REPORT OF THE

COMPANY LAW REVIEW GROUP

ON

THE REGULATION OF RECEIVERS

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1.1 Executive Summary

The issue of the governance and regulation of receivers has been highlighted by Oireachtas members in recent years. Most recently, officials from the Department of Business, Enterprise and Innovation and the Department of Justice and Equality appeared before the Joint Oireachtas Committee on Finance, Public Expenditure and Reform, and Taoiseach on 18 October last on the matter.

Concerns were raised around the lack of supervision of receivers; their costs; qualifications and, indeed, the quality of information they provide throughout the process.

While these concerns extend beyond receivers appointed to the property of a company and relate to receivers in general, it was determined that certain of the issues raised by the Joint Oireachtas Committee particularly in relation to the qualification and supervision of receivers; and the provision of information to companies on the progress and cost of receiverships, would benefit from an examination by the Company Law Review Group.

The Minister therefore requested that the Review Group undertake a review of the regulation of receivers as an additional item to their work programme for 2018-2020, with the following terms of reference:

(1) Examine and make recommendations as to whether the supervisory regime for receivers in the Companies Act 2014 needs to be strengthened including in relation to the introduction of qualifications for appointment as a receiver to the property of a company and ongoing supervision.

(2) Examine and make recommendations as to whether receivers should be obliged to provide information to the company on the management of the business and progress of the receivership, (beyond the abstract referred to in section 430 and 441) particularly where a receiver has been appointed over all or substantially all of the property of a company. If a receiver is a receiver/manager should there be a requirement for the receiver to supply information to the borrower and potentially other creditors, particularly preferential creditors, on the progress of the receivership.

(3) Notwithstanding section 444 of the Companies Act 2014 in relation to the court's power to fix a receiver's remuneration, and notwithstanding that the receiver's remuneration may be fixed in an instrument, examine and make recommendations as to whether there should be a requirement for greater

transparency in relation to receivers' fees for the information of both the company (to whose property the receiver has been appointed) and other creditors, in particular, preferential creditors.

Should factors that a debenture holder or a court must consider when fixing a receiver's fee be set out in the Companies Act such as are set out in relation to liquidator's fees at section 648(9) of the Act?

(4) Any other recommendations the CLRG consider appropriate.

Having regard to the more detailed considerations below, the following is a summary of the Committee’s responses to the terms of reference posed by the Minister:

- There should be a minimum qualification required for appointment as a receiver to the property of a company;
- Receivers should be subject to ongoing supervision;
- Receivers should be obliged to provide information to a company and to creditors on the management of the business and progress of the receivership, particularly where they have been appointed over all or substantially all of the property of the company;
- There should be greater transparency in relation to receiver’s fees for the information of stakeholders affected thereby;
- Where relevant, factors that a court must consider when fixing a receiver’s fee should be set out in the Act such as are set out in relation to liquidator’s fees at Section 648(9);
- A system of recording and reporting statistics on receivership and other insolvency cases would be beneficial so that future legislative decisions can be aided by statistical analysis of the different types of cases.

1.2 This Report

This Report has been prepared by the Corporate Insolvency Committee of the Company Law Review Group, to which the task of responding to the Minister’s request was delegated by the Review Group. The members of the Insolvency Committee are set out in Appendix A. The Report was formally adopted by the full Review Group in May 2019.

1.3 Background

Receivership is a long-standing legal mechanism for the enforcement of a security and appointment of a receiver is one of the oldest remedies known at law.[1]The principal source of law relating to receivership is contract law. By far the most common method of appointment of a receiver is under the powers contained in a debenture.

While a receiver falls within the meaning of an insolvency practitioner, a receiver's role is very different from that of a liquidator or an examiner. A liquidator has the task of winding up a company, realising its assets and distributing those assets in accordance with the law. An examiner is appointed under the Act for the purpose of examining the 'state of the company's affairs' and, secondly, to put together some compromise or scheme of arrangement which may facilitate the survival of the company (at least in part), and then reporting to the court. A receiver, appointed on foot of a debenture, has a much narrower function i.e. the principal task is to secure the assets of a company which have been mortgaged or charged in favour of the debenture holder who appointed him or her and realise those assets so that the secured creditor's debt is repaid as quickly and efficiently as possible.

There are two different types of receivers: the first which has the function of essentially 'collecting' income from the property with a view to its subsequent sale, the second of 'receiving and managing' the property, running it as a going concern i.e. a receiver and manager[2]. Although this distinction is recognised in case law the Companies Act 2014 states in Section 2(9) that in the Act a reference to a receiver of the property of a company includes:

> *(a) a reference to –*
> > *(i) a receiver and manager of the property of a company; or*
> > *(ii) a manager of the property of a company;*
>
> *(b) a reference to a receiver or to a receiver and manager or to a manager, of part only of that property; and*
> *(c) a reference to a receiver only of the income arising from that property or from part of it.*

Related to the distinction is the nature of the charge or security which gives rise to the appointment of the receiver. The primary distinction is between a fixed charge, which is fixed and or attaches to a specified asset or assets, and a floating charge which hovers over a class or range of assets but without specificity until the charge crystallises. Again, case law and the Companies Act 2014 recognises the distinction and provides for different obligations depending on the nature of the charge.

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[1] Courtney Thomas. B, *The Law of Companies*, (4th edn., Bloomsbury Professional, 2016) at 21.002 and Wylie, J., *Irish Land Law*, (5th edn., Bloomsbury professional, 2013) at 14.45 *et seq.*

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

For example, the obligation on directors under section 430(1) of the Act to provide information **to** the receiver arises where the receiver is appointed *"…of the whole, or substantially the whole, of the property of a company…secured by a floating charge.."* The obligation under section 440 of the Act to pay preferential debts in priority to any claim for principal or interest to the secured creditor relates only to the realisations of assets secured by a floating charge. Following the decision of the Supreme Court in *Re J.D. Brian Ltd.*[3] and the subsequent adjustment of the effect of that decision in s. 92 of the Companies (Accounting) Act 2017 this obligation relating to preferential debts relates to all floating charges regardless of subsequent crystallization which were created as floating charges. However, the legal effect of the Supreme Court decisions is that a floating charge can be crystallised by notice in addition to the normal crystallising events with the consequence being that the distinction between floating and fixed charges is blurred.[4]

Whether or not to extend the distinction to the recommendations in this report became a consistent theme of the Review Groups' deliberations. The nature of the charge over the assets might mean that the receiver has different powers and duties, particularly in relation to the payment of preferential creditors in priority to the debts of a floating charge holder. However, deliberations in the group focused on the distinction between a receiver appointed simply to receive the income and proceeds of sale of one asset such as a buy-to-let property, and a receiver and manager usually appointed over substantially the whole of the business and property of the company. The question to which the Review Group repeatedly returned was whether there was support for the proposition that a higher level of qualification, regulation and supervision was necessary or desirable for the receiver appointed over substantially the whole of the business and property of a company (receiver and manager), as opposed to a receiver appointed simply to receive the income and proceeds of sale of one asset such as a buy-to-let (receiver or fixed charge receiver).

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[3] [2015] IESC 62.

[4] Lynch Fannon I: Crystallisation of Floating Charges: Reform and Clarity, *Commercial Law Practitioner* 2016, 23(8), 209-212.

2 Current Law

2.1 Mode of Appointment

There are presently three methods by which a receiver can be appointed:

1) Order of the Court

Section 28(8) of the Supreme Court of Judicature Act, 1877 grants the courts the power to appoint a receiver. The procedures for such a grant are found in Order 50, r 6 of the Rules of the Superior Courts and the relevant case law. This power is a codification of the equitable power of the court to grant the relief in any case where it would seem appropriate. The court also has the power to appoint a receiver to execute a judgment of the court ("a receiver by way of equitable execution"). This power is not commonly exercised.

2) Contract/Debenture

The most common ground for appointing a receiver is by a debtor on foot of a contract or deed, typically, a debenture[5]. A debenture document will usually have an express clause which reserves the right to appoint a receiver over the property following certain specified events such as default of payment, breach of contract, bankruptcy and so forth. To ensure uniformity and to avoid problems arising from poor drafting of debentures, the power to appoint a receiver is implied into all mortgages by section 108 of the Land and Conveyancing Law Reform Act, 2009.

3) Statute

Chapter 3 of Part 9 of the National Asset Management Agency Act, 2009 permits the agency, NAMA, to appoint a statutory receiver on the occurrence of certain specified events. The power of appointment under the Act is not limited to those circumstances set out in the Land and Conveyancing Reform Act, 2009 or the Conveyancing Act, 1881.

2.2 Company Law & Receivers

Where the property the receiver is appointed to preserve, manage or sell is the property of a company, the provisions of Part 8 of the Companies Act 2014 (as amended) will apply. These provisions, amongst other things, disqualify certain persons from being appointed as a receiver, require that the Registrar of Companies be notified where a receiver is appointed, and set out the powers a receiver has following appointment.

A receiver appointed over all the assets of a company may also be appointed to manage and carry on the business of the company. Where a receiver is appointed over company property, any letters, invoices, orders or other documents emanating from

[5] A debenture is a legal term for a written contract or deed which is evidence of a debt. For simplicity and to avoid prolixity, debenture will be used in the rest of this document.

that company must indicate that a receiver has been appointed. Similar information must be found in electronic correspondence and on the website of the company. The Registrar of Companies will also change the status of the company on the register to read "in receivership".[6]

While the receiver is primarily concerned with obtaining the secured assets for the benefit of the creditor that appointed them, they also owe a residual duty to the company.[7] This position, however, should not be overstated; a receiver is entitled to do such acts to achieve the interests of the debenture, even if those acts would be overall detrimental to the company.[8]

2.3 The Power of Sale and the Duties of Receivers

In most situations, a receiver will be appointed with a view to disposing of or selling the secured property to satisfy a debt. In doing so, the receiver enjoys a wide discretion but is subject to certain duties. The receiver has a duty to act in good faith. The following scenario gives an example of acting otherwise than in good faith:

> *A receiver, following default, arranges to sell the asset. Sale will be via auction. Yet the receiver does not consult estate agents regarding the mode of sale nor the reserve price, and the sale is not widely publicised. At auction, a company in which the receiver has substantial interest (either directly or through a family member) purchases the property. There were no other bidders.*[9]

In these circumstances, it is unlikely that a receiver can show they acted in good faith. However, this does not mean a company in which the receiver has an interest cannot purchase the property the receiver has offered up for sale. Rather, the receiver is required to ensure that reasonable care is taken when selling the asset to obtain the best price possible in the circumstances. This latter obligation is derived from equity and is now found in section 439(1) of the Companies Act 2014:

> *A receiver of the property of a company shall, in selling property of the company, exercise all reasonable care to obtain the best price reasonably obtainable for the property as at the time of sale.*

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[6] See *Independent Trustee Company Ltd. v Registrar of Companies* [2016] IECA 274, where the court held that the change in status on the register was not warranted where a receiver was appointed over the beneficial interest of a property which the company in question was the legal owner.

[7] *Bula Ltd. V Crowley (No. 4)* [2003] 2 IR 430, at 448 per Denham J.

[8] See *Downsview Nominees Ltd. v First City Corporation Ltd.* [1993] AC 295.

[9] See *Tse Kwong Lam v Wong Chit Sen* [1983] All ER 54.

2.4 Agency Relationship of the Receiver

Receivers appointed on foot of a debenture will very commonly be designated as being agents of the debtor. This means that it is the debtor who is liable for any acts done by the receiver, not the debenture holder who appointed them. This practice is reflected in statute law such as section 108 (2) the Land and Conveyancing Law Reform Act 2009.[10]

2.5 Receiver's Remuneration

A receiver appointed by a debenture holder will typically have a provision for their fees set out in the debenture. These fees and expenses will, usually, be paid by the company to which the receiver has been appointed or out of the proceeds of sale of the asset. A creditor, member or a liquidator can apply to court to fix the fees of a receiver regardless of whether the fees have been fixed by agreement with the debenture holder or not.

2.6 Powers of Receiver to Take Possession of a Property

A receiver is empowered to take possession of a property and to take such steps as to secure a property. This includes insuring the property and extends to employing the services of security guards or a security firm to protect the property. Recently, we have seen controversies over the use of certain individuals to take possession of a property and the tactics used by such individuals. There is some debate as to whether the actions of persons or companies charged with taking possession of a property are regulated by the Private Security Services Act, 2004. In any event, the criminal law governing assault and offences against the person is applicable, as would any civil wrong such as trespass to the person, civil assault or false imprisonment.[11]

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[10] Section 108 was itself a re-enactment of the provisions found in section 19(1) of the Conveyancing Act, 1881.

[11] Also relevant is the common law offence of conspiracy. "Unlawful means" conspiracy is an agreement by two or more people to carry out a lawful act by unlawful means (including an agreement to carry out a tortious, but not criminal, act).

3 First term of reference for this report – Supervision & Qualification

Examine and make recommendations as to whether the supervisory regime for receivers in the Companies Act 2014 needs to be strengthened including in relation to the introduction of qualifications for appointment as a receiver to the property of the company and ongoing supervision.

3.1 Qualifications for appointment

There are no positive qualification requirements set out in the Act. The only qualifications that the law requires of receivers are negative, i.e. certain persons are barred from becoming receivers.

Section 433 (1) of the 2104 Act provides that none of the following persons can be appointed as a receiver:

> *(a) an undischarged bankrupt;*
> *(b) a person who is, or has been within 12 months of the commencement of the receivership, an officer or employee of the company;*
> *(c) a parent, spouse, civil partner, brother, sister or child of an officer of the company;*
> *(d) a person who is a partner of or in the employment of an officer or employee of the company;*
> *(e) a person who is not qualified by virtue of Section 433(1) for appointment as a receiver of the property of any other body corporate which is that company's subsidiary or holding company or a subsidiary of that company's holding company or would be so disqualified if the body corporate were a company;*
> *(f) a body corporate.*

Should a receiver subsequently find themselves disqualified by virtue of application of the above after their initial appointment, they have a duty to vacate their position and provide notice in writing within 14 days to the company, the Registrar of Companies, and either the debenture holder or court-depending on the manner in which they were appointed. Failure to provide written notice is a category 2 offence as per Section 433 (6) of the Act.

3.2 Supervision

There is no requirement that a receiver be subject to a supervisory regime or be a member of a regulated professional body. While the majority of those undertaking work as a receiver will be accountants or solicitors, and therefore members of a professional body, they will only be subject to oversight insofar as their work as a receiver is covered by the remit of those bodies.

Section 448 of the Act requires that any disciplinary committee or tribunal of prescribed professional bodies whose members conduct receiverships are required to notify the Director of Corporate Enforcement in certain circumstances, for example, where a member of that body has not maintained proper records or is suspected of having committed a category 1 or 2 offence as set out in section 870. Furthermore, the Director of Corporate Enforcement can exercise a supervisory role over the activity of receivers insofar as he or she deems it necessary or appropriate in the discharge of their functions under the Act.[12]

3.3 Previous recommendations of the Company Law Review Group

In Chapter 13 of its first report, set out in Appendix B of this Report, the CLRG observed that all liquidators, examiners and receivers should be;

> *(i) competent to undertake insolvency work and knowledgeable of the Companies Act*
> *(ii) independent of the parties and able to work impartially;*
> *(iii) insured or bonded against loss through fraud, or malpractice;*
> *(iv) subject to some form of oversight and monitoring both generally and in relation to individual cases to assure continuing competence and propriety of actions and decisions;*
> *(v) diligent, meticulous and scrupulous in their work, and possessed of a sense of urgency in the performance of their duties; and*
> *(vi) able to assess risk and conduct their affairs in a cost-effective way.*

The Group believed that the justification for requiring insolvency practitioners to possess such skills is the fact that their work will involve them in situations whereby they are required to realise and distribute assets that are beneficially owned by others, whether creditors or shareholders.

In examining the supervision of insolvency practitioners, the establishment of a statutory licensing or qualification scheme for liquidators and receivers was considered. It was accepted that a greater level of regulation and oversight was in the public interest:

> *"The Review Group believes that a system for regulating insolvency needs to have the confidence of the general public, creditors, shareholders and the courts. That requires the setting of clear standards for the regulatory body and that these are maintained through systems of accountability and openness and of oversight on behalf of the general public. The*

[12] Section 949 (1)(e) Companies Act 2014.

Review Group is conscious that neither independence within the body nor oversight of it requires multi-levels of bureaucracy imposing substantial costs on insolvency practitioners (and therefore on creditors) or on government."

In 1998, the McDowell Report recommended that, as part of its very first work programme, the CLRG should consider the establishment of a statutory licensing or qualification scheme for liquidators and receivers.[13] In 2001, the CLRG addressed the issue in detail and outlined that a regulatory framework providing for the setting, testing and monitoring of standards should provide for:

"(a) greater confidence in the capability of liquidators to undertake the administration of insolvencies;
(b) greater confidence in the proper exercise and discharge of powers; and
(c) greater assurance against abuse and misuse of the system."[14]

The CLRG concluded:

"The key principle is that a regulatory framework should provide assurance as to the necessary level of competence in those administering insolvencies, to ensure the efficiency, effectiveness and integrity of, and confidence in, the insolvency system".[15]

The CLRG recommended that a system of regulation should be introduced and put forward a range of proposals with regard to the operation of such a system. In particular, it stated that:

(i) The appropriate route to take in respect of the regulation of insolvency practitioners was to provide for regulation through the medium of recognised professional bodies (i.e. the professional accountancy bodies and the Law Society).
(ii) The then proposed Irish Auditing and Accounting Supervisory Authority (which had not yet been established) should be involved in the monitoring of recognised professional bodies (including the Law Society).[16]
(iii) The recognised professional bodies should be required to devise a specialised standard/qualification in insolvency practice in order to practise as such.

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[13] *McDowell Report*, para 4.37.

[14] Company Law Review Group, *First Report* (2001), para 13.72.

[15] Company Law Review Group, *First Report* (2001), para 13.72.

[16] The Report stated that such monitoring should occur in the same manner as IAASA would monitor members of the recognised accountancy bodies when acting as auditors.

(iv) Insolvency practitioners should be required to have sufficient professional indemnity cover.

The recommendations of the report were given effect in part in the 2014 Act, in relation to liquidators and examiners, which will be examined below.

3.4 Liquidators & Examiners

In contrast to receivers, the 2014 Act introduced, for the first time, a requirement that a person acting as a liquidator or examiner must meet certain minimum qualifications and be subject to supervision. The new regime, which has been described as "*an important and welcome change in Irish law*",[17] requires that a prospective liquidator:

1) holds certain qualifications;
1) puts appropriate professional indemnity insurance in place; and
2) is not disqualified from acting as a liquidator.

Section 519 provides that a person is not qualified to act as an examiner of a company unless he or she would be qualified to act as the company's liquidator[18].

4.4.1 The Requirement to Hold Certain Qualifications

Section 633(1) states that a person will only be qualified for appointment as liquidator of a company if they fall into one of the following five categories:

Categories of liquidators	
Category 1	members of a prescribed accountancy body
Category 2	practising solicitors
Category 3	members of another professional body recognised by the Supervisory Authority
Category 4	persons qualified under the laws of another EEA state
Category 5	persons with practical experience of windings up and knowledge of the relevant law.

The provisions of the **first category** and **second category**, whereby practising accountants and solicitors are recognised as qualified to act as liquidators, reflect the CLRG's observation that these practitioners are particularly well-placed, by virtue of their experience and qualifications, to act as liquidators.[19] This speaks to the CLRG's view that:

[17] Lynch Fannon, 'Insolvency and Rescue', *Guide to the Companies Act 2014*, (Bloomsbury Professional, 2015) Chapter 7, para 7.089.

[18] However, Section 519 does not require an examiner to put in place professional indemnity insurance.

[19] Company Law Review Group, *First Report* (2001), para 13.9.5.

> *"[It is] essential that, through an accountancy or other qualification or degree or through experience, [that] a liquidator is able to demonstrate a competence in legal, accounting or business issues likely to be involved in an insolvency."*[20]

The majority of practising liquidators will be sourced from **Category 1** and **Category 2** (with practitioners from the former category having a sizeable majority over the latter). However, in making provision for three additional categories of qualified individual, the legislation has maintained a degree of flexibility with regard to future developments in this area which may arise as a consequence of EU membership.

The **third category** of individual eligible for qualification as a liquidator under section 633 is a member of "*such professional body as the Supervisory Authority may from time to time recognise for the purposes of this section*".[21] This provides a simple mechanism for adapting the legislation if an alternative professional body is identified as suitable to act as a liquidator. It is worth noting, however, that it is rare for a body from outside the accounting and legal spheres to be granted this type of recognition.[22] The UK Insolvency Service, for example, was conferred with similar powers under the Insolvency Act 1986 but has never sought to use them.[23]

The **fourth category** under section 633 recognises individuals that are entitled, under the laws of another EEA state, to act as liquidator in insolvency proceedings and the qualifications held by, or the circumstances otherwise relating to the person, that entitle him/her to so act are ones that, by virtue of any Community Act, entitle him/her to act as a liquidator in the State.

The **fifth and final category** is a "grandfathering" provision designed to capture individuals who may be suitably qualified to practice as liquidators, by virtue of their experience, but do not fall within Categories 1 – 4. This provision was inserted into the Act to avoid a situation whereby individuals currently practising as liquidators, but who are not members of a recognised professional body or qualified under the laws of another EEA state, are excluded from earning a livelihood.[24]

[20] *Ibid*, para 13.5.2.

[21] The CLRG recommended in 2001 that Irish Auditing and Accounting Supervisory Authority (IAASA) should be provided with the facility to recognise other professional bodies (Company Law Review Group, *First Report* (2001), para 13.9.8).

[22] The Insolvency Service of Ireland has identified qualified financial advisors (in addition to solicitors, barristers and accountants) as a class of individuals entitled to seek authorisation to act as a personal insolvency practitioner. It should be noted, however, that this designation is arguably specifically appropriate to the personal insolvency context (Regulation 4(1)(a)(iv) of the 2013 Regulations).

[23] Section 391 of the 1986 Act.

[24] The CLRG recommended the inclusion of this provision in 2001 (Company Law Review Group, *First Report* (2001), para 13.9.8).

In conclusion, it can be seen that the legislation implements a number of the recommendations made by the CLRG with regard to qualifications. Section 633:

1) designates practising accountants and solicitors as being automatically qualified to act as liquidators;[25]
2) confers IAASA with discretion to recognise professional bodies (other than the prescribed accountancy bodies and the Law Society) as having members qualified to act as liquidators; and
3) makes special provision to extend qualification to practising liquidators who do not fall within the new qualifying categories.

However, the 2014 Act departs from the CLRG recommendations in that it does not:

1) make provision for a statutory licensing process whereby prospective liquidators are obliged to seek authorisation from a regulatory body before being allowed to practice; and
2) require prospective liquidators to obtain a qualification in insolvency, achieved on foot of an examination.

3.4.2 The Requirement to Hold Professional Indemnity Insurance

Section 634 introduces a new requirement, in accordance with recommendations made by the CLRG,[26] that liquidators must hold professional indemnity insurance. The section confers IAASA with an overall supervisory role in relation to professional indemnity matters.

IAASA, acting in accordance with the powers conferred on it by section 634, introduced regulations in March 2016 requiring that insurance policies maintained by a liquidator provide a limit of liability for each and every claim (exclusive of defence costs) of not less than €1,500,000, and provide cover for defence costs.[27]

3.5 United Kingdom

Overall responsibility for insolvency policy in Great Britain (England, Wales and Scotland) rests with the Secretary of State for Business, Innovation and Skills. On a day-to-day level, the Insolvency Service, through its insolvency practitioner policy section, is responsible for overseeing the insolvency regime on the Secretary of State's behalf. Insolvency policy and legislation in Northern Ireland is the responsibility of the Northern Ireland Assembly, although it is similar in virtually all respects to that in Great Britain.

[25] Subject to the proviso that they have adequate professional indemnity insurance in place and are not otherwise disqualified.

[26] Company Law Review Group, *First Report* (2001), para 13.10.1 – 13.10.3.

[27] Regulation 4 of the Companies Act 2014 (Professional Indemnity Insurance) (Liquidators) Regulations 2016 (SI 127 of 2016).

Insolvency practitioners and the recognised professional bodies

Under the provisions of the Insolvency Act 1986, the Secretary of State recognises certain professional bodies, called recognised professional bodies or RPBs, for the purposes of authorising their members to act as insolvency practitioners. Only insolvency practitioners can legally act as office holders in insolvency proceedings: as trustees in bankruptcy; liquidators, administrators and administrative receivers of companies; and supervisors of Individual Voluntary Arrangements and Company Voluntary Arrangements.

The Insolvency Service regulates the RPBs to ensure that the members they authorise are fit to act as insolvency practitioners. The RPBs are independent bodies that make their own membership rules and regulations, but they are required to have in place rules to ensure their insolvency practitioners meet acceptable requirements as to education, practical training and experience. The commitments made by the RPBs are set down in a "Memorandum of Understanding", which records the agreement between the RPBs and the Secretary of State.

One of the main requirements is that individuals must pass the Joint Insolvency Examination to qualify as insolvency practitioners. When they act as an insolvency practitioner the law requires them to have in place a 'bond', a form of insurance, against which a claim could be made if the practitioner acts fraudulently or dishonestly. All insolvency practitioners are also subject to regular monitoring visits (at least once every six years, and more frequently if considered necessary) from their authorising bodies – the Insolvency Service, acting on behalf of the Secretary of State, and the RPBs. Monitors seek to establish that insolvency practitioners are adhering to the legislation, and to accepted standards such as Statements of Insolvency Practice (SIPs), the Insolvency Code of Ethics and the relevant rules and regulations of the authorising bodies.

Monitors from the Insolvency Service visit each RPB on a regular basis (usually at least once in three years) to ensure that the RPB is complying with the Memorandum of Understanding. If any RPB fails to meet the requirements, the matter may be referred to the Secretary of State, which could result in its status as a recognised professional body being revoked. Due to the Insolvency Service's role in monitoring the RPBs, it is often regarded as the "regulator of regulators".

A secured lender in the UK can still appoint a receiver of income, particularly those which are referred to as LPA receivers (Law of Property Act 1925). That receiver need not be a licensed insolvency practitioner. House of Commons briefing papers from 2017 indicate some debate over the regulation of these types of receivers.[28]

3.6 Australia

[28] House of Commons Library Number CBP 7931CPB7931, 16 March 2017 Law of Property Act Receivers and Number CDP-0088 12 April 2017,

In Australia, a prospective corporate insolvency practitioner must apply to the Australian Securities and Investment Commission in a prescribed form and satisfy the Commission that they meet the relevant standards relating to qualifications, experience and competence.[29] ASIC is also charged with all aspects of the regulation of insolvency practitioners. Furthermore, complaints in relation to insolvency practitioners can be made directly to ASIC. ASIC guides persons who have queries and complaints to, in the first instance, raise their concerns with the receiver. However, if this fails to resolve a person's concerns, they may lodge a report of misconduct with ASIC. A report of misconduct can be lodged online.

ASIC considers a complaint against three questions:

1. What is the extent of harm or loss from the misconduct?
2. What are the benefits of pursuing the misconduct?
3. How do other issues like the type and seriousness of the misconduct and the available evidence affect our consideration of the matter?

ASIC states that it receives over 20,000 complaints of misconduct each year regarding liquidators, receivers and administrators, including statutory reports. It should be noted that Australia had a population of 24.6 million in 2017.

Complaints regarding bankruptcy practitioners (including bankruptcy trustees, debt agreement administrators and trustees of a Personal Insolvency Agreement) are dealt with by the Australian Financial Security Authority.

Section 423 of the Corporations Act 2001 provides for the supervision of controllers – a term which includes a receiver. Where the Court or ASIC has a concern, or where a concern is brought to their attention, regarding the performance of their duty by a controller, the Court or ASIC may inquire into the matter and may take such action as it thinks fit.

Review Group deliberations

Contractual nature of receivership

The Review Group considered the contractual nature of receivership, and that the appointment of a receiver is a private contractual remedy. However, it was concluded that given a receiver's potential impact on other stakeholders, it is desirable that they have a minimum level of competency and are subject to ongoing supervision.

Unintended consequences

The Review Group also considered the potential implications any qualification requirements may have on individuals acting as receivers outside of the accountancy or legal profession. It was noted that anecdotal evidence would suggest an increase in

[29] Applicants must also demonstrate that they are fit and proper persons, carry appropriate insurance and are not otherwise disqualified. Referee reports and the statutory fee must also be provided.

the number of non-accountancy professionals being appointed to the role, particularly on foot of fixed charges over rental properties. It is not the intention of the Review Group to preclude any suitably qualified person, with the relevant experience, from acting as a receiver purely on the basis that they are not a qualified accountant or solicitor. It was noted that section 633 of the Act took account of this very issue for experienced liquidators through category 5 qualifications, otherwise known as 'grandfathering provisions', and that a similar provision could be replicated in respect of receivers.

EU Developments

The Council and the Parliament have reached agreement on a Proposal for a Directive of the European Parliament and of the Council on preventative restructuring frameworks, second chance and measures to increase efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU[30] . Once the linguistic revision is completed, the text will be formally adopted by the two institutions and published in the official journal.

The Directive contains provisions in relation to practitioners in procedures concerning restructuring, insolvency and discharge of debt and will require them to receive suitable training and have the necessary expertise for their responsibilities. It will also mandate that 'insolvency practitioners' should be subject to oversight and regulatory mechanisms to ensure that their work is effectively supervised. Member States will also be required to ensure that the remuneration of practitioners is governed by rules consistent with the objective of an efficient resolution of the procedures. The question of whether the provisions of the Directive will be applied to receivers is an issue which will require consideration in the context of transposition of the Directive, thus rendering the Review Group reluctant to comment specifically on the Directive within the context of its recommendations.

Previous recommendations of the CLRG

The Review Group looked at previous recommendations of the CLRG in relation to the introduction of a statutory licensing system for insolvency practitioners. While it was not possible for the Review Group to fully analyse these recommendations within this report, it was viewed as a matter that the Minister may wish to further consider or refer back to the Review Group as part of a wider exercise.

Review Group recommendation

It is recommended that, following consultation with stakeholders, the qualification requirements of section 633 and professional indemnity requirements of section 634 of the Act be amended to apply, as appropriate, to receivers. This could be done in one of the following three ways:

[30] https://www.consilium.eurpoa.eu/en/press-releases/2018/12/19eu-agrees -new-rules-on-business-insolvency?

1. By adding ‘Receivers’ to Section 633 (1) and amending the remainder of the section/s accordingly; or
2. By inserting a new provision into Part 8 of the Act based on section 633 and amended as appropriate to refer and apply to receivers; or
3. Providing in part 8, as is done in section 519 that a person shall not be qualified to be appointed as receiver unless they would be qualified to act as a liquidator.

Consequent upon the recommendation that receivers have a minimal level of competency it is desirable that the competency requirements be supervised.

It is further recommended that the regulation requirements for liquidators (which are, in effect, consequent upon the qualification for appointment by reference to section 633 of the Act) be amended to apply, as appropriate to receivers.

It is recommended that receivers be required to hold professional indemnity insurance in line with the requirements for liquidators as per section 634.

4 Second term of reference for this report - Information

Examine and make recommendations as to whether receivers should be obliged to provide information to the company on the management of the business and progress of the receivership, (beyond the abstract referred to in section 430 and 441) particularly where a receiver has been appointed over all or substantially all of the property of a company. If a receiver is a receiver/manager should there be a requirement for the receiver to supply information to the borrower and potentially other creditors, on the progress of the receivership.

4.1 Summary of current position under the Act

The Registrar of Companies must be notified of the appointment of a receiver. [31]There is an obligation on receivers to send periodic abstracts, showing receipts and payments, asset disposal and asset valuation, to the Registrar of Companies.[32] Breach of the requirements is a category 4 offence.

Where a receiver of the whole, or substantially whole, of the property of a company is appointed on behalf of the holders of any debentures of the company secured by a floating change, then:

(a) The receiver must send notice to the company of his or her appointment
(b) A statement as to the affairs of the company shall be submitted to the receiver 14 days after receipt of the notice of his or her appointment
(c) Within 2 months of receiving this statement the receiver will send to;
  (i) the Registrar;
  (ii) the court;
  (iii) the company;
  (iv) any trustees for the debenture holders on whose behalf he or she was appointed; and
  (v) so far as he or she is aware of their addresses, all such debenture holders;

  a copy of the statement and any comments he or she feels appropriate to make on it.[33]

The receiver must also send, 30 days after each six-month period of the receivership, an abstract in the prescribed form showing:

[31] Section 436.

[32] Section 441.

[33] Section 430(1).

(a) the assets of the company of which they have taken possession, their estimated value and the proceeds of sale of same;
(b) his or her receipts and payments during that period of 6 months; and
(c) the aggregate amounts of his or her receipts and of his or her payments during all preceding periods since his or her appointment.[34]

Section 431 outlines the contents of the statement required by section 430.

A receiver must also report to the Director of Public Prosecutions and to the Director of Corporate Enforcement if it appears to him or her that a past or present officer or member of the company has been guilty of an offence in relation to the company.[35] The Director of Corporate Enforcement may also request the production of a receiver's books.[36]

4.2 *Compliance*

There is no statistical information in relation to the rates of compliance of receivers with regard to their filing obligations under the Act. However, we understand from the CRO that there has been a surge in the filing of abstracts since a campaign was undertaken last year to ask liquidators and receivers to update the register.

Please see below table of figures:

Year	E9 Form (receivers abstract)
2014	3,349
2015	4,899
2016	5,148
2017	5,113
2018	7,280

There were 2,387 companies with a receiver standing appointed over an asset in the company as at end of 2018 and with a receiver due to file a return every six months the CRO should be receiving 4,774 abstracts a year. One could infer from the figures that any default in compliance is being somewhat remedied.

[34] Section 430(3).

[35] Section 447.

[36] Section 446.

Year	E11 form (cessation of receivership)
2014	129
2015	200
2016	400
2017	550
2018	504

The increase in E11's being filed would also indicate an effort on behalf of receivers and liquidators to update the register.

4.3 Enforcement of duty of receivers to make returns

Section 442 of the Act gives the Court a statutory jurisdiction to make an order directing a receiver to remedy a default in filing. The application can be made by any member or creditor of the company. As observed in previous reports, it should be noted that recourse to the courts is not always proportionate or indeed possible for some stakeholders.

4.4 Other statutory provisions

It is noted that section 418 of the Act requires companies to keep copies of instruments creating any charge and that sections 216 and 217 of the Act provide for inspection of registers and documents (including charges) by members and creditors. There is little if any evidence of how these sections are operating.

4.5 Case law

The Court will find a receiver is under a duty to account to the company. The nature and extent of this duty is fact specific.

The principal Irish case is the unreported judgment of Costello J. in *Irish Oil and Cake Mills v Donnelly*[37]. The Plaintiffs were two limited companies, 'Irish Oil and Cake Mills' & 'Irish Oil and Cake Mills (Manufacturing)', which owed some £1.9 million to a debenture-holder. The debenture-holder held a floating charge and appointed a receiver and manager over the assets of the company. The second Plaintiff held an interest in a subsidiary, which it was suggested should be sold to discharge the debts of the company. A dispute arose as to whether the sale of the subsidiary was at an undervalue. The Plaintiffs issued proceedings against the Receiver and sought an injunction. By agreement, the parties adjourned this injunction, and the Plaintiffs' solicitors wrote to the receiver seeking detailed accounts and information on the

[37][1986] WJSC-HC 798.

receivership. However, a newspaper article appeared stating that an offer had been made for the Plaintiffs' business[38]. The Plaintiffs applied for a fresh injunction directing the Receiver to furnish them the information requested, a direction that the Receiver should furnish any information they desire in the future, and a direction that no assets should be disposed of pending the furnishing of this information.

The trial judge noted, at the hearing of the injunction, that this last direction was largely abandoned by the Plaintiffs, and no evidence was adduced on whether the Receiver was proposing to sell an asset at an undervalue. This was despite a great deal of evidence having been adduced by both parties concerning the conduct of the receivership and the Plaintiffs' financial position.

The Plaintiffs, for their part, claimed that it was a matter of general principle that a receiver is bound to furnish such information. Reliance was placed on the contractual relationship between the parties and the judgment of the English Chancery Court in *Smiths Ltd. v Middleton* in support of this claim.[39] Mr Justice Costello rejected the claim under the contractual ground as well as an additional claim that the receiver was obliged to account to the company because it was 'under a duty of care' to the company.

Rather, Costello J., held that there was a duty and it was an equitable one:

> *It cannot be said that a Receiver/Manager is under <u>no</u> duty to account to the Company…nor did the Defendant so urge in this case. The extent and nature of the duty of the accounts he must furnish will depend on the facts of each individual case.*[40] [emphasis in original]

In *Smiths Ltd. V Middleton* Blackett-Ord VC analysed the relevant clause of the debenture, which stated that the receiver was an agent of the company. He reasoned:

> *…I think there are at least two good reasons why the receiver is accountable to the mortgagor, the first being that he is the mortgagor's agent, a peculiar sort of agent of course, but nevertheless an agent, and an agent is prima facie an accountable party; and, secondly, because…where the receiver is directed to pay the residue to the person entitled, that he must have kept an account so as to be able to know and demonstrate to others, particularly presumably the mortgagor, what the residue is.*[41]

[38] It is not clear whether business refers to the interest in the subsidiary or to the whole business.

[39] [1979] 3 ALL ER 842.

[40] [1986] WJSC-HC 798, at 811.

[41] [1979] 3 All ER 842, at 846.

The receiver had contended that where a borrower was a company under a debenture governed by the Companies Acts the company had no equitable right to call on the receiver, as its agent, to account to it because the duty, under the then UK equivalent of Chapter 2 of Part 6 of the 2014 Act, imposed on the directors of the company (who remained in office to keep accounts, taken with the receiver's duty to make returns to the Registrar under the then UK equivalent of section 430 of the 2014 Act, replaced any equitable right the company might have to call on the receiver to account.

Blackett-Ord rejected this submission, holding that precedent clearly stated the company was entitled to proper accounts from the receiver.[42] As a consequence, he granted the company the relief they had sought and ordered that full accounts be delivered.

Laffoy J., reviewing the case law on the duties of receivers in *Moran v Hughes*[43], observed about *Smiths*:

> *The headnote in the report accurately summarises the decision of Blackett-Ord V.C. The headnote…stated:*
> *"A receiver appointed under a debenture providing for him to be the agent of the debtor company, in practice ran the company on behalf of its directors and was, therefore, answerable to the company for the conduct of its affairs. That being so, the receiver was under a duty to keep full accounts…and to produce those accounts to the company when required to do so. In order to enforce that right the company required a remedy beyond that provided in* [s.322]. *The receiver would be treated as an accounting party to the company."*[44]

In *Moran v Hughes,* Laffoy J. adverted to the strong suggestion that the Plaintiff's claim was brought with an ulterior motive and, ultimately refused the Plaintiff's claim on this basis, as well as his failure to demonstrate any prejudice.

Looking over the case law, it is suggested that while there is a duty on receivers to account to the company and give appropriate information, the extension of this duty to provide more comprehensive detail is limited to those cases where the company/applicant can show prejudice or a need for the information and where the application is brought *bona fide.*

[42] *Ibid*.

[43] [2013] IEHC 522.

[44] *Ibid*, p. 29

4.6 Preferential Creditors

The Review Group has had the benefit of hearing directly from the Revenue Commissioners on issues relating to the provision of information to preferential creditors.

Over the last 5 years Revenue has been involved in 1,450 corporate receivership cases. Approximately 65% of cases are appointed over fixed charges only.

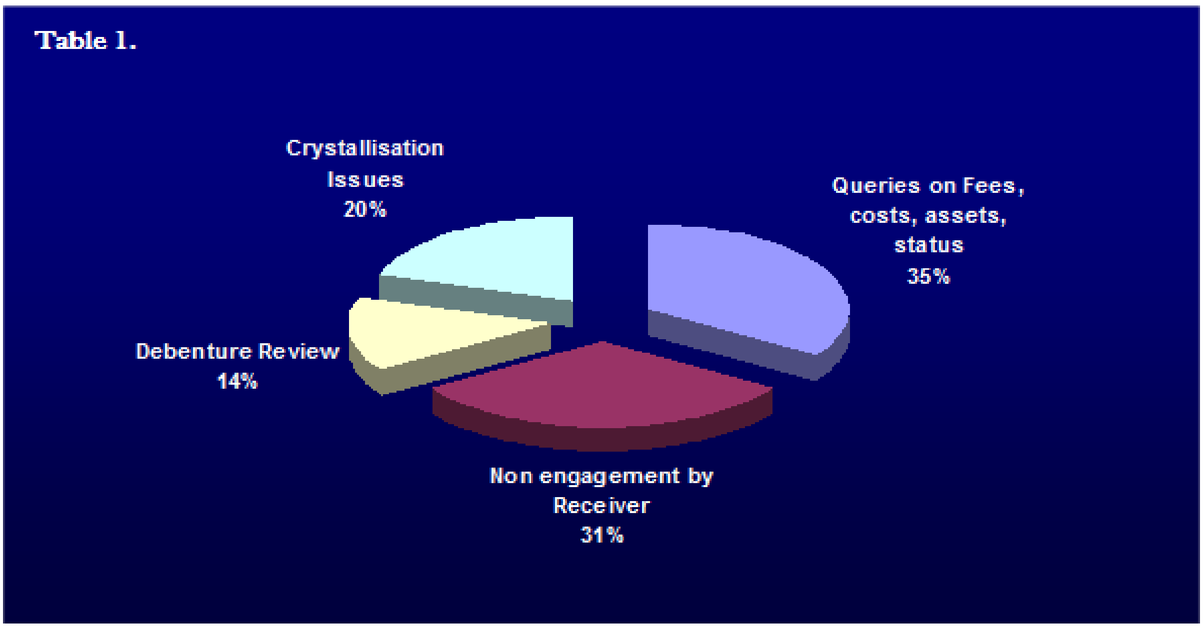
Currently there are 260 receivership cases (64% are with four accountancy firms) actively being worked within Revenue's Insolvency Unit. In 184 (71%) of those cases a receiver was appointed more than 5 years ago.

Revenue's main difficulties with receivers can be categorised under the following 3 headings:

- **Lack of information** – requests by Revenue for information to enable the case to be finalised are not fully addressed by receivers.
- **Non-engagement** – no response from receivers to Revenue contact.
- **Fee challenges** - the level of the fees relative to (i) the work performed (ii) the grade performing the work (iii) the hours spent carrying out the work.

Issues have arisen for Revenue in relation to the apportionment of fees between fixed and floating charge realisations in the cases where there is both a fixed and floating charge over the borrower's assets.

Since 2014 there have been 35 referrals to the Revenue Solicitor's Office (RSO) for assistance in dealing with receivership cases. Table 1 below breaks down the reasons for those referrals.



In order to remedy these issues, a subcommittee of the Tax Administration Liaison Committee [TALC] was established in 2013 to agree a consistent approach to the administration of receiverships between Revenue and practitioners. Guidelines were developed in relation to a number of aspects, including the provision of information to Revenue by receivers. This was necessitated by, among other things, the changes to VAT on property which were introduced in 2008 and required a VAT history of the property. The *Guidelines on the Tax Consequences of Receiverships and Mortgagees In Possession* were first published in October 2015 and were revised in June 2016 and November 2017. A copy of the Current (November 2017) guidelines is attached at Appendix C.

Section 4 of the Guidelines sets out "Information to be Provided on Appointment":

> *Within 7 days of appointment, a receiver over corporate assets should forward the following information to Revenue, as appropriate, using the secure online facility MyEnquiries (please use the facility within MyEnquiries to input the following Collector General's Division email address: insolvency@revenue.ie along with the tax reference number of the borrower, if known):*
>
> - *Name and contact details of receiver*
> - *Name and contact details of borrower*
> - *Tax reference of borrower (if known)*
> - *CRO number of borrower*
> - *Deed of Appointment, specifically highlighting date of appointment*
> - *Copy of the Debenture/loan agreement under which appointment was made*
> - *Details of assets appointed over, in as much detail as possible e.g. folio numbers, bank details etc.*
> - *The nature of the appointment over each asset – Fixed or Floating*
> - *Whether the entity is continuing to trade outside of the receivership*
> - *Whether the receiver will continue to trade and the entity under which this trade will be carried on (CRO and tax reference number).*

The Insolvency Unit of Revenue have advised that this information is never received within the 7-day timeframe.

It is noted that while the proportion of Revenue cases that have been escalated internally to the Revenue Solicitor's Office[45] is very small when compared to overall numbers, it is more significant when compared to active cases.

Review Group deliberations

Common sense suggests that parties directly affected by the acts of the receiver should be entitled to certain basic information.

There are circumstances and points in time where that information should be 'live', as opposed to, if compliant, 6-month intervals. The Review Group considered the wide range of interests to be balanced. For example, it is worth re-iterating that the appointment of a receiver arises as performance of part of a contractual relationship under given circumstances. It may not be appropriate or proportionate for all interested creditors or parties to be given a statutory entitlement to obtain an account from a receiver.

While further consideration should be given to the adequacy of the current regime, including compliance and enforcement thereof, it is noted that the TALC guidelines resulted from consultation between Revenue and the Receivership sub-committee of TALC and the Banking and Payments Federation Ireland (BPFI).

There were a range of views expressed in the deliberations of the Review Group, ranging from advocating full, regular disclosure to all stakeholders to selective disclosure to potentially affected creditors only. It commented that there is a potential that imposing additional requirements may increase costs.

However, there was a great deal of weight given to the information provided by Revenue as a reflection of how preferential creditors were treated generally in this regard. Given the fact that Revenue have significant resources at their disposal and still encounter these issues, it can be inferred that other preferential creditors such as employees experience similar difficulty, potentially to a greater extent.

Review Group Recommendation

While further consideration should be given to the adequacy of the current regime, including compliance and enforcement thereof, the Review Group considered the provision of information by a receiver in three stages: on appointment, during the receivership and at its conclusion. The Review Group recommends as follows:

[45] 35/1450 cases dealt with by Revenue have been escalated to their Solicitor's Office. However, when compared to active cases, this is a much more significant number representing 35/260 cases.

- Insofar as it does not already provide for, the form E8 should be amended to include the following information on appointment:
    i. Detail of the nature of the asset/s over which the receiver is appointed;
    ii. The nature of the appointment over each asset;
    iii. The deed of appointment; and
    iv. Information regarding future trading.

- Section 216(10) to be extended to receivers, where appointed. Should the company not comply with a request to inspect instruments creating a charge, the onus can be placed on the receiver. The request must be satisfied within 7 days.
- The abstracts filed with the Registrar as per section 430 and 441 should be sequenced to align more closely with the sale of assets for the benefit of creditors and provide sufficient detail in relation to fees. Within 7 days of completing the sale of any asset, an abstract must be filed with the Registrar in the prescribed form detailing-

    i. The asset/s of the company which they have sold and the proceeds of sale of same; and
    ii. His or her receipts and payments in relation to that asset.
- Insofar as it does not already provide for, the form E11 should be amended to incorporate a time limit of 7 days following cessation.

The Review Group notes that non-compliance of CRO filing is a Category 4 offence and non-adherence to section 216(10) is a Category 3 offence.

5 Third term of reference for this report - Fees

Notwithstanding section 444 of the Companies Act 2014 in relation to the court's power to fix a receiver's remuneration, and notwithstanding that the receiver's remuneration may be fixed in an instrument, examine and make recommendations as to whether there should be a requirement for greater transparency in relation to receivers' fees for the information of both the company (to whose property the receiver has been appointed) and other creditors, in particular, preferential creditors.

5.1 Fees

While a receiver's fees will typically be set out in a debenture, Section 444(2) of the Act provides that the High Court may fix the amount to be paid by way of remuneration. The courts can exercise this power on the application of a liquidator, creditor or member of a company in respect of a receiver of the property of the company, appointed under powers contained in any instrument-such as a debenture.

Section 444(3) provides that the Court's power shall, where no previous order has been made in relation to the matter:

> *(a) extend to fixing remuneration for any period before the making of the order or the application for it;*
> *(b) be exercisable notwithstanding that the receiver has died or ceased to act before the making of the order or the application for it; and*
> *(c) If the receiver has been paid or has retained for his or her remuneration for any period before the making of the order any amount in excess of that fixed by the court for that period, extend to requiring him or her or her personal representatives to account for the excess or such part of it as may be specified in the order*

The Court may also amend the order on an application made by the liquidator or by any creditor or member of the company or by the receiver.

5.2 Case law

In *Re Red Sail Frozen Foods Limited*, the Laffoy J. in the High Court considered the calculation of receiver's fees and the practicalities of fixing their remuneration:

> *"There is no mechanism in this jurisdiction whereby the court can refer the measurement of remuneration and costs, charges and expenses (other than legal costs) in respect of which the Receiver is entitled to reimbursement of out of the assets collected by him to a venue or forum more knowledgeable and experienced and, in short, better equipped to deal with the issue than the court. In practical terms, in this type of situation, the court relies on some party who effectively performs a role similar to an amicus curiae, be it the Revenue Commissioners or some*

other representative creditor, or a regulator such as IFSRA or the company. In this case, the solicitors and counsel for the Companies performed that role conscientiously and effectively and raised the matters of which the court needed to be apprised. However, in reality, I do not think, even with further information and, in particular, information linking the hours claimed in appendix 2 to the Report with the various tasks performed by the Receiver, I would be in any better position to adjudicate on the claim.[46]*"*

It was further stated:

"I am satisfied that the Receiver conducted the receivership in a proper and bona fide manner and that the basis on which the remuneration is claimed conforms with the normal practice in the accountancy profession. Accordingly, on that basis, subject to one qualification which I will outline when considering the third issue, I am prepared to adopt the course adopted by Geoghegan J. and make an order under s. 24(6) of the Act of 1881, as applied and extended by the debentures, allowing the Receiver such rate higher than 5% which results in his being lawfully entitled to remuneration by way of commission at the rate which will entitle him to the following sums out of the assets of the Companies:

(a) in the case of Frozen Foods €841,283;

(b) in the case of Kilmore €211,450; and

(c) in the case of Exports €33,324.

On the basis of the manner in which I have construed the debentures, the out of pocket expenses fall outside the commission, but are payable separately.

Similarly, the legal costs fall outside the commission and are payable separately. It was accepted by counsel on behalf of the Receiver that on that basis the court does not have to approve the legal costs. Unlike the other elements of the Receiver's claim, there is a mechanism for having the appropriateness of the legal costs dealt with – having them taxed by a Taxing Master of this Court. However, that is a matter for the parties inter se.

Finally, I should make it clear that the second issue is concerned only with the entitlement of the Receiver to remuneration and costs and the measurement of the remuneration. It is not concerned with the issue of priority of distribution out of the assets of the Companies."

A receiver's fee can be contrasted with legal fees, where a specialist body oversees and scrutinises the legal costs charged in a case or transaction. The High Court Taxing Master (to be replaced shortly by the Legal Costs Adjudicator) can reduce legal bills, reject them or make a finding that such costs charged were grossly excessive. Similarly,

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[46] *In Re Red Sail Frozen Foods* [2007]2 IR 361, at 383.

disciplinary action can follow where a practitioner charges fees which are grossly excessive. Receivers have no such oversight body[47] and would not be subject to such disciplinary action.

Competition and the market mechanism is a poor restraint on receiver's fees. Like legal costs, the expenses and work required by a certain case is very difficult to price at the outset, and comparisons of skill and experience are not easy to make. The agency relationship of contractual receivers introduces further complications as the remuneration of the receiver is imposed on the creditor, rather than the debenture-holder. This lessens the incentive for the debenture-holder, who appoints the receiver, to seek out the most competitively priced.

More generally, there have been queries as to the cost effectiveness of receivers. The National Asset Management Agency, for example, has stated it is cheaper to pay developers/NAMA creditors to manage properties rather than appoint a receiver over the property in question.

5.3 Liquidators

While the Act does not provide comprehensive guidelines in relation to factors which should be considered in setting out a receiver's fee, it does outline the factors which must be considered when setting out a liquidator's fee.

Section 648(9) provides that the following should be taken into account:

> *(i) the time properly required to be given by the person as liquidator and by his or her assistants in attending to the company's affairs;*
> *(ii) the complexity (or otherwise) of the case;*
> *(iii) any respects in which, in connection with the company's affairs, there falls on the liquidator any responsibility of an exceptional kind or degree;*
> *(iv) the effectiveness with which the liquidator appears to be carrying out, or to have carried out, his or her duties; and*
> *(v) the value and nature of the property with which the liquidator has to deal.*

5.4 The diminishing role of the Court in determining liquidators' fees

The Act was designed to make liquidations, and court liquidations in particular, less dependent on Court intervention. As such, Section 646 of the Act provides that the liquidator's entitlement to remuneration may be expressed to be—

> *(a) by way of a relevant percentage,*

[47] A receiver who is also a member of a regulated professional body (such as an accountant, solicitor, barrister etc.) will be subject to oversight from those bodies insofar as their work as a receiver is covered by the remit of those bodies. Yet, there is no requirement that a receiver be a member of any professional body or have any such qualifications.

(b) by reference to time expended in the conduct of the winding up, or

(c) otherwise by reference to any method or thing.[48]

Section 646 (2) mandates that the liquidator's fees are intended to be approved by agreement with a committee of inspection, or failing that by resolution of the creditors.

The Court's role is limited to fixing the remuneration of the provisional liquidator (section 645) and the remuneration of the liquidator only when the committee of inspection and/or the creditors fail to agree.

The complexity of the task can be discerned from the recent decision of Finlay Geoghegan J in *Custom House Capital*[49], notwithstanding the clear legal principles to be applied and the participation of a *legitimus contradictor*. Of note is the following passage:

> *"First, the onus is on the liquidator to satisfy the Court, on the evidence put before it, that the amount he is seeking is reasonable remuneration for the work done by him. However, the Court, in determining whether or not a liquidator has put before the Court sufficient evidence or should be required either to produce additional evidence or have certain fees disallowed by reason of the absence of relevant evidence to justify same, should bear in mind the balance required which I identified in Re Home Payments Ltd. (in liquidation) [2013] IEHC 507, [2013] 4 I.R. 141 ("Home Payments") to provide the Court with "sufficient information" to enable it to "form a view as to the appropriate allowable fees whilst not adding unnecessarily to the cost of the liquidation".*

In *Mouldpro*[50], Whelan J. at para. 102, cited Finlay Geogheghan J. in the earlier case of *Sharmane Limited* [51]as follows in relation to the practise of seeking measurement of costs based upon hourly rates and hours worked:

> *"This may, of course, comprise one element to be taken into account in determining what reasonable remuneration is. However, in my view, it should not be the only element, and in determining what is reasonable remuneration the court must also have regard to the nature of the work carried out, the complexity of the work and the importance or value of the work to the client. These would be common elements taken into account by professionals charging or seeking to agree fees with clients."*

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[48] Section 646(1).

[49] [2018] IEHC 652.

[50] [2018] IECA 88.

[51] [2009] 4 IR 285.

Review Group deliberations

The Review Group again considered that common sense would indicate that parties affected by the fees of the receiver should be entitled to certain basic information.

There is a need, however, to balance a range of interests:

- Sophisticated purchasers of professional services;
- Interests of affected parties;
- The public interest
- Minimal interference in contractual relations; and
- Not adding unnecessarily to the cost.

Recommendation of the Review Group

While further consideration should be given to the adequacy of the current regime as regards certain stakeholders, including creditors, having regard to the contractual nature of the engagement, and having regard to Section 440 and Section 646 of the Act, the following recommendations are made:

1. Part 8 of the Act should be amended to provide that a receiver has an entitlement to remuneration upon the terms set out in the instrument under which he is appointed or otherwise agreed or fixed and such an entitlement may be expressed to be-
    i. By way of a relevant percentage,
    ii. By reference to time expended in the conduct of the receivership, or
    iii. Otherwise by reference to any method or thing.

2. Where a receiver is appointed on behalf of the holders of any debentures of the company secured by any charge created as a floating charge by the company the receiver should provide within a short time frame to the company and to any member or preferential creditor who seeks it, information referable to the receiver's fees. The information provided should be sufficient enough so that the overall structure and amount of fees are substantiated and that their apportionment between assets realised explained.

3. Where a Court is required to fix a receiver's remuneration under Section 444 of the Act, the following shall be taken into account:
    i. The time expended by the receiver in the conduct of the receivership;
    ii. The complexity of the case;
    iii. If an exceptional degree of responsibility falls on the receiver in connection with the company's affairs;
    iv. The effectiveness with which the receiver conducts the receivership; and

v. The value and nature of the property the receiver is dealing with

6 Fourth term of reference for this report – Further Consideration

Specify any other recommendations the CLRG consider appropriate.

The Department should consider the creation of a statistical database on all insolvencies so that future legislative decisions can be aided by statistical analysis of the different types of cases.

APPENDIX A

Members of the Insolvency Committee

Barry Cahir	Beauchamps, nominee of the Irish Society of Insolvency Practitioners
Helen Curley	Department of Business, Enterprise and Innovation (Ministerial Nominee)
Irene Lynch Fannon	University College Cork (Ministerial Nominee)
Michael Halpenny	Nominee of the Irish Congress of Trade Unions
Rosemary Hickey	Office of the Attorney General (Ministerial Nominee)
John Loughlin	Nominee of Consultative Committee of Accountancy Bodies Ireland (CCAB-I)
Vincent Madigan	Formerly of Department of Business, Enterprise and Innovation (Ministerial Nominee)
Moya Moore	Office of the Attorney General, co-opted by the Committee
Kevin O'Neill	Nominee of the Courts Service
Paddy Purtill	Revenue Commissioners, co-opted by the Committee

APPENDIX B

Chapter 13 of the First Report of the Company Law Review Group, 2000-2001

THE REGULATION OF INSOLVENCY PRACTITIONERS

13.1 Introduction

13.1.1 Among the issues the Review Group was asked to consider was the licensing and/or regulation of insolvency practitioners in Ireland. Current figures from the CRO indicate that there are 1,220 liquidators carrying out a total of 4,541 liquidations between them. Most liquidators are engaged in a single liquidation, with a relatively small proportion engaged in multiple liquidations.[52] Only 80 individuals are liquidators to ten or more companies. It is difficult to ascertain the average duration of liquidations or even the amount of funds held in liquidations although it should be noted that all liquidators of liquidations of more than two years' duration are required to file accounts of receipts and payments in the CRO. In addition to liquidators, the regulation of insolvency practitioners would also extend to examiners and receivers. The Group approached the issue of whether a licensing system and/or regulation should be introduced in Ireland with an open mind.

13.2 Approach of the Review Group

13.2.1 The Review Group received a number of submissions on the regulation of insolvency practitioners generally and of liquidators in particular. Most submissions call for statutory or statute-backed licensing for insolvency practitioners. There is also some support for utilising recognised professional bodies in a regulatory capacity as in the UK. The Group notes that many of the calls for regulation come from what might be termed "suppliers" to the market, and because of this submissions were the subject of rigorous scrutiny.

13.2.2 The Revenue Commissioners also made the case to the Review Group for licensing insolvency practitioners and for a bonding system to cover all liquidations, not just court appointed ones.

13.2.3 In the course of the Review Group's deliberations on mitigating the effects of strike-off for creditors[53], considered in Chapter 15, the Group came to the

[52] An example of the scale of such multiple-liquidators is seen in Re CB Readymix Ltd; Cahill v Grimes, High Court July, 2001 (Smyth J) where the respondent, an engineer, was disqualified from acting as a liquidator, receiver or examiner of a company for seven years under s 160 of the 1990 Act. In the course of the judgment Smyth J cited the respondent as being "on his own averment liquidator of some fifty companies." It should be noted that this decision is under appeal.

[53] The Review Group considered the situation of creditors in the context of strike-off of companies for failure to file annual returns with the CRO.

conclusion that the lack of a State-funded public interest liquidation service gave rise to a number of problems, which would otherwise be dealt with by such a service, and could exacerbate the consequences of other problems such as strike-off. Accordingly, the Review Group recommends that it be charged with considering the establishment of such a service in its second work programme 2002 to 2003.

13.3 Regulation and competition

13.3.1 In approaching the issue of regulation, the question posed by the Review Group was whether competition alone was a sufficient regulator of insolvency practitioners. The Group is aware that a regulatory framework, with consequent establishment of a standard with which practitioners must comply, and restriction of the right to practise, could increase the costs of a winding-up.

13.3.2 The broader issue of regulation versus competition has been, and continues to be, the focus of examination by the OECD.[54] It is the case that all OECD countries regulate the activities of certain occupations, either directly or by delegating regulatory powers to professional associations. Typically, these regulations govern matters such as entry into the profession, the conduct of members of the profession, the granting of exclusive rights to carry out certain activities and (often) the organisational structure of professional firms. In many countries concerns have been raised that professional regulation has the direct or indirect effect of restricting competition in the market for professional services, raising costs and limiting variety and innovation.

13.3.3 Concerns arise that regulation restricts competition more than is appropriate or necessary, raising the price and limiting innovation in the provision of professional services. In addition, where a professional association is delegated certain regulatory powers, such as the power to discipline its members, concerns arise that professional associations may use these powers as a tool to restrict entry, fix prices and enforce anti-competitive co-operation between its members. In the absence of regulation, however, consumers of a service may be unable to assess the quality of the service being provided to them. The OECD report concluded that as a general rule regulation of professional markets should address market inadequacies using means which least restrict competition.

13.3.4 Sophisticated commercial purchasers of professional services are in a position to assess their own needs and to assess the services they purchase and consequently have less need for regulation of professional services. This is particularly true in the case of receivers who are almost invariably appointed by financial institutions to act on their behalf in the realisation of security granted by companies to be applied in repayment of monies owing. Different

[54] See OECD paper DAFFE/CLP(2000) 2.

considerations apply, however, to both liquidators and examiners. When a liquidator or examiner is needed for reasons of insolvency that company can hardly be said to be operating at its most efficient. In the event of liquidation, corporate or institutional shareholders may be able to look after their own interests. It is, however, the case that regulation should focus on the need to protect small consumers and there is a strong case to be made that the interests of small creditors and shareholders are in need of greater protection. After all, liquidators of companies are fiduciaries who are in control of other persons' money.

13.3.5 When a company is being wound up, the beneficial owners of the company's assets (its creditors and, if solvent, its shareholders) are thought entitled to the legitimate expectation that the person charged with the orderly realisation and distribution of assets in accordance with law possesses the necessary professional expertise to comply with what are, by any standard, sophisticated legislative provisions. There are certain functions that it is reasonable to assume can only be competently performed on a consistent basis by persons with appropriate knowledge and experience. For example, the State could not countenance persons who have no formal medical qualification offering their services to the public on the grounds that the public can choose to avail of their services or those of a qualified medical practitioner.

13.3.6 The Review Group considered whether there was an alternative to regulation through information disclosure. The argument would be that a liquidator would be obliged to provide information on his training and experience and this would, of itself, facilitate an informed choice. The Group concluded, however, that this did not protect small creditors or shareholders sufficiently, as they would not usually be in a position to significantly influence the choice of liquidator. Moreover, unless creditor and shareholder consent is unanimous, can it ever be right that a majority (whether bare or qualified) can agree to the appointment of an insolvency practitioner who lacks the necessary formal qualifications?

13.4 Issues arising in the proposed regulation of insolvency practitioners

13.4.1 The submissions received on the regulation of insolvency practitioners were more concerned with standard-setting than with citing specific issues where liquidations, receiverships or examinerships had not worked effectively. Since no nationwide historical survey which would have led to the compilation of empirical data on these specific issues has occurred to date, the Review Group had of necessity to rely to some extent on the experience of its members in the legal and business worlds and in public administration as well as on the submissions received. However, with regard to liquidators, for example, the perception available to the Group (inter alia from the Revenue Commissioners) is that currently, while the majority of liquidators act in an appropriate manner, concerns can arise about the following issues:

(i) Failure by the liquidator to complete the liquidation, or the taking of an inordinate amount of time to complete the liquidation.

(ii) Liquidators who appear to take on too many cases.

(iii) Liquidators who appear to act in the directors' interests rather than in an independent fashion.

(iv) Failure to comply with the reporting requirements of the Companies Acts.

(v) Seeking fees in excess of what appears reasonable.

(vi) Lack of particular knowledge and skills required to undertake the role effectively.

13.4.2 While the circumstances listed above would arise only in a limited number of cases the absence of a guaranteed level of professional expertise can in itself give rise to misgivings about professional competence.

13.4.3 The recent High Court decision in *Re CB Readymix Ltd; Cahill v. Grimes*[55] illustrates just how badly wrong a liquidation can go. In that case Smyth J stated he was satisfied that the particular liquidator, in respect of whom a disqualification order was sought, had:

> "(a) Failed to act in an impartial manner. (b) Destroyed the books and records of the company. (c) Failed to act in the interests of the creditors of the company and, in particular, of the Revenue."

Smyth J also stated that he was satisfied and found as a fact that:

> "…the respondent has, notwithstanding being well seasoned as a personal litigant, sought to justify a course of conduct which displays a most serious lack of commercial probity. To seek, as the respondent sought in this case, to argue that 'the books and records were not destroyed, they were just dumped' displays a sense of gross negligence or total incompetence, and on the facts a complete failure to appreciate the gravity of the action taken."

Smyth J disqualified the respondent from being concerned in the management of a company as a liquidator, receiver or examiner for a period of seven years. The Review Group is conscious of the dangers of generalising from the particular. Nevertheless, it is the case that the liquidator in that case was not

[55] High Court, 20 July 2001 (Smyth J). It should be noted that this decision is under appeal.

regulated by, or a member of, the recognised accountancy bodies[56] or the Law Society of Ireland.

13.4.4 The Review Group accepts that a greater degree of regulation of insolvency practitioners is in the public interest. Unlike the UK and most other common law jurisdictions Ireland does not have a State-funded public interest liquidation service.[57] 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."[58]

13.4.5 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. This is a matter that the Group believes should be considered in its second programme.

13.4.6 Although the Companies Acts are clear as to the duties of liquidators they are silent as to appropriate qualifications. It is clear that for appointment as a voluntary liquidator one needs at least to enjoy the confidence of the company's creditors (s 267 of the 1963 Act). Sections 300 and 300A of the 1963 Act set out the circumstances in which a person is disqualified from appointment as a liquidator (s 300 of the 1963 Act specifies that a body

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[56] See 13.8.5.

[57] The Report of the Government Advisory Committee on Fraud December 1992 made the point that no qualifications were necessary to act as receiver, liquidator, or examiner and recommended that receivers, liquidators and examiners should be licensed and bonded. That Committee noted that : "A licensing system for insolvency practitioners was introduced in the United Kingdom in the 1986 Insolvency Act. Since the introduction of that Act there is a general view that the quality of those appointed and also the quality of their work has improved dramatically."

[58] At para 2.3.

corporate cannot be appointed as a liquidator). The Companies Acts do not set out any professional qualification as necessary to be held by a liquidator, receiver or examiner.[59] Nor is delegated regulation by a recognised professional body of these occupations provided for as applies for example to the regulation of auditors by recognised accountancy bodies (ss 191 and 192 of the 1990 Act). It should, of course, be recognised that professional standards and codes of conduct apply to liquidators and other insolvency practitioners who are members of professional bodies.

13.5 Regulation – general principles and issues

13.5.1 As a general principle, the Review Group accepts that all liquidators, examiners and receivers should be:

(i) competent to undertake insolvency work and knowledgeable of the Companies Acts;

(ii) independent of the parties and able to act impartially;

(iii) insured or bonded against loss through fraud, or malpractice;

(iv) subject to some form of oversight and monitoring both generally and in relation to individual cases to assure continuing competence and the propriety of actions and decisions;

(v) knowledgeable about the nature and scope of the duties to be performed and, where necessary, specialised in the business of the debtor;

(vi) diligent, meticulous and scrupulous in their work, and possessed of a sense of urgency in the performance of their duties; and

(vii) able to assess risk, and conduct their affairs in a cost-effective way.

The Group believes that the justification for requiring insolvency practitioners to possess such skills is because their work will involve them in situations where they are required to realise and distribute assets that are beneficially owned by others, whether creditors or shareholders.

13.5.2 The Review Group considers it essential that, through an accountancy or other qualification or degree or through experience, a liquidator is able to demonstrate a competence in the legal, accounting and business issues likely to be involved in an insolvency. In the absence of such demonstrable competence, there can be no rational confidence that a person will be able to exercise

[59] Section 237 of the 1990 Act permits the Minister to make regulations stipulating who shall not be qualified for appointment as liquidator, receiver (and by extension, examiner). No such regulations have been made.

properly the powers conferred on him or to discharge his statutory and common law functions, duties, responsibilities and accountabilities. The Group accepts that this indicates the likelihood of a need for an insolvency qualification for liquidators where knowledge and practical understanding is tested by study, examination and experience.

13.5.3 Ideally, authorisation or licensing should follow from attainment of a professional qualification and the maintenance of probity and professional standards. This in turn suggests monitoring or supervision by a regulatory body. The regulatory body may be a government department or agency; a separately constituted body; a professional body (or bodies); or a combination, provided that their respective roles, duties and responsibilities are clearly spelled out. It is particularly important where a professional body is involved in the regulation of insolvency practitioners that independence from its members is clearly demonstrated through its constitution, mechanisms and processes and through its staff. This may require a legislative framework or statutory supervision – rather than involvement in individual matters – by a government department/agency or separately constituted body to give assurance of that independence.

13.6 Regulation in other jurisdictions

13.6.1 In some jurisdictions, e.g. Australia, Canada and the USA, registration and regulation of insolvency practitioners is the function of government: the UK has a statutory framework requiring authorisation/licensing of office holders, with the power to grant, and remove, authorisations/licences delegated to recognised legal and accountancy bodies within that framework. Finland does not have an authorising/licensing system but an independent regulator oversees the administration of cases.

13.6.2 It is instructive to consider how the Insolvency Service in the UK operates. The Service operates principally in England and Wales. It administers compulsory individual and corporate insolvencies, pursues fraud and misconduct through prosecution and disqualification, regulates the private sector insolvency profession, and manages insolvency funds. Under the UK Insolvency Act 1986, only authorised persons may act as insolvency practitioners. Persons are authorised on the basis of experience and competence, they are subject to regulations and must hold a security bond for the proper performance of their duties. Authorisation may be granted by the Secretary of State or by a professional body recognised by the Secretary of State which regulates the conduct of its members and may withdraw licences. The seven recognised professional bodies (RPBs) in Great Britain account for some 95% of all authorisations. The bodies currently recognised are:

(i) the Institute of Chartered Accountants in England and Wales;

(ii) the Insolvency Practitioners' Association;

(iii) the Law Society of England and Wales;

(iv) the Institute of Chartered Accountants of Scotland;

(v) the Association of Chartered Certified Accountants;

(vi) the Institute of Chartered Accountants in Ireland; and

(vii) the Law Society of Scotland.

13.6.3 On foot of a review of the insolvency practitioner regulation, an Insolvency Practice Council has been established composed of five lay members and three insolvency practitioners. The Council has an agenda setting and review role in relation to ethical and professional standards within the insolvency practitioner profession.

13.6.4 There is much to be said for the British system where, in the main, insolvency practitioners are members of recognised professional bodies. Above all, this recognises that insolvency practitioners come to specialise in this area of work from a professional background either in accountancy or law. It also has the advantage that the persons concerned are subject to the professional and ethical standards of their own professional bodies.

13.7 Objectives of regulation

13.7.1 The Review Group believes that there are four key arguments that support better regulation of liquidators in Ireland. First, the stakeholders of companies being wound up, in receivership or under the protection of the courts have a right to expect that the person responsible for protecting their interests and distributing their money will have received formal training in law or accountancy. Second, where there is no recognised professional standard, creditors and other relevant persons may have difficulty in making an informed choice about liquidators. Third, the consequences of poor insolvency administrations may impact severely on a large number of persons, including secured and unsecured creditors, directors, employees and shareholders. However, not all of the affected persons have any direct influence on the selection or supervision of the liquidator. Protection of the interests of those persons supports a system of regulation of liquidators. Finally, a system of regulation provides a mechanism to address the maintenance of professional independence and the integrity of all liquidators.

13.7.2 The Review Group believes that a system for regulating insolvency needs to have the confidence of the general public, creditors, shareholders and of the courts. That requires the setting of clear standards for the regulatory body and that these are maintained through systems of accountability and openness and of oversight on behalf of the general public. The Review Group is conscious that neither independence within the body nor oversight of it requires multilevels of bureaucracy imposing substantial costs on insolvency practitioners (and therefore on creditors) or on government.

13.7.3 A regulatory framework providing for the setting, testing and monitoring of standards should provide for: (a) greater confidence in the capability of liquidators to undertake the administration of insolvencies; (b) greater confidence in the proper exercise and discharge of powers; and (c) greater assurance against abuse and misuse of the system. The key principle is that a regulatory framework should provide assurance as to the necessary level of competence of those administering insolvencies, to ensure the efficiency, effectiveness and integrity of, and confidence in, the insolvency system.

13.7.4 Ideally, the regulatory framework should provide for:

(i) establishing professional and ethical standards and guidance for insolvency practice;

(ii) setting requirements as to suitability (fit and proper), competence and integrity of office holders and as to continuing professional education/experience;

(iii) setting requirements as to insurance or bonding;

(iv) monitoring liquidators' conduct, competence and compliance with legislation, standards and other requirements, and investigating complaints;

(v) taking effective action in relation to incompetent or dishonest office holders, including investigating and reporting suspected fraud or other offences or misconduct and/or having the power to institute proceedings. In some jurisdictions, the regulatory body has power to intervene by way of, for example, applying to the court where it has serious concerns about the administration of a case.

13.8 Regulation – developments in Ireland

13.8.1 It is worth noting that present statutory provisions on insolvency designed to deal with "scorched earth" situations[60] are contained in s 251 of the 1990 Act. This section relates to companies which are not being wound up but which are insolvent and the court is satisfied that the insufficiency of assets is the reason why they are not being wound up. Section 251 applies to such companies

[60] A "scorched earth" situation arises where the company directors so deplete a company's assets as to result in there being insufficient assets left even to justify the winding-up of the company. See the McDowell Report at para 4.42.

several sections of the 1963 and 1990 Acts which relate to companies being wound up. This section was amended by s 54 of the 2001 Act. That amendment provides, inter alia, that s 251 of the 1990 Act will now also apply to s 149 of the 1990 Act (restriction of directors) and provides for the Director of Corporate Enforcement to apply to court for restriction under any of the sections which apply. There is also an amendment introduced by s 53 of the 2001 Act which relates to the supervision of receivers and which will also make the Director aware of cases where applications pursuant to s 54 would be appropriate. With regard to a suitable regulatory framework, there are two important recent developments of particular relevance to the question of the regulation of insolvency practitioners.

The Director of Corporate Enforcement and the 2001 Act

13.8.2 The 2001 Act establishes on a statutory basis the Office of the Director of Corporate Enforcement. The Director has been given the powers formerly assigned to the Minister under the Companies Acts to: (a) initiate and undertake company investigations; and (b) prosecute on a summary basis all breaches of the Companies Acts by companies, directors and other parties. Part V of the 2001 Act deals with Winding-Up and Insolvency. It amends a number of existing company law provisions concerning insolvency and winding-up. It aims to address the "phoenix syndrome" whereby companies go out of business leaving substantial debts, yet their directors immediately start new enterprises doing the same business without having to account for their previous failures. The powers necessary for the Director to discharge his role in respect of the supervision of insolvency practitioners are also provided for in Part V of the Act.

13.8.3 Section 48[61] of the 2001 Act requires persons to notify the Registrar of their appointment as liquidator of a company within 14 days of such appointment. The Registrar must forward a copy of such notification to the Director. Section 50[62] provides that the Director may apply to the court for company directors, officers, liquidators, receivers or examiners to be brought before the court with a view to assessing damages where any such person has misapplied or retained any property of the company or has been guilty of a breach of duty or trust in relation to the company. Section 52[63] requires a receiver to file a statement with the Registrar as to whether, in his opinion, the company is solvent at the end of the receivership and the Registrar is required to copy every such statement to the Director. This is intended to allow the Director to monitor the state of companies that have undergone receiverships. (Receiverships often precede liquidations.) Section 52 also provides for a requirement that the

[61] Amending s 278 of the 1963 Act.

[62] Amending s 298 of the 1963 Act.

[63] Amending s 319 of the 1963 Act.

Registrar inform the Director of the appointment of receivers notified to the CRO. This is intended to allow the Director to discharge his general supervisory function in respect of receivers. Section 53 empowers the Director to require a receiver to produce his books and answer any questions in relation to them or to the conduct of a particular receivership or receiverships.[64]

13.8.4 Similarly, s 57 of the 2001 Act empowers the Director to require a liquidator to produce his books and answer any questions in relation to them or to the conduct of a particular liquidation or liquidations. These sections will allow the Director to investigate complaints or allegations of misconduct against receivers and liquidators. Section 56 imposes a requirement on liquidators of insolvent companies to make reports to the Director in a form to be prescribed and to make applications for the restriction of the directors of such companies, unless relieved of that obligation by the Director in specific cases. Pursuant to the Act the report of the liquidator will include information on the circumstances in which the company became insolvent and the extent to which the action of the directors lead to the insolvency. This information will allow the Director to determine if an application for restriction under s 150 of the 1990 Act should be made to court in respect of directors of such companies. Where the Director decides it is appropriate to make such an application, it will be the responsibility of the liquidator to do so.

13.8.5 Section 58 of the 2001 Act requires a disciplinary committee or tribunal of a prescribed professional body whose members conduct liquidations or receiverships to notify the Director where it finds that the member has not maintained proper records or where it suspects that the member may have committed an indictable offence under the Companies Acts. This provision is to allow the Director to discharge his general supervisory role in respect of liquidators and receivers and also his role of investigating offences under the Companies Acts. It is understood that the bodies initially prescribed under this section will be those recognised by the Minister under s 187 of the 1990 Act, whose members may qualify for appointment as auditors. These bodies are:

(i) The Institute of Chartered Accountants in Ireland (ICAI).

(ii) The Institute of Certified Public Accountants in Ireland (ICPAI).

(iii) The Association of Chartered Certified Accountants (ACCA).

(iv) The Institute of Incorporated Public Accountants Ltd (IIPA).

(v) The Institute of Chartered Accountants in England and Wales (ICAEW).

(vi) The Institute of Chartered Accountants of Scotland (ICAS).

[64] Amending s 323 of the 1963 Act.

Given that some solicitors act as liquidators (and could act as receivers) the Review Group recommends that the Law Society of Ireland should be a prescribed professional body. The Review Group further recommends that s 58 be extended to include persons appointed as examiners under the 1990 Amendment Act.

The Oversight Board to supervise accountancy bodies

13.8.6 The second major development of relevance is the proposed establishment, on foot of the July 2000 report of the Review Group on Auditing,[65] of a statutory Oversight Board to supervise the accountancy bodies.[66] The Oversight Board will have statutory responsibility for:

(i) the recognition of accountancy bodies, including the amendment of the conditions of recognition;

(ii) the approval of each body's constitution and amendments thereto;

(iii) the approval of and requiring changes to each body's ethical code and professional rules;

(iv) working with the accountancy bodies and other parties on the development of auditing and accounting standards and practice, including in particular the approval of auditing practice notes and bulletins;

(v) making arrangements for examining the validity of material departures from accepted accounting standards and practice by PLCs;

(vi) supervision of the performance of each recognised body in the area of monitoring (quality review), including the approval of the body's annual monitoring plan and the power to undertake an independent review of an auditing practice;

[65] The Review Group on Auditing was chaired by Senator Joe O'Toole. That group was set up by the Minister on foot of the recommendation by the Public Accounts Committee (PAC) of Dáil Éireann in December 1999 that the Department of Enterprise, Trade and Employment should establish a Review Group to examine in detail a number of matters, including auditor independence, the auditing of financial institutions and the role of the external auditor in ensuring statutory compliance. The background to this was the finding by the Comptroller and Auditor General that evasion of DIRT (Deposit Interest Retention Tax) was pervasive. The Minister established a Review Group on Auditing with 12 terms of reference, dealing with self-regulation in the auditing profession as well as with the issues raised by the PAC Report.

[66] The Government has since approved the drafting of legislation to give effect to the recommendations of the Review Group on Auditing. The "Oversight Board" will be called the Irish Auditing and Accounting Supervisory Authority (IAASA).

(vii) supervision of the investigation, discipline and appeals arrangement within each body, including the power to obtain access to documentation and to explanations from each of the recognised bodies in respect of its exercise of its delegated supervisory duties;

(viii) sanctioning each accountancy body where supervisory failures occur, e.g. by way of private admonition, public censure and/or financial penalties up to £100,000 (Û126,973.81) in addition to costs;

(ix) arranging for the supervision of individually authorised auditors by the recognised accountancy bodies;

(x) the transmission and receipt of confidential information to/from specified authorities as far as is legally possible and subject to appropriate safeguards;

(xi) acting as a specialist source of advice to Government and other parties on auditing and accounting matters;

(xii) the approval of regulatory/business plans, the development of performance indicators and determining and evaluating the content of the annual report which each of the recognised bodies should be required to submit to the Board.[67]

13.9 Regulation and standard setting

13.9.1 With regard to liquidators, examiners and receivers, the Review Group believes that there is an argument to be made for seeing how effectively the Director can apply the supervisory powers being accorded to him under the 2001 Act and for reviewing this in due course. However, this raises the question of establishing a priori standards for those who undertake insolvency work.

13.9.2 Section 55 of the 2001 Act sets out the onus for the recognised accountancy bodies to report to the Director company law offences (which come to the body's attention) committed by their members while acting as liquidators or receivers. The recognised accountancy bodies are:

(i) The Institute of Chartered Accountants in Ireland (ICAI).

(ii) The Institute of Certified Public Accountants in Ireland (ICPAI).

(iii) The Association of Chartered Certified Accountants (ACCA).

[67] Report of the Review Group on Auditing July 2000 p 126, recommendation 8.2. It is important to note that the Review Group on Auditing recommended overall "that the recognised accountancy bodies should continue to regulate their members within a reformed framework of supervision comprising some persuasive external influence."

(iv) The Institute of Incorporated Public Accountants Ltd (IIPA).

(v) The Institute of Chartered Accountants in England and Wales (ICAEW).

(vi) The Institute of Chartered Accountants of Scotland (ICAS).

Similarly, there is a requirement in the 2001 Act for these bodies to report to the Director instances where, on the basis of a disciplinary investigation of a member acting as auditor, they have reasonable grounds for believing that an indictable offence under the Companies Acts has been committed. The Review Group recommends that s 55 be extended to include members acting as examiners.

13.9.3 The Group understands that the forthcoming legislation setting up IAASA will place an onus on these bodies to report to IAASA on all disciplinary investigations. This would include offences under the Companies Acts committed while a member of a recognised accountancy body was acting as auditor, liquidator or receiver. Thus, IAASA could, in principle, be the supervisory board for insolvency practitioners as well as for accountants and auditors or at least could be the supervisory body for accountants and auditors when these act as insolvency practitioners. In the view of the Review Group this approach provides a strong protective mechanism for creditors.

13.9.4 Given the establishment of IAASA and the intention to supervise members of the recognised accountancy bodies more effectively on foot of legislation to give effect to recommendations in the Report of the RGA, it is likely that the penalties applied by the disciplinary committees will be more stringent than those applied in the past. Notable among these penalties is the serious penalty of withdrawing a practising certificate for a period of time. While it is clearly a very serious matter to be disqualified from acting as an insolvency practitioner it is, in the opinion of the Review Group, an even more serious matter to be disqualified from practising as an accountant or auditor because of fraud or malpractice in carrying out a liquidation if that is one's primary occupation. Even short of this degree of penalty, the Group has been informed by one of the accountancy bodies that complaints, particularly of inaction, are often enough in themselves to precipitate action by a respondent short of bringing the respondent before a disciplinary hearing.

13.9.5 This raises the core issue of whether the functions of liquidator, receiver and examiner should be restricted to persons with a qualification from one of the recognised accountancy bodies. There is an inherent logic to this, particularly with regard to s 55 of the 2001 Act. After all, if an individual is not a member of a recognised body (especially if he is not a member of any professional legal or accountancy body), there is less likelihood of the offence being detected and the Director notified. Creditors and members of a company should be mindful that, in principle, it would be better to choose a liquidator who is a member of a recognised body. It is also relevant to point out that in the UK members of the Law Societies, as well as of accountancy bodies, can be recognised as insolvency practitioners. Similarly in Ireland it would be appropriate, if we go down the road of recognised professional bodies, that the Law Society of Ireland should be one of these.

13.9.6 The recognised accounting bodies already have both ethical guidelines and practice guidance for members involved in insolvency practice.[68] The ICAI is the biggest single recognised professional accountancy body in Ireland. The Institute's Handbook SIP gives guidance as to best practice to be adopted by insolvency practitioners having regard to relevant legislation. SIP already apply in Ireland (being a modified version of those applying in Northern Ireland and the rest of the UK) even in the absence of a system of State regulation of insolvency practitioners.

13.9.7 It is further noted that whilst in the UK (generally speaking) an individual must be a member of a recognised professional body in order to practise as an insolvency practitioner he must also hold a qualification in insolvency, achieved on foot of examination. In Ireland, if the right to practise as a receiver, liquidator or examiner is to be restricted to members of recognised professional bodies it would seem to be an appropriate quid pro quo that these bodies should be required by the Minister to devise a specialised standard/qualification in insolvency practice in order to practise as such.

13.9.8 The Review Group believes that the appropriate route to take with regard to regulating liquidators, examiners and receivers is to provide for regulation through the medium of recognised professional bodies (RPBs) and recommends accordingly. An indicative list of RPBs would be composed of the six accountancy bodies, identified at 13.9.2 above, and the Law Society of Ireland. It should be noted that the Group believes that a facility should be provided whereby recognition could be granted to other professional bodies,[69] where appropriate, by IAASA. In return for this those bodies should be required to devise an examinable standard for the specialisation of insolvency practitioner within their professions. The Minister and/or the Director should facilitate the development of this standard and IAASA should be involved in monitoring the regulation by the accountancy bodies (and the Law Society of Ireland) of their members when acting as liquidators, receivers or examiners in the same manner as it will monitor members of the recognised accountancy bodies when acting as auditors. Provision for this (and for inclusion of the Law Society of Ireland among recognised bodies for the purpose of regulating liquidators,

[68] See, for example, Statement 2 and Section S Statements of Insolvency Practice (SIP) of the Handbook for members of the Institute of Chartered Accountants in Ireland (ICAI).

[69] For example, organisations such as ICSA (whose members have for some time been involved in the conduct of members' voluntary liquidations) might well apply for and be considered suitable for inclusion in this regard.

receivers and examiners) should, if feasible, be included in the Bill currently being drafted to establish IAASA. Arrangements would have to be made not to exclude from their livelihood, persons currently practising as liquidators, receivers or examiners.[70] On balance, the Review Group concludes it is preferable that a licensing system on the lines set out above should be introduced sooner rather than later. For a creditor or member of a company involved some additional costs might arise through professionalisation of the function of insolvency practitioner. The trade-off would be that all insolvency practitioners and their regulators will be subject to supervision by IAASA.

13.9.9 As previously noted, there is an argument for waiting to see how the exercise of the Director's powers impacts on the conduct of insolvency practitioners and for awaiting the outcome of this Group's likely future consideration of a State-funded public interest insolvency service it may be premature to implement. Hence all of the recommendations in this chapter at this point of time. Indeed, strong views in this regard were expressed by members of the Group in the course of discussions on the matter. The introduction of such a system would set standards to be followed prospectively. This is more desirable than the retrospective establishment of standards on a piecemeal basis in a primarily court-based, sanction-focused context. The Review Group also believes that the introduction of such a system would assist in providing a powerful incentive to the relevant professionals to adopt, and act in accordance with, the highest standards. In a sense the introduction of such a system should be seen as complementary to the powers to be exercised by the Director. In any event, the efficacy of the powers for regulating liquidators, receivers and examiners being accorded to the Director will need to be reviewed after they have been in operation for some years. In the circumstances, the Review Group concluded that there should be no delay in introducing a system which it believed likely to be of benefit. While the Review Group accepts that the introduction of such a regulatory system may, in certain instances, prove to be a disincentive to the appointment of any liquidator to an insolvent company, it concluded, on balance, that the absence of a liquidator was no worse than an unqualified liquidator. Either way there will remain a significant number of cases where noone is willing act as a liquidator to a company which is hopelessly insolvent, i.e. devoid of resources to pay the liquidator. While this is a separate issue from the issue of regulation, the Group believes that it is an issue of some importance, which merits consideration in a future programme of the Review Group.

13.10 Bonding and indemnity insurance

13.10.1 The Review Group also considered the issue of bonding or indemnity insurance for insolvency practitioners. At present there are no statutory requirements for

[70] For example, members of ICSA who currently carry out members' voluntary liquidations.

insolvency practitioners to obtain, or maintain, professional indemnity insurance. It is arguable that insolvency practitioners, like other professionals, have an incentive to maintain arrangements which would enable them to meet possible liabilities in order to protect their own assets. From this perspective there would be no need to regulate for these matters. However, the contrary view is that some professionals may choose to protect their interests not by taking out insurance, but by declining to hold any significant assets in their own names. As a consequence, the substance of any recovery for personal liability may be limited in the event that there is a successful action. The Review Group concluded that there is a legitimate need to regulate for some kind of compensation mechanism. The question then arising is whether bonding or professional indemnity insurance offers a better compensation mechanism.

13.10.2 As a general principle, issuers of performance bonds would, in most circumstances, require the person whose performance they are guaranteeing to provide them with a secured counter-indemnity. For example, a bank issuing a bond may require the insolvency practitioner concerned to provide security in the form of mortgages over property or third party guarantees which the institution may enforce in the event of the bond being called on. At present in Ireland, the High Court determines the level of security to be given by a liquidator on his appointment.[71] The court usually delegates the fixing of the amount of such security and the time within which it is to be entered into to the Examiner. The accounting requirements of official liquidators and their obligation to lodge all funds to a specific branch of the Bank of Ireland are also provided for by court order. Other liquidations are not covered by bonds.

13.10.3 By contrast, the level of professional indemnity insurance cover is limited primarily by the amount of the premium a practitioner is required to pay. This is liable to provide a greater level of protection in terms of quantum than bonding, even though claimants may have to bring a successful court action in order to obtain the benefit of professional indemnity insurance. In addition, non-court liquidations would be covered by professional indemnity insurance. The recognised professional bodies have professional indemnity rules applying, e.g. for the ICAI the professional indemnity insurance regulations are set out in the rules of professional conduct and apply to members in practice and to authorised firms. Under these regulations "a firm must: (a) take such steps as may reasonably be expected of it to secure that it is able to meet claims against it arising out of professional business; (b) arrange cover for itself which meets the limits specified."[72] By insisting that liquidators, examiners and receivers must be members of or regulated by existing RPBs or the Law Society of Ireland then all such persons could readily be obliged to have in force professional

[71] See s 228(a) of the 1963 Act and Rules of the Superior Courts Orders (Order 74, Rules 31 – 33).

[72] See Regulation 510 Rules of Professional Conduct of the ICAI.

indemnity insurance.[73] The Review Group accordingly recommends that insolvency practitioners should be required (whether by statute or the internal requirements of their RPBs) to have sufficient professional indemnity cover.

APPENDIX C

The Guidelines on the Tax Consequences of Receiverships and Mortgagees In Possession (November 2017)

GUIDELINES ON TAX CONSEQUENCES OF RECEIVERSHIP AND MORTGAGEE IN POSSESSION (MIP)

1. Introduction

The appointment of a receiver is one of the ways by which a lender can enforce a mortgage or charge. There are various types of receivers. For example, there is a fixed charge receiver who is appointed under a mortgage in respect of a particular asset, e.g. an investment property. In contrast, a floating charge receiver is a receiver who takes control of a person’s assets generally, or of certain categories of assets (for example, debtors or stock). A receiver’s main purpose is to realise the assets over which he/she has been appointed for the benefit of the charge holder. While a receiver does not have a duty to trade or to try to save the company or business, in practice he/she will often continue to trade, rent property etc. pending a sale of the property or the relevant assets. For example, a receiver may take over a business on foot of fixed and floating charges and continue trading as a receiver/manager. A receiver may also be appointed by court order where, for example, the lender does not have a power to appoint a receiver under the mortgage deed. A receiver appointed by the court is deemed an officer of the court and owes duties to the court. There are special tax rules concerning the tax treatment of a court appointed receiver (section 1049 Taxes Consolidation Act 1997). These guidelines deal with receivers and mortgagees in possession (MIPs), other than court appointed receivers. The appointment of a receiver does not result in a change in the legal ownership of the assets of the borrower. However, the receiver will for all practical purposes have full control over the trade/rental activities associated with the assets he/she is appointed over. As a result of the increase in the level of personal and corporate receiverships and property repossessions, there has been an increase in requests for clarification of the tax requirements and

[73] In relation to solicitors, to the extent (if any) that existing professional indemnity insurance policies do not envisage the solicitor acting as a liquidator, examiner or receiver, the Law Society of Ireland might be required to insist that solicitors who act as such effect appropriate insurance cover.

obligations on receivers and MIPs. In response, Revenue has prepared these guidelines, setting out our interpretation of the current legislative position, to assist all concerned in understanding and meeting their statutory obligations. It is a matter for each person affected to take their own legal advice in relation to the application of the guidelines.

2. Tax Registrations

Other than in Paragraph 3.4, all legislative references in this Part are to the Taxes Consolidation Act 1997.

Receivers

Receivers should obtain a new tax reference number for each receivership, unless there is no tax payment or filing obligation. This number should be used by the receiver for: ▯ returning income tax on Form 1 in accordance with section 52; ▯ returning CGT as income tax on Form 1; ▯ registering as a Principal contractor or subcontractor under the RCT regime; ▯ registering as an employer in respect of retained employees of the borrower.

The requirement to obtain a new tax reference number for each receivership does not apply, however, where a mortgagee appoints the same individual as receiver over assets of the same borrower. In these circumstances, a single tax reference number for the receivership will suffice.

Additionally, if a co-ownership or partnership was issued with one tax reference number, then it is sufficient for a receiver to have one tax reference number covering this co-ownership/partnership.

A receiver who supplies goods or services which are deemed to be supplied by the accountable person (section 22(3) or 28(4) of the Value Added Tax Consolidation Act 2010 (VATCA)) is obliged to register for VAT within 14 days of making the supply (section 65(4) of the VATCA).

Mortgagees in Possession (MIPS)   MIPs can use one tax reference number for all activities undertaken as a MIP, and for returning rental income, including that earned by receivers, under section 96(3).

Tax Payment and Filing Requirements

3 .1 Direct Taxes – Irish Rental Income

The existing legislation (section 96(3)) provides that tax on net rental income from property in receivership, or from property where the mortgagee has taken possession, is chargeable on the mortgagee. This includes tax on any balancing charge arising or on “section 23” type relief clawed back on a sale of property. This means that the mortgagee (not the receiver) has to make a return in respect of, and pay the tax liability on, such income.

For each individual letting, rental profit should be calculated as if the borrower was still in possession. This has a number of consequences, including the need to take into account in the calculation the borrower’s–

- other income;
- losses and allowances, current or brought forward;
- tax credits, if the borrower is an individual;
- group relief from within the borrower's group, if the borrower is a member of a corporate group (provided all relevant returns are filed and elections made on time.

However, it should be noted that unconnected receivership losses, or losses etc. from other activities of the mortgagee, cannot shelter such rental profits.

This rental income should be returned as rental income on Form CT1 using the tax reference number allocated to the mortgagee (see Paragraph 2 – Tax Registrations) for income from property over which the mortgagee has taken possession or over which the mortgagee has appointed a receiver. Where the borrower is not a company, the mortgagee's liability should be regrossed at 25% for the purposes of computing the amount of income to be included on Form CT12. The payment dates will follow normal Corporation Tax payment dates3.

Rental income and expenses in relation to property in receivership or where the mortgagee is in possession should not be included in the tax return of the borrower. A consequence of this is that, where the letting of the property in receivership gives rise to a loss, the loss is not available to the borrower to utilize against other rental income. Any such loss is, however, available to the mortgagee in question when calculating its liabilities under section 96(3) in respect of the rental property of that borrower only.

At the same time as the CT1 is filed by the mortgagee through ROS in respect of receivership and MIP rental income, a backup schedule containing the following information should be filed electronically by the mortgagee (by emailing lcdfsb@revenue.ie) in support of the CT1:

1. Address(es) of the specific properties concerned 2. LPT Property ID(s) where available 3. Gross rent receivable from each letting 4. Taxable rent on each letting 5. Tax rate applied to each letting 6. Tax liability on each letting

The schedule should include details of all rental income irrespective of whether or not a liability arises in respect of the income.

The schedule is being requested at the same time as submission of the CT1 on the basis that it would be easier to compile the schedule while tax returns are being completed. There is no set format in which the schedule should be submitted. Providing the requisite information is submitted, mortgagees are free to extract that information from their systems in whatever manner best suits them.

Apart from the requirements to file the CT1 and provide the supporting schedule, section 890 imposes an obligation on a person, in their capacity as a receiver, to provide details of income received by them. Form 8-2 is the appropriate form on which such income is to be returned and is available on the Revenue website. This form should be filed using the tax reference number for the particular receivership.

Revenue recognises that, in certain instances, there may be difficulties in obtaining the information required to prepare an accurate rental computation. However, Revenue will not seek to challenge a computation provided reasonable endeavours are undertaken in the calculation of tax due and all assumptions underpinning the calculation are clearly set out and retained by the mortgagee.

In the normal course, it would be unusual for an overpayment of tax to arise in respect of a mortgagee's liability under section 96(3). However, in circumstances where an overpayment does arise, for example, where preliminary tax is overpaid or where the mortgagee subsequently reduces its liability to take account of previously unclaimed expenditure incurred by a receiver or additional information provided by the borrower (e.g. unused Case V losses), a refund of the tax overpaid will be made to the mortgagee on receipt of a valid repayment claim.

Where preliminary tax is overpaid, a completed CT1 and backup schedule would generally be regarded as a valid repayment claim. Where the repayment results from matters which are not reflected in a previously submitted CT1 and backup schedule, full details of the amendment should be provided in support of the repayment claim.

In all cases, a valid repayment claim should be made within the relevant time period (currently 4 years). While Revenue is not in a position to match mortgagee and borrower tax returns (assuming that the latter have been received) for the purpose of identifying tax overpaid under section 96(3), it is prepared to provide information to mortgagees in the circumstances set out in Paragraph 5 below.

Direct Taxes – Other Income

Corporation tax due by a company in receivership or where the mortgagee has taken possession (other than in respect of rental income referred to above and capital gains referred to below) should be returned and paid by the company.

In relation to other income assessable under Schedule D earned by entities (including individuals) not liable to Corporation Tax, Revenue's position is that the existing legislation (section 52) treats the receiver as the person liable for income tax on that income, profits or gains as calculated in accordance with Part 4 of the TCA 1997. This liability extends to all income the receiver receives, whether entitled to or not, in respect of any particular receivership, other than the release of a specified debt that is deemed income under section 87B, or income in respect of which a mortgagee is liable under section 96(3), i.e. rents arising in respect of the period commencing on or after the date on which the receiver is appointed. Income tax applies to such income at the standard rate, currently 20%, and is provided as a credit against the borrower's tax liability on the borrower's income, profits or gains for that year.

The receiver should return this income on Form 1, under the relevant receivership number. The Form 1 should be completed on a calendar year basis and filed by the following 31st October of each year in which a liability arises.

Normal income tax, including preliminary tax, payment rules apply to these liabilities.

As with the position on rental income, Revenue recognises that in certain instances, a receiver may have difficulty in obtaining the information required to prepare an accurate computation in relation to income which does not fall within section 96(3). Again, Revenue will not seek to challenge a computation provided reasonable endeavours are made in calculating the tax due and all assumptions underpinning the computation are clearly set out and retained by the receiver.

The obligations on a receiver under section 890 referred to in Paragraph 3.1 in relation to rental income falling within section 96(3) equally apply as respects other income.

Direct Taxes – Capital Gains

Section 571 provides that any "referable capital gains tax" or "referable corporation tax" arising on a disposal is chargeable on, and payable by, the "accountable person", which includes a receiver or a mortgagee in possession.

As referable capital gains tax and referable corporation tax are recoverable by way of an assessment to income tax under Case IV of Schedule D, normal income tax payment rules apply, including those relating to the payment of preliminary tax.

Referable capital gains tax and referable corporation tax are to be calculated in accordance with the provisions set out in sections 571(2) and 571(3) respectively. In instances where a receiver has entered into a sale contract which is closed by a mortgagee, the mortgagee is the accountable person. The tax due is recoverable by way of an assessment to income tax, under Case IV of Schedule D, on the accountable person on a ring-fenced basis.

All relevant factors, including other disposals by the borrower, any reliefs or deductions (including unused losses), Group Relief4, personal exemptions etc.

4 Section 429 states that the consent is required in such format as Revenue may require. Currently, this is through completion of the relevant boxes in Form CT1, which are required to be completed and submitted by the surrendering and claimant companies, rather than the receiver.

In addition, the accountable person must file all necessary tax returns in relation to liabilities arising as accountable person. Any referable capital gains tax or referable corporation tax arising should be returned on Form 1 as Case IV income by:

▯ the receiver, using the tax reference number of the relevant receivership, or ▯ the mortgagee, where the mortgagee is the accountable person, using the tax reference number allocated to the mortgagee, (see Paragraph 2 – Tax Registrations).

Accountable persons should, in respect of every accountable period in which properties are disposed of, file electronically by the Form 1 filing date (to lcdfsb@revenue.ie) a schedule containing the following information:

1. Address(es) of the specific property concerned 2. LPT Property ID(s) where available 3. Date of Disposal 4. Market Value 5. Deductible Costs 6. Details of any loss relief etc. claimed 7. Chargeable Gain 8. Tax liability

The schedule should also include details of all property disposed of during the period in question, irrespective of whether or not a liability to tax arises. The schedule is being requested at the same time as submission of the Form 1 on the basis that it would be easier to compile the schedule while tax returns are being completed. There is no set format in which the schedule should be submitted. Providing the requisite information is submitted, lenders are free to extract that information from their systems in whatever manner best suits them.

As is the case with rental and other income, Revenue recognises that in certain instances, accountable persons may experience difficulties in obtaining the

information outlined above (including a tax return completed by the borrower) required to prepare an accurate tax computation. However, Revenue will not seek to challenge a computation once reasonable endeavours are undertaken in the calculation of tax due and all assumptions underpinning the computation are clearly set out and retained by the accountable person. Any refunds of referable capital gains tax or referable corporation tax paid by an accountable person that may be due will be made to the accountable person once entitlement to a refund has been established. This will normally require (other than in circumstances where preliminary tax is overpaid) that the borrower has filed all outstanding tax returns up to and including the accounting period in which the disposal took place and that all other tax obligations of the borrower and the accountable person that may affect entitlement to the refund have been met.

Should refunds of capital gains tax or corporation tax on other disposals made by a borrower arise, these would be repaid to the borrower.

3.4 VAT

These guidelines should be read in conjunction with the VAT leaflet titled "Transfer of Business" as the VAT treatment of disposals of property coming within the Transfer of Business provisions is significantly different to these guidelines as regards the capital goods scheme obligations, VAT deductibility on costs of sale, the joint option for taxation and the question of who is accountable for VAT.

These guidelines relate to transactions where the Transfer of Business provisions do not apply.

All legislative references in Paragraph 3.4 are to the Value Added Tax Consolidation Act 2010.

3.4.a Disposal of an asset of an accountable person

An asset of an accountable person disposed of by a receiver or a MIP, towards the settlement of a debt of that person, is deemed to have been disposed of by the accountable person (section 22(3)). Where the asset is disposed of by a receiver and VAT is due in relation to that supply, the receiver is obliged to submit the VAT return under the receiver's VAT number for the receivership in question and to remit the tax due (section 76(2)). Where the asset is disposed of by the MIP, and VAT is due in relation to that supply, the MIP is obliged to submit the VAT return under the MIP's VAT number obtained for MIP-related issues and remit the tax due.

3.4.b Supply of services (including lettings) while carrying on the business of an accountable person

Services that are supplied by a receiver or a MIP, carrying on the business of an accountable person or using the assets of an accountable person towards the satisfaction of a debt of that person, are deemed to be supplied by the accountable person (section 28(4)). These services include services such as those provided in the course of operating a bar or hotel and the provision of lettings which the accountable person has opted to tax. Where a letting was not previously taxable but the receiver or a MIP opts to tax the letting using a landlord's option to tax (section 97(1)(a)(i)), the owner of the property is deemed to have supplied that letting and to have exercised the option to tax (section 28(5)). In each situation, the receiver/MIP, as the case may be, is obliged to submit the return under the respective receiver/MIP VAT number and to remit the tax due (section 76(2)).

3.4.c Deductibility

VAT incurred by a receiver/MIP on goods or services supplied to and used by him or her for the purposes of taxable supplies under paragraphs 3.4.a or 3.4.b above should, subject to the normal restrictions, be claimed in the VAT return that the receiver/MIP is required to make in respect of the disposal of the goods, the supply of services, any capital goods scheme adjustment or any deductibility adjustment.

Revenue will allow deductibility for a receiver in respect of VAT input costs incurred by such receiver in respect of a taxable sale or taxable letting of property by the MIP or vice versa. Whoever makes the supply must account for VAT on such supply.

In circumstances where the MIP is obliged to incur costs in completing the development of a property prior to it being handed to a receiver for sale and it is known from the outset that the sale will be completed by the receiver, Revenue will allow deductibility to the MIP, subject to the normal restrictions.

A receiver and MIP cannot both get deductibility for the same expenditure. Only the entity who incurs the costs is entitled to deductibility.

3.4.d Deductibility adjustments – Transitional Properties

Where a property was developed or acquired pre-1 July 2008 (transitional rules section 95(1)) and there was an entitlement to deductibility in relation to that development or acquisition and a receiver/MIP makes an exempt letting of that property, a deductibility adjustment may be necessary (section 95(4)(c)). The receiver/MIP who makes such letting is obliged to include the amount of the adjustment in the VAT return under the receiver/MIP's number as if it were tax due and is obliged to pay the tax due (section 76(2)(a)). Where subsequently, such property is the subject of a VATable disposal by the receiver/MIP, or would be a VATable disposal but for the Transfer of Business provisions, the receiver/MIP who makes the disposal may be entitled to a VAT credit under the capital goods scheme (section 64(6)(a)).

Where a receiver/MIP lets a residential property, the 1/20th annual capital goods scheme adjustment may apply in circumstances where the borrower is a property developer who, had the borrower let the property, would be subject to the treatment outlined in Tax Briefing 69 "VAT treatment of property developers renting out residential properties".

3.4.e Capital Goods Scheme (sections 63 & 64 of VATCA)

The capital goods scheme (CGS) is a mechanism for regulating deductibility over the VAT life of a property. For VAT purposes, a capital good is a developed property and includes refurbishment (Section 2). The scheme operates by ensuring that deductibility for a property reflects the use to which the property is put over its VAT life. The VAT life of a property is 20 years (or intervals) in the case of an acquired or developed property, or 10 years (or intervals) in the case of a refurbished property.

If the property is sold during the VAT life, or the use of the property during any of the intervals in the VAT life of the property does not reflect the deductibility in the initial interval, an adjustment may be required under the CGS. This adjustment may be negative or positive resulting in either a liability to tax or an increase in deductibility. The capital good owner can exercise some control over the occurrence of CGS liability by availing of options to tax otherwise exempt sales or lettings. A capital good owner is obliged to maintain a capital good record in respect of each capital good (section 64(12)).

Where a receiver is appointed in respect of a property or a business, that receiver effectively 'steps into the shoes' of the capital good owner for the duration of the receivership (section 64(12A))5. The capital good owner is obliged to pass the capital good record to the receiver who is, in turn, obliged to maintain the record and to pass it on to a purchaser. Where the receiver's appointment ends, the record should be passed back to the borrower unless another receiver is appointed or the mortgagee takes possession, in which case the record should be passed to the receiver or mortgagee who takes possession.

Where a receiver has "stepped into the shoes" of the capital good owner and, as a result of the disposal of the capital good or a change in its taxable use, an adjustment under the capital goods scheme is necessary, the receiver is obliged to calculate the adjustment. Where that adjustment gives rise to a tax liability under the scheme, the receiver is obliged to include the amount of the adjustment in the VAT return under the receiver's number as if it were tax due, and pay the tax due (section 76(2)(a)(i) and (ii)). Where that adjustment gives rise to an increase in deductibility, the receiver should include the amount of the adjustment in the VAT return and is entitled to receive the benefit of that increased deductibility by reducing the amount of VAT payable in the period, or by refund, provided all other tax obligations are met.

The occurrence of a CGS liability may be influenced by the actions of the receiver. Subject to the provisions of the relevant sections of the VATCA, the following options may be relevant:

(a) joint option to tax an otherwise exempt sale (section 94(7)), (b) a landlord's option to tax an exempt letting (section 97), (c) the transfer of a business rule (section 20(2)(c)).

A receiver cannot opt to tax a sale of a property to a person who is connected (section 97(3) of the VATCA) to either the owner or the receiver (section 94(7)(d) of the VATCA).

The first sale of residential property, which was developed by the owner, or a person connected with the owner within the meaning of section 97(3), on which that owner was entitled to deductibility is always a taxable sale and, where that property is sold by a receiver, the receiver is obliged to account for VAT (sections 22(3), 76(2) and 94(7)(e)).

3.4.f Capital Goods Record

It is recognised that, in certain instances, a receiver/MIP may have difficulty in obtaining information required to prepare an accurate CGS computation. However, Revenue will not seek to challenge the CGS computation provided reasonable endeavors are undertaken in obtaining all the information and all assumptions are reasonable and clearly set out in the calculation and are retained by the receiver/MIP.

3.4.g VAT Group

Where a receiver is appointed to a company which was, prior to receivership, registered as a member of a group, the receiver may apply for a corresponding group registration. However, group registration will be granted only in circumstances where all of the conditions outlined in section 15 are satisfied.

3.4.h Waiver Cancellation Amounts

Where a receiver or a MIP disposes of the last property covered by a waiver of exemption, the landlord's waiver of exemption is treated as if it were cancelled on the date of disposal (section 96(12)(c)). The waiver cancellation amount, if any, remains the responsibility of the borrower.

3.5 RCT

Tax legislation provides no exemption from the operation of Relevant Contracts Tax (RCT) in the case of receivership or where there is a MIP. Revenue considers that all aspects of the RCT legislation, including deduction by the principal contractor and the offset by Revenue of RCT against outstanding taxes, must be applied as normal, notwithstanding the fact that a receiver has been appointed to a business or the mortgagee is in possession.

Where the receiver acts as a Principal

A receiver who is appointed to a business in the construction, meat processing or forestry sectors, who engages a subcontractor to carry out relevant operations, is a principal contractor for RCT purposes. A MIP who engages a subcontractor may also be a principal contractor depending on the circumstances. A receiver/MIP (who is a principal under the legislation) is, therefore, obliged to operate the RCT system on relevant payments made to the subcontractor in the same way as any other principal contractor. **This includes registering with Revenue as a principal contractor and obtaining a 'deduction authorisation' in relation to all relevant payments made. If there is any doubt as to whether a particular contract is a relevant operation for RCT purposes, the receiver/MIP should contact the local Revenue office dealing with the borrower's tax affairs.**

Appointments over separate borrowers will be examined separately, i.e. the appointment of Mr X as receiver over a construction company will not automatically deem all Mr X appointments to be within the RCT regime – each appointment will be examined separately.

In cases where a receiver/MIP is carrying out construction work to meet health and safety or planning guidelines, each case would have to be examined and judged on its own facts and merits. Factors to be considered would include the type and range of works being carried out, whether this work was being carried out in conjunction with other work or as part of wider construction work and what was the ultimate intention with regard to the property. Where there is doubt as to the position regarding cases which involve health and safety or planning guidelines requirements, details should be submitted to the relevant local Revenue office.

Where the receiver acts as a Subcontractor

Any RCT deducted from a subcontracting business in receivership and remitted to Revenue will be offset against outstanding taxes of the business in the order statutorily provided for, with any balance being repaid to the receiver provided all of the business' tax obligations are met. Section 530V(4) distinguishes between RCT deducted on foot of a contract entered into by a business prior to receivership and new contracts entered into by the receiver (in his capacity as receiver). If the contract giving rise to the RCT deduction was entered into by the receiver following the receiver's appointment, the RCT deducted is offset only against liabilities of the post-appointment period, with any balance being repaid to the receiver. Payments which are made to a receiver in respect of relevant contracts entered into prior to appointment are credited to the period prior to the appointment. (See e-Brief 3/11)

Where a receiver is acting as a subcontractor in a relevant contract entered into after his/her appointment and the receiver obtains a new RCT reference number in respect of the receivership, the RCT system automatically grants a deduction rate of 20%, as a three year compliance history does not exist for the new receivership RCT registration. However, the requirement to have a three year compliance history can be disregarded, and the rate changed to 0%, if the receiver has met all the other conditions for the 0% rate and the risk to Revenue is minimal.

3.6 PREM

A receiver who intends retaining employees of the borrower for more than a month should obtain, in the name of the borrower in receivership, a new employer tax reference number from month 2 and return PAYE/PRSI/USC in respect of such wage payments under this new number. This will facilitate the efficient administration by Revenue of receivership cases.

Redundancy/Arrears of pay

Where employees are not retained by the receiver on appointment, redundancy payments and arrears of pay must always be returned under the borrower's employer tax reference number. Receivers are reminded of the following rules relating to the application of PAYE/PRSI/USC:

Redundancy payments or arrears of pay made after the date of cessation of employment and before the following 1 January, and not included in Form P45, should be dealt with for tax purposes in the following way:

- if a tax credit certificate is held by the borrower, the receiver must deduct tax on the redundancy payments or arrears by reference to the former employee's tax credits and standard rate cut-off point as if the payment is being made on the date the employee ceased to be employed by the borrower. if no tax credit certificate is held by the borrower, the receiver must apply the emergency basis of tax deduction to the redundancy payments or arrears.

- Where a former employee receives a payment of arrears of pay in the year(s) following the year of cessation of employment, the receiver must apply the emergency basis of tax deduction to the arrears.

Redundancy payments and arrears of pay, with related liabilities, should be included on the Forms P35 under the borrower's original employer number. In addition, P45s, including supplementary P45s, should also be issued under the original employer number.

4. Information to be provided upon appointment

Within 7 days of appointment, a receiver over corporate assets should forward the following information to Revenue, as appropriate, using the secure online facility MyEnquires (please use the facility within MyEnquiries to input the following Collector General's Division email address: insolvency@revenue.ie along with the tax reference number of the borrower, if known):

- Name and contact details of receiver
- Name and contact details of borrower
- Tax reference of borrower (if known)
- CRO number of borrower
- Deed of Appointment, specifically highlighting date of appointment
- Copy of the Debenture/loan agreement under which appointment was made
- Details of assets appointed over, in as much detail as possible e.g. folio numbers, bank details etc.
- The nature of the appointment over each asset – Fixed or Floating
- Whether the entity is continuing to trade outside of the receivership
- Whether the receiver will continue to trade and the entity under which this trade will be carried on (CRO and tax reference number)

Details which are forwarded to insolvency@revenue.ie through MyEnquiries, are available on-line to other Revenue Divisions, thereby eliminating the need for receivers to provide multiple copies of documentation.

In circumstances where the information provided is incomplete, the relevant Revenue District will pursue the outstanding information before processing any request for information submitted by a receiver.

For receivers over non-corporates, the above information, as appropriate, should be submitted prior to requests to Revenue for information to assist with the tax aspects of the receivership (see Paragraph 5).

5. Revenue sharing taxpayer information with a Receiver

Section 851A(8) provides that a Revenue officer may disclose taxpayer information to another person in certain specified circumstances including"(h) taxpayer information which may reasonably be regarded as necessary for the purposes of determining any tax, interest, penalty or other amount that is or may become payable by another person or any refund or tax credit to which the other person is or may become entitled, …………," Revenue is of the view that, where a receiver requests taxpayer information for any of the purposes reflected above, it may share that information with receivers for those specific purposes only. In view of this, Revenue issued e-Brief 16/12 entitled "Disclosure of Information to Mortgagees in Possession (MIPs), Asset Receivers and other Receivers to enable them to meet their obligations under Value-added Tax legislation". The e-Brief advised practitioners of a new instruction in the Revenue VAT Tax and Duty Manual relating to information disclosure. While this instruction details VAT information commonly requested, and the type of information that may be disclosed by Revenue, it has become standard practice, on foot of the ebrief, for a receiver, upon appointment, to issue standard letters to Revenue requesting this information. It was never the intention that Revenue would become the first port of call for receivers in seeking to obtain information to enable them to determine if the transactions in any of the properties over which they have been appointed would give rise to a VAT charge. This kind of unfocussed blanket approach to seeking information has the detrimental effect of limiting the time available to Revenue to assist in cases where details are genuinely not available elsewhere.

This should be borne in mind when requesting taxpayer information and as much background data as possible must be provided by a receiver to facilitate Revenue in researching the query. For example, with respect to requests for details as to base cost, enhancement expenditure, whether section 23 type relief has been claimed on the property and whether it has been treated as investment property or trading stock, provision of the approximate date of purchase or enhancement should be provided, together with the then vendor's details. A receiver should set out clearly what information is required, and what they understand the tax position to be. While Revenue will endeavour to respond to queries promptly, given the nature of the exercise, it can take time.

On the general question of access to Revenue held information, Revenue would caution against any expectation that the information it possesses can be made available other than for the limited purposes provided for under section 851A(8)(h), or that the information will provide the solution to all of the receiver-related information gaps. The information Revenue holds is largely dependent on tax returns submitted under the self-assessment system and certain other sources and may not be held in a form, or to the level of disaggregation, that would necessarily be useful for the particular purpose envisaged. Nonetheless, within these limitations, Revenue is prepared to share available information for the sole purpose of assisting in the determination of tax liabilities. This facility will be provided where the information cannot otherwise be accessed by the receiver from the borrower or from other sources and where the information can be furnished following reasonable efforts at retrieval. In requesting information from Revenue, receivers/MIPs must confirm in the letter of application that all other avenues have been pursued and provide details of these previous efforts to establish the information.

Personal information, including PPSNs and personal tax allowances, can never be disclosed by Revenue. Neither can information relating to assets over which the receiver has not been appointed. This may result in Revenue being unable to provide details of, for example, rental tax losses forward unless the receiver has been appointed over all properties of the entity

All requests for information need to be forwarded to the District dealing with the borrower's tax affairs.

6. Capital Gains Tax Clearance Certificates (CG50As)

In the case of a receiver/MIP appointed to an asset charged by a company or an individual, the application for a tax clearance certificate (Form CG 50A) should be made by the receiver or the MIP, as the case may be, on the disposal of specified assets to third parties where the consideration exceeds certain limits, currently €500,000 (the limit is €1m in the case of a house or an apartment). Applications should be made to the following Revenue districts:

Disposal by: Relevant District Tax Reference Number Receiver over corporate assets District dealing with corporate Company tax reference number Receiver over assets of an individual District dealing with individual Individual's PPSN /tax reference number Receiver over co-owner asset District dealing with Receiver PPSN/tax registration of all co-owners to be listed on a schedule MIP Large Cases Division6 MIP's tax reference number

The vendor details on the application Form should be completed as "[receiver/MIP name] - as receiver/MIP over assets of [borrowers name]"and signed by the receiver/MIP in their capacity as such.

The vendor, for the residence test purposes, is the borrower, not the receiver/ MIP. However, for MIP applications to LCD using the tax reference number of the mortgagee as MIP, Revenue will permit that the residence test may be determined by reference to the mortgagee's residence position.

In instances where a CG50A has issued to a receiver, but the contract is being closed by a MIP, while technically a new CG50A should be sought, Revenue will accept the CG50A issued to the receiver.

7. Reasonable Endeavours

For the purposes of these guidelines, "reasonable endeavours" means all the steps that a reasonable person would take in the circumstances. This means that the person must take all reasonable steps within their powers which are capable of producing the desired results. These would be the steps the person would take if acting in their own interests and desiring to achieve that result, acting honestly, reasonably and making a positive effort to perform the relevant obligation.

Taking section 96(3) as an example, if the following steps were undertaken, Revenue would be satisfied that the reasonable endeavours test is met:

Income - the amount of rent receivable under a letting agreement should normally be available to the receiver or lender. Where a computation of rental income is prepared on the basis of the rent received, the receiver/lender should be satisfied that the amount received equates to the rent receivable under the agreement. Where there is a discrepancy, the lender must try to ascertain the reason(s) for the discrepancy. For example, have the terms of the agreement been altered and, if so, in what circumstances, or has the tenant just ceased paying the full rent provided for in the agreement. In all cases, the computation should be prepared on the basis of the rent receivable (subject to any claim under section 101).

Property owned by a partnership or co-ownership: Before making any assumptions in relation to the extent of a borrower's interest in such property, the lender should check if the required information is available from its own records or from other records to which it might have access.

Joint borrowers: As in the case of property owned by a partnership or coownership, the lender should check all avenues available to it before making any assumptions in relation to the borrower's interest in a property.

Group relief: When claiming group relief, the lender should, in addition to obtaining the necessary confirmations in relation to group structure etc. satisfy itself that the losses have in fact been surrendered by the group member.

Deductible expenditure: In general, it should be possible for lenders to identify and calculate the amount of any deductible expenditure when computing the rental income from property in receivership. Difficulties in this area relate mainly to the deduction under section 97(2)(e) for interest on loans:

Purpose of the loan: Interest on a loan is deductible only to the extent that it is used to purchase, improve or repair the rental property in question. It follows, for example, that a deduction for interest is not due merely because a loan is secured on property. Therefore, before making a deduction, the lender must satisfy itself in relation to the purpose of the loan. In this regard, it would normally be expected that the lender would be in a position to confirm from records in its possession that the loan (or a replacement or amalgamated loan (Part 4.8.6 of the Income Tax, Capital Gains Tax and Corporation Tax Manual refers) was used for the purposes set out in section 97(2)(e).

PRTB registration requirements: For the purposes of section 96(3) computations, a lender must be able to show that the relevant registration requirements have been met in respect of all tenancies which existed in relation to the property in the chargeable period for which a deduction for interest is made. The checks required in this regard might include having sight of the tenant's copy of the registration confirmation letter or making direct contact with the PRTB. (The inclusion of a property on the PRTB's published register is not necessarily proof that the registration requirements have been met in relation to a tenancy for a particular period.)

If there are individual situations where additional clarity is required on how best to meet 'reasonable endeavours', a submission should be made to the relevant District where the return is being filed.

8. Filing a Stamp Duty Return on ROS when property is being sold through a receiver/Mortgagee in Possession (MIP)

Receivers

If property is being sold through a receiver and the receiver is a party to the instrument On the 'Instrument Category' screen, tick the box to indicate that the receiver is acting in a fiduciary capacity for the vendor; On the 'Instrument Party Details' screen– o input the tax reference number of the mortgagor/borrower into the 'vendor' field; o select the fiduciary capacity from the drop down menu; o input the name of the receiver; and o click on the "Add Vendor Fiduciary Capacity" button. Valid tax reference numbers in respect of each party to an instrument are needed in order to file a stamp duty return. However, Revenue recognises that practical difficulties can arise where mortgagors/borrowers who are individuals do not cooperate with the requirement to provide a valid tax reference number to a receiver. Receivers may, where every other possible avenue to obtain a valid tax reference number has been exhausted, input as the vendor's tax reference number, the tax reference number obtained from Revenue in respect of the particular receivership. However, it should be noted that the names that will appear on the stamp certificate are the names attached to the receiver and to the vendor in Revenue's systems.

Mortgagees in possession (MIP)

If property is being sold by a MIP, the MIP is the actual vendor and not acting in a fiduciary capacity. Therefore, the MIP's own tax reference number should be input in the e-stamping return in the 'vendor' field.