *Glegola v The Minister for Social Protection & Ors* [2017] IECA 37 p19.
[128] See Appendix 9.

The requirement of a formal insolvency or receivership under the Protection of Employees (Employer's Insolvency) Act 1984 can be contrasted to the relatively informal requirement under the Redundancy Payments Acts 1967-2007. Under the Redundancy Payments Acts 1967–2007, where an employer cannot afford to pay amounts due, the employee can apply for a statutory redundancy lump sum to be paid from the Social Insurance Fund. The same formal requirements with regard to insolvency do not apply in respect of redundancy payments. Both the employee and the employer must sign a declaration that a genuine redundancy situation exists and the employer must satisfy the Department of Social Protection that it cannot afford to make the statutory redundancy payment.

Where an employer refuses to pay an employee the statutory redundancy entitlements, the employee can apply to the Workplace Relations Commission within 12 months of the date of redundancy and, following a favourable decision, can apply to the social insurance fund for payment. There is a statutory entitlement to a redundancy payment which is not dependent on the status of the employer. The State steps in when the employer cannot/will not pay. [129]

One further related issue which was identified in the course of discussions was that the insolvency payments scheme covers entitlements relating to the period of eighteen months prior to the date of the insolvency of the employer or the termination of employment (or twelve months in respect to pension entitlements). This can cause difficulties in cases where a company ceases trading but is not wound-up or a receiver is not appointed for some time. Where a liquidator is not appointed, for instance, as a result of an insufficiency of funds, employees are deprived of access to the employer's insolvency fund. If this state of affairs continues for in excess of 18 months, employees may not be entitled to claim under the Employment Insolvency Act when the company is eventually wound-up or a receiver is eventually appointed.

Conclusion

It is the expectation of the Review Group that the proposed deemed restriction and SAL schemes[130] would alleviate some of the difficulties experienced by employees of companies which have entered into informal insolvencies. However, the SAL is primarily intended for companies with relatively small amounts of debt and accordingly will not benefit employees of larger or more indebted companies. In order to address the problems of these employees in gaining access to the insolvency payments scheme of the Social Insurance Fund a more comprehensive legislative change is needed to the Protection of Employees (Employer's Insolvency) Act 1984 or other relevant enactment.

6.3 State funding of Corporate Insolvencies

A significant difficulty in the protection of unsecured creditors and employees in insolvency can be the cost of bringing an action for breach of directors' obligations. Anecdotal evidence suggests that the lack of funding is a key reason for the paucity of cases in respect of many of the liquidators' remedies under company law, though other critical considerations identified included the lack of prospect of any recoveries from directors, who are often

[129] Irene Lynch Fannon has stated in her text *Corporate Insolvency and Rescue that* there would appear to be no great difficulty in extending this flexible practice to other types of entitlements covered by the 1984 Act and to dispense with the requirement for a liquidator or receiver to be appointed before the Act applies.

[130] See section 4.4

personally insolvent as well, and the difficulties of proving to the standard demanded by the Courts that the breach had taken place and that the director(s) should be held responsible. In many cases, there will be insufficient funds in the estate to pursue the director. Some countries have opted to directly fund the liquidation process and/or provide funds to liquidators to bring actions on behalf of the insolvent company. [131]

The Review Group previously considered the state funding of corporate insolvencies in its Second Report and this consideration was again discussed by the Review Group. Further information on the previous consideration by the Review Group can be found in Appendix 4 and information from other jurisdictions on state funding of insolvencies in Appendix 8.

Conclusion

The introduction of a state funding of corporate insolvencies could result in the position of employees and unsecured creditors being improved in liquidation proceedings, however, the cost of operating such a fund would be substantial. It is not clear that there is compelling evidence to justify the introduction of such a service at this time.

6.4 Obtaining Alternative Funding – The Rule against Maintenance and Champerty

The law in Ireland on third party funding of litigation differs from many other common law jurisdictions (most notably the United Kingdom) as a result of the rule against maintenance and champerty. Briefly, maintenance involves improper interference in civil proceedings often by way of the provision of financial assistance. Champerty is a form of maintenance where financial support is provided by a party with no connection to the dispute in exchange for a share in the spoils of the litigation or some other profit.

The rationale for the rule against maintenance and champerty is to maintain the integrity of the litigation system, to prevent people from trading in litigation for profit, and to prevent people with inappropriate motives from influencing litigation. Maintenance and champerty have been both torts and criminal offences in Ireland dating back to as early as 1634[132].

Accordingly, in Ireland, third party funding of litigation is only permitted where it does not breach either of these prohibitions. An example of permitted third party funding is where shareholders of a company finance litigation to which the company is a party to or where creditors fund a liquidator of an insolvent company to bring an action which may increase the funds ultimately available for distribution.

Recently, in the United Kingdom in particular, investment companies offering third party litigation funding have entered the market. Professional third party litigation funding is where a company, unrelated to the litigation in question, funds the litigation with a view to making a profit. Arguably, it could be presented as a business which trades on litigation which is presently not allowed in Ireland.

The position in Irish law was recently confirmed by the Supreme Court in *Persona Digital Telephony Ltd v The Minister for Public Enterprise*[133]. This was the first case to have come before the Irish courts directly concerning the acceptability of professional third party litigation funding. The Supreme Court held that it is contrary to public policy and an abuse of process for a third party to provide financial assistance to support litigation in return for a share in the proceeds unless that third party has a genuine interest in the litigation. However, the Court also recognised that

[131] A summary of models for state funding of liquidations in a selection of other jurisdictions has been included in Appendix 7.
[132] Maintenance and Embracery Act 1634
[133] *Persona Digital Telephony Ltd v The Minister for Public Enterprise* [2017] IESC 27

in light of modern issues, such as Ireland's status as an international trading state, there might well be justification for having a modern law on champerty and third party funding of litigation. Notwithstanding that view, Denham CJ found that the development of the law in this area would require full legislative analysis, was not suited to piecemeal evolution through case law and was therefore a matter for the consideration of the Oireachtas.

While not making a formal recommendation in respect of this issue, the Review Group does believe that the rule against maintenance and champerty, and its place in the face of the international trend towards third party litigation funding, may benefit from fresh consideration by the Law Reform Commission.

6.5 After the Event Insurance

After the event insurance ("ATE insurance") is a policy that can be taken out by litigants to protect them from the opposing party´s legal costs if their claim is unsuccessful. Unlike traditional insurance which is taken out ahead of an event occurring, ATE insurance is available only to litigants who are already involved in, or who are contemplating, a legal claim. ATE insurers will therefore be keen to only offer a policy for those cases where they believe the client's claim is likely to succeed. Essentially, the insurer is making a bet on the outcome of the case. In the United Kingdom, after the event insurance has been available to plaintiffs as an alternative to security for costs for some time.[134] Despite the absence of legislative change of the type that was introduced in England in 1999, ATE Insurance has nonetheless entered into this jurisdiction[135]. However, it is still comparatively novel.

In an insolvency context, ATE Insurance could be taken out by a liquidator who was seeking to bring high risk litigation against a parent company of the insolvent company or its former directors. Anecdotal evidence suggest that liquidators are often slow to recommend speculative litigation as an adverse costs ruling may wipe out what little monies are available for distribution and potentially leave the liquidator personally liable to the creditors of the company for the costs of the unsuccessful litigation.

In Ireland, the Court of Appeal has recently considered ATE insurance in *Greenclean Waste Management Limited v Maurice Leahy*[136]. The judgment was given in the context of an application by the defendant for security for costs[137] against the plaintiff, an insolvent company. In its first judgment in *Greenclean*, the High Court refused to grant security for costs on the basis that the plaintiff had ATE insurance. The defendant appealed that decision to the Supreme Court, and in 2013 that court directed the High Court to determine whether, in principle, ATE was champertous, illegal or otherwise unenforceable.

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[134] The Access to Justice Act brought into force in England and Wales in 1999 allows clients to insure against the risk of having to pay the Defendant's costs should their case be unsuccessful. The Act also introduced for the first time the use of conditional fee agreements. These are sometimes called no-win no-fee agreements.

[135] ATE Insurance has recently been offered in Ireland by Composite Legal Services, a United Kingdom registered company and a wholly owned subsidiary of AmTrust Europe Limited. Composite Legal Services in its press release have indicated that the ATE insurance premiums would typically range from 20% to 40% of the sum insured and would be rebated so that the premium is less expensive the earlier the case concludes. This premium can be paid in full at policy inception or insurers may offer a contingent premium structure wherein the full premium or part of it, is only payable in the event of a successful outcome. This product is intended for cases where the prospects of success and the prospects of being able to make a successful recovery are good, in percentage terms at least 60%.

[136] *Greenclean Waste Management Limited v Maurice Leahy* [2015] IECA 97 The case was a professional negligence action concerning advice given by the company's previous solicitor about its repairing obligation under a lease of commercial premises, and the subsequent alleged failure of the company's solicitor to advise the company about a potential claim against its previous solicitor.

[137] Under Irish law, security for costs may be awarded against a company where there is reason to believe that the company will be unable to pay the defendant's costs if successful in its defence, and the defendant can show a prima facie defence to the claim. If security for costs is ordered, the proceedings may be stayed until the security has been given.

In its subsequent judgment, the High Court stated that the tort of champerty still exists but that the ATE insurer's interest in the outcome of the litigation was legitimate, and accordingly the court found that the ATE policy was valid. The Court of Appeal applied the decision of Akenhead J in *Michael Philips Architects Limited v. Riklin*[138], which states:

> *"(a) There is no reason in principle why an ATE Insurance policy which covers the claimants liability to pay the defendant's costs, subject to its terms, could not provide some or some element of security for the defendant's costs. It can provide sufficient protection.*
>
> *(b) It will be a rare case where the ATE Insurance policy can provide as good security as a payment into court or a bank bond or guarantee. This will be, amongst other reasons, because insurance policies are voidable by the insurers and subject to cancellation for many reasons, none of which are within the control or responsibility of the defendant, and because the promise to pay under the policy will be to the claimant.*
>
> *(c) It is necessary where reliance is placed by a claimant on an ATE Insurance policy to resist or limit a security for costs application for it to be demonstrated that it actually does provide some security. Put another way, there must not be terms pursuant to which or circumstances in which the insurers can readily but legitimately and contractually avoid liability to pay out for the defendant's costs.*
>
> *(d) There is no reason in principle why the amount fixed by a security for costs order could not be somewhat reduced to take into account any realistic probability that the ATE Insurance would cover the costs of the defendant."*

However, on the basis of the particular terms of the ATE policy taken out by the plaintiff in this case, the court found that there was insufficient evidence to demonstrate an effective ATE policy, and that even if there had been, the policy in question was so conditional that it was not sufficient security. On this basis, the court found that the High Court had been wrong to decline the order for security for costs, and allowed the defendant's appeal in that regard.

The court held that while ATE insurance can provide sufficient protection for a defendant's costs, there must not be terms pursuant to which the insurers can readily but legitimately and contractually avoid liability to pay out for the defendant's costs.

The decision of the Court of Appeal demonstrates the significant difficulties that an insolvent company (or company without the means to discharge the other party's costs) will face in seeking to rely solely on ATE insurance cover when disputing an application for security for costs.

[138] *Michael Philips Architects Limited v. Riklin* EWHC 834 (TCC)

Glossary of Terms:

1963 Act	Companies Act 1963
1990 Act	Companies Act 1990
2005 Act	Social Welfare (Consolidation) Act 2005
2014 Act	Companies Act 2014
ASIC	Australian Securities and Investments Commission
CRO	Companies Registration Office
Director	Director of Corporate Enforcement
DPP	Director of Public Prosecutions
McDowell Report	The Working Group on Company Law Compliance and Enforcement known as the McDowell Group.
Minister	Minister for Enterprise, Trade and Employment
ODCE	Office of the Director of Corporate Enforcement
PLC	Public Limited Company
Review Group /CLRG	Company Law Review Group
SI	Statutory Instrument
ICTU	Irish Congress of Trade Unions
IMF	International Monetary Fund
SAL	Self-Administered Liquidation
ATE insurance	After the Event Insurance

Legislation Referenced

Bankruptcy (Ireland) Amendment Act 1872

Bankruptcy Act 1914 (UK)*

Companies Act 1862 (UK)*

Companies (Consolidation) Act 1908

Companies Act 1963

Companies Act 1985 (UK)*

Companies (Amendment) Act 1977

Companies Act 1980 (UK)*

Companies Amendment Act 1980 (NZ)*

Companies (Amendment) Act 1982

Companies (Amendment) Act 1983

Companies (Amendment) Act 1986

Companies (Amendment) Act 1990

Companies Act 1993 (NZ)*

Companies Act 2006 (UK)*

Companies Act 2014

Companies Accounting Bill 2016

Courts Act 1981

Courts and Civil Law (Miscellaneous Provisions) Act 2013

Courts (Supplemental Provisions) Act 1961

Corporations Act 2001 (Australia)*

Enterprise Act 2002 (UK)*

German Insolvency Code (InsO)*

Insolvency Act 1986 (UK)*

Maintenance and Embracery Act 1634

Protection of Employees (Employer's Insolvency) Act 1984

Safety, Health and Welfare at Work Act 2005

Social Welfare (Consolidation) Act 2005

Title 11 United States Code*

*Denotes legislation from other jurisdictions

Appendices

Appendix 1: Letter from Minister Bruton to the Company Law Review Group

Dr. Thomas B. Courtney,
Chairman,
Company Law Review Group,
Arthur Cox Solicitors,
Earlsfort Centre,
Dublin 2.

14 January 2016

Dear Tom,

Thank you very much for the Company Law Review Group (CLRG) report and recommendation in relation to Justice Laffoy's judgment in the Belgard Motors Case. I welcome the background information, deliberations and the clear recommendation in the report and would like to acknowledge the dedication shown by the CLRG in reverting to me with such expediency and in such a thorough manner.

I am now writing to you, again, in your capacity as Chair of the CLRG, to request that the CLRG examine and recommend ways in which company law and indeed the wider legislative code could be potentially amended to ensure better safeguards for a company's employees and unsecured creditors. In this context, the following areas may merit particular consideration: corporate governance; corporate insolvency; share capital; directors' duties and personal liability along with more general provisions in company law.

I consider that limited liability is a privilege and not an absolute right. I am concerned that there are potential contexts in which the privilege of limited liability for a company could be used to avoid a company's obligations to its employees and to unsecured creditors. In the consideration of this matter, it would be useful to explore, inter alia:

- Instances where the corporate veil can and should be lifted that could be adopted in statute.
- The potential strengthening of obligations on Directors to a company's employees as part of Directors' duties.
- Building-in checks and balances in statute which would strengthen obligations to employees for better protection in company restructuring.
- Circumstances in a liquidation of an insolvent company where the debts or liabilities of that company can be met from solvent companies in the same group or in related companies.

I would be grateful if the same commendable promptness and comprehensiveness could be given to the examination of this issue by the CLRG as was the case with the report in relation to the Supreme Court judgment. I look forward to hearing from you in this matter.

I also wish to inform you that Minister Nash and I have decided to ask a duo with experience in Employment and Company Law to examine options for enhancing the employment rights and protections afforded to employees in

insolvency situations. While the focus of this work will be primarily on Employment Law I believe that it is necessary to consider the interface between Employment Law and Company Law. I expect that this work will complement the work that I am asking the CLRG to undertake. I will be advising the duo of the work that the CLRG will be undertaking and I will ask them to liaise directly with you, as appropriate.

Yours sincerely,

Richard Bruton T.D.,
Minister for Jobs, Enterprise and Innovation.

Appendix 2: Membership of the Ad-hoc Committee

Vincent Madigan	Chairperson
Jonathan Buttimore	Office of the Attorney General
Barry Cahir	Irish Society of Insolvency Practioners
John Conlon [to January 2017]	Department of Social Protection
Tara Coogan	Department of Jobs, Enterprise and Innovation
Marie Daly	Irish Business and Employers Confederation (IBEC)
Stephen Dowling (to June 2016)	Bar Council
Mark Fielding	Irish Small & Medium Enterprises Association (ISME)
Michael Halpenny	Irish Congress of Trade Unions (ICTU)
Irene Lynch Fannon	Ministerial Nominee
Ralph MacDarby	Institute of Directors
Conor O'Mahony	Office of the Director of Corporate Enforcement
Breda Power	Department of Jobs, Enterprise and Innovation
Paddy Purtill	The Revenue Commissioners
Jon Rock (to June 2016)	Institute of Chartered Secretaries and Administrators in Ireland
Jim Walsh	Department of Social Protection

Secretariat: Síona Ryan

Legal Researcher: Lisa Maher, BL

Appendix 3: Section 621(2)(a) – Preferential Payments in a Winding Up – Rates and Taxes

Preferential Payments in a Winding Up – Rates and Taxes

(i) all local rates due from the company at the relevant date and having become due and payable within the period of 12 months before that date;

(ii) each tax assessable on, in relation to, or by the company under the Taxes Consolidation Act 1997 in respect of, or apportioned on a time basis to, a period ending on or before the relevant date, for which the tax concerned is due and payable, but the particular period (in respect of which priority under this subparagraph for the tax concerned is claimed) shall not be of more than 12 months' duration;

(iii) any amount due at the relevant date in respect of sums which an employer is liable under Part 18D or Chapter 4 of Part 42 of the Taxes Consolidation Act 1997 and regulations thereunder to deduct from emoluments to which that Part or Chapter applies paid by that employer during the period of 12 months next ended on or before the relevant date reduced by any amount which that employer was under that Part or Chapter and regulations thereunder liable to repay during that period, with the addition of interest payable under section 991 of that Act;

(iv) any tax and interest for which the company is liable under the Value-Added Tax Consolidation Act 2010 in relation to taxable periods which shall have ended within the period of 12 months next ended before the relevant date;

(v) any local property tax that the company is liable to remit to the Revenue Commissioners under section 74 of the Finance (Local Property Tax) Act 2012 during the period of 12 months next ended before the relevant date and any interest payable in relation to that tax under section 149 of that Act;

(vi) an amount of local property tax payable, under section 16 of the Finance (Local Property Tax) Act 2012 , by the company at the relevant date to the extent that such tax is payable in respect of any one liability date (within the meaning of section 2 of that Act) falling before the relevant date and any interest payable in relation to that tax under section 149 of that Act.

Appendix 4: Matters Previously considered by the Company Law Review Group

Consideration of the Order of Priority in a Winding Up

Detailed consideration was given to preferences of employees and the Revenue in the CLRG Report of 2007[139]. In particular, substantive reasoning was set out both for supporting Revenue preferences and for abolishing preferences as well as an outline of the experience of other jurisdictions. The 2007 CLRG Report concluded that there was a significant difference between:

(i) monies collected in "trust" for the State and

(ii) monies owing directly by a company by way of taxes arising from its trading and other activities.

The CLRG made a number of specific recommendations involving the retention of fiduciary taxes (PAYE, PRSI, RCT and VAT payable) and the abolition of Revenue priority for other taxes (such as corporation tax to the Revenue Commissioners or rates to a local authority)[140].

The 2007 report also considered the introduction of 'top slicing' in the United Kingdom following the introduction of the Enterprise Act 2002, whereby the Revenue preference was abolished in exchange for a scheme of ring-fencing of assets for the benefit of unsecured creditors. The Report of the Company Law Review Group 2007 at page 114 noted:

In section 251 of the Enterprise Act 2002, certain categories of debt lost preferential status. These are:

- debts due to Inland Revenue;

- debts due to Customs and Excise; and

- Social Security contributions.

The estimated value to the Crown of this de-categorisation was £70 million per annum (which is a very small proportion of the amount of unpaid debts owed by insolvent companies). It is important to note that the benefits arising from the de-categorisation of Crown debts do not go wholly to floating charge holders. Rather, section 252 of the Enterprise Act (inserting section 176A into the Insolvency Act 1986) requires a prescribed amount of the net property to be top-sliced for unsecured creditors unless the funds available are less than the prescribed minimum or the costs of the distribution would be disproportionate to the benefit. The reserve fund is calculated as follows: the net property constitutes the property after fixed charge holders and liquidation/administration costs have been paid.

- where the net property is no more than £10,000 in value, 50% is retained for the reserve fund;

- where the net property is between £10,000 and £1 million, 10% is retained for the reserve fund;

- for values over £1 million, 5% of the net property is retained for the reserve fund.

[139] Company Law Review Group Annual Report 2007 pages 109-118.

[140] In contrast, in February 2010, the Public Accounts Committee published a report entitled "First Interim Report on the Loss of Fiduciary Taxes arising from abuse of Limited Liability". The report examined the loss of fiduciary taxes arising from company insolvency and the steps that needed to be taken to give greater protection to this tax base. It recommended retaining the Revenue preference and introducing personal liability for directors for PRSI contributions collected by the company.

The CLRG concluded that on the basis that in an insolvent liquidation, there is, in general, very little monies available for creditors, they saw little merit in devising such an elaborate regime that would be unlikely to yield any significant benefit to unsecured creditors.

Consideration of State funding of Corporate Insolvencies

The issue of funding liquidations has been addressed in the United Kingdom by Official Receivership. The Official Receiver has a duty to initiate investigations into insolvencies whether the company has assets or not and in particular, must consider the circumstances surrounding the insolvency and whether or not an offence has been committed. In its First Report, the CLRG considered the introduction of state funding of insolvencies by way of Official Receivership and whether this approach should be adopted in Ireland. It stated:

> *"Unlike the UK and most other common law jurisdictions Ireland does not have a State-funded public interest liquidation service. The McDowell Report recommended against the establishment of such a service. It was pointed out that:*
>
> *"For historical reasons of economy and scale, the Oireachtas did not provide, when enacting the Companies Act, 1963, any parallel to the functions of the Official Receiver in Britain. The function of liquidations and the enforcement of the law relating to insolvency was left in private hands, assisted by the supervisory role of the High Court's judges and officers. The result has been that there is little tradition or experience in the public enforcement by public officials of the civil or criminal law relating to serious non-registration type breaches of the Companies Acts."*
>
> *The cost of such a service to the Exchequer, relative to the size of the Irish economy, appears to be the primary factor against the establishment of a state-funded public interest liquidation service. If such a service was in existence, the Review Group considers that it may be easier to establish a regulatory and supervisory regime for insolvency practitioners. However, the Group considered that because of the McDowell Report's relatively recently reached conclusion, the focus would, in the first instance, be upon considering the possibility of improving the regulatory system, short of recommending such a large-scale change".* [141]

The Companies Act 2014 sets out that in order to act as a liquidator or provisional liquidator a person must be:

- A member of a prescribed accountancy body;
- A practising solicitor;
- A member of other professional body recognised by the Supervisory Authority;
- A person qualified under the law of another EEA state;
- A person with practical experience of winding-ups and relevant insolvency law.

All liquidators must now meet professional indemnity regulations made by the Supervisory Authority.

In its Second Report, the CLRG considered the 1998 report of the Working Group of Company Law Compliance and Enforcement and stated:

> *"In considering how to deal with unliquidated insolvent companies a primary issue for consideration is if a State funded liquidation service might be somehow utilised to liquidate such companies. Consideration of the case for a State-funded Insolvency Service for Ireland is not new.*

[141] Company Law Review Group, First Report, p239 para 13.4.4-13.4.5

Recently, the issue of a State Insolvency Service was considered by the Working Group on Company Law Compliance and Enforcement (WG). Its November 1998 Report noted the role of the Insolvency Service in the UK which "appoints Official Receivers in cases where insufficient assets exist to pay private insolvency practitioners to liquidate the assets of bankrupts and insolvent companies."

The report went on to note that:

"While the service is profit-making, the Group was reluctant to recommend the establishment of an equivalent State infrastructure in Ireland. Rather the Review Group proposes a series of more modest measures which the Review Group believes will nevertheless make an impact in dealing with the problem of companies which cease to trade without being wound up."

Finally, the report concludes that:

"The Group recognises…that the success or otherwise of these recommendations may require to be reviewed in due course by the Company Law Review Group."

Although that report did not set out the analysis on which its conclusion was based, the Review Group understands that the profitability of the Insolvency Service in England and Wales was founded in part on a treasury management function for the proceeds of all liquidated assets (including those generated by private sector insolvency practitioners). The introduction of such arrangements in Ireland would require substantial legal and operational changes, and it was very unclear if these changes could be justified solely in the context of addressing the discrete problem of unliquidated insolvent companies. The WG [Working Group] *accordingly decided to recommend that sufficient powers should be conferred on the proposed Director to address the problem where warranted on a case-by-case basis. It is relevant also to note that the Insolvency Service is well resourced financially. The bulk of its operating costs in the year 2001-2002 came from two sources – fees charged to insolvent estates administered by Official Receivers and by insolvency practitioners; and investment income from the Insolvency Service Account and Insolvency Services Investment Account."*[142]

[142] Company Law Review Group, Second Report, para 4.8.7.-4.8.10

Appendix 5: Section 599 – Contribution Orders – Contribution Orders in New Zealand and Ireland

1. Introduction

The contribution order is a power granted under the Companies Act 2014 in which a liquidator, creditor or contributor of an insolvent company can apply to the High Court to make a related company liable for the insolvent company's debts. The court can order that a related company contribute to the assets available for the winding up of the insolvent company. The contribution order remedy is a unique feature of New Zealand and Irish company law. Sections 140 of the 1990 Act (now section 599 of the Companies Act 2014) was based on section 30 of the New Zealand Companies Amendment Act 1980 (now section 271a of the Companies Act 1993). The New Zealand provision had its origin in a recommendation in the 1973 Macarthur Committee Final Report of the Special Committee to Review the Companies Act, responding to a submission that in at least two recent cases well-known public companies had abandoned subsidiaries. Neither country has substantially amended its law in respect of contribution orders in the intervening years. As a result, the two sections remain quite similar. The differences between the legislation in New Zealand and Ireland are examined below.

2. Extract from the Nash Report

…[T]he Companies Act 1990 introduced a means by which a liquidator, or a creditor or contributor, can bolster the assets of the company being wound up by applying to the court for an order directing that a 'related' company should contribute to its debts. This can bring about a potentially quite dramatic 'piercing of the corporate veil' that otherwise gives each company in a group a separate legal identity. It seems that New Zealand is the only other jurisdiction in the common law world with a comparable statutory provision. There seem to be no reported cases considering in detail the proper application of the Irish section. The section is now re-enacted as section 599 of the Companies Act 2014. Under the section, in deciding whether it is just and equitable to make an order, the court has regard to –

- *the extent to which the related company took part in the management of the company being wound up;*
- *the conduct of the related company towards the creditors of the company being wound up;*
- *the effect which the order would be likely to have on the creditors of the related company.*

An order is not to be made unless the court is satisfied that the circumstances giving rise to the winding up of the company are attributable to the actions or omissions of the related company. The section states that it is not just and equitable to make an order if the only ground for making the order is the fact that the company was related, or that creditors of the company being wound up had relied on the fact that another company was related. In the Dáil Committee on the Bill, on the 6th March 1990, the then Minister Des O'Malley said of the section (which was at that stage section 118 of the Bill):

> *"I think I should say a few general words about section 118 to try to put it into context because it is, perhaps, a bit more difficult to follow if you do not have the context. We are all aware of situations that can or do arise with groups of companies whereby the separate legal identity of each member of the group is really only a facade, with the various group companies being run by the same people, effectively, as one company. The courts have, in recent years, shown an increasing willingness to lift the veil of separate legal identity in such circumstances and all we are really doing here is setting this within a statutory framework. Section 118, therefore, will enable the court, on the application of the liquidator or a creditor or contributory of any company that is being wound up, to order that any related company should pay to the liquidator an amount equivalent to the whole or part of all or any of the debts provable in the winding-up.*

Let me say, however, this will not lead to any automatic stripping away of the separate legal identity of related companies. On the contrary, it is clear from the section that the mere fact that the companies are related will not be a ground for an application under the section. The power of the court here will be discretionary, first, whether to make a related company liable in the first place and, secondly, the extent to which it should be made liable. The basic test that the court will apply is the familiar just and equitable one. Subsection (2) follows on from this and gives guidelines for the court to follow in this respect, while subsections (3) and (4) specify various situations where the court cannot make an order …"

[Later Des O'Malley, in replying to John Bruton TD, set out the rationale for the introduction of contribution orders:]

"I would suggest that he look at section 30 of the Companies (Amendment) Act, 1980 of New Zealand, where a new section 315a is inserted by that section of the New Zealand Act, and it is very similar to this one. This section largely codifies into statutory form, or is intended to, a number of judgments which have been delivered in the High Court and the Supreme Court here in recent years. The chief one is from a judgment of Mr. Justice Costello in Power Supermarkets Ltd v. Crumlin Investments Ltd and Others, delivered on 22 June 1981." While the section is certainly very similar in its terms to what is now section 271 of the New Zealand Companies Act 1993, it also echoes, as Deputy O'Malley said, earlier and indeed subsequent case law. Section 599 gives specific and detailed statutory expression to the principles expressed in this case law."

As I noted, we still await an authoritative Irish judgment on the circumstances in which a contribution order will be made as between related companies. What we do know, however, is the legislative policy behind the provision. The similar New Zealand provision had its origin in a recommendation in the 1973 Final Report of the Special Committee to Review the Companies Act (the Macarthur Committee), responding to a submission that in at least two recent cases well-known public companies had abandoned their subsidiaries. It is clear that a contribution order is not merely an administrative or procedural order but that it affects the substantive rights of those parties interested in the winding up of a company subject to such orders. As one New Zealand judge put it:

"Obviously, it contemplates a departure from the priorities laid down in the Companies Act 1955. I think Parliament intended the Court to have the broadest discretion to effect a result which accords with common notions of fairness in all the circumstances, bearing in mind the cardinal principle of insolvency administration, that there shall be equality among creditors of the same standing."

A court, in considering making a contribution order, must determine whether it is 'just and equitable' to do so. Although the legislatures in both Ireland and New Zealand provided a number of similar factors for the court to consider, the circumstances that will amount to just and equitable remain uncertain in the absence of an authoritative Irish judgment. The New Zealand courts have discussed a number of relevant factors, including:

- *whether directors of the subsidiary acted in that capacity or rather as employees of the parent*
- *whether they distinguished between the best interests of the subsidiary and the parent*
- *whether the subsidiary had financial capacity to continue to trade separately*
- *whether a parent's conduct had indicated that it stood behind the subsidiary.*
- *the interests of shareholders versus those of creditors*
- *the intermingled nature of the business*

- *whether the actions of the parent led directly to the liquidation of the subsidiary*
- *the group's conduct towards its creditors.*

[End of extract]

3. The Statutory Provisions

Sections 140 of the 1990 Act (now Section 599 of the Companies Act 2014) was based on section 30 of the New Zealand Companies Amendment Act 1980 (now section 271a of the Companies Act 1993). The New Zealand provisions and the Irish provisions are set out in full at Annex A of this document.

The original contribution order provision, Head 90 of the Bill for the Companies Act 1990, replicated the equivalent New Zealand provision in its entirety. However, owing to political concerns at the time that the provisions were 'anti-business', a number of changes were made in the drafting process to increase the onus of proof for any party seeking a contribution order. Perhaps the most important change was made by the then Minister, John Bruton, where he decided that s140 (2) – which sets out matters which ought to be considered prior to the making of a contribution order, should be split into two sub-sections. The latter of these sub-sections would have a compulsory element, so that no order could be made unless the court was satisfied that the circumstances giving rise to the liquidation were attributable to the actions or omission of the related company. The factors which influenced this policy decision included the political and industrial climate, unprecedented unemployment and reliance on foreign direct investment.

4. The Substantive Differences between the New Zealand and Irish Provisions

Arising out of the aforementioned political concerns a number of changes were made to section 140 to ensure contribution orders were only available in particular circumstances. As a result, there are now some differences between the two sections.

As noted above, the most significant of the differences between the Irish and New Zealand provisions is that in New Zealand, the extent to which the circumstances giving rise to the liquidation may be attributed to the related company is only one of four factors which the court may have regard to. Under the equivalent Irish provision, the court is expressly prohibited from making a contribution order unless the court is satisfied that that the circumstances giving rise to the liquidation are attributable to the actions or omission of the related company.

In addition an Irish court is not granted the discretion to consider 'any other matters it sees fit' when deciding whether it is just or equitable to make the contribution order. The New Zealand court is given this discretion by virtue of section 272 (1) (d).

Finally section 140 of the Companies Act was amended at the Seanad stage to include section 140 subsection (2) (c)[143]. Section 140 (2) (c) requires that the court have regard to the question as to what effect the making of an order would have on the solvent related company. This amendment was introduced to insure the related company was not forced into liquidation by virtue of the making of the contribution order. As noted below the case law in New Zealand has developed so as to prevent a contribution order being made where it would have the effect of threatening a related company with liquidation.

[143] 120 Seanad Debates Col. 2447

5. Irish Case Law in Respect of Separate Legal Personality for Groups

In certain circumstances Irish courts will disregard the separate legal personality of a company where to do otherwise would result in the use of the corporate personality as a cloak to conceal impropriety or if to do otherwise would lead to an injustice. The single entity doctrine was first set out in *Power Supermarkets Ltd v Crumlin Investments Ltd*[144]. Costello J referred to *Smith, Stone & Knight v Birmingham Corporation*[145] and also to *DHN Ltd v Tower Hamlets*[146]. He went on to say:

> *"It seems to me to be well established from these as well as from other authorities … that a court may, if the justice of the case so requires, treat two or more related companies as a single entity so that the business notionally carried on by one will be regarded as the business of the group, or another member of the group, if this conforms to the economic and commercial realities of the situation. It would, in my view, be very hard to find a clearer case than the present one for the application of this principle. I appreciate that Crumlin Investments is a property owning not a trading company but it is clear that the creation of the new company and the conveyance to it of the freehold interest in a unit in the shopping centre were means of carrying out the commercial plans of the Dunne family in the centre. The enterprise had a twofold aspect (a) the creation of a new retail outlet for the Dunnes Stores Group in the shopping centre and (b) the enhancement of the rents in the centre as a whole which the creation of such an outlet would hopefully produce. To treat the two companies as a single economic entity seems to me to accord fully with the realities of the situation. Not to do so would involve considerable injustice to the plaintiffs as their rights under the covenant might be defeated by the mere technical device of the creation of a company with a £2 issued capital which had no real independent life of its own. If it is established that the covenant is breached there should in my opinion be an injunction against both defendants."*[147]

In *Lac Minerals Ltd v Chevron Mineral*[148] Murphy J stated:

> *"However, the fact that the corporate veil may be lifted in the sense that the acts of one corporate body may be treated as those of another is now well established within this jurisdiction. It is clear from the decisions in Power Supermarkets Ltd. v. Crumlin Investments Ltd. (Unreported, High Court, Costello J, 22nd June, 1981) … and the decision in The State (McInerney) v. Dublin County Council [1985] I.R. 1. In the latter case Carroll J laid down the following principle at p. 1:-*
>
> *"In my opinion the corporate veil is not a device to be raised and lowered at the option of the parent company or group. The arm which lifts the corporate veil must always be that of justice. If justice requires, as it did in D.H.N. Ltd. v. Tower Hamlets [1976] 1 W.L.R. 852, the courts will not be slow to treat a group of subsidiary companies and their parent company as one."*[149]

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[144] *Power Supermarkets Ltd v Crumlin Investments Ltd* (Unreported, High Court, Costello J, 22nd June, 1981).
[145] *Smith, Stone & Knight v Birmingham Corp* [1939] 4 All ER 116
[146] *DHN Ltd v Tower Hamlets* [1976] 1 WLR 852
[147] *Power Supermarkets Ltd v Crumlin Investments Ltd* (Unreported, High Court, Costello J, 22nd June, 1981) at paras 8 and 9.
[148] *Lac Minerals Ltd v Chevron Mineral* [1995] 1 ILRM 16.
[149] *Lac Minerals Ltd v Chevron Mineral* [1995] 1 ILRM 16 *at page 187*

The seminal case in this jurisdiction is *Fyffes plc v DCC plc*[150], Laffoy J held that, in the case of a group of companies, the court might treat the group as a single entity where to do otherwise would have unjust consequences for outsiders dealing with companies in the group. Having reviewed the authorities and commentary on the authorities on this question, Laffoy J noted:

> *"In addition to the broad requirement of justice, it is clear that in both of the cited cases the allegation was that the affairs of associated companies were being carried on in such a manner that the decisions of one body corporate were dominated by the other so that there was no reality in the distinction between them. These two ingredients are required, first, the factual identification of the acts of one body corporate with those of another and, secondly, the requirement that justice would be served only if the court ignores the distinction between the separate corporate entities."*

These aspects of Laffoy J's judgment were upheld on appeal by the Supreme Court[151].

6. Abuse of the Doctrine of Separate Legal Personality

The courts have shown themselves willing to disregard the separate legal personality of a company where it has been used to avoid statutory obligations, or where it would otherwise frustrate the purpose of a statute.

In *Merchandise Transport Ltd v British Transport Commission*[152] , a holding company attempted to use its subsidiary company as a vehicle to avoid a statutory provision designed to protect the public from unfair competition. The provision prohibited licensed public hauliers from using their vehicles to carry their own goods; and private hauliers were likewise prohibited from using surplus capacity to carry the goods of others. An application by the subsidiary for a public haulier's licence was refused by the licensing authority, and the refusal was upheld by the Court of Appeal. The court disregarded the separate legal personality of the subsidiary by looking at the motives of its controllers.

In *Fyffes v DCC,* Laffoy J referred to the fact that treating the subsidiary company as a separate entity would allow the evasion of obligations contained in the Companies Acts:

> *"(2) As a matter of law, Lotus Green and DCC may be treated as a single entity as regards the sale of the shares in Fyffes and the generation of the profit therefrom for the purpose of preventing the avoidance of the availability of an effective remedy under s. 109 and thus preventing an injustice to parties with a remedy under s. 109, if DCC is liable to account. It should be so treated if the plaintiff has established that:*

> *(a) an evidential basis exists for finding that, as regards the holding and disposal of the shares, to borrow the terminology used by Murphy J in the Lac Minerals Limited case, there was a factual identification of the acts of Lotus Green and DCC; and*

[150] *Fyffes plc v DCC plc* [2009] 2 IR 417
[151] *Fyffes plc v DCC plc* [2009] 2 IR 417 at paras 685 and 756.
[152] *Merchandise Transport Ltd v British Transport Commission* [1962] 2 QB 173

(b) not to so treat the companies would allow the DCC Group to evade its obligations under Part V.

In relation to the point at (a), the plaintiff argued that the companies in the DCC Group could have, but did not in fact, arrange their affairs so as to ensure that factual identification did not take place. In relation to the point at (b), the plaintiff did not and, on the evidence could not, assert that the purpose of the incorporation of Lotus Green and the hiving off of the shares to it was to avoid liability under Part V. The sole objective was to mitigate the tax liability of the DCC Group. However, the reality of the situation is that by defending the plaintiff's statutory claim on the basis that DCC made no profit from the sale of the shares, if DCC was precluded from dealing by virtue of s. 108(6) and Lotus Green was not, the DCC Group would effectively evade liability under s. 109, if the profit generated by Lotus Green on the Share Sales were not treated as the profit of DCC. To recognise this reality is to give a purposive meaning to Part V in the light of the Directive."[153]

In *Fyffes v DCC,* Laffoy J treated DCC Group and Lotus Green as a single entity even though tax avoidance and not evasion of statutory duty was the primary purpose for their corporate group structure, because to do otherwise would effectively allow DCC to evade liability for insider dealing, an offence under the Companies Acts.

7. New Zealand Case Law - Contribution Orders:

In the 23 years since its introduction New Zealand courts have only occasionally exercised this power. The most common problem encountered is reconciling the interests of the unsecured creditors of the solvent and insolvent group companies, particularly if the contribution sought from a solvent group company threatens that company's own solvency. In considering these competing interests, New Zealand courts have ruled that any contribution order should be levied only against the balance of assets in the solvent company's hands after taking into account its *bona fide* debts. New Zealand courts have also held that contribution orders should not interfere with the rights of secured creditors of the solvent group company.

It seems that a creditor or shareholder who succeeds in an application under section 271 is limited to benefiting from an increased dividend in the winding up, as the contribution resulting from a successful application is directed to be paid to the liquidator. Although the section allows the court to make the order on such terms and conditions as it thinks fit, it is submitted that this would not allow the court to improve the priority of any creditor or shareholder.

The New Zealand courts have over the years acknowledged the wide discretion which section 271 confers upon them. They have concluded that parliament intended that this discretion be used to affect a result which accords with the common notions of fairness in all the circumstances. They have concluded that the presence or absence of the guidelines set out in section 272 (1) (a) to (d) is not determinative in deciding whether to make a contribution order.

Despite its more liberal drafting the effect of section 271 has not been perceived as a barrier to business in New Zealand. As in Ireland, it has only rarely been considered by the courts. Recently, however it has been applied in *Lewis Holdings Limited v Steel & Tube Holdings Limited* [2014] NZHC 3311 and as a result New Zealand law firms have been advising their clients who are directors and boards of holding companies to closely consider the implications of the decision for how they manage their subsidiaries going forward.

[153] *Fyffes plc v DCC plc* [2009] 2 IR 417 at 496

Briefly, the facts of the case were that Lewis Holdings took action against Stube Industries - a liquidated subsidiary of NZX-listed Steel & Tube Holdings. Before being wound up, Stube leased a Wellington property owned by Lewis Holdings, which filed a $2.62 million proof of debt with the liquidators. Lewis Holdings and the liquidators took Steel & Tube Holdings to the High Court at Wellington, wanting the parent firm to pay for Lewis Holdings' claim in the liquidation.

Justice Mackenzie held that Stube Industries' directors did not make a distinction between the interests of Steel & Tube and those of the subsidiary.

> "They saw only one set of interests involved, the overall interests of the group ... they did not hold formal board meetings for Stube. Nor did they sit down together to discuss matters with a conscious appreciation that they were doing so with their Stube directors' hats on."

The judge also held that the evidence supported the proposition that Stube Industries was treated as a division of Steel & Tube Holdings, for financial purposes. Justice Mackenzie found it was just and equitable that Steel & Tube Holdings should pay the whole of Lewis' claim but what that amounted to would be determined after another hearing. A fuller consideration of the Lewis Holdings decision and the case law which preceded it are available at Annex C of this document.

8. Other Jurisdictions

In the United Kingdom, while the Cork Committee considered the issue of group liability it declined to make a finding. In its report it stated that the issue was of such importance it merited separate consideration by a different committee[154]. Unfortunately, no such committee was ever formed. Australia has introduced a statutory pooling mechanism and also considered introducing contribution orders. However, it concluded that the making of contribution orders was too much of an infringement on the doctrines of limited liability and separate legal personality. Finally, the United States provides for an equitable remedy of consolidation which is available to the court where two companies have inter-mingled their affairs to such an extent that it justifies the piercing of the corporate veil. A fuller consideration of these matters is set out in Annex D of Appendix 5 of this document.

[154] Report of the Review Committee on Insolvency Law and Practice under the chairmanship of Sir Kenneth Cork (1982) Cmnd 8558

Section 271 - Contribution Order in New Zealand

271 (1) (a) of the Companies Act 1993

The New Zealand equivalent to section 599 and 600 are contained in section 271 of their Companies Act 1993. It states that:

> (1) On the application of the liquidator, or a creditor or shareholder, the court, if satisfied that it is just and equitable to do so, may order that—
>
> > (a) a company that is, or has been, related to the company in liquidation must pay to the liquidator the whole or part of any or all of the claims made in the liquidation.[155]
>
> (2) The court may make such other order or give such directions to facilitate giving effect to an order under subsection (1) as it thinks fit.

Section 272 of the Companies Act 1993 sets out a number of considerations a court may take into account prior to the making of a contribution order.

> 272 (1) In deciding whether it is just and equitable to make an order under section 271(1)(a), the court must have regard to the following matters:
>
> > (a) the extent to which the related company took part in the management of the company in liquidation:
> > (b) the conduct of the related company towards the creditors of the company in liquidation:
> > (c) the extent to which the circumstances that gave rise to the liquidation of the company are attributable to the actions of the related company:
> > (d) such other matters as the court thinks fit.[156]
>
> 272 (3) The fact that creditors of a company in liquidation relied on the fact that another company is, or was, related to it is not a ground for making an order under section 271.

Section 140 of the Companies Act 1990 - Ireland

> 140.—(1) On the application of the liquidator or any creditor or contributory of any company that is being wound up, the court, if it is satisfied that it is just and equitable to do so, may order that any company that is or has been related to the company being wound up shall pay to the liquidator of that company an amount equivalent to the whole or part of all or any of the debts provable in that winding up. Any order under this section may be made on such terms and conditions as the court thinks fit.
>
> (2) In deciding whether it is just and equitable to make an order under subsection (1) the court shall have regard to the following matters—
>
> > (a) the extent to which the related company took part in the management of the company being wound up;
> > (b) the conduct of the related company towards the creditors of the company being wound up;

[155] 271 (b) deals with pooling orders.
[156] 272 (2) deals with pooling orders.

(c) the effect which such order would be likely to have on the creditors of the related company concerned.

(3) No order shall be made under subsection (1) unless the court is satisfied that the circumstances that gave rise to the winding up of the company are attributable to the actions or omissions of the related company.

(4) Notwithstanding any other provision, it shall not be just and equitable to make an order under subsection (1) if the only ground for making the order is—

(a) the fact that a company is related to another company, or

(b) that creditors of the company being wound up have relied on the fact that another company is or has been related to the first mentioned company.

(5) For the purposes of this Act, a company is related to another company if—

(a) that other company is its holding company or subsidiary; or

(b) more than half in nominal value of its equity share capital (as defined in section 155 (5) of the Principal Act) is held by the other company and companies related to that other company (whether directly or indirectly, but other than in a fiduciary capacity); or

(c) more than half in nominal value of the equity share capital (as defined in section 155 (5) of the Principal Act) of each of them is held by members of the other (whether directly or indirectly, but other than in a fiduciary capacity); or

(d) that other company or a company or companies related to that other company or that other company together with a company or companies related to it are entitled to exercise or control the exercise of more than one half of the voting power at any general meeting of the company; or

(e) the businesses of the companies have been so carried on that the separate business of each company, or a substantial part thereof, is not readily identifiable; or

(f) there is another company to which both companies are related;

and "related company" has a corresponding meaning.

(6) For the purposes of this section "company" includes any body which is liable to be wound up under the Companies Acts and "creditor" means one or more creditors to whom the company being wound up is indebted by more, in aggregate, than £10,000.

(7) Where an application for an order under subsection (1) seeks to require a licensed bank, within the meaning of section 25, to contribute to the debts of a related company, a copy of every such application shall be sent by the applicant to the Central Bank who shall be entitled to be heard by the court before an order is made.

Section 599 of the Companies Act 2014 - Ireland

599. (1) On the application of the liquidator or any creditor or contributory of a company that is being wound up, the court, if it is satisfied that it is just and equitable to do so, may make the following order.

(2) That order is one that any company that is or has been related to the company being wound up shall pay to the liquidator of that company an amount equivalent to the whole or part of all or any of the debts provable in that winding up.

(3) The court may specify that that order shall be subject to such terms and conditions as the court thinks fit.

(4) In deciding whether it is just and equitable to make an order under this section the court shall have regard to the following matters:

(a) the extent to which the related company took part in the management of the company being wound up;

(b) the conduct of the related company towards the creditors of the company being wound up;

(c) the effect which such order would be likely to have on the creditors of the related company concerned.

(5) No order shall be made under this section unless the court is satisfied that the circumstances that gave rise to the winding up of the company are attributable to the acts or omissions of the related company.

(6) Notwithstanding any other provision, it shall not be just and equitable to make an order under this section if the only ground for making the order is—

(a) the fact that a company is related to another company, or

(b) that creditors of the company being wound up have relied on the fact that another company is or has been related to the first-mentioned company.

(7) For the purposes of this section—

"company" includes any company, and any other body, which is liable to be wound up under this Act;

"creditor" means a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding €10,000 or 2 or more creditors, by assignment or otherwise, to whom in aggregate the company is indebted in a sum exceeding €20,000.

(8) Where an application for an order under this section seeks to require a credit institution to contribute to the debts of a related company, a copy of every such application shall be sent by the applicant to the Central Bank which shall be entitled to be heard by the court before an order is made.

Annex B Legislative and Political History of Section 140

Section 140 was originally Head 90 of the Companies Bill submitted to Government in November 1984. At the time it was submitted it was noted it was based primarily on New Zealand law, the submitted head was in fact identical to the modern day New Zealand section. In addition the Bill included at section 116, a statement that as a general rule, directors of holding companies have the same rights, duties and obligations to subsidiaries as they have in respect of the holding companies. In addition, it was proposed that personal liability could be imposed on the director of a holding company in respect of a subsidiary under section 298 of the 1963 Act.

The Confederation of Irish Industry (CII) wrote to the Minister John Bruton and stated it was opposed to these sections[157]. In particular they felt that:

> “such a measure would undermine the concept of the limited liability status of individual companies in a group with all the implications that that would have. It could hamper the efforts of indigenous Irish companies to diversify in order to reduce their over-dependence on a small number of product categories. The consequences of this for the viability of companies and for employment are clear especially in an era of uncertain trading conditions such as are being experiences in the Western world today.”

They submitted that section 140 gave to much leeway to the courts and submitted that the contribution orders should only be made when the insolvency resulted from fraudulent and reckless trading. They suggested that the section be amended to state that:

> “No order shall be made under this section unless the court is satisfied that the circumstances that gave rise to the winding up of the company are attributable to the fraudulent or wrongful actions or omissions of the related company.”

Furthermore, they believed the general rule regarding directors of holding companies should be deleted in its entirety.

The political and economic climate during the time of drafting (1983-85) should also be considered. *A Review of Industrial Policy*, referred to as the “Telesis Report”, after praising the clarity and consistency of industrial policy, highlighted the problems of FDI, its impact on job creation and failure to create linkages with indigenous industry. The report encouraged a shift towards building strong indigenous companies in the export and sub-supply business sector and that the proportion of funds given to domestic industries (one third of all funding available) be doubled by the end of the decade.

The government official response in the form of a White Paper (Government of Ireland, 1984) came in the context of a severe economic crisis. It acknowledged that "Industrial policies which had clearly served Ireland well in the 1960s and 1970s are now having less success" (Government of Ireland, 1984: 3) and recognized that economic “flexibility, creativity and growth were all being thwarted by the dependence on foreign investment”. Yet, the White Paper stated that there would be no radical change to incentives for FDI - "consistency and stability over many years of our policies for industrial development have been a major source of strength". There was to be greater selectivity, the White Paper seeking to advance the process of "picking winners", with the aim of developing domestic companies

[157] Letter from the CII regarding the ‘Proposed Domestic Company Law Bill’ dated 30th July 1984

with export potential and a promotion of enterprise to strengthen indigenous. The report also saw a shift away from manufacturing towards services.

The following policy considerations were raised in relation to the proposals in the Bill regarding group liability and contribution orders:

- A growing perception emerged that the new Companies Act was anti-risk taking and anti-business.
- The issue of limited liability within groups was to be dealt with by the Ninth Directive (on corporate groups) at EEC level. It was suggested that this matter should be dealt with at EEC level rather than Ireland being a pioneer in the area. There was also a danger that the provisions may have to be changed in light of the subsequent changes in EEC law.[158]
- From an industrial policy perspective there was concern that the contribution and pooling provisions might have the effect of discouraging the takeover of weaker enterprises by stronger companies. It was considered that a situation which creates total liability within a group of companies for all of the subsidiaries would make it very difficult for the IDA to negotiate take-overs of weaker companies by a large company because the large company would be afraid that all its existing assets would be put at risk if the weak company turned out to be worse than it appeared at first sight.

As a result of these policy concerns a number of changes were made to 'moderate' the proposed bill. These amendments included significant changes to Heads 89 ad 90 which were the original sections dealing with group liability.

In January 1985, Head 90 was changed in the drafting process. The subsection setting out the guidelines for the court was to be split into two sub-heads. The important distinction between the two was that the Court was only 'to have regard to' the first set of criteria but must 'be satisfied' in respect of the second sub-head i.e. that the circumstances giving rise to the winding up of the company are attributable to the acts or omissions of the related company.

In addition to the splitting of the sub heads, the continued inclusion of guideline (d), namely, such other matters as the court thinks fit, was argued against because it was felt that the inclusion of that phrase gave too wide a discretion to the court. Accordingly, this section was later removed.

Finally, section 140 (2) (c), that is, the requirement that the court consider 'the effect which such order would be likely to have on the creditors of the related company concerned' was added at Seanad stage[159]. The stated policy for these amendments was to ensure a related company was not itself driven into liquidation arising out of the making of a contribution order.

[158] Still awaiting adoption.
[159] Companies (No. 2) Bill, 1987: Committee Stage, 12 July 1988.

Annex C New Zealand Case Law

In *Re Home Loans Fund (NZ) Ltd* [160] Justice Casey stated, in relation to the Companies Special Investigation Act 1958, that there was little authority to guide him on the interpretation of the words 'just' and 'equitable'. He commented that:

> *'Obviously, it contemplates a departure from the priorities laid down in the Companies Act 1955. I think Parliament intended the Court to have the broadest discretion to affect a result which accords with common notions of fairness in all the circumstances, bearing in mind the cardinal principle of insolvency administration, that there shall be equality among creditors of the same standing.'*

Justice Casey stated that pooling provisions demonstrated the legislative acceptance of the importance of equality in the distribution of an insolvent company's assets. The power to intervene is expressed in extremely wide language, but is tempered by the equitable basis of the section and the flexibility to place conditions on the orders to ensure that equity is done. In exercising the broad discretion conferred by the section, the court is directed to take into account the guidelines outlined in section 272(1). These are:

a) The extent to which the related company took part in the management of the company in liquidation.
b) The conduct of the related company towards the creditors of the company in liquidation.
c) The extent to which the circumstances that gave rise to the liquidation of the company are attributable to the actions of the related company.
d) Such other matters as the court thinks fit.

The presence or absence of any of these factors is not decisive.

Two interlocutory decisions discussing the section have made reference to the ability of the related company to contribute to the assets of the company being wound up. In the first case, *Lewis v Poultry Processors*[161], there was evidence that a contribution might threaten the solvency of the related company. Justice Tipping commented that.

> *"I doubt very much whether [the section] is intended to prejudice the position of bona fide unsecured creditors of the related company. If the related company is fully solvent then there is no problem. The contrasts between [the contribution and pooling provisions] suggest [a contribution] order will only run against the balance of assets in the related company's hands after it has satisfied its bona fide indebtedness."*

The second case, *Re Liardet Holdings Ltd*[162], confirmed this view. The court considered it doubtful that any order to contribute under the section would be made on the facts, because there was evidence that nothing would be left after that company paid its own creditors.

If the contribution sought from a related company threatens that company's solvency, then the court must consider the equities involved affecting the creditors of that company. These creditors will rely on arguments that they had

[160] *Re Home Loans Fund (NZ) Ltd (in group liq.)* (1983) 1 NZCLC 95,073, 95-583.
[161] *Lewis v Poultry Processors (*1988) 4 NZCLC 64,508.
[162] *Re Liardet Holdings Ltd* (1983) BCR 604.

relied on the separate assets of the company when trading with it and should not be denied a full payout because of that company's relationship with another company. The comments in *Lewis v Poultry Processors* and *Liardet Holdings* make it clear that such equities will have significant input to the court's decision to make an order but will not necessarily be decisive. The court is faced with balancing the equities of two sets of creditors who have dealt with two separate companies. It is submitted that the expression 'bona fide unsecured creditors' of the company mentioned by Justice Tipping could be limited to those creditors who have clearly dealt with the company as a separate commercial entity and not the combined companies. This may be a difficult decision for a court to make and may mean ascribing to creditors motives that were not clear at the time of the trading.

Lewis Holdings Ltd v Steel & Tube Holdings Ltd

Most recently a contribution order was sought in *Lewis Holdings Ltd v Steel & Tube Holdings Ltd*[163]. *Lewis Holdings* represents the first substantial analysis of contribution orders in recent times and considers in detail the guidelines to be utilised by the court prior to the making of a contribution order. Accordingly, *Lewis Holdings merits* comprehensive consideration.

In *Lewis Holdings* the Plaintiff was the owner of a property which was the subject of a perpetually renewable ground lease. The lessee at the time the Plaintiff purchased the property was Stube Industries Limited ("Stube"), a wholly owned subsidiary of the Defendant.

The history of the matter was that from approximately 1990, although the property was leased to Stube, the Defendant parent company occupied the property under an informal sub-lease from Stube, which from that time onwards had no employees. The property was effectively managed by the Defendant. In 1996, 1997 and again in 2003 the Defendant paid for decontamination works which had to be carried out on the property on behalf of Stube. The ground lease was due to expire on 1 December 2009 but was in fact deemed to have been renewed in 2009 due to a failure to serve the necessary notice to the Plaintiff that Stube did not wish to accept a renewal of the lease. Following the renewal, the Defendant parent company continued to pay the rent on the property as it had done previously until 2013.

In May 2013, the directors of the Defendant recommended that Stube be put into liquidation following a decision to cease providing financial support to Stube and noting that the directors of Stube had made unsuccessful efforts to exit Stube from the lease. Stube was put into liquidation by a shareholders' resolution. The liquidators disclaimed the lease as onerous property under section 269 of the New Zealand Companies Act, 1993 leading the Plaintiff to file a proof of debt in Stube's liquidation.

The Plaintiff and the liquidators claimed that the Defendant Company should be ordered to pay to the liquidators the whole of the sum of the Plaintiff's claim in the liquidation. The Judge, MacKenzie J, noted that Ireland was the only country other than New Zealand in the common law world which had a statutory provision allowing for the making of contribution orders against related companies.

MacKenzie J noted that the two competing principles at issue were:

(a) the separate legal identity of companies and the right of commercial enterprises to run their businesses through subsidiary and related companies as they see fit; and

(b) the mischief that can result from an unyielding application of separate corporate identity.

[163] *Lewis Holdings Ltd v Steel & Tube Holdings Ltd* [2015] NZCCLR 5.

The Judge held that an unyielding application of the principle of separate corporate entity would defy the legislative policy behind the provisions, and the rationale for the principle of separate corporate entity is to enable a business to be carried on by a separate legal entity so as not to expose the shareholders to the liabilities which the business may incur. It was inherent in this rationale that the company must be not only a separate legal entity but also a "separate commercial entity", and that its business will not be carried on in such a way that this company is not a mere "front" or "façade" for business actually carried on by others.

Judge Mackenzie's Analysis of the General Principles to be applied in the Making of Contribution Orders

The New Zealand Companies Act sets out certain criteria to be considered by the court in deciding whether to make a contribution order. Three of these considerations are also set out in the equivalent section in Irish company law and *Lewis Holdings* could provide guidance to an Irish court as to how these criteria ought to be applied. The guidelines considered by MacKenzie J were as follows:

(a) The extent to which the Defendant took part in the management of the subsidiary

MacKenzie J held that the Court must consider whether the directors of Stube had acted in that capacity or rather as senior employees of the Defendant. The two directors of Stube were also the CEO and CFO of the Defendant. The Judge held that the Defendant carried on the affairs of the business as a single unit "through divisions rather than through subsidiaries". A number of findings buttressed this opinion:

(i) The directors did not distinguish between the best interests of Stube and the Defendant. Their obligation was to oversee the conduct of Stube's business, rather than simply manage it as an integrated part of the business of the Defendant. The directors were acting in their capacity as CEO and CFO of the Defendant.
(ii) Stube did not have the financial capacity to continue to trade separately. If it were to be treated as a separate entity, there would have had to have been legal arrangements to ensure its support, but none were put in place.
(iii) Stube had no employees of its own. All work on its behalf was done by employees of the Defendant. Many steps taken on its behalf were done on the Defendant's letterhead and the Defendant oversaw the administration of the lease, the renewal of the lease and the attempts to find a buyer for Stube's leasehold interest.
(iv) The accounting treatments which had been put in place were also relevant. MacKenzie J noted that there was a degree of financial intermingling; Stube had no separate bank account; and all payments and receipts for Stube were made through the Defendant. The rent invoices for the property were addressed to the Defendant at the Defendant's request.

The Court concluded that there was no evidence of exercise of management functions independent of the Defendant to any material extent.

(b) The conduct of the Defendant towards the Plaintiff as a creditor of the subsidiary

The Judge noted that this was not a case where a creditor was confused as to the entity with which it was contracting. Rather, the Defendant's conduct between 2003 and 2013 indicated that it stood behind Stube. Stube's directors should have considered whether it was capable of incurring the obligation to pay the rent from its own resources but this was not done. No special resolution had been passed as would have been necessary under the New Zealand Companies Act.

(c) The extent to which the circumstances that gave rise to the liquidation were attributable to the actions of the Defendant

This factor distinguishes the New Zealand legislation from its Irish counterpart. In New Zealand, the extent to which the circumstances giving rise to the liquidation may be attributed to the defendant is a factor to be taken into account, whereas under the Irish provision, the court cannot make a contribution order unless the court is satisfied that that the circumstances giving rise to the liquidation are attributable to the actions or omission of the related company.

In this case, the Defendant had ceased funding Stube and then caused the necessary resolution to be passed appointing a liquidator. Stube could not continue following the withdrawal of funding. MacKenzie J held that the liquidation of Stube was entirely attributable to the actions of the Defendant.

The case is interesting therefore from the Irish perspective, because the circumstances (as determined by MacKenzie J) met the Irish legislation's criteria for the making of a contribution order.

(d) Such other matters as the Court thinks fit

Under this heading, MacKenzie J addressed a number of other factors. One which is worth noting is that the Judge commented that the Defendant was a publicly listed company which "ought to have known better". The Judge commented that a failure to observe those requirements cannot readily be ignored or excused where the company concerned is the subsidiary of a publicly listed company. The implication appears to be that a publicly listed company (or group holding company) may be given less sympathy than a small private corporate group.

Furthermore, MacKenzie J held that there should be no "circularity" as regards the making of a contribution order and the receipt of a payment by the same party as a creditor in the liquidation. Therefore, the Judge ordered that the contribution it was ordering the Defendant to make must be limited solely to the claim being made in the liquidation by the Plaintiff. This was to prevent any portion of the amount of the contribution being returned to the Defendant in the liquidation.

He also found that the extent to which the corporate veil is lifted so as to make a related company liable for the claims against a company in liquidation is determined principally by a consideration of the actions of the related company. When the extent of involvement of the related company has been limited, the extent of the contribution may also be limited to only part of the claims. The Defendant took part in the management of Stube to an extent which was, in essence, total so it is just and equitable that the Defendant should pay the whole amount of Plaintiff's claim.

United Kingdom

In 1982, the Cork Committee referred to the fact that its review was limited to insolvency law, but the ramifications of group trading spread throughout the company law code. The Committee reluctantly came to the conclusion that it could not recommend a fundamental change in company law by means of proposals to effect a change in insolvency law. The Committee considered that the matter was of such importance and of such gravity that there should be the widest possible review of the different considerations, with a view to the introduction of reform. In the intervening years no such review has taken place.

Australia

In 1992, Australia introduced corporate liability for a holding company which fails to prevent insolvent trading by one of its subsidiaries.[164] Section 588V of the Corporation Act 2001 sets out the circumstances in which a holding company will be found liable for its subsidiaries insolvent trading:

(1) A corporation contravenes this section if:

(a) the corporation is the holding company of a company at the time when the company incurs a debt; and

(b) the company is insolvent at that time, or becomes insolvent by incurring that debt, or by incurring at that time debts including that debt; and

(c) at that time, there are reasonable grounds for suspecting that the company is insolvent, or would so become insolvent, as the case may be; and

(d) one or both of the following subparagraphs applies:

(i) the corporation, or one or more of its directors, is or are aware at that time that there are such grounds for so suspecting;

(ii) having regard to the nature and extent of the corporation's control over the company's affairs and to any other relevant circumstances, it is reasonable to expect that:

(A) a holding company in the corporation's circumstances would be so aware; or

(B) one or more of such a holding company's directors would be so aware; and

(e) that time is at or after the commencement of this Act.

(2) A corporation that contravenes this section is not guilty of an offence

In 2007, Australia also introduced its own version of pooling[165] More recently, a debate has taken place in Australia about whether further protection is needed for persons who become unsecured creditors of a group company prior to the point of insolvency being reached, yet still remain unpaid if the company subsequently becomes insolvent. Those creditors are not protected by the existing shadow director and holding company liability provisions, given that these provisions only cover debts incurred at, or from, the point of insolvency. The problem particularly arises where a parent company intentionally runs down a group company through asset stripping or other methods that eventually, but not immediately, results in it being unable to pay its previously accrued debts. The Australian Advisory Committee (Australia's equivalent to the Law Reform Commission) considered whether to give courts the power to

[164] Corporations Act 2001 (AUS), s588V.

[165] (Corporations Act 2001 (Cth) Pt 5.6 div 8.).

make contribution orders. That power would be in addition to the existing rules governing all corporate liquidations. In particular, they considered the contribution order that is available under New Zealand's company law.

The Advisory Committee recommended that, notwithstanding the New Zealand legislation, contribution orders should not be introduced in Australia. The Advisory Committee was concerned that this power would be fundamentally contrary to the separate legal entity principle that underlies corporate law. If contribution orders were introduced, a group company's financial position would always remain uncertain, given that a court could subsequently order the company to pay the outstanding debts of another group company in liquidation.

United States

In the United States, a bankruptcy process called substantive consolidation is available to the court and derives from the court's equitable jurisdiction. The effect of an order of substantive consolidation is that the assets and liabilities of different entities are consolidated and treated as one entity. The consolidated assets create one fund from which all of the claims against the consolidated debtors are satisfied. The process has been defined by the courts as follows:

> Substantive consolidation usually results in, inter alia, pooling the assets of, and claims against, the two entities, satisfying liabilities from the resulted common fund, eliminating inter-company claims; and combing the creditors of the two companies for the purposes of voting on reorganisation plans[166]

Consolidation cases usually involve the presence of two or more of the following factors:

- intermixture of affairs;
- lack of corporate formalities;
- inadequate capitalisation; and/or
- fraud or evasion.

Use is made of instrumentality, domination and alter ego theories to justify piercing the veil.

US courts are not only more willing to pierce the veil in favour of creditors they also apply a doctrine of equitable subordination, which postpones internal creditors to external creditors. There is no equivalent to equitable subordination in British Commonwealth jurisdictions. Germany however has similar provisions deferring inter-group loans in favour of external creditors.

[166] *Re Augie/Restivo Banking Co.* 850 F 2d 515, 518 (2nd Circ,1988)

LIQUIDATOR'S REPORT UNDER SECTION 682 OF THE COMPANIES ACT 2014

Please refer to the Guidance Notes when completing this Report. These are available

Name of Company: ______________________________

Registration Number of Company: ______________________________

from the ODCE website at www.odce.ie/publications/decision.asp

Please indicate if this is the first, second, etc. or final Report filed for the above company:

Section 1: LIQUIDATOR DETAILS

(Question 1 to be completed in every Report. Questions 2 to 9 to be completed as part of the first Report and in every subsequent Report where a change in details arises.)

1. **Name of Liquidator:** ______________________________

2. **Name of Liquidator's firm** *(if applicable)*: ______________________________

3. **Address of Liquidator:** ______________________________

4. **If you are a member of a professional body, please state which one:** ☐

5. **Liquidation Type** *(please tick one)*: **Creditors' Voluntary Liquidation:** **Official Liquidation:** ☐

6. **If a Creditors' Voluntary Liquidation, were you the members' nominee?** **Yes:** **No:**

7. **Date of your appointment as Liquidator:** ______________________________

8. **Name of Liquidator's staff member with day-to-day responsibility for the Liquidation** *(where applicable)*:

____

9. **Contact Details for** *(please tick one)*: **the Liquidator:** **Staff Member:** ☐

Telephone Number(s): **Fax Number:** ______________________________ ______________________

E-mail Address: ____

Section 2: COMPANY DETAILS

(To be completed as part of the first Report and every subsequent Report where a change in details arises)

10. Business/Trading Name(s) *(please include all those used in the 12 months prior to the date of commencement of the winding up)***:**

____

____

____

11. Address of Current Registered Office:

____

____

____

12. Address of any other Registered Office used in the 12 months prior to the date of commencement of the winding up:

____

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13. Principal Trading Address(es) *(please include all those used in the 12 months prior to the date of commencement of the winding up, if different from the Registered Office(s) above)***:**

____

____

____

14. Nature of the Company's Business:

a. Please state the most relevant NACE Classification at the date of commencement of the liquidation *(see Guidance Notes)***:**

____

b. Please give a precise description of the Company's activities at the date of commencement of the liquidation:

____

____

____

15. **Number of Company employees at the date of commencement of the liquidation:** ____________________

16. **Turnover for each of the last three financial years preceding the date of commencement of the liquidation: Financial Year Ended (date): Turnover: (€ amount) Financial Year Ended (date): Turnover: (€ amount)**

Financial Year Ended (date)**:** **Turnover:** (€ amount)

17. **Trading Details** *(please state as a minimum month and year)***:**

a. **Date of Commencement of Trading:** ____________________

b. **Date of Cessation of Trading** *(if applicable)***:** ____________________

18. **Please state, in your opinion, the reasons for the liquidation of the Company, and cite the evidence to support this opinion on a separate sheet.**

19. **Has there been any Scheme of Arrangement/Receivership/Examinership/Liquidation in the Company in the 36 months prior to the date of this report?**

Yes: **No:** ☐

If yes, please provide relevant information, including type, name and address of any office-holder(s), date(s) of appointment/termination of appointment, copies of all notices of appointment and reports of receivers/examiners/liquidators or other office holders of the Company during that period:

____

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20. **Is there a deficiency in any tax return or payment of taxes?** **Yes:** ☐ **No:** ☐

If so, please specify the periods, if any, for which returns are overdue and/or the amounts due. Please also specify the amounts paid in respect of those periods. *(please attach to this Report a copy of the Revenue Statement of Collections and Payments that issued to you upon your appointment as liquidator. If not attached, please state why not.)***.**

____

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21. Have you any information which may lead you to believe that there was a person acting as a shadow director of the Company? *(Please note that the expression 'shadow director' may include an individual or a body corporate)***:**

Yes: **No:** ☐

If yes, please provide the following details for the individual/body corporate in question:

a. Full Name: ______________________

b. Current or last known address: ______________________

c. What was the Person's role in the Company? ______________________

d. Has the Person demonstrated to you that s/he has acted honestly and responsibly in relation to the conduct of the Company's affairs?

Yes: **No:** ☐

Please provide on a separate sheet details of the factors which support this answer and any other relevant information.

Section 3: COMPANY DIRECTORS

(To be completed as part of the first Report and every subsequent Report where a change in details arises)

22. In this Section, you are required to include every person who appears to you to be, or have been, a director of the Company at the date of commencement of the winding up or at any time in the 12 months prior to the date of commencement of the winding up.

A separate copy of this Section should be used for each Person.

---

a. Full name *(including other known names)*: ______________________

b. Current or last known address: ______________________

____

c. Date of birth: ______________________

d. Period as director: ______________________

From *(date)*: **To** *(date)*: ______________________

e. What was the Person's role in the Company? ______________________

f. If the company had employees, can you please confirm if the directors have demonstrated to you that they have had regard to the interests of their employees in accordance with the requirements of section 224 of the Companies Act, 2014?

Yes [ ] No [ ]

If not, please provide full details on a separate sheet. ______________________

____

g. Has the Person demonstrated to you that s/he has acted honestly and responsibly in relation to the conduct of the Company's affairs?

Yes: **No:** [ ]

Please provide on a separate sheet details of the factors which support this answer.

h. Other Directorships *(please provide full details of present/past companies of which this Person is/was a Director in the period from 12 months prior to the date of commencement of the winding up of the Company to date and include the company registration number, the date(s) of appointment/termination of the period as Director in each case and please indicate if any of these companies operated in a sector similar to the Company in liquidation)*:

____

____

____

Section 4: STATEMENT OF AFFAIRS, ACCOUNTS AND REPORT TO CREDITORS

(To be completed as part of the first Report and every subsequent Report where a change in details arises)

23. Directors' Statement of Affairs or similar document *(please attach a copy to this Report. If a copy is not attached, please state why not and attach details of the known assets and liabilities of the Company)***:**

____

____

____

24. Is there a material difference between the Statement of Affairs or similar document and the expected final position?

Yes: **No:** ☐

If so, please provide details of the amount and the reason for this material difference on a separate sheet.

25. Audited/Other Accounts *(please attach to this Report a copy of the last two sets of the audited accounts of the Company and the most recent draft or management accounts prepared after the last set of audited accounts. If the Company is exempted from audit, please provide a copy of the accounts laid before the AGM for the same period and the most recent draft or management accounts. If none are attached, please state why not.)***:**

____

____

____

26. Report to Creditors and any other relevant material, e.g., minutes of creditors' meeting and Chairperson's statement to meeting *(please attach these documents and if they are not available, state why not)***:**

____

____

____

27. Has a Committee of Inspection been appointed?

Yes: **No:** ☐

If so, please provide the names and addresses of the members:

____

____

____

____

____

28. **Will the winding up be completed within 18 months from the date of this report?**

Yes: **No:** ☐

29. **Was there any material transfer of assets of the Company** *(see Guidance Notes)* **to any person during the period commencing 12 months prior to the date of commencement of its winding up and ending on the date of this report?**

Yes: **No:** ☐

If yes, please provide details, e.g., date(s) of transfer, nature of asset(s), beneficiary(ies), on a separate sheet.

30. **On what date was the Company unable to trade out of its financial difficulties?** ____________________

Section 5: PROCEEDINGS

(To be completed as part of the first Report and every subsequent Report where a change in details arises)

31. Are you asking the Director of Corporate Enforcement at this time to relieve you from the requirement to apply, pursuant to section 683 of the Companies Act 2014, for the restriction of one or more of the directors of the Company?

Yes: ☐ **No:** ☐

If yes, is relief being sought for?, *(please tick one)*

All directors: ☐ **Certain named directors:** ☐

In either case, please name each director for which relief is sought and state the grounds upon which you consider that an application for restriction should not now be taken against each individual.

____

____

____

____

In respect of any remaining directors, please name them and indicate the grounds upon which the application for restriction will be made in each case:

____

____

____

32. In respect of this Company will you be applying to the High Court to disqualify any person, pursuant to section 842 of the Companies Act 2014?

Yes: ☐ **No:** ☐

If yes, please name the person(s) in question and indicate the grounds upon which the application to disqualify will be taken:

____

____

____

____

33. Are any other proceedings being undertaken, or contemplated, by you against officers of the Company?

Yes: ☐ **No:** ☐

If yes, please specify the nature of the proceedings, the person(s) against whom the proceedings are being or may be taken and the date/expected date of commencement of the proceedings. If proceedings have commenced please state whether they are in the High Court or Circuit Court and cite the Court record number of the case:

____

____

____

34. Are any other civil or criminal proceedings being undertaken, or contemplated, by any other person against the Company or any of its officers?

Yes: **No:** ☐

If yes, please specify the nature of the proceedings, the person(s) against whom the proceedings are being or may be taken, the date/expected date of commencement of the proceedings and the name, address and telephone number of the person taking or contemplating the proceedings. If proceedings have commenced, please state whether they are in the High Court or Circuit Court and cite the Court record number of the case:

____

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35. Have you made, or are you contemplating making, a report to the Director of Public Prosecutions and the Director of Corporate Enforcement under section 723 of the Companies Act 2014?

Yes: **No:** ☐

If yes, please specify the nature of any suspected offence(s), the person(s) to whom the report relates, the relationship of each such person to the Company and the date/expected date of submission of the report:

____

____

____

Section 6: FINAL REPORT

36. Outcome of restriction application(s) to the High Court (if applicable) *(please provide details for each person)***:**

____

____

____

37. Outcome of any other court proceedings taken under the circumstances set out in questions 32, 33 and 34:

____

____

____

Section 7: Liquidators Statement

(To be completed on <u>every</u> occasion a report is made)

I, ______________________________ , being the liquidator of the above company, state that the details and particulars
contained in this Report and all associated documentation prepared by me are true, correct
and complete, to the best of my knowledge and belief.

Signed: ____

Date: ____

Please ensure that copies of the following are attached to this Report:

- Separate sheets (if applicable) [items 18, 22(g), 24, 29];
- Copies of notices of appointment and reports of receivers/examiners/liquidators/other office-holders (if applicable) [item 19];
- A copy of the Revenue Statement of Collections and Payments that issued to you upon your appointment as liquidator.
- Statement of Affairs (or details of assets and liabilities) [item 23];
- Last two sets of audited accounts and draft or management accounts subsequently prepared, if any [item 25];
- Report to Creditors and other relevant material, including minutes of creditors' meeting, Chairperson's statement to meeting [item 26];
- Additional copies of Section 3: Details of Company Directors;
- Any further information or documentation that you deem to be required.

Appendix 7: Proposed Scheme for the winding-up of certain qualifying companies by means of a Self-Administered Liquidation (SAL)

Eligibility Criteria

To be eligible for the simplified procedure, the company would have to

- Have estimated gross liabilities as per the statement of affairs of not more than a prescribed amount (where there are connected companies, the liabilities of the connected companies shall be taken into account in estimating the gross liabilities); and
- None of the directors of the company may have availed of a SAL within the preceding 3 years; and
- None of the directors of the company may be subject to a Restriction/Disqualification order at the time of the application.

Only if the company meets the foregoing criteria, will it be eligible to make an application to wind up the company via the SAL process. Otherwise, the company should be wound up by way of a normal liquidation (creditors or court).

Application Procedure

Where a company satisfies the eligibility criteria specified in paragraph 1 above, the directors of the company may submit an application for a SAL to the CRO. The application should be in the form of a sworn affidavit accompanied by:

- a Statement of Affairs prepared not more than 30 days prior to application
- a declaration in relation to the expected realisation and disbursement of any assets, including identification of any disposals planned to connected persons (hereinafter called "the realisation and disbursement plan");
- confirmation that there has been no transfer of assets, goodwill, customers, etc to the directors of the company or to any other entity connected to them within the preceding 12 months or, if there has been any such transfer, evidence that the transfer has taken place at fair market value;
- confirmation that no creditor, including the company's lenders, has been unfairly preferred for payment within the preceding 12 months;
- confirmation that all creditors and members have been given notice of the application (including copies of the foregoing items) within the preceding 30 days;
- confirmation that the Revenue Commissioners have been given notice of the application (including copies of the foregoing items) within the preceding 30 days;
- a modest non-refundable fee.

Processing SAL application

On receipt of a valid application (i.e. an application in the proper form containing all of the information, confirmations and application fee as set out in para.3), the CRO will publish full details of the application on its website.

At this stage the directors will cease to have any function other than to facilitate the winding-up of the company. In particular the company cannot continue to trade unless it is specifically and expressly with a view to maximising the value of assets. Their duties from this point on are to act in the best interests of creditors by maximising the value of assets.

Any creditor or member shall, within [30] days of the Application being published on the CRO website, be entitled to file an objection to the winding up of the company by this procedure or to the proposed realisation and disbursement plan. Any such objection should be submitted to the CRO which will note its receipt on the register and forward a copy to the ODCE. The objection must specify the nature of the objector's relationship to the company and the basis for their objection.

The ODCE shall pass any objections received to the directors and allow them up to [30] days to comment thereon. The ODCE may also seek any additional information it sees fit from the directors or from the objectors at any stage in the process.

Having obtained all the information it deems necessary, the ODCE will consider the information that is available to it and may determine that

- the directors should be required to convene a meeting of the creditors for the purposes of considering the appointment of a liquidator ; or
- the winding up should proceed in accordance with the original application; or
- the winding up should proceed on a revised basis, e.g. with a revised basis for the disbursement of any available funds; or
- the SAL should not proceed further pending further investigations by any competent authorities for example in relation to any allegations of fraud.

The ODCE's determination on the application shall be final.

The ODCE may also decide to apply for the restriction (section 150 of the CA 1990) or disqualification (section 160 of CA 1990) of the directors where it considers that the conduct of the directors in the making of this application or in the prior management and control of the company may have been dishonest or irresponsible.

At any stage in the process, a member or creditor may apply to the Court for the appointment of a liquidator. Any liquidator appointed on foot of such an application shall be entitled to review the implementation of the SAL to date and to apply to the Court for certain elements to be overturned if appropriate.

Implementation

Where a meeting of creditors is convened on the direction of the ODCE and that meeting

- approves the appointment of a liquidator, the liquidator shall proceed to liquidate the company in accordance with established procedures.

or

- fails to approve the appointment of a liquidator, the matter will be referred back to the ODCE for a further determination in accordance with para. 8.

Where the ODCE approves the winding up of the company, whether in accordance with the original application or in a revised form, the directors shall proceed to expeditiously realise any assets and disburse them on the approved basis but in any event, the directors shall, other than in exceptional circumstances, have a maximum of 12 months to complete the process.

Following the disbursement of the assets, the directors shall file a report with the CRO confirming details of all realisations and disbursements. Where this process has not been completed within 6 months, an interim report shall be provided and further interim reports shall be provided every 6 months until the process is complete.

The ODCE shall be entitled to review any reports received and to ask the directors to provide any evidence necessary to confirm the contents of the report.

[It is envisaged that the ODCE would conduct a limited amount of spot-checking on such reports, generally where there are allegations of irregularities in the implementation of the realisation and disbursement plans.]

Where the ODCE determines that the directors are failing to expeditiously realise any assets and disburse them on the approved basis, it shall notify the directors of its conclusions in this regard and indicate that it intends to nominate a liquidator to liquidate the company.

The directors shall be allowed [14] days to fill any submissions they may wish to make in regard to the proposed appointment. Following the expiry of this time, the ODCE may decide, having had regard to any submissions received,

- to nominate a liquidator to liquidate the company;
  or
- to allow a further period for the completion of the SAL.

The ODCE's determination in this regard shall be final.

Where the ODCE nominates a liquidator to liquidate a company in accordance with para. 15 above, the directors shall be personally liable for any amount of fees properly due to the liquidator that cannot be met from company assets.

In the event that the directors determine that it is necessary and appropriate to amend the realisation and disbursement plan in any material way, they shall seek, in advance, the written authorisation of the ODCE to any such amendment. On receipt of any such request, the ODCE will determine whether the amendment should be permitted. Where the ODCE considers it appropriate, it may direct that the creditors generally or any particular class of creditor who would be affected by the departure, should be notified of the proposed amendment and afforded an opportunity to comment before the ODCE will make a determination on the matter.

Conclusion of the Process

On receipt of the final report from the directors, and subject to the conclusions of any reviews conducted by the Office, the ODCE shall issue a Winding-up Certificate to the CRO who shall note the dissolution of the company on the register.

Monitoring and Control

The ODCE shall have the right to inspect any books or records relevant to the application and shall be entitled to seek such further information, explanations, clarifications as it sees fit to enable it consider the application or for any other purpose within the powers of the ODCE.

Non-compliance with the scheme

In order to avail of the scheme, the directors shall be expected to comply fully with the requirements of the scheme and to cooperate fully with the ODCE in relation to any aspects. In particular,

- the inclusion of any false or misleading statement in the application or in any subsequent communications or correspondence with the ODCE;
- any failure to provide any books, records, information sought by the ODCE or any other failure to cooperation with requests from the ODCE;
- any attempt to prefer any person other than in accordance with the realisation and disbursement plan
- any failure to implement the realisation and disbursement plan in a manner other than that approved by the ODCE;
- any failure to convene a meeting of creditors where directed to do so by the ODCE;

shall be offences under the Companies Acts. They shall also be grounds for the making of a restriction order or a disqualification order under THE Companies Act 2014.

Appendix 8: State Funding of Insolvencies in Other Jurisdictions

United Kingdom - Official Receivership

State funding of insolvencies in the United Kingdom is referred to as Official Receivership. An Official Receiver is a civil servant who acts on directions, instructions and guidance from the Inspector General. There are 42 Official Receivers and they complete between 35,000 and 60,000 administrations every year. The primary duties of the Official Receiver are to secure the assets, realise them, distribute the proceeds, and to undertake actions in cases where there have been offences or misconduct. Additionally, the Official Receiver has a duty to initiate investigations in insolvencies whether the company has assets or not and in particular he must consider the circumstances surrounding the insolvency and whether or not an offence has been committed. The Official Receiver's statutory duty is set out in section 132(1) of the Insolvency Act 1986. He must investigate:

(a) if the company has failed, the causes of failure; and

(b) generally, the promotion, formation, business, dealings and affairs of the company.

He must make such report (if any) on these matters to the court as he thinks fit. Such report is, in any proceedings, prima facie evidence of the facts stated in it (section 132(2)).

Although the Receiver has a discretionary duty to initiate investigations in estates with no or few assets, restrictions apply if the estate has insufficient funds to pursue the action. In case of lack of funds, the Receiver may seek a settlement outside the court, obtain funding from creditors, appoint an insolvency practitioner as liquidator, assign the right of action to another party, or disclaim the right of action

This system of Official Receivership is financed through cross-subsidisation. Since 1 April 2004, case administration fees have been set so that they cover the average costs of case administration. These fees are £1,715 (personal bankruptcy) and £2,235 (corporate insolvency), which are partly recovered by petition costs. The petition costs have risen substantially over the years. Case administration fees are recovered from the assets realised in non-assetless insolvencies. With 50% of the estates containing no assets, according to the Insolvency Service, the Secretary of State has imposed an additional fee, ranging from 15% to 100%, with a cap at £80,000. The system of cross-subsidisation as it is used in the U.K. is claimed to be self-financing. Case administration fees are more or less equal to the case administration costs in the same period

Australia - Assetless Administration Fund

The Assetless Administration (AA) Fund was established by the Australian Government to finance preliminary investigations and reports by liquidators into the failure of companies with few or no assets, where it appears to Australian Securities and Investment Commission (ASIC) that enforcement action may result from the investigation and report. It may also finance actions by liquidators to recover assets in certain circumstances. The AA Fund is administered by ASIC.

The AA fund finances insolvency practitioners in their work on behalf of companies with little or no assets and has been running since 2006. The fund is administered by ASIC. It finances preliminary investigations and reports by liquidators into the failure of companies with few or no assets, where it appears to the ASIC that enforcement action may result from the investigation and report. A particular focus of the Fund is to curb fraudulent phoenix activity. The AA Fund enables a liquidator to carry out a proper investigation and report, which then helps the ASIC decide whether to commence enforcement action.

The ASIC have issued a guide for registered liquidators appointed in a creditors' voluntary winding up or a court-ordered winding up, who are seeking funding from the AA Fund to carry out an investigation and prepare a supplementary s533 report.

Liquidators can seek funding from the AA Fund to carry out an investigation and report:

1. in circumstances where they believe director restriction orders may be appropriate; or
2. for other matters; such as where the liquidator believes there is or may be evidence of possible offences or other misconduct in relation to the Corporations Act 2001

Director banning applications may be funded up to $8,250 whereas for other matters, applications are uncapped and the funding allocated depends on ASIC's assessment of the regulatory impact/significance of the matter.

Prior to the introduction of the fund many employees in 'deemed insolvency' situations were left without access to the GEERS scheme (Australia's equivalent to the Social Insurance Fund). The ASIC now has a discretionary power to order the winding up of abandoned companies to assist employees of companies that are abandoned. The ASIC appoints a liquidator to such companies and funds the liquidator to wind up the company and assist employees obtain their entitlements to the Fair Entitlement Guarantee scheme administered by the Department of Employment. The appointments are funded up to the amount of $8,800 from the Assetless Administration Fund.

AA Fund as a Regulatory Tool

A particular goal of the AA Fund is to limit phoenix activity. The AA Fund helps close the regulatory gap that arises when a failed company is not properly investigated. This can happen because liquidators are not obliged to incur any expense, other than an expense necessary to comply with their minimum statutory duties, unless the company in liquidation has sufficient available property to fund it. As a result, when a company is left with few or no assets, the liquidator is without funds to bring an action to recover assets for the benefit of creditors and often performs only a routine investigation. This may allow misconduct in the lead up to a formal insolvency to go undetected.

The AA Fund enables a liquidator to carry out a proper investigation and put together a liquidator report, which then helps ASIC decide whether to commence its own investigation or enforcement action. Addressing the regulatory gap through more rigorous investigation and reporting will improve corporate conduct generally, improve returns for creditors, and reduce the scope for phoenix activity.

Liquidator actions to recover assets

A liquidator may also seek funding assistance from the AA Fund to take action to recover assets where fraudulent or unlawful phoenix activity is suspected. The AA Fund may provide

funding to a liquidator to perform mandatory functions in relation to an insolvency administration where ASIC orders the winding up of the insolvent company.

ASIC has used its wind up powers in 2014 and 2015 to appoint liquidators to 31 companies that owed a total of 98 employees more than $995,000 in entitlements. While the ASIC's intervention in these cases was commendable, what was striking was how few in number the appointments were.

Operation of the Fund in Practice

A liquidator in a creditors' voluntary winding up or a court-ordered winding up can apply for assistance from the AA Fund to carry out preliminary investigations and prepare supplementary s533 reports (equivalent of Ireland's liquidator reports which are submitted to the ODCE in respect of director's disqualification or restriction). A liquidator in a creditors' voluntary winding up or a court-ordered winding up can also apply for assistance from the AA Fund to enable the liquidator to bring an action to recover assets where fraudulent or unlawful phoenix activity is suspected. This includes actions to deprive persons of the benefits of breaches of duty by company officers (including breaches by corporate insolvency practitioners) that have a sizeable adverse effect on employees, consumers or small business. This may include funding replacement liquidators to investigate a former liquidator if there are concerns that the liquidator was complicit in the breach of duty.

What is the funding process?

To gain access to the AA Fund the following four criteria must be satisfied:

(a) the liquidation must be 'assetless'
(b) the initial s533 report must have been lodged
(c) the issue to be reported on must be of a type that ASIC may consider pursuing
(d) and there is or may be material, information or evidence available to support any allegations or concerns of the liquidator

Consequently liquidators must risk their own funds to investigate a company in the first place in the hope that some conduct emerges that qualifies for funding. They are essentially acting as the ASIC's investigative officers.

Funding criteria and guidelines

Once the funding criteria are satisfied, the process differs depending on what type of remedy is being sought. Generally, applications relating to possible restriction of directors that meet the criteria set out and seek funding of $7500 or less will be funded. Where these applications meet the criteria but are seeking funding of more than $7500 approval for funding may only be given where the ASIC and the liquidator come to an agreement on funding.

In applications for funding relating to other matters the ASIC will consider four issues when deciding whether to fund a liquidator investigation :

1. Strategic significance.
2. Benefits of pursuing misconduct.
3. Issues specific to the case (the seriousness of the misconduct; the time that has lapsed since the misconduct occurred; the strength of the evidence)

4. Alternatives available - are other enforcement outcomes available? For instance, a possible class action or the availability of litigation funding.

As a result only the most egregious conduct of directors as reported to a liquidator by creditors will prompt the liquidator to make the initial enquiries that leads to an application. Where the director's conduct is more subtle or where a small amount of money is involved it is in the liquidator's interest to refuse the engagement. If such a fund were to be adopted in Ireland the eligibility should be loosened so as to allow the funding of liquidators where fraudulent or unlawful activity is suspected.

The Netherlands – Trustees Guarantee Rules (TGR) 2005

The Trustees Guarantee Rules (TGR) enables a bankruptcy trustee who is confronted with an empty estate, to institute legal actions on the basis of director's liability, fraudulent conveyance or transactional avoidance or to investigate such possibilities. Such trustee can obtain a (current-account) credit facility with the Kas Bank N.V. The Dutch government, through the Ministry of Justice, provides Kas Bank N.V. with a guarantee for the deficit. The TGR sets out the circumstances in which an insolvency representative can successfully apply for additional state funding. It guarantees to compensate a deficit in case the investigation turns out to be unsuccessful or if the legal procedure results in a negative outcome for the estate.

Three conditions apply in order to qualify for funding.

1. The rules prescribe that recovery is probable. If recovery is improbable, the insolvency practitioner can request a fee which is intended to cover the costs of the investigation that is aimed at determining whether the suffered loss can be recovered from the other party and whether the other party will be able to pay.
2. The requested amount has to be reasonable compared to the possibilities of recovery. The Ministry of Justice requires a 1:4 ratio, that is, the expected proceeds of the action should exceed the requested amount of funding by an amount multiplied by four.
3. The requested amount should be proportionate to the total amount of the debt.

The activities by the trustee required for a successful application require a substantial amount of time, especially where he must demonstrate that recourse will be possible. Because these activities by definition must be performed before the guarantee can be awarded by the Ministry of Justice, the costs involved will not be reimbursed. Consequently, these costs will remain for the account of the estate, which in case of an empty estate will result that such costs will not be met.

In practice, only a limited number of cases qualify for funding, since it is difficult to obtain funding in cases where the debts are relatively large.

Consequently, insolvency representatives tend to apply for funds for recovery investigation purposes rather than for a legal procedure. The requirements for resource investigation funding are less strict.

The purpose of the TGR is to stimulate bankruptcy trustees (in their task as liquidator of bankrupt estates for the benefit of the creditors) to fight the abuse of legal entities. In practice, however, the Ministry of Justice seems to emphasize on protecting the interests of

the unsecured creditors, in a sense that they obtain a substantial greater portion from the estate as distribution on their unpaid claims against the bankrupt debtor.

Germany – Not Opening an Insolvency Procedure

In Germany courts simply do not open an insolvency procedure if the estate does not have sufficient assets to pay the costs of liquidation. A 2007 publication illustrates how frequently German courts have used this power to deny opening proceedings, average refusal rates throughout Germany were 46% in 2006. The legal consequence of a refusal to open proceedings is *Auflosung*, which essentially means that the debtor loses its legal competence to act. The debtor company can continue to exist after the refusal, so long as the purpose is to distribute the assets among the creditors and even the shareholders. Consequently, the debtor becomes responsible for liquidating the estate. As a result of the transfer of control of the liquidation to the director, the liquidation itself can become arbitrary, as it decides which creditors will be paid and to what extent. As a result of this responsibility and the companies' loss of legal capacity it becomes difficult for creditors to instigate a claim against the company. This in turn can offer an incentive to directors to deplete the company's assets. This process has been criticised and some commentators say creditors have lost out on tens of billions because companies assets were not liquidated by a third neutral party, and because companies sometimes further deplete their assets.[167]

[167] Uhlenbruck, H Hirte and H Vallender, *Insolvenzordnung Kommentar* (Vahlen, Munchen 2010) p26

Appendix 9: Proposals for reform of the Companies Act 2014 in relation to informal insolvency for consideration the Company Law Review Group

The Department of Social Protection is aware of cases whereby employers have ceased trading without engaging in any formal wind-up process (so called "informal" insolvencies) and some or all of their former employees are left with money (such as arrears of wages) owed to them. At present, such employees are not covered by the insolvency payments scheme as their former employers do not satisfy the definition of insolvency for the purposes of the scheme, i.e. the company has ceased trading but is not placed into voluntary or involuntary liquidation or receivership, usually owing to the lack of assets within the company to justify the appointment of a liquidator or receiver.

This situation has also been commented upon by the High Court in the Davis Joinery case, with Ms Justice Laffoy, as follows:

> *…one has to be concerned for less fortunate employees of corporate employers who have become caught up in what has become known as "informal insolvency" and who are not in a position to petition to have the employer corporation wound up. Unless the issue is successfully litigated….the obvious unfairness inherent (emphasis added) in the Act of 1984, as amended, will only be addressed by legislative change. Whether such change should be implemented is a matter of policy for the Government and the Oireachtas.*

Similar sentiments have been expressed by legal commentators, such as Regan (2009), Lynch-Fannon and Murphy (2009) and Sweeney (2009).

The Department is concerned that situations of informal insolvency may limit the application of the EU Directive 20008/94/EC on the protection of employees in the event of the insolvency of their employer. The motivation here is to provide enhanced protections for employees in situations of informal insolvency, rather than addressing any deficiency in the transposition of the Directive in the Employees (Employers' Insolvency) Act 1984.

The Department is of the view that altering the definition of company insolvency in the 1984 Act to include a definition of informal insolvency could have unforeseen consequences for the Companies Act 2014. It could present significant legal difficulties to extend the definition of insolvency soles for the purposes of the 1984 Act, with the risk of definitional spillover into company law. Therefore, any reform proposals to address informal insolvency should be aligned with the Companies Act.

There are two issues to be considered in this context: broadening the definition of insolvency to encompass situations where available assets are insufficient to warrant a liquidation; and providing a legal mechanism whereby an employee would be entitled to make a claim under the insolvency payments scheme.

First, we address the definition of insolvency in Section 570, Companies Act 2014

A company may be wound up where is unable to pay its debts. This is defined in S 270 is €10,000 for an individual creditor (or €20,000 in aggregate when multiple creditors). It is likely

that many employee creditors of a company may be owed less than these thresholds. The issue then is whether the threshold should be lowered for employee creditors.

It is proposed that a new S 570 (e) should be considered along the following lines:

- A lower threshold of c €1,000 would apply an employee creditor (or €2,000 if more than one employee)
- A longer period of time (e.g. 60 days) had elapsed when the debt was not settled
- The employee creditor could thereafter apply (to the High Court) for a declaration that the company should be deemed insolvent, but the available assets are insufficient to warrant a liquidation.
- Ensure that the costs of such an application can be contained.

Second, we consider the issue of declaratory relief under Section 567, Companies Act 2014

It is the Department's view that the appropriate relief upon which claims upon the insolvency payments scheme in situation of informal insolvency should rely is a declaration that the company ought to be wound up, but the available assets are insufficient to warrant a liquidation. This is in line with Article 2(1)(b) of the EU Directive.

The purpose of a declaratory relief is that it may speak definitively to the Directive, but does not carry executory weight. A declaration is an ideal alternative relief to an order winding up a company. The declaratory relief could then be respected under the insolvency payments scheme as entitling the affected employees to make a claim.

This would retain a degree of coordination between the insolvency procedure and the issue of informal insolvency. Therefore, the declaratory relief should be contained in the Companies Act. There is already provision in the 2014 Act in relation to informal insolvency as defined in S 567(1).[168] What is proposed then is an elaboration of this provision in relation to the winding up of a company where there are insufficient resources to warrant a liquidation per se.

A proposed new Section 567 (a) could contain the following elements:

- It would be applicable to situations where a company ought to be wound up, but there are insufficient available resources to warrant a liquidation
- It would be confined to employee creditors
- The Minister for Social Protection would be notified of any application for a declaration

[168] *This section applies in relation to a company that is not being wound up where –*

a) execution or other process issued on a judgement, decree or order of any court in favour of a creditor is returned unsatisfied in whole or in part, or

b) it is provided to the satisfaction of the court that the company is unable to pay its debts, taking into account he contingent and prospective liabilities of the company,

and, in either case, it appears to the court that the reason or the principal for its not being wound up is insufficiency of assets.

- The declaration would be based on clear procedures to advertise and notify relevant parties of the petition for a declaration in line with the Rules of the Superior Courts
- The grounds for assessing if a company has insufficient available assets to warrant a liquidation would be elaborated upon, including the non-appearance of the company
- The costs of the application would be regulated.
- Relevant statutory bodies would be notified of the decision.

Separately, certain amendments would be required in the 1984 Act to reflect the proposed declaration. These would include procedures for verifying claims and the power for the Minister for Social Protection to raise a debt against the company in informal insolvency.

Department of Social Protection
18th April, 2016

IRISH CONGRESS OF TRADE UNIONS

The below arises from the general discussion at the CLRG Plenary of 13th June 2017 to consider the Report of the Ad-Hoc Committee on the Protection of Employees and Unsecured Creditors. The points made here are supplementary to those made orally at the meeting and to the references to the ICTU position in the Report, and both confirm and clarify the Congress submissions as well our position on those made by others. Accordingly we re-iterate below the specific proposals put before the Ad-Hoc Committee as well as a synopsis of our views on others.

CLRG REPORT ON THE PROTECTION OF EMPLOYEES AND UNSECURED CREDITORS

[Report of Nessa Cahill & Kevin Duffy – March 2016

As a preliminary and for the purposes of clarity it is important to state that the Congress has already, last year, written to the Minister seeking the full implementation of the above separate report of March 2016.]

CLRG DRAFT REPORT CHAPTER 2

S 224 Directors duties to Employees

(A) The provisions of section 224 of the Companies Act 2014 read as follows:-
"(1) The matters to which the directors of a company are to have regard in the performance of their functions shall include the interests of the company's employees in general, as well as the interests of its members.
(2)Accordingly, the duty imposed by this section on the directors shall be owed by them to the company (and the company alone) and shall be enforceable in the same way as any other fiduciary duty owed to a company by its directors."

(B) The statutory duty detailed in this section recites the provisions of the previous 1990 Companies (Amendment) Act (section 52) which, in turn, was based on similar provisions in section 309 of the then UK Company (Consolidation) Act 1985.

(C) The original intent was to impose a significant and distinct statutory duty on directors with regard to their employees in general (without unduly interfering with the resolution of disputes between employees and their employers via the normal established Industrial Relations dispute resolution machinery). As well as that, it was also intended to impose a similar duty with regard to the members of the company. These intentions were prompted by concerns arising from a number of company failures. However the eventual wording became considerably diluted following lobbying and by what we understand were policy considerations.

(D) In the event what finally emerged was, in the opinion of Congress, a far cry from what was intended such that one leading authority has opined that what the legislature gave with one hand it took with the other, pointing out that the beneficiaries of the statutory duty imposed, may not themselves enforce it. [Courtney – "The Law of Private Companies (2nd Ed) 2003 p510-11].

(E) It is the Congress view that the challenge is to give this section of the Companies Act teeth by rendering the duty imposed by subsection (1) enforceable by employees.

(F) A possible way of doing this would be to amend subsection (2):-
"Accordingly, the duty imposed by this section on the directors shall be enforceable directly by employees and by members of the company."

(G) Such an amendment, or similar, could allow for direct vindication of rights under s 224 by employees without having to depend on others , such as an "altruistic liquidator "in the case of employees, as suggested by Dr.Courtney.

(H) A second consideration that arises with the issues of enforceability and vindication for employees is that of forum and cost. This essentially underlines the need to allow some flexibility for employees in seeking enforcement of that statutory duty in a lower court if necessary. A similar issue arises where seeking redress for breach of that statutory duty.

(I) A third consideration in this connection is the extension of this duty on directors to the employees (and members) of related companies, particularly to the directors of holding or parent companies, whose acts and omissions can have a very significant impact on the employees and members of subsidiaries. In such circumstances it seems entirely just and reasonable to impose such a duty through the "corporate veil".

(J) The breach of their statutory duty under section 224 by directors (including shadow directors) should leave them open to serious penalisation at the level of a category 1 or 2 offence, including disqualification for a minimum period of 5 years, apart from any other legal or other proceedings which may arise from such a breach.

(K) In this regard and in order to underline the importance of this provision in the Companies Act and to re-inforce the intentions of the Oireachtas to emphasise directors duties in this regard, it would be appropriate for all directors to sign an undertaking on taking up office acknowledging their duty under section 224 (amended and reinforced), in addition to the general undertaking required under S 223..

(L) Finally , reflected in the text of the report are a number of reasons why the proposal did not attract sufficient support from other members of the Ad-Hoc Committee and we would like to take this opportunity to briefly clarify our view on those:

- (i)One reason given was that a direct right of action by employees could undermine the way in which directors' duties are currently enforced i.e. role of ODCE in bringing disqualification or restriction proceedings and/or private enforcement by minority members or shareholders via derivative actions
- In our view such a strengthening of s224 could supplement rather than undermine enforcement and could constitute a dissuasive measure as outlined above.

-
- (ii) Another reason given for opposition to the proposal was that it could have serious ramifications for the enforcement of company law generally.
  The Congress response is similarly that our proposal should have a dissuasive effect on directors particularly in the vicinity of insolvency not just in respect of employees but in respect of members of companies.
-
- (iii) A further reason cited for lack of support for our proposal is that employees could have more rights than other creditors and also shareholders
- For the purposes of clarification it is important to point out that our proposal to strengthen the section is in respect of both employees and members. Accordingly it would be incorrect to say that employees would have more rights than shareholders.
- In any event there is specific reference to the duty of directors to employees in the Act and there is nothing to prevent the Act being amended further to augment the rights of creditors in general in the area of enforceability.

S 225 Directors Compliance Statements (DCS)

Notwithstanding Congress's view that the current provisions under section 225 do not go far enough in terms of their reach, an exception should be made in the case of directors' statutory duties under section 224, and directors of all companies should be obliged to report annually on their compliance in this regard.

The Congress position has been consistent on the question of DCS's since the major debate within the CLRG in 2005 and remains as reflected in our Reservation appended to the (majority) CLRG on DCS's of that year. [The ODCE and Revenue also entered Reservations to the main Report]

Finally under this heading the report of the Ad-Hoc Committee itself notes that S225 is less onerous than even the mitigated proposal supported by the majority of the CLRG in 2005 and our view is if this section is not strengthened now it will have to be at some other stage.

Specifically if we have ,as a committee ,been requested by the Minister to look at "The potential strengthening of obligations on Directors to a company's employees as part of Directors duties" (Letter from Minister to CLRG of 14/1/16), this seems a fair, reasonable, straightforward and necessary one.

Codification of Directors Duties

Congress is generally supportive of the spirit of the proposal under this heading but believes the wording should be more aligned with that of Article 18 of the new draft Pre-Insolvency Directive (notwithstanding that the view of the ETUC and ICTU is that the wording there could be further strengthened in relation to employees) viz.:

Article 18

"Duties of directors

Member States shall lay down rules to ensure that, where there is a likelihood of insolvency, directors have the following obligations:

(a) To take immediate steps to minimise the loss for creditors, workers, shareholders and other stakeholders;

(b)To have due regard to the interests of creditors and other stakeholders;

(c) To take reasonable steps to avoid insolvency;

(d) To avoid deliberate or grossly negligent conduct that threatens the viability of the business"

The CLRG chairman, Dr Tom Courtney has offered some considered thoughts on the proposal of the Ad-Hoc Committee, questioning certain aspects of its formulation and proposing an alternative wording.

However, we respectfully disagree that the effect of even the wording suggested by the Ad-Hoc Committee (which we do not believe goes far enough) would be to encourage the shutting down of companies in order to avoid liability. In this connection we reiterate that a stronger wording yet is in the new draft Directive, the ostensible purpose of which is to avoid shut-down through restructuring.

Secondly, to focus on the" belief "of the Director rather than on what is a positive duty is to weaken the purpose of the proposal.

Finally, while we understand the point made that without money or a "mark", little may be achieved, that is not an argument for effectively diluting the duties of directors in this regard. If anything, it undermines any argument to render these duties fiduciary (and therefore possibly as "illusory" as the duty to employees and members under s224) and points more towards the necessity of a more directly enforceable suite of duties.

REPORT CHAPTER 3

S 599 Contribution Orders

Section 599 of the Companies Act 2014 provides that a related company (as defined under the Act) may, subject to certain restrictions, be required to contribute to the debts of a company being wound up.

In summary, and as stated at the recent plenary, Congress is seeking the implementation of the wording in the New Zealand statute as laid out in the Report. Congress also supported the spirit of the recent Labour Party and other proposed amendments to S599 in the Seanad, and would point out as follows:

The original proposed Irish provision was based on mirroring the wording in the NZ statute.

However, that proposal was subject to strong lobbying at the time, including that by the then Confederation of Irish Industry (CII) and the wording and the structure of the section changed for a number of policy reasons, including the fear that it was "anti-business".

As a result the change put a heavy onus of proof on the party seeking a contribution order to demonstrate that the insolvency arose from the actions or omissions of the related company .(S140 of 1990 Companies Act- now s599 of the Act of 2014)

Most importantly this requirement in s599 (5) has compulsory effect, is a condition precedent and is the main difference between the equivalent ROI and NZ statutes

Accordingly in the ROI there is a compulsory requirement that the insolvency be brought about by the actions and omissions of a related company, regardless of the other 3 factors to be considered under 599(4)

In NZ, consideration of the actions and omissions of the related company is only one of 4 factors to be considered by the court, such factors to include any other matters the court sees fit.

In other words the NZ court has a wider discretion than the court in ROI.

Accordingly, the equivalent NZ legislation is more accessible for creditors, including employees, unsecured creditors and SME's, whereas the Irish legislation was deliberately designed to be more onerous for creditors , including employees and unsecured creditors. This perhaps answers the question as to why there are no cases in Irish law to refer to. However, if the question is asked, as it has been by the Minister, are there areas in which company law can be improved; this is surely one of them?

Finally, it is to be noted that the equivalent compulsory requirement under 599(5) is only one of 4 factors to be considered under s600 (Pooling Orders). Interestingly, there appears to be no dearth of activity under section 600, which tells an equally illuminating story in contrast to s599.

REPORT CHAPTER 4

Ending Employment contracts

Congress supports this proposal

Unfair Preference

Congress is in favour of the original proposal that was before the Ad-Hoc committee (and which appeared at the time to find acceptance with the majority) to align the substance and wording of s 604 with that of s608 viz.:

"That the requirement to prove an intention to prefer should be adapted in line with the fraudulent effect provision which is currently in section 608, so that any action which has the effect of giving an unfair preference to one creditor over other creditors could be set aside if the proofs were met".

In this connection, it appears from research carried out for the Ad-Hoc Committee that in the US and Australia in such circumstances an "effects based test" is used and that in both the UK and Germany a less onerous standard is used than in the ROI.

It seems reasonable to presume then that such an alignment would improve the position for all employees and unsecured creditors, including SME's.

Deemed Restriction of Directors Who Fail to Appoint a Liquidator

Congress supports this proposal

Enhanced Focus on Directors' Duties to Employees/ s682 Liquidators Report Form

Congress proposed and supports this proposal

Self-Administered Liquidation (SAL)

Insofar as this proposal is designed to ease the situation with insolvent unliquidated companies, particularly small businesses where employees can often be caught in limbo with no access to the Insolvency Fund, Congress is supportive of the spirit, though concerned less there be unintended consequences.

Ultimately, for employees, the answer mainly lies in the recommendation in Chapter 6 of the Ad-Hoc Committee's Report for a change in the law to allow access to the Insolvency Fund- a matter on which Congress has campaigned for some time.

REPORT CHAPTER 5

S 569 Circumstances under which company may be wound up by the court & section 572 Powers of court on hearing petition

(A) Section 569 deals with the circumstance under which a company can be wound up by a court and section 572 further deals with the power of the court to hear a petition to wind up a company.

(B) The extent of compliance of the directors of the company with their statutory duty to the interests of employees under section 224 should be included under both sections for consideration by the court when making a decision.

The purpose of this proposal was to ensure the court is aware of the position of the employees in any application for a provisional liquidator and allow the court to enquire further on this matter. (NB This may be mitigated somewhat by the proposal in the Report to require the provisional liquidator to seek the order of the court before termination of employee contracts – see Chapter 6)

Section 570 Circumstances under which company deemed to be unable to pay its debts

Congress has previously sought the retention of the €1,269.74 minimum debt threshold for employee creditors petitioning the court to wind up an employer company, in circumstances of "informal" insolvency or where employers simply "walk away". The consequences of this refusal/failure on the part of employers are that employees are unable to avail of their entitlement under the Employees (Employer' Insolvency) Act 1984 to access the Insolvency Fund.

Congress had further sought that the costs of such an application would be contained by allowing it to be made in the District Court, at least by employee creditors.

While understanding there are issues here with regard to the powers and jurisdiction of the High Court, the question of access to justice must intervene in the debate to produce a fairer outcome for often low paid employees who are caught in limbo.

In this regard the paper presented by DSP to the Ad-Hoc Committee has been more that helpful in focussing discussion on this ongoing problem. While the

proposal to amend section 570 to allow for a lower threshold of € 1,000 for employee creditors is very welcome, the retention of the High Court as the forum of application is a massive deterrent cost wise and there are questions around the period of time over the settlement of the debt. If a way could be found to have such applications made by employee creditors in the District Court then it would certainly assist.
It is not clear either how the proposal for declaratory relief under a new section 567 could work to the better advantage of the employee creditor in circumstances of "informal" insolvency or companies not in liquidation.

In the absence of a solution on the company law side, one must be found on the Employment Law side of the house. In this connection we have already noted that Article 2.4 of Directive 2008/94/EC provides as follows:

**"This Directive does not prevent Member States
from extending employee protection to other situations of insolvency, for example where payments have been de facto stopped on a permanent basis, established by proceedings different from those mentioned in paragraph 1 as provided for under national law."**

Accordingly Congress believes it is eminently possible to devise proceedings to accommodate the extension of employee protection envisaged by Article 2.4. and this could be met by changing the law to allow access to the Insolvency Fund as per the recommendation of the Ad-Hoc Committee in Chapter 6 of the Report.

S 747 Investigation of Companies Affairs by Court Appointed inspectors on application of company

This section at sub section 2 confers the right on creditors and others to apply to the court to appoint one or more competent inspectors to investigate the affairs of a company in order to enquire into matters specified by the court and to report on those matters in such manner as the court decides.

The court has the power to make such an appointment notwithstanding that the company is in the course of being would up.

Nevertheless there are a number of potential barriers to the exercise of that right by employee creditors and these are the possible requirement by a court for the lodgement of security for payment of the costs of an investigation as well as the High Court (or in certain circumstances , the Circuit Court) costs of the proceedings themselves.

To recognise the particular difficulties faced by employee creditors and statutory duty owed by directors to them and reflected in section 224, consideration should be given to allow for such an application in the District Court with the investigation being carried out by the officers of the ODCE with no requirement for payment or security for costs by the employee creditor applicants.

S 819 Restriction of Director of Insolvent Company

This section provides for the restriction of directors of insolvent companies for up to 5 (five) years.

Firstly, it is the considered view of Congress that such a limited period is not dissuasive enough and that the court should have discretion to make a declaration for lengthier periods of disqualification in the more serious cases of abuse, particularly of the interests of employees, with a minimum period of disqualification of 5 years.

In this connection, the non-compliance of directors with their statutory duty to have regard to the interests of employees under section 224 (as discussed above) should be specifically included in the criteria for declaration by the court.