COMPANY LAW REVIEW GROUP
an grúpa athbhreithnithe dlí cuideachtaí

COMPANY LAW REVIEW GROUP

REPORT ON THE CONSEQUENCES OF CERTAIN CORPORATE LIQUIDATIONS AND RESTRUCTURING PRACTICES, INCLUDING SPLITTING OF CORPORATE OPERATIONS FROM ASSET HOLDING ENTITIES IN GROUP STRUCTURES

DECEMBER 2021

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Chairperson's Letter to the Minister for Business, Enterprise and Innovation

Mr Leo Varadkar T.D.,
Tánaiste and Minister for Enterprise, Trade and Employment
23 Kildare Street
Dublin 2 D02 TD30

Mr Robert Troy, T.D.
Minister of State for Trade Promotion, Digital and Company Regulation
23 Kildare Street
Dublin 2
D02 TD30

21 December 2021

Dear Tánaiste,

Dear Minister,

I am pleased to present to you a Report of the Company Law Review Group (**CLRG**) on the consequences of certain corporate liquidations and restructuring practices including splitting of corporate operations from asset holding entities in group structures.

This and related issues have proven to be complex, requiring extensive discussion and analysis, reflected by the 11 meetings of the CLRG's Corporate Insolvency Committee in 2021 which considered the issues in this Report. I wish to pay tribute to the exceptional input of the Committee's Chair, Professor Irene Lynch Fannon, who led the discussion and analysis and formulation of the conclusions and recommendations in this Report. The Committee's approach was to improve access for creditors to the remedies available under the Companies Act, in the context of the Act's objective being to balance the respective rights of stakeholders.

Perhaps inevitably, it was not possible for there to be unanimity on all issues and accordingly, the Report notes where there was a majority view only.

As well as thanking the CLRG's Corporate Insolvency Committee for their engagement and input in examining these issues, I would also like to thank the Department of Enterprise, Trade and Employment for their support, in particular, Secretary to the Group, Mr Stephen Walsh.

Yours sincerely,

____

Paul Egan SC
Chairperson
Company Law Review Group

1. Introduction to the Report

1.1 The Company Law Review Group

The Company Law Review Group (**CLRG**) is a statutory advisory body charged with advising the Minister for Enterprise, Trade and Employment (**the Minister**) on the review and development of company law in Ireland. It was accorded statutory advisory status by the Company Law Enforcement Act 2001, which was continued under section 958 of the Companies Act 2014. The CLRG operates on a two-year work programme which is determined by the Minister, in consultation with the CLRG.

The CLRG consists of members who have expertise and an interest in the development of company law, including practitioners (the legal profession and accountants), users (business and trade unions), regulators (implementation and enforcement bodies) and representatives from government departments including the Department of Enterprise, Trade and Employment (**the Department**) and Revenue. The Secretariat to the CLRG is provided by the Company Law Review Unit of the Department of Enterprise, Trade and Employment. Full lists of members of the Company Law Review Group and of the Corporate Insolvency Committee are set out in Section 2.

1.2 The Role of the CLRG

The CLRG is established to monitor, review and advise the Minister on matters pertaining to company law. In so doing, it is required to "seek to promote enterprise, facilitate commerce, simplify the operation of the Act, enhance corporate governance and encourage commercial probity" as per section 959(2) of the Companies Act 2014.

1.3 Policy Development

The CLRG submits its recommendations on matters in its work programme to the Minister. The Minister, in turn, reviews the recommendations and determines the policy direction to be adopted.

1.4 Contact information

The CLRG maintains a website www.clrg.org. In line with the requirements of the Regulation on Lobbying Act and accompanying Transparency Code, all CLRG reports and the minutes of its meetings are routinely published on the website. It also lists the members and the current work programme.

The CLRG's Secretariat receives queries relating to the work of the Group and is happy to assist members of the public. Contact may be made either through the website or directly to:

Stephen Walsh
Secretary to the Company Law Review Group
Department of Enterprise, Trade and Employment
Earlsfort Centre
Lower Hatch Street
Dublin 2
D02 PW01 Email: stephen.walsh@enterprise.gov.ie

1.5 Work Programme and Policy Context

Item 1 on the Company Law Review Group's (CLRG) Work Programme 2020-2022 arises from commitments contained in the Programme for Government, '*Our Shared Future'*,[1] in relation to workers' rights when a company goes into liquidation.

The Tánaiste wrote to the Chair of the CLRG on 30 July 2020, requesting that Item 1 be considered a priority issue:

> '*The first item on the Work Programme deals with commitments from the Programme for Government. Issues surrounding workers' rights when a company goes into liquidation have come to the fore in light of COVID-19, in particular the alleged practice of a minority of trading entities splitting their operations between trading and property with the result being the trading business (including jobs) go into insolvency and assets are taken out of the original business. I ask that the CLRG report to me on this matter by 31st December 2020. It is time that these issues not only be reviewed but also dealt with. Government will be ready to act on the findings and propose legislation where this can achieve results.'*

This issue raises three distinct questions surrounding:

- first, the legal provisions which serve to protect workers as creditors in corporate liquidations;
- secondly the alleged practice of restructuring corporate entities into trading operations and property holding companies which result in the removal of assets from the trading entity; and
- thirdly, the examination of legal provisions regarding removal of assets out of the original business including sales to connected parties on insolvency.

In his letter to the Tánaiste in late December 2020, the CLRG Chairperson outlined the CLRG's planned approach to this Work Programme Item. The Committee has divided the work into three separate workstreams: -

- The first workstream involved a review of existing legislative provisions regarding the provision of information to creditors generally and to employees specifically. The specific question was whether these provisions provide sufficient protection to employees and creditors or whether some of the reforms which have either been suggested earlier by the CLRG in its 2017 Report ought to be implemented and/ or whether there are additional measures which ought to be put in place.

  The CLRG Report on *Existing Legislative Provisions Regarding the Provision of information to Creditors Generally and in Particular to Employees* (March 2021) addressed this issue.

[1] Programme for Government: Our Shared Future gov.ie - Programme for Government: Our Shared Future (www.gov.ie)

- The second workstream involves a consideration of employees as corporate stakeholders. In particular, the CLRG were specifically asked to consider a concern regarding alleged restructuring and splitting of corporate operations entities within a group from asset holding entities with this occurring in a minority of cases.

- The third workstream (which is the subject of this Report) addresses:

    - the legal provisions that pertain to any sale to a connected party following insolvency of a company including who can object and allowable grounds of an objection;

    - transactions around insolvency which remove assets from the reach of creditors, including employees, and in particular involve the transfer of assets to connected parties.

Many of the provisions mentioned as being relevant to workstream 2 are also relevant to workstream 3 in that these can be broadly categorised as transactional avoidance provisions, sometimes referred to as 'asset swelling provisions'. This Report presents a combined review of the provisions relevant to each of these workstreams.

1.6 The CLRG Report on Existing Legislative Provisions Regarding the Provision of Information to Creditors Generally and in Particular to Employees (March 2021)

As mentioned above, the CLRG Report on *the Provision of information to Creditors Generally and in Particular to Employees* (March 2021) addressed workstream 1 of the work programme described above. This Report addresses workstreams 2 and 3 combined. The policy context in which this particular work is undertaken is similar to the concerns and issues described in the CLRG's Report of March 2021.

2. The Company Law Review Group Membership

2.1 Membership of the Company Law Review Group

The membership of the Company Law Review Group at [date] is set out in this table.

Paul Egan SC	Chairperson (Mason Hayes & Curran LLP)
Alan Carey	The Revenue Commissioners
Barry Conway	Ministerial Nominee (William Fry LLP)
Máire Cunningham	Law Society of Ireland (Beauchamps LLP
Richard Curran	Ministerial Nominee (LK Shields LLP)
Marie Daly	Irish Business and Employers' Confederation (IBEC)
Emma Doherty	Ministerial Nominee (Matheson)
Ian Drennan	Director of Corporate Enforcement
Bernice Evoy	Banking and Payments Federation Ireland CLG
James Finn	The Courts Service
Michael Halpenny	Irish Congress of Trade Unions (ICTU)
Rosemary Hickey	Office of the Attorney General
Tanya Holly	Ministerial Nominee (DETE)
Shelley Horan	Bar Council of Ireland
Gillian Leeson	Euronext Dublin (The Irish Stock Exchange PLC)
Prof. Irene Lynch Fannon	Ministerial Nominee (Matheson and School of Law, University College Cork)
Vincent Madigan	Ministerial Nominee, formerly of the Department of Enterprise Trade and Employment
Kathryn Maybury	Small Firms Association Ltd (KomSec Limited)
Neil McDonnell	Irish Small and Medium Enterprises Association CLG (ISME)
Dr. David McFadden	Ministerial Nominee (Companies Registration Office)
Salvador Nash	The Chartered Governance Institute (KPMG)

Fiona O'Dea	Ministerial Nominee (DETE)
Ciara O'Leary	Irish Funds Industry Association CLG (Maples and Calder LLP)
Gillian O'Shaughnessy	Ministerial Nominee (ByrneWallace LLP)
Maureen O'Sullivan	Ministerial Nominee (Registrar of Companies)
Kevin Prendergast	Irish Auditing and Accounting Supervisory Authority
Maura Quinn	The Institute of Directors in Ireland
Eadaoin Rock	Central Bank of Ireland
Doug Smith	Restructuring and Insolvency Ireland (Eugene F Collins)
Tracey Sullivan	Consultative Committee of Accountancy Bodies – Ireland (CCAB-I)

2.2 Membership of the CLRG Corporate Insolvency Committee

Prof. Irene Lynch Fannon	Chair (Matheson and School of Law, University College Cork)
Marie Daly	CLRG member
Michael Halpenny	CLRG member
David Hegarty	Office of the Director of Corporate Enforcement
Rosemary Hickey	CLRG member
Tanya Holly	CLRG member
Tara Keane	Department of Enterprise, Trade and Employment
Neil McDonnell	CLRG member
Vincent Madigan	CLRG member
Conor O'Mahony	Office of the Director of Corporate Enforcement
Paddy Purtill	Revenue Commissioners
Doug Smith	CLRG member
Tracey Sullivan	CLRG Member

2.3 Legal Researchers to the Corporate Insolvency Committee

David Allen, B.L.	Barrister at Law
Matthew Brady, B.L.	Barrister at Law

3. Defining the Problem and the Economic Impact of COVID-19

3.1 Defining the problem outlined for Workstreams 2 and 3.

The Review Group's Corporate Insolvency Committee (the **Committee**) was anxious that the problem or mischief which has led to the concern amongst the public and other stakeholders should be adequately defined so that abusive incidences of corporate restructuring and re-organisation are separated out from a legitimate interest that any corporate group might have in organising its affairs, with a view to minimising business risk.

The general view of members of the Committee was that the incidence of abusive practices, although attracting headlines and a great deal of concern, is low. On the other hand, the Review Group recognises the importance of ensuring that restructuring and reorganisation proceeds within the confines of the framework provided in the Companies Act 2014 (as amended). As we have noted in our March 2021 Report, there are complex policy issues involved in this matter. In that vein the Committee sought to refine the issues which could be addressed by the CLRG, conscious that the Review Group's remit concerns company law only. This part of the Review Group's work focuses on corporate restructurings and necessarily revisits some recommendations (described below in Section 4) made by the CLRG in its 2017 Report.

In ensuring that the problem is appropriately defined, the Review Group has sought to differentiate between examples of group restructuring and of group insolvencies. In some cases, there may be aggressive corporate restructurings where valuable property assets are removed from a group in a receivership process prior to liquidation, while other examples might include a more straightforward insolvency of particular corporate entities within a group. In both cases, concerns can arise that employees and other creditors may not be given adequate notice of the insolvency. On the other hand, any group of companies is entitled to arrange its affairs in a manner which is appropriate to its needs provided such arrangements comply with company law. For example, even relatively small group structures include companies which hold property, and other related companies, which carry on the trading activities of the group. This structure may involve a small number of companies (two for example) with a parent holding company. A further common example is that trading activities of a group can be divided into separate corporate entities relating to geographical market sectors.

The ODCE noted that its reviews of liquidations generally demonstrated that issues of concern arise in only a small subset of cases with the conclusion being reached that in over 90% of all liquidations directors had acted honestly and responsibly.

Overall, the view of state agency and practitioner representatives on the group was that the abusive examples which informed the work programme item is reflective of only a small number of insolvencies. The transactional avoidance provisions which are considered below are key measures available to liquidators and others, including creditors and other stakeholders, which may address some of the issues which have arisen. These are often described as 'asset swelling measures'. However, it is acknowledged that these provisions are not often used. There are various reasons for this which are described initially in Section 5 below and considered in detail in further Sections of this Report. This Report seeks to address these issues.

3.2 The Economic Impact of Covid-19

The Review Group is particularly aware that, in addition to the concerns which gave rise to the 2017 CLRG Report, and to the creation of its current work programme, the consequences of the COVID-19 pandemic have added to those concerns. There is a general anticipation of an increase in corporate insolvency figures, particularly in the retail sector. Given this predicted scenario the issue of creditors' and workers' rights has come to the fore. While current figures do not show a marked increase in insolvencies, this is likely to be due to the continued availability of government supports to enterprises, together with banking, trade credit and landlord supports being provided to affected companies. [2]

Notwithstanding such supports it is expected that the continued COVID-19 restrictions throughout 2021 will result in an increase in the number of businesses going into insolvency processes. The economic impact of COVID-19 makes the subject matter of this report a priority. As the Government seeks to unwind the level of business supports as the effects of the pandemic subside, levels of insolvencies are expected to increase. Although it had been predicted that insolvencies would increase by Q3 2021, the World Bank has taken the view that it may be roughly three years from the beginning of the pandemic before we see the real impact of non-performing loans arising from the loss of business during this period.[3]

The Central Bank[4] has also acknowledged the impact that significant levels of Government supports have had on different sectors and the broader economy. In reviewing the impact of COVID-19 on SMEs the Central Bank notes that SMEs are likely to face considerable financial strain compared with larger corporations and households. The uneven nature of the impact of COVID-19 on different sectors of the economy is already apparent and it is expected that whilst insolvency is likely to occur across various sectors of the economy, a particular impact will be seen in hospitality (bars, restaurants, hotels) and retail sectors.

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[2] The recent National Competitiveness and Productivity Council Bulletin 21-5, Firm Dynamism and Productivity, states that, "While Insolvency rates to date remain in line with pre-pandemic trends, as more of the economy opens up and financial supports are gradually withdrawn, this could result in the number of firms facing financial pressure." firm dynamism and productivity.pdf (competitiveness.ie)

[3] "The Calm Before the Storm: Early Evidence on Business Insolvency Filings After the onset of Covid-19". World Bank 2021. World Bank Document

[4] https://www.centralbank.ie/news/article/press-release-impact-of-covid-19-on-irish-enterprises-sudden-large-and-uneven-01-october-2020

4. Previous Reports and Policy Developments relevant to the Committee's work

4.1 CLRG Report on the Protection of Employees and Unsecured Creditors 2017

Some of the issues which are addressed in this report were considered by the CLRG in its Report on *The Protection of Employees and Unsecured Creditors 2017,* which entailed a root and branch review of all the provisions of the Companies Act 2014 (as amended) relevant to the treatment of employees and unsecured creditors in an insolvency, in particular in what could be termed 'an aggressive restructuring context'. Some of the issues considered in that Report continue to be relevant to the subject matter of this Report and as described in the following sections have been addressed in the Plan for Action on Collective Redundancies following Insolvency. Other outstanding matters are considered in detail below.

4.2 Plan for Action on Collective Redundancies following Insolvency

Having regard to concerns expressed following previous liquidations, Ministers of State Damian English and Robert Troy launched the Plan of Action for Collective Redundancies in June 2021. A particular focus was placed on identifying ways to ensure that incorporation cannot be used as a pretext to avoid a company's legal obligations to its employees and creditors. This policy initiative is not in response to any one previous corporate insolvency resulting in collective redundancies. Rather, it addresses the issues arising across the generality of such situations and seeks to further supplement existing legislative protections and safeguards afforded to affected stakeholders. This policy response has been informed by a number of initiatives[5] and combines legislative proposals in the areas of employment law governing insolvency and redundancy as well as legislative proposals in the area of company law and corporate insolvency law that are material to the protection of workers as creditors. In addition, clear and accessible information bulletins will be provided by the Department in relation to those remedies designed to secure the protection of employees and which are already a feature of the existing legal landscape. Separately, in recognition of the changing nature of the employment landscape and the vast and complex body of law that exists in this area, it is further proposed to move to establish an independent forum that will consider employment law issues into the future, similar to the Company Law Review Group. Membership of this forum will include stakeholders such as employee and employer representatives, as well as employment law and other legal experts.

4.3 Company Law

Following consideration of the CLRG'S recent 2021 Report "*Review of existing legislative provisions regarding the provision of information to creditors generally and in particular to employees*", as well as the outstanding recommendations of the 2017 Report on the *Protection of Employees and Unsecured Creditors*, the Department of Enterprise, Trade and Employment made nine recommendations for legislative amendment as part of the Plan for Action on Collective Redundancies following Insolvency. While the CLRG sought to arrive at a consensus in each of the

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[5] Duffy Cahill Report of April 2016 (*Expert Examination and Review of Laws on the Protection of Employee Interests when Assets are separated from the operating Entity)*, CLRG 2017 *Report on the Protections for Employees and Unsecured Creditors* and the CLRG Report of March 2021 entitled *Review of existing legislative provisions regarding the provision of information to creditors generally and, in particular, to employees.*

reports, ICTU dissented to varying degrees and submitted minority reports. Three of the nine supported amendments are in response to the minority report.

The following recommendations were implemented in the *Companies (Rescue Process for Small and Micro Companies) Act 2021*, which was commenced on December 8th, 2021.

- amending s. 627 to clarify that the liquidator has power to bring/defend proceedings before the WRC and Labour Court.

- amending s. 587 to oblige the liquidator/director to ensure creditors are made aware that they have the right to form and participate in a Committee of Inspection.

- amending s. 666 to provide that where a Committee of Inspection is appointed it shall include at least one employee creditor member (ICTU minority report).

The following remaining recommendations will be progressed at a later stage by way of regulations or amendment to the Companies Act 2014:

- amending the ODCE's liquidator's form to include consideration given to employees by the director in the period leading up to liquidation.

- engaging with the Courts Service to allow for a petition notice in a court liquidation to be published on corporate websites (Superior Court Rules amendment).

- establishing a working group of stakeholders to examine the format of the Statement of Affairs and liquidation related CRO forms.

- obliging directors to notify employees of the petition filed at court; the court could then have regard to whether the company has met this obligation.

- enabling the court to direct the provisional liquidator to inform employee representatives of his/her appointment, to explain the process and to invite them to provide information on the company's affairs.

- obliging directors to furnish creditors with the Statement of Affairs within 24 hours of it being presented to court and amend ODCE's liquidator's form to include a question on whether this obligation has been fulfilled.

The issues considered and recommendations made as part of this report may also be progressed in the context of the overall plan.

4.4 Employment Law

Some of the issues relevant to the position of employees in corporate insolvencies were considered by the Duffy Cahill Report.[6] Its terms of reference recognised what it described as the "the complex interface between company law and employment rights law", noting that the two codes

[6] Ibid. See https://enterprise.gov.ie/en/Publications/Duffy-Cahill-Report.html

have been devised for very different purposes.[7] Its terms of reference also included a request that consideration be given to changes at this interface between these two codes of law. Notwithstanding the fact that the Government has engaged extensively with the Social Partners to respond to the anticipated rise in insolvencies the Irish Congress of Trade Unions (ICTU) has highlighted that some of the Duffy Cahill Report's recommendations remain outstanding. It should be noted, however, that the Plan for Action on Collective Redundancies following Insolvency was welcomed by all the Social Partners.

In view of its remit the Committee decided not to take a view on the adequacy of these provisions.

[7] https://enterprise.gov.ie/en/Consultations/Consultations-files/Appendix-1-Terms-of-Reference-for-Expert-Examination.pdf

5. Relevant Company Law Provisions and Considerations

5. 1 The Relevant Company Law Provisions

The Committee identified the following provisions of the Companies Act 2014 (as amended) as being worthy of further review:

- Section 599 of the 2014 Act, under which a related company may be required to contribute to debts of a company being wound up;
- Section 600 of the 2014 Act, under which the assets of related companies in liquidation may be pooled; and
- a possible addition to the 2014 Act (as amended) following the structure of section 224 (under which directors must have regard to the interests of employees) in order to impose on directors of companies a statutory obligation to consider the interests of creditors where it appears that a company is, or is likely to be, unable to pay its debts as they fall due. This proposal is reflective of statements in case law and has been the subject matter of a CLRG recommendation in 2017.[8]
- Additional provisions which are potentially relevant to both workstreams 2 and 3 include what are generally described as 'transactional avoidance provisions'. These include sections 602, 603, 604, 608, 609, 610, 612 & 613 of the Companies Act 2014 (as amended). These provisions can be generally described as provisions which have the effect of ensuring assets are not removed from the reach of creditors. Not all of the provisions have been given equal consideration as the Committee responded to particular submissions or observations.

Even though these provisions have, in many cases, been on the statute book in some form since the 1963 Companies Act and have, in other cases, been on the statute book since 1990, many of the provisions have been rarely used. The Review Group considers that there are a number of reasons for this being the case.

The first is that evidentiary requirements in the provisions are not always met. Some proposals are made to clarify provisions with this difficulty in mind. These are considered in Section 6 of this Report. Secondly, in relation to some of the provisions, pursuing the officers of the company or relevant alleged wrongdoers may not be worthwhile. This is particularly relevant when the purpose of the provision is to impose personal liability on directors or officers as in the case of section 610 on fraudulent and reckless trading (see below). Thirdly, in some cases, depending on the drafting of the legislation, the liquidator is personally liable for the costs of such action if unsuccessful. This is considered to be a deterrent and presents a challenging environment in which a liquidator must weigh the pros and cons of embarking on such action. This issue is considered in Sections 9 and 10 of this Report. Finally, the low level of funding to pursue such actions is also in question. For this reason, this Report makes some suggestions on the topic of third-party funding in insolvency related litigation at Section 8 below.

[8] See below Section 4.2.1

5.2 Provisions to be considered which are also considered in the CLRG 2017 Report

5.2.1 Proposed Section 224A of the Companies Act 2014

The 2017 CLRG Report recommended that the Companies Act 2014 would be amended to include the "imposition of a statutory obligation on directors of companies to consider the interests of creditors where it appears that a company is, or is likely to be, unable to pay its debts as they fall due." This proposal reflects an obligation which has already been described in case law, in particular in a decision of the Supreme Court in *Re Frederick Inns Ltd,*[9] where Blayney J. considered the issue of payments made by four companies to settle debts of related companies when the companies were under the management of directors 'pending imminent liquidation'. Holding that these payments were not "lawfully and effectively done" the court held that:

> "Because of the insolvency of the companies the shareholders no longer had any interest. The only parties with an interest were the creditors. The payments could not have been lawful because they were made in total disregard of their interests."[10]

In doing so the court referred to similar principles outlined in other common law jurisdictions.[11]

The obligation to have regard to the interests of creditors at a point of insolvency was reiterated in a statement of principles relevant to restriction provisions from Clarke J (as he then was) in *Re Swanpool Ltd.*[12] In considering how the issue of restriction is approached the court noted that approaches may differ depending on the facts but "[I]n broad terms there would seem to me to be three types of situation which the court is typically required to consider in such applications. They are:

1. Issues involving compliance by the company with its formal obligations under the Companies Acts including keeping books and records, making returns, holding meetings and the like;

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[9] *Re Frederick Inns Ltd* [1994] 1 ILRM 387

[10] *Ibid.*

[11] See *Kinsela and Another v Russell Kinsela Property Limited (in liquidation*) (1986) 4 NSWLR at p. 722: "In a solvent company the proprietary interests of the shareholders entitle them as a general body to be regarded as the company when questions of the duty of directors arise. If, as a general body, they authorise or ratify a particular action of the directors, there can be no challenge to the validity of what the directors have done. But where a company is insolvent the interests of the creditors intrude. They become prospectively entitled, through the mechanism of liquidation, to displace the power of the shareholders and directors to deal with the company's assets. It is in a practical sense their assets and not the shareholders' assets that, through the medium of the company, are under the management of the directors pending either liquidation, return to solvency, or the imposition of some alternative administration." See also *West Mercia Safetywear Ltd (in liquidation) v Dodd* [1988] BCLC 250.

[12] *In Re Swanpool Ltd* [2006] 2 ILRM 217 where Clarke J. stated at para 3.1: "In in Re Frederic Inns Limited [1994] ILRM 387 the Supreme Court had to consider the question of the duties of directors in a situation where a company was being wound up or where any creditor could have it wound up on the ground of insolvency. Blayney J., in giving the judgment of the court, found that in such circumstances the directors owed a duty to the creditors to preserve the assets so as to enable them to be applied pro tanto in discharge of the company's liabilities. There can be little doubt, therefore, that amongst the important duties of directors is to ensure that, when it becomes clear that a company is insolvent, the assets are preserved and dealt with in the way in which the Companies Acts require."

2. The commercial management of the company most particularly at the period when the company was insolvent or heading in that direction; and

3. Compliance by the directors with the obligations identified in *Frederick Inns* to ensure that once the company was facing insolvency its assets were dealt with in a manner designed to ensure the proper distribution of those assets in accordance with insolvency law."

Following consideration of COVID-19 measures during early 2020 by the CLRG, a proposal to codify this obligation appeared in the General Scheme of what became the Companies (Miscellaneous Provisions) (Covid-19) Act 2020 [13], but this provision was not enacted at that time.

The 2020 Act primarily dealt with temporary, emergency measures designed to ensure the normal operation of the Companies Act for the duration of the pandemic. It provided for temporary amendments to the Companies Act to allow for virtual meetings as well as certain substantive amendments to insolvency law. Owing to the emergency nature of the Act it was drafted and brought through the Houses of the Oireachtas within a particularly compressed timeframe. As the insertion of the new section 224A was to be a permanent amendment, it was considered appropriate to remove it pending further policy analysis and consideration to ensure it accurately reflected the existing common law duty as set out in *Re Fredericks Inns*.

This obligation must now also be viewed in the additional context of Article 19 of Preventive Restructuring Directive *(*EU*)* 2019/1023, which sets down minimum rules for Member States' preventive restructuring frameworks, and which must be transposed by 17 July 2022.[14]

Article 19 directs that:

> "Member States shall ensure that, where there is a likelihood of insolvency, directors, have due regard, as a minimum, to the following:
>
> (a) the interests of creditors, equity holders and other stakeholders;
>
> (b) the need to take steps to avoid insolvency; and
>
> (c) the need to avoid deliberate or grossly negligent conduct that threatens the viability of the business."

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[13] Report on Measures to address Company Law Issues arising by reason of the COVID-19 pandemic. The suggested provision is as follows:
"(1) The directors of a company who believe, or who have reasonable cause to believe, that a company is unable or likely to be unable to pay its debts as they fall due, shall–
(a) have regard to the interests of the company's creditors; and (b) preserve the company's property.
(2) The duty in subsection (1) shall be owed to the company (and the company alone) and shall be enforceable in the same way as any other fiduciary duty owed to a company by its directors.
(3) Where a director of a company acts in breach of his or her duty under subsection (1) and the company goes into insolvent liquidation then the director shall be liable to indemnify the company for any loss or damage resulting from that breach.
(4) For the purposes of subsection (3), a company shall be taken to have suffered loss or damage where, upon its insolvent liquidation, its creditors do not recover the sums which they would have received had there been no breach of the duty in subsection (1)."

[14] The Examinership process provided in Part 10 of the Companies Act 2014 and the rescue process outlined in Companies (Rescue Process for Small and Micro Companies) Act 2021 are relevant to this Directive.

Even where a duty to consider the interests of creditors might be imposed on directors nevertheless there are a number of considerations regarding the enforcement of directors' duties, particularly in a liquidation context. The statement of directors' duties in the Companies Act 2014 interfaces with provisions on disqualification, where directors can be disqualified for breach of duty. This is considered further below in Section 7. An additional approach is to consider a change in the law on the funding of insolvency litigation as mentioned in the previous section which is considered in detail in Section 8 below.

5.2.2 Recommendation

Amend the Companies Act 2014 to insert a new section 224A which:

a) codifies the duty identified by the Supreme Court in Re Frederick Inns Ltd and,

b) does so in a manner which takes account of the terms of Article 19 of Directive (EU) 2019/1023.

5.2.3 Consideration of Sections 599 and 600

Sections 599 and 600 were considered by the CLRG leading to its Report in 2017. Their precursors were sections 140 and 141 of the 1990 Act. Section 599 refers to the possible obligation imposed by a court on a related company *to contribute* to the pool of assets of a company in liquidation. (Contribution orders). Section 600 refers to *pooling orders*, where the assets of related companies in liquidation are pooled under a court order. The Committee did not consider this second provision to be particularly relevant to the issues at hand and therefore its observations focus on Section 599.

Section 599 of the 2014 Act provides a mechanism by which a company (for example a parent company) that is related to another company which is being wound up (a subsidiary) can be ordered to make a contribution to the debts of the company being wound up on foot of an application by a creditor, liquidator or contributory of the company. As such, section 599 provides a potential remedy for creditors who have been deprived of access to assets through the use of company structures. Pursuant to s. 599, the court is permitted to make a contribution order when it considers it *"just and equitable"* to do so. Subsection (4) stipulates that the court must have regard to the following factors in the exercise of its discretion:

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

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

c) The effect which a contribution order would have on the creditors of the related company.

In addition, under s. 599(5) it is a mandatory requirement of the section that the court be satisfied that the circumstances giving to the winding up of the company are *"attributable"* to the acts of the related company.

5.2.4 Legislative history of Section 599.

The contribution order remedy was derived from a similar provision in s. 30 of the New Zealand Companies Amendment Act 1980[15]. The New Zealand provision was enacted on foot of a recommendation by the Macarthur Committee[16] in response to instances where well known public companies had *abandoned* their subsidiaries. The remedy was first enacted in this jurisdiction in s. 140 of the Companies Act 1990. As originally drafted, the Bill was identical to the New Zealand legislation. However, some perceived the contribution order to be anti-risk taking and anti-business. At the same time the issue of group liability was due to be addressed in the Ninth Directive (on corporate groups) at EU level[17] and it was felt by some that developments at EU level should be awaited. In this context, a number of changes were made to moderate the proposed provision. The section as enacted therefore differed from the New Zealand provision in a number of material respects:

1) First, the Irish legislation has both discretionary and mandatory elements. The Court is required to have regard, in the first instance, to three discretionary criteria in determining whether or not it is just and equitable to make a contribution order under s. 599(4). In addition, however, the court must also be satisfied that the circumstances which gave rise to the liquidation of the company were attributable to the acts of the related company under s. 599(5). In New Zealand, on the other hand, although the legislation does require the court to consider the extent to which the circumstances which gave rise to the liquidation were attributable to the acts of the related company, there is no requirement that this acts as a prerequisite to the making of an order;

2) Second, the express provision in the New Zealand legislation which permits the court to have regard to any other factor that it considers fit in exercising its discretion to make a contribution order was not included in the Irish legislation (1990 Act) on the basis that it was thought to give too broad a discretion to the Court;

3) Finally, a requirement that the Court consider the effect which such an order would have on the creditors of the related company was added to the Irish legislation at Seanad stage[18] and does not appear in the New Zealand provision. This is provided for in section 599(4)(c).

[15] Now contained in ss. 271(1)(a) and 272 of the Companies Act 1993.

[16] Final Report of the Special Committee to Review the Companies Act, 1973 (New Zealand).

[17] A draft "Ninth Company Law Directive on the Conduct of Groups containing a Public Limited Company as a Subsidiary" was circulated by the Commission in December 1984 for consultation. According to its Explanatory Memorandum, the Directive was intended to provide a framework in which groups can be managed on a sound basis whilst ensuring that interests affected by group operations are adequately protected. Such a legal framework, adapted to the special circumstances of groups, was considered to be lacking in the legal system of most Member States. The consultation on the draft Directive showed that there was very little support for such a comprehensive framework on group law: such an approach was largely unfamiliar to most Member States, and the business sector viewed it as too cumbersome and too inflexible. As a consequence, the decision was made not to issue an official proposal. However, since that time a number of European jurisdictions have made amendments to parent liability for group structures.

[18] It is perhaps worth noting that although the New Zealand legislation does not impose a similar requirement, the courts in New Zealand have expressed significant doubt that the section would be permitted to operate so as to prejudice the *bona fide* unsecured creditors of a related company.

5.2.5 The CLRG 2017 Report's observations on Section 599

The Irish and New Zealand provisions were examined in detail by the Review Group in the course of discussions leading to its 2017 Report.[19] At that time neither section 599 nor its predecessor had been the subject of a written judgment of the Superior Courts. This continues to be the case. The Review Group noted that the more liberal language in the text of the New Zealand legislation had not given rise to a significant volume of claims for contribution orders in that jurisdiction and that also continues to be the case.[20]

With the exception of ICTU, who recommended replication of the New Zealand provisions in Irish law, the Review Group did not recommend any change to s. 599 of the 2014 Act at that time. It was considered that the section provided an exceptional remedy that would only be used where very rare circumstances were present.

5.2.6 Attribution test in section 599(5)

During the current review the issues mentioned at (1)-(3) in section 5.2.4 were considered and, following debate, the Review Group, by a majority, suggests a qualification of the attribution test in s.599(5)

There was general agreement regarding the desirability of a modification of the test expressed in s.599(5) which prevents a court from making an order unless the '*court is satisfied that the circumstances that gave rise to the winding up of the company are attributable to the acts or omissions of the related company*.' The view was taken that this was a particularly restrictive provision and might prevent the use of the provision in the exceptional cases where such an order might be warranted.

The Review Group's proposal is to move subsection 599(5) with some rewording into *s.599(4)(d)* so that section 599 would, with the underlined change, read as follows:

> (1) On the application of the liquidator or any creditor or contributory of a company that is being wound up, the court, if it is satisfied that it is just and equitable to do so, may make the following order.
>
> (2) That order is one that any company that is or has been related to the company being wound up shall pay to the liquidator of that company an amount equivalent to the whole or part of all or any of the debts provable in that winding up.
>
> (3) The court may specify that that order shall be subject to such terms and conditions as the court thinks fit.
>
> (4) In deciding whether it is just and equitable to make an order under this section the court shall have regard to the following matters:
>
> (a) the extent to which the related company took part in the management of the company being wound up;

[19] See Section 3.3 and Appendix 5 of the Report.

[20] These issues are adumbrated in Section 4.1 above.

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

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

(d) the extent to which circumstances that gave rise to the winding up of the company are attributable to the acts or omissions of the related company.

5.2.7 Recommendation

The Review Group, by a majority, recommends that the attribution test contained in section 599(5) be modified by the insertion of s. 599(4)(d) to provide for a less restrictive provision stating that the court can have regard to the extent to which circumstances that gave rise to the winding up are attributable to the acts or omissions of the related company.

5.2.8 Consideration by a court of other issues

A Committee majority favoured inserting the provision found in the New Zealand legislation which allows the court to have regard to any other factor that it considers fit in exercising its discretion to make a contribution order. The majority were satisfied that a provision allowing for a discretionary approach by the court would not open the floodgates of litigation but would allow for case-by-case decision-making and analysis which seemed appropriate as a tool for dealing with what the Committee considered to be exceptional, abusive cases as outlined in Section 3.1 above (Defining the Problem). The issues described in the following paragraphs were examples of matters which might require discretionary analysis by a court.

(i) Withdrawal of support for the company in liquidation

The need for judicial discretion in this context was underlined by experience as described by practitioners and by Revenue where a parent company might withdraw support previously provided to a subsidiary on the basis that the subsidiary was struggling and ought to be liquidated. For example, there have been cases where a subsidiary had ongoing commitments which had been supported by the parent and which were then withdrawn (this could arise for example under a leasehold arrangement with the parent supporting payments of rent). The Committee took the view that this decision, which is perfectly legitimate in most cases, might nevertheless warrant scrutiny in particular circumstances. The fact that a decision to withdraw financial support to a subsidiary could be considered quite differently underlined the importance of providing some discretion to the court.[21]

(ii) The holding of cross directorships in a group context

A further issue which gave rise to discussion was the holding of cross directorships within a group structure. This is an issue with other consequences and effects in other areas of company law and the Committee therefore acknowledged that this particular issue was not central to its

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[21] Indeed, this reflects the fact scenario in *Lewis Holdings Ltd. v Steel & Tube Holdings Ltd*. [2015] 2 NZLR 831 where a contribution order was made and subsequently affirmed by the Court of Appeal [2016] NZCA 366.

deliberations. Nevertheless, it was agreed that when encountered in practice, this issue confounded the idea that each company within a group was managed as a separate entity. In fact, there was little evidence in these kinds of situations that there was any reality to the proposition that directors in such circumstances were independently considering each of the companies separately. This again underlined the importance of providing for judicial discretion in this area.

5.2.9 Recommendation

The Review Group, by a majority, recommends the insertion of a provision similar to the New Zealand provision, which allows the court to have regard to any other factor that it considers fit in exercising its discretion to make a contribution order.

5.2.10 The 'Interests of Justice' Exception.

It has been observed that in the context of groups, Irish law already allows for a discretionary decision of the courts to lift the corporate veil where the 'interests of justice' requires it. Indeed, case law was referred to in the debates surrounding the initial introduction of this legislation. This is sometimes referred to as an aspect of the single economic entity approach to corporate groups and has its origins in an English precedent *DHN Food Distributors v London Borough of Tower Hamlets* [22] where the emerging treatment of groups as a single economic entity for accounting purposes was considered as part of the approach of the court with the court holding that the separate personality of companies that were related in a group structure could be set aside where the interests of justice required it. This approach was subsequently adopted into Irish law in *Powers Supermarkets (Quinnsworth) v Crumlin Investments (Dunnes)*.[23]

The exceptions to the general doctrine of corporate personality in a group structure are outlined by Laffoy J. in *Fyffes v DCC*.[24] The exception, which relies on a broad discretionary 'interests of justice' criterion is somewhat controversial however, in that having been developed in English law in the 1970s, it has been reconsidered following a detailed judgement delivered by the UK Supreme Court in Prest *v. Petrodel Resources Ltd.* [25] which took a more restrictive approach to this issue. This decision has been approved by Laffoy J. in the Supreme Court decision of *O'Donnell and Ors v Bank of Ireland*.[26] In the intervening years since the Fyffes decision there have been a few references to

[22] DHN Food Distributors v London Borough of Tower Hamlets [1976] 1 WLR 852.

[23] Powers Supermarkets (Quinnsworth) v Crumlin Investments (Dunnes) [1981] 6 JIC 2201

[24] Fyffes plc v DCC plc and Ors. Laffoy J. [2005] IEHC 477. This particular part of the judgement was approved by Fennelly J. delivering the opinion of the Supreme Court in that case. See [2007] IESC 36

[25] [2013] UKSC 34

[26] *O'Donnell and Ors v Bank of Ireland &Ors.* [2014] IESC 77 In Paras 36-41 of its judgement the court describes the principles set out by the UKSC in *Prest v Petrodel Resources Ltd.* [2013] UKSC 34 pertaining to exceptions to the rule on corporate personality and states in Para. 41 that 'Therefore, there appears to be no basis upon which to depart from the ordinary rules of separate corporate personality in this case."

the principle but no decisions which disregarded the separate personality of corporates in a group, particularly with a view to imposing liability as between related companies.[27]

[27] In *Goode Concrete v. CRH plc* [2012] IEHC 116, Cooke J indicated that he would have been prepared to lift the corporate veil on the interest of justice principle in the course of an application for security for costs, but did not do so as the companies in question were foreign companies.
In *Aim Cash & Carry Limited v. All Points Building Maintenance Ltd* [2014] IEHC 555, Keane J refused to lift the veil because the two entities were not under the same control so it could not be said that they were part of the same economic entity. There is also a passing reference to the single economic entity doctrine in the decision of McGovern J in *IIB Internet Services ltd v. Motorola* [2012] IEHC 567 which concerns an application to dismiss proceedings. The Defendants contended that the single economic entity doctrine did not represent the law in this jurisdiction. Citing a number of the cases (Power Supermarkets *et al*), McGovern J was satisfied that the Plaintiffs had raised an arguable ground which would comfortably get them over the threshold of an application to dismiss as bound to fail.

6. Transactional Avoidance Provisions

6.1 Introduction

The following paragraphs provide a review of what are called 'asset swelling measures' and / or 'transactional avoidance provisions'. Generally, where successfully pursued, the outcome of actions under these provisions has the effect of recovering funds or assets from companies or individuals, whether connected parties or otherwise, which form part of the pool of assets available to the creditors of the insolvent company. As described above in Section 5.1, there are a number of reasons why these provisions are not used as frequently as anticipated or expected. This Section considers the provisions in the context of the first of these reasons, namely the evidentiary requirements contained in the provisions per se.

6.1.1 Sections 597 and 598

These refer to circumstances where last minute floating charges are created. The Committee did not spend time considering these provisions as no particular submissions had been received as to substantive reform. However, a recommendation is made regarding third-party litigation funding to support the operation of these provisions as described in Sections 8 of this Report. Of relevance to the discussion in Sections 8 to 10 of this Report is that neither of these provisions specifies the applicant, i.e., whether this is the liquidator or the company, rather the section is couched in passive terms.

6.1.2 Section 602

This contains provisions that relate to voidance of dispositions of property after the commencement of a winding up. This section prohibits the post-liquidation disposition of property, any transfer of shares and any alteration in the status of members of a company. This subsection is a merger and expansion of section 255 of the Companies Act 1963, which dealt with voluntary winding up, and section 218 of the Companies Act 1963, which dealt with court ordered windings-up. This section now creates an express avoidance of property dispositions in voluntary windings-up, identical to that in court ordered windings-up. This provision was not considered in any detail by the Committee as no particular submission was received in relation to it. Again, the applicant is not specified in the section itself and this point is relevant to the discussion in Sections 8 to 10 of this Report.

6.1.3 Section 603

This contains provisions that relate to voidance of executions against property of a company. If a winding up order is made, any attachment, sequestration, distress or execution which is being effected against the property of the company and which has been put in force after the commencement of the winding up shall be void. This section re-enacts section 219 of the Companies Act 1963. It has been amended to apply to all types of winding up and not merely to court ordered windings-up. This recognises that two primary objectives of winding up, common to both court ordered and voluntary windings-up, are to enable the orderly realisation and the fair distribution of the company's assets. Both of these objectives are subverted by allowing individual creditors to obtain payment out of a company's assets other than by the ordinary rules of realisation and distribution in a winding up. This provision was not considered in any detail by the

Committee as no particular submission was received in relation to it. As with s. 602 the applicant is not specified in the section.

6.1.4 Section 604

This section operates to set aside as void any payment or disposition of company property made in favour of a creditor ***"with a view to giving the creditor…preference over the other creditors of the company"*** (emphasis added) where the payment or disposition is made within six months of the commencement of a winding up and the company is, at the time of the commencement of the winding up, unable to pay its debts. Subsection 4 contains a rebuttable presumption to the effect that any payment or disposition made in favour of a 'connected person' as defined in the Act shall be presumed to have been done with a view to giving that person an unfair preference and be invalid accordingly. The provision replicates in material part what had been termed the fraudulent preference provision contained in section 286 of the Companies Act 1963, (as amended) which was derived from the personal bankruptcy legislation. The most significant change to the section implemented by the 2014 Act was the substitution of the phrase "unfair preference" in place of "fraudulent preference" so as to clarify that fraud was not a required proof pursuant to the section. The fact that the provision has been the subject of very few reported decisions of the Superior Courts to date suggests that the provision has been underutilised and that the amendment implemented by the 2014 Act has not led to any major change of this position.

Notwithstanding the removal of the reference to fraud, the section remains a very difficult one to prove. The difficulties relating to the original provision regarding proof of intent to prefer can be equally applied to the 2014 provision. The previous provision was interpreted to mean that the applicant must establish that the dominant intention of the company at the time of entering into the disputed transaction was to give the creditor a preference over the other creditors. The difficulties with this are two-fold: First, establishing corporate intent or motive requires that such intent be imputed from a controlling individual(s) to the legal entity. This will often be a difficult onus for a liquidator to discharge. Second, the requirement that the intention to prefer must be shown to be the dominant motive under the previous legislation meant that, on some interpretations, where a creditor pressurised the debtor for payment, this negated the intent.

Other factors which may have influenced the extent to which the section has been relied upon are the lack of funds generally available to bring proceedings in an insolvent liquidation, a matter which is considered in this Report, as well as the possibility that the person against whom the relief is sought may not be a 'mark' (namely that the assets or moneys will not be returned to the creditors).

It was observed that this provision is borrowed from traditional bankruptcy law, so the issue of proof of intent is somewhat misplaced and outdated in a corporate setting. Yet the 2014 legislation continues to refer to the concept of a corporate debtor engaging in a payment to a creditor 'with a view to giving the creditor…a preference over the other creditors of the company'. It is difficult to demonstrate how one can easily attribute such an action to a corporate entity, namely that a corporate entity enters into a transaction *with a view* to achieving a particular purpose. [28]

[28] See generally Lynch Fannon, I and Murphy G: *Corporate Insolvency and Rescue* (Bloomsbury Professional, 2012) paras. 9.118-9.122.

Nevertheless, on balance the majority view of the Committee was that the provision was used in practice (without being litigated) and that the provisions of section 608 complemented this provision.

6.1.5 Preferences in favour of connected guarantors

During the Committee's deliberations some questions were raised about the scope of the connected parties provisions provided for in Section 604(4) and their application to connected guarantors. Subsection (2) provides that a disposition of company property that is done with a view to giving any creditor, *or any surety or guarantor for the debt due to such creditor*, a preference over the other creditors of the company, shall be deemed an unfair preference, *inter alia*, if a winding up of the company commences within 6 months after the date of the disposition.

Subsection (4) in turn provides that an act to which subsection 2 applies in favour of a connected person which was done within two years before the commencement of a winding up of the company shall, unless the contrary is shown, be deemed, in the event of the company being wound up, to have been done with a view to giving such person a preference over the other creditors and be invalid accordingly.

A question was raised on a hypothetical scenario described in the following terms: where nine months before the commencement of a winding up, the company pays a debt due to its bank (an unconnected creditor) and therefore falling outside the 6-month look-back period. However, that debt is secured by personal guarantees given by the company's two directors (connected persons). Does the two-year time limit apply so that the payment can be set aside as an unfair preference? The answer appears to be yes. On balance the Committee felt that this provision was clear.

There was discussion about the fact that the provision relied on particular time limits within which transactions could be challenged under the section and whether there would be merit in providing for the suspension of the operation of these hard deadlines in appropriate cases where the action of individuals involved seemed to point to a deliberate attempt to evade the statute.

6.1.6 Recommendation

The Review Group, by a majority, recommends an amendment to section 604 in the following terms:

> **"The Court may make an order under this section notwithstanding that the transaction or transactions the subject of an application pursuant to the section do not fall within the time periods specified in ss. 2(a) and (4) above, where it is satisfied that it would be just and equitable to do so based on the circumstances surrounding the impugned transaction or transactions."**

6.1.7 Section 605

This section concerns the liabilities and rights of persons who have been unfairly preferred. This section re-enacts section 287 of the Companies Act 1963. The term "fraudulent" has been changed to "unfair" to reflect that the section may be triggered in the absence of fraud. This provision was

not considered by the Committee as it is a follow on from section 604 and no particular submissions were received concerning its terms.

6.1.8 Section 608

This provides that where, during the winding up of the company, it can be shown on application to the court by a liquidator, contributory or creditor of a company that a disposal of property of the company has taken place which has, as its effect, the perpetration of a fraud on the company, its creditors or members "…the court may, if it deems it just and equitable to do so, order any person who appears to have the use, control or possession of such property or the proceeds of the sale or development thereof to deliver it, or pay a sum in respect of it, to the liquidator on such terms or conditions as the court sees fit" . Section 608(5) goes on to state that the provision is "in addition to, and not in substitution for, any restitutionary or other relief by way of recovery".

Whereas section 604 requires proof of an intention to give an unfair preference, in contrast it will suffice for the purposes of section 608 to establish that the ***effect*** of a disposition is to perpetrate a fraud on the company, its creditors or members. It should be noted, however, that a similar requirement set out in the predecessor to section 608 gave rise to some controversy. In *Re Le Chatelaine Thudichum Ltd* Murphy J, citing Courtney, held that the phrase in the legislation:

> "…merely requires that the company, its creditors or members be deprived of something which it is, or to which they are, lawfully entitled" [29]

On the facts before him, the judge was satisfied that the effect of the disposition was to deprive the company of its assets and to diminish the pool of assets available to the creditors of the company, thereby perpetrating a fraud within the meaning of the statute on both the company and the creditors. In arriving at this conclusion, the court was influenced by the fact that the respondent was aware that the company was insolvent at the time of the disposition and could not, therefore, be considered to have acquired the property bona fide.[30]

In *Re Devey Enterprises*[31] Laffoy J observed that 'strangely, despite the fact that twenty years have elapsed since section 139 (the previously enacted provision from the 1990 Companies Act) was enacted, it has been the subject of very little judicial consideration.' She went on to refer to the summary of the provision provided by MacCann and Courtney in their annotation to the Companies Acts:

> "In order to set aside a disposition of assets the liquidator does not have to prove that the company intended to defraud its creditors. Rather, he has the lower evidential burden of merely establishing that the effect of the disposition has been to defraud the creditors. However, in *Re Comet Food Machinery Co Ltd* [[1999] 1 ILRM 475] the Supreme Court observed, albeit obiter, that the section could be invoked if it were established that assets had been diverted with a view to frustrating a judgment against the company. This is hardly a controversial observation since, in such circumstances, the disposition would not only have had the effect of defrauding the creditors; rather, it would have been intended to defraud them."

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[29] [2010] 1 I.R. 529 at p. 539
[30] *Ibid.* at p. 541
[31] [2011] IEHC 340

In summarising the facts on the evidence before her Laffoy J. concluded that 'in reality the respondents had procured a gratuitous disposition of the company's money in their own favour' and that this had the effect of perpetrating a fraud on the company and its creditors. As a consequence, the court ordered the respondents to repay to the company a sum exceeding €1 million.

The more recent decision of the Court of Appeal in *Re Tucon Process Installations Ltd v Bank of Ireland* [32] casts some doubt on the correct interpretation of this provision. In the earlier decisions described above, namely *Re Le Chatelaine Thudichum v Conway* and *Re Devey Enterprises Ltd,* it seemed to be clear that the effect of this provision was that to set aside certain transactions the liquidator only had to prove that the effect of the disposition in question was to perpetrate a fraud on the company, its member and or creditors. The focus in both cases was the distinction of this provision from the fraudulent preference provision embodied in s. 138 of the 1990 Act, now s. 604 of the Companies Act.

However, in *Tucon Process Installations v. Bank of Ireland*[33], Hunt J made the following observation of the requirement:

> "…improper dispositions or misapplications of company property will be caught by the section, but payments in favour of creditors or for the benefit of the company concerned will not be included in an order made under the section. A simple payment made to an unsecured creditor when the company is insolvent will not, without more, trigger the operation of the section…The type of additional ingredient necessary…must amount to an impropriety before the provisions of the section are engaged"[34]

The dictum was upheld on appeal with the Court of Appeal affirming that the transaction did not offend the provisions of section 608[35].

It should be noted that in *Re Tucon Process Installations Ltd.* an issue arose as to whether the appellant company had *locus standi* as the section refers to the application being brought by the liquidator, creditor or contributory. In this case both the High Court and the Court of Appeal held that the appellant company had *no locus standi* to bring the application. Therefore, the judgement regarding the substantive provision is *obiter*. The facts in *Tucon* concerned payments in *the normal course of business* of moneys into a bank account held by the company in the respondent bank, the payments having the effect of reducing an overdrawn account. In contrast, in the other cases there were specific, unorthodox arrangements made to address repayments to creditors of amounts outstanding. For example, in *Chatelaine* the disposition concerned transfer of stock and assets as payment for rent outstanding. In effect, a transaction which could not be regarded as being in the ordinary course of business.

Furthermore, it is not clear that the transfer of moneys by debtors into a bank account as occurred in *Re Tucon Process Installations* is in fact a disposition within the meaning of the section. This issue is indeed alluded to but not resolved in the Court of Appeal judgement. For example, in Para 26 reference is made to 'dispositions of the company' and to 'dispositions made by an insolvent

[32] [2016] IECA 211
[33] [2015] IEHC 312
[34] *Ibid*., at pp. 7-8
[35] [2016] IECA 211

company'. However, the facts in this particular case did not involve dispositions by the company but lodgements by ordinary debtors of the company in the company's account. It would seem that this particular decision is particularly fact specific.

In considering the case law to date the Committee took the view that the only lack of clarity is whether the provision requires something more than a late payment to a particular creditor. Specifically in the context of this Report the question would be whether payments to companies within a group would be exempt from this provision if these were simply payments of outstanding debts, albeit where the payments were made to related companies.

The Committee considered that the provision could be amended to state that "payments made in the ordinary course of business" are exempt from the provision. The Committee took the view that payments to employees in the ordinary course of business could be specifically mentioned in this exemption from the operation of the provision.

6.1.9 Recommendation

The Review Group recommends that Section 608 be amended to state that "payments made in the ordinary course of business" are exempt from the provision. This includes payments made to employees in the ordinary course of business.

6.2 Officer liability

6.2.1 Section 609

This section provides for the imposition of personal liability on officers of a company where proper books of account are not kept and re-enacts section 204 of the Companies Act 1990. This provision was not considered in any detail by the Committee as no particular submission was received in relation to it.

6.2.2 Section 610

This affords the court the power, *inter alia*, to impose personal liability on any officer of an insolvent company who was *"knowingly a party to the carrying on of any business of the company in a reckless manner"*. The action is available to a liquidator, examiner, receiver, creditor or contributory of a company. Although the concept of trading in a reckless manner is not defined, subsection (3) deems two particular classes of conduct as reckless, namely where the officer of the company was a party to:

a) the carrying on of the business and, having regard to the general knowledge, skill and experience that may reasonably be expected of a person in their position, the person ought to have known that their actions or those of the company would cause loss to creditors; and

b) the contracting of a debt by the company and did not honestly believe on reasonable grounds that the company would be able to pay the debt when it fell due for payment.

Like other provisions considered in this report, the fact that there are a limited number of reported cases on section 610 and its predecessors[36] is suggestive of the possibility that the provision is another which has been underutilised to date. This provision is a particular example of where difficulties have arisen in the interpretation and application of the section. In this regard a few observations can be made.

First, the section seems to waver between the imposition of an objective standard and the availability of a subjective defence. While the concept of recklessness in Irish law is generally considered to set an objective standard, the use of the word *'knowingly'* in subsection (1)(a) appears to import a subjective element to the test[37]. This can be contrasted with the objective standards set out in subsection (3), which in turn can be contrasted with the apparently subjective standard set out in the subsection (8) defence.

Second, the fact that the predecessors to section 610(3) have been interpreted as mandatory deeming provisions which deem conduct that would not otherwise amount to reckless trading as reckless, without any room for consideration of the circumstances of a particular case, appears to have been problematic. In *Re Hefferon Kearns Ltd*[38], for example, Lynch J. described the predecessor to subsection (3)(b) above as a draconian provision.[39] On the facts of the case, the judge felt compelled to make a finding of reckless trading pursuant to the subsection but relied on the *'honestly and responsibly'* defence to avoid making a declaration pursuant to the section.

More recently, in *Re Appleyard Motors Ltd*[40] it was held that the use of the word *"would"* in the predecessor to subsection (3)(a) outlined above meant that it would not suffice for the purpose of invoking the section to show that a director ought to have known that his actions *might* cause loss to a creditor. Rather, the use of the word required that *"the loss to the creditor must have been foreseeable to a high degree of certainty"*[41]. The finding of the High Court that the director had been guilty of reckless trading pursuant to subsection (a) was overturned on that basis. Commentary has suggested that the Court's decision may have been influenced by a desire to avoid the seemingly unjust consequences that flowed from the mandatory nature of the deeming provision on the particular facts of the case.[42] The decision appears to set a very high standard to be met on an application pursuant to the section.

At least one commentator is of the view that the intention of the legislature in enacting the provision was to set an objective test of recklessness and that the provisions in subsection (3) would be examples of what would constitute recklessness, rather than the mandatory deeming

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[36] Section 297A of the Companies Act 1963 as inserted by s. 138 of the Companies Act 1990. A similar provision set out in s. 33 of the Companies (Amendment) Act 1990 was repealed by s. 180 of the Companies Act 1990 and replaced by s. 297A of the 1963 Act. The predecessors are in materially similar terms to s. 610. Many of the issues highlighted in this part of the Report have been considered by the Law Reform Commission in its Report on Regulatory Powers and Corporate Offences Vol 1 [2018]. See www.lawreform.ie

[37] *Re Hefferon Kearns Ltd (No. 2)* [1993] 3 I.R. 191 at 222.

[38] *Ibid*.

[39] *Ibid.* at pp. 224-225.

[40] *Ibid.*

[41] *Ibid.* at para. 41.

[42] See Breen, *"Re Appleyard Motors Ltd; Toomey Leasing Group Ltd v. Sedgwick: Another Nail in the Coffin for Reckless Trading?"* (2018) 25(9) CLP 204

provisions which they ultimately became[43]. The same commentator suggested that it would be beneficial to amend the section to reflect that intent[44].

Finally, the defence set out in subsection 8, which affords the court a discretion to relieve a director from liability under the section where it is satisfied that the director has acted honestly and responsibly, has been the subject of criticism on two grounds: First, it has been said that the issue of honesty ought to be irrelevant to a consideration of whether somebody has acted recklessly. Second, it is difficult to reconcile a finding that someone has acted recklessly with one that they have acted responsibly,[45] as occurred in *Re Hefferon Kearns.*

6.2.3 Proposed amendments to section 610

Four changes to the provision are proposed by the Committee:

1. The use of the word *'knowingly'* would be removed from the section, with a view to making the test for reckless trading an objective one;

2. Subsection (3) would be amended so as to make the conduct referred to therein examples of what might amount to reckless behaviour in a particular situation, rather than a mandatory deeming provision requiring that the conduct referred to be deemed as reckless trading regardless of the particular circumstances involved;

3. The use of the word *'would'* in subsection 3(a) of the section would be replaced by the phrase *"was likely to…"* with a view to lowering the threshold required under the subsection;

4. The defence in subsection (8) would be amended in a manner that would make it similar to the defence contained in section 214(3) of the Insolvency Act 1986 in England and Wales.

The proposals would be incorporated into an amendment of the section in the following terms with proposed amendments shown by underlining and deletion.

> (1) If in the course of the winding up of a company or in the course of proceedings under Part 10 in relation to a company, it appears that—
>
> (a) any person was, while an officer of the company, ~~knowingly~~ a party to the carrying on of any business of the company in a reckless manner, or
>
> (b) any person was knowingly a party to the carrying on of any business of the company with intent to defraud creditors of the company, or creditors of any other person or for any fraudulent purpose,
>
> the court, on the application of the liquidator or examiner of the company, a receiver of property of the company or any creditor or contributory of it, has the following power.

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[43] Breen, *"Fictions or Guidelines? The Deeming Provisions in Section 610 of the Companies Act 2014"* (2019) 26(9) CLP 168.

[44] See Breen, *ibid.*

[45] See Breen, *"Fictions or Guidelines? The Deeming Provisions in Section 610 of the Companies Act 2014"* (2019) 26(9) CLP 168.

(2) That power of the court is to declare, if it thinks it proper to do so, that the person first-mentioned in paragraph (a) or (b) of subsection (1) shall be personally responsible, without any limitation of liability, for all or any part of the debts or other liabilities of the company as the court may direct.

(3) Without prejudice to the generality of subsection (1)(a), an officer of a company ~~shall be deemed~~ **may be found** to have been knowingly a party to the carrying on of any business of the company in a reckless manner if—

(a) the person was a party to the carrying on of such business and, having regard to the general knowledge, skill and experience that may reasonably be expected of a person in his or her position, the person ought to have known that his or her actions or those of the company ~~would~~ **was likely to** cause loss to the creditors of the company, or any of them, or

(b) the person was a party to the contracting of a debt by the company and did not honestly believe on reasonable grounds that the company would be able to pay the debt when it fell due for payment as well as all its other debts (taking into account the contingent and prospective liabilities).

(4) Notwithstanding anything contained in subsection (2), the court may grant a declaration on the grounds set out in subsection (1)(a) only if—

(a) paragraph (a), (b), (c) or (d) of section 570 applies to the company concerned, and

(b) an applicant for such a declaration, being a creditor or contributory of the company or any person on whose behalf such application is made, suffered loss or damage as a consequence of any behaviour mentioned in subsection (1).

(5) In deciding whether it is proper to make a declaration on the ground set out in subsection (3)(b), the court shall have regard to whether the creditor in question was, at the time the debt was incurred, aware of the company's financial state of affairs and, notwithstanding such awareness, nevertheless assented to the incurring of the debt.

(6) Where the court makes a declaration under this section, it may provide that sums recovered under this section shall be paid to such person or classes of persons, for such purposes, in such amounts or proportions at such time or times and in such respective priorities among themselves as such declaration may specify.

(7) On the hearing of an application under this section, the applicant may himself or herself give evidence or call witnesses.

(8) Where it appears to the court that any person in respect of whom a declaration has been sought on the grounds set out in subsection (1)(a) ~~has acted honestly and responsibly in relation to the conduct of the affairs of the company or any matter or matters on the ground of which such declaration is sought to be made,~~ **did, from the time he or she knew or ought to have known that there was no reasonable prospect that the company would avoid going into insolvent liquidation, take every step with a view to minimising the potential loss to the company's creditors as (on the assumption that he or she had knowledge that there was no reasonable prospect that the company would avoid**

going into insolvent liquidation) he or she ought to have taken, the court may, having regard to all the circumstances of the case, relieve him or her either wholly or in part, from personal liability on such terms as it may think fit.

The Committee expressed a majority view in favour of these proposed amendments.

6.2.4 Recommendation

The Review Group, by a majority, recommends that amendments be made to section 610 of the Companies Act 2014 as outlined above in this Report.

6.2.5 Relationship of Section 610 to the proposed Section 224A in Section 5.2.1 of this Report regarding the statement of duties to creditors.

The reckless trading provision discussed above is entirely different from the provision regarding duties to creditors. The reckless trading provision is a specific cause of action open to various stakeholders which potentially allows for contribution to the corporate assets to be made by directors who are personally liable for the debts of the company. The proposed provision as regards a director owing duties to creditors will be enforceable in the normal manner, primarily as a cause of action for the company. Even if a breach were found the issue of a remedy is open to the court in accordance with the normal framework. In that vein the interface between section 224A as proposed and the disqualification provisions is discussed in Section 7 below.

6.2.6 Section 612

This sets out the power of the court to assess damages against certain persons. This section provides for a summary procedure whereby redress may be obtained in respect of breaches of duty perpetrated by directors and other officers. This section derives from section 298 of the Companies Act 1963, inserted by section 142 of the Companies Act 1990 and amended by section 50 of the Company Law Enforcement Act 2001. The title has been amended to reflect that it does not relate solely to damages against directors. This provision was not considered in any detail by the Committee as no particular submission was received in relation to it.

6.2.7 Section 613

This sets out the power of the court to assess damages against a director of the company's holding company. The effect of this section is to extend the misfeasance provisions of section 612 to a situation where a director of a holding company has been guilty of wrongdoing in relation to the assets or affairs of any subsidiary. This section re-enacts section 148 of the Companies Act 1990. This provision was not considered in any detail by the Committee as no particular submission was received in relation to it.

7. Further provisions which may be of relevance.

7.1 Disqualification Provisions under s. 842

Section 842 of the Companies Act 2014, provides:

> 'On the application of a person specified in section 844 or of its own motion, the court may make a disqualification order in respect of a person for such period as it sees fit if satisfied…
>
> "(a) that the person has been guilty, while a promoter, officer, statutory auditor, receiver, liquidator or examiner of a company, of any fraud in relation to the company, its members or creditors,
>
> (b) that the person has been guilty, while a promoter, officer, statutory auditor, receiver, liquidator or examiner of a company, of any breach of his or her duty as such promoter, officer, auditor, receiver, liquidator or examiner,
>
> (c) that a declaration has been granted under section 610 in respect of the person,
>
> (d) that the conduct of the person as promoter, officer, statutory auditor, receiver, liquidator or examiner of a company makes him or her unfit to be concerned in the management of a company…."

The individuals specified in Section 844 who can make such an application to have a director or officer disqualified include individual shareholders, employees and creditors amongst others.

In Ireland there has been considerable litigation under section 842 (d) but much less under any of the grounds mentioned in section 842(a), (b) or (c) which are relevant to the discussion in the report as they relate to fraud, breach of duty and a breach of section 610. In addition, the litigation has not been brought by employees or creditors as indicated in Section 844 but primarily by liquidators or the ODCE. This is, perhaps, unsurprising in that other stakeholders tend to be primarily focussed on achieving a monetary return and usually rely on liquidators and/or the ODCE to deal with the regulatory aspect. This probably reflects concerns about the significant costs and risks associated with the making of such applications but may also be a practical issue in that they may not have access to all relevant evidence. Such parties regularly make complaints to liquidators and/or the ODCE recommending that restriction or disqualification proceedings should be brought where they consider that the circumstances of the case warrant it. It is not clear why the interface between these provisions has not resulted in further litigation.

It is also not clear why the interface between these provisions and Section 224 which provides that directors owe a duty to employees has not been considered or litigated. This is of particular relevance to the concerns expressed by ICTU and other groups regarding actions of management in the restructuring/ reorganisation space. It is possible that an employee (or a trade union) could indeed bring or threaten to bring disqualification proceedings against a director for breach of the duty owed in section 224, but this does not seem to have occurred. This is also relevant to the proposal made to add an amending section 224A providing for a duty owed by directors to creditors.

In Ireland the public enforcement of director's duties through disqualification and restriction has occurred within an overall context of viewing compliance with director's duties as serving a public interest function in addition to the private law enforcement of directors' duties. This shift in emphasis has taken legislative form since the passing of the Companies Act 1990 and is continued in the Companies Act 2014 (as amended). This section describing further possibilities regarding public enforcement of directors' duties continues that policy direction.

8. Funded litigation in insolvency.

8.1 Introduction

In its 2017 Report, the Review Group noted that a significant difficulty in the protection of unsecured creditors and employees in insolvency can be the cost of bringing an action for breach of directors' obligations. In its discussions on the anti-avoidance provisions referred to elsewhere in this report, the Review Group once again identified the lack of funds available to a liquidator to prosecute proceedings as an issue which was likely to inhibit the utilisation of the sections. As such, the Group felt it appropriate to give some consideration to the issue of third-party funding of litigation, in particular in the limited context of insolvency litigation.[46]

8.2 The current position in Ireland

In this jurisdiction, the rules against maintenance and champerty have operated to prohibit third party funding of litigation generally. The issue of third-party funding (which is now legal in certain circumstances in other common law jurisdictions) has been considered by the Law Reform Commission in a 2016 Issues Paper[47] and by the 2020 Report of the Review of the Administration of Civil Justice by the Group chaired by former President of the High Court, Peter Kelly referred to below.

The issue of litigation funding was also considered in two relatively recent decisions of the Supreme Court. First, in *Persona Digital Telephony v. The Minister for Public Enterprise*[48], it was held that an arrangement between the Plaintiff and a professional third-party funder to fund the litigation in return for a share of its proceeds offended the rule against champerty. In doing so, however, Denham CJ (as she then was) commented that it might be appropriate to have a modern law on the third party funding of litigation but considered that this raised complex issues of policy which fell more properly to be considered by the legislature than the courts.[49] Delivering a concurring judgment, Clarke J. (as he then was) agreed with the conclusion that the proceedings raised complex issues of policy involving the right of access to justice which fell more properly to be considered by the legislature than the courts. In coming to that conclusion though, Clarke J expressed a *"significant feeling of disquiet"*[50] with the result of the decision on the basis that it would lead to a very real possibility that the plaintiff might not be able to bring its claim to trial.[51] While the judge agreed with the conclusion reached by Denham CJ, he did sound a warning that if no action was taken by the legislature, the Courts might have no option but to intervene to find a remedy in an appropriate case. Further concurring judgments were delivered by McMenamin and Dunne JJ[52].

[46] Company Law Review Group Report on Protection of Employees and Unsecured Creditors 2017, Section 6.4 pp. 93-94.
[47] Law Reform Commission Issues Paper, Contempt of Court and Other Offences and Torts Involving the Administration of Justice, LRC IP 10-2016
[48] [2017] IESC 27
[49] [2017] IESC 27, judgment of Denham CJ at para. 54(vi)
[50] *Ibid*., judgment of Clarke J at para. 2.1.
[51] Paras. 2.6-2.9
[52] It is understood that McKechnie J delivered a dissenting judgment concluding that the plaintiff should be permitted to avail of third-party funding in the claim, but the approved judgment is not yet available.

More recently, (2019) in *SPV Osus v. HSBC Institutional Trust Services (Ireland) Ltd*[53] the Supreme Court held that the assignment of various causes of action to a party without any interest in the litigation was champertous and unenforceable. While O'Donnell J. (as he then was) acknowledged that there might be a significant public interest in making litigation more accessible to people of ordinary means[54], including through the provision of some limited and regulated form of third party funding, the judge considered that the objections of the common law to the commodification of litigation, in particular the assignment of causes of action, retained force and vitality.[55] Clarke CJ delivered a concurring judgment which repeated the concerns he had expressed in *Persona* that there was a significant and increasing problem with access to justice which required urgent consideration[56]. Although the Chief Justice (as he then was) again expressed the view that the matter ought to be addressed by the legislature, he took the opportunity to emphasise again that a point could be reached where the court would be compelled to intervene if the legislature did not.[57]

> "2.*8 However, it may be that this is just another consequence of the separate legal personality of joint stock companies. That analysis does not, in my view, warrant a significant change in the law being imposed by court decision so as to give rise to a potentially unregulated market in litigation. Doubtless the legislature can pay proper regard to considerations such as that just identified in deciding on any potential changes. But I have ultimately come to the view that an unregulated change in this area has the potential to do more harm than good. As a matter of common law, therefore, it seems to me that the position identified by O'Donnell J. needs to be maintained unless and until there is considered legislative change.*
>
> *2.9 I would finally add that, undesirable as unregulated change might be, I would wish to reiterate the point made in Persona that a point might be reached where the courts had no option but to go down such a route if it became clear that no real effort was being made on the part of the legislature to address issues such as those which came into focus on this appeal."*

Leaving the broader picture aside the following paragraphs present an argument as to why this issue can be exceptionally treated in insolvency law.

8.3 Funded litigation in the specific context of insolvency law.

It is important to note that neither of the decisions considered in the previous section related to the use of litigation funding in the more limited and specific context of insolvency proceedings. The possibility of third-party litigation funding in the context of corporate insolvency has not yet been considered in any reported case in this jurisdiction, [58] whereas the use of third-party funding in insolvency proceedings has traditionally operated as an exception to the prohibition against funding in a number of common law countries. In 2020, the issue was considered by the Kelly Group Report, which made the following recommendation:

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[53] [2019] 1 I.R. 1
[54] At p. 52
[55] At p. 58
[56] [2019] 1 I.R. 1 at p. 8.
[57] *Ibid.* at p. 9.
[58] See however, *Re Gaelic Seafoods (Ireland) Ltd* Record No. 2002/153COS, Order of Ms Justice Finlay Geoghegan dated 21 December 2006.

"The Review Group does see merit, in the more immediate term, in the more limited proposal of the Irish Society of Insolvency Practitioners that third party funding should be available to liquidators, receivers, administrators under the Insurance (No. 2) Act 1983, the Official Assignee or trustees in bankruptcy to fund proceedings intended to increase the pool of assets available to creditors, on condition that the applicant was satisfied that a reasonable case against a prospective defendant existed and would result in increasing the pool of available assets. Such funding arrangements would have an obvious benefit in ensuring that the creditors of a company or individual or members of a company were not left without effective recourse against misfeasance or fraud on the part of the debtor or company concerned."[59]

The lines of authority in other jurisdictions which have led to the conclusion that assigning a cause of action to a third party is a permissible use of the liquidator's power of sale could lead to the same conclusions in this jurisdiction and could support a limited change to rules against third party funding as they apply to liquidation.[60] Following an approach similar to other countries the starting point is that under section 559 of Part 11 of the Companies Act 2014 the definition of property 'means all real and personal property which includes *any right of action by the company or liquidator under the provisions of this Act or any other enactment*'. Section 614 provides for the vesting 'of all or any part of the property of whatsoever description belonging to the company or held by trustees' to vest in the liquidator. Finally, under Section 627, in Part 3 of the included Table, subsection b) allows the liquidator to 'sell the property of the company by public auction or private contract'. Based on statutory provisions similar to these three provisions permission for third party funding of actions in insolvency has been given by courts in other common law jurisdictions, thus carving out exceptions to the general rules against champerty and maintenance.

Turning to the actual wording of the provisions which relate to transactional avoidance which are considered in this Report, namely Sections 599, 604, 608 and 610 it does seem that in the case of Section 604 (based on an older bankruptcy law provision) it is not clearly stated as to whom the cause of action belongs. This is also the case as regards Sections 597 and 598 which relate to the invalidity of floating charges. In the other provisions the cause of action rests with the liquidator, rather than with the company. In *Re Oasis Merchandising Ltd*[61], the English Court of Appeal drew a distinction between assets which were the property of the company at the time of the commencement of the liquidation, on the one hand, and assets which only arose after the liquidation had commenced and were recoverable by the liquidator pursuant to a statutory power, on the other. The court held that it was only the former category that fell within the liquidator's statutory power of sale under the Insolvency Act 1986 so as to permit a liquidator to enter into some form of funding arrangement. The effect of that decision was that claims under the transactional avoidance provisions in the Insolvency Act, as well as their proceeds, could not be assigned. The decision became the subject of criticism.[62] However, the same issue might not arise in this jurisdiction because, unlike in England and Wales, the definition of 'property' in the 2014 Act

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[59] *Review of the Administration of Civil Justice: Review Group Report*, Chaired by former President of the High Court Peter Kelly, October 2020, at p. 325.

[60] See generally Symes, C. and Lombard, S: Judicial Guidelines for Insolvent Litigation Funding Agreements (2020) 28 Insolvency Law Journal 165 which considers the development of the law in Australia in addition to methods of addressing policy concerns and issues in the context of a more developed structure.

[61] [1997] 2 WLR 764

[62] See Finch and Milman, *Corporate Insolvency Law: Perspectives and Principles (3rd ed., Cambridge University Press, 2017)* at pp. 474-477 and various further references contained therein.

specifically includes any right of action of the liquidator. Nevertheless, in practice, there does appear to be a lack of certainty on the point.

Subsequently though, section 118 of the Small Business, Enterprise and Employment Act 2015 inserted what has been described as a clarifying provision into the Insolvency Act in England so as to expressly permit liquidators to assign various causes of action which arise after the commencement of a liquidation and which vest in a liquidator (as well as the fruits of any such cause of action). [63]

It seems likely that the effect of the two recent decisions of the Supreme Court in this jurisdiction, together with the uncertainty regarding the scope of the exception in insolvency proceedings just outlined, might well dissuade insolvency practitioners and funders from pursuing an argument or course of action based on existing provisions, particularly in circumstances where maintenance and champerty remain both torts and criminal offences.

In conclusion it appears that the best way to address the matter, would be to clarify that there is an exceptional treatment of actions in insolvency already in the Companies Act 2014, legislation which is more recent than the provenance of the rules against champerty and maintenance, and that these provisions operate without prejudice to the continuing rules against maintenance and champerty. This position is reflective of other common law jurisdictions described above. This proposal simply amounts to a clarification of existing law and reflects the proposal described above emanating from the Kelly Report. The CLRG notes that consideration is already being given to a broader reform of the maintenance and champerty rules by the Department of Justice and by the Law Reform Commission, but a full review of these recommendations is beyond the scope of the work of the Company Law Review Group. The Department of Enterprise, Trade and Employment noted that there may be practical difficulties emanating from carving out insolvency from the broader reform project and any recommendations made by the Committee to this effect would require extensive consultation with the Department of Justice.

This outcome could be achieved by amending the Companies Act 2014. Following considerable debate, the Committee has come to the recommendation as below.

[63] The wording of the relevant provision is as follows:
"Power to assign
(1) This section applies in the case of a company where—
(a)the company enters administration, or
(b)the company goes into liquidation; and "the office-holder" means the administrator or the liquidator, as the case may be.
(2) The office-holder may assign a right of action (including the proceeds of an action) arising under any of the following—
(a)section 213 or 246ZA (fraudulent trading);
(b)section 214 or 246ZB (wrongful trading);
(c)section 238 (transactions at an undervalue (England and Wales));
(d)section 239 (preferences (England and Wales));
(e)section 242 (gratuitous alienations (Scotland));
(f)section 243 (unfair preferences (Scotland));
(g)section 244 (extortionate credit transactions)."

8.4 Recommendation

Recognising the particular circumstances of insolvency proceedings, the Review Group, by a majority view, is broadly supportive of provision being made to allow for litigation funding in such proceedings.

However, the Review Group recognises that there are significant and legitimate concerns about possible adverse and potentially unforeseen consequences of such funding and agree that careful consideration would need to be given to the identification of appropriate conditions and safeguards that should be attached to the introduction of rules allowing such funding. These could, for example, include provisions such as those that apply in the UK which specify that the funders cannot have any role in the litigation and that the funding must be approved in advance by the creditors of the company.

Accordingly, the Review Group recommends that further detailed consideration should be given to the identification of the conditions and safeguards that would be necessary to ensure that the risks associated with the approval of litigation funding in insolvency can be minimized.

9. Role of costs in the non-litigation of provisions in Chapter 6 of Part 11 of the Companies Act 2014. (Described in this report as 'asset swelling' or 'transactional avoidance' provisions).

The Committee considered the position that pertains to liability for costs arising in connection with actions that can be taken under the asset swelling measures described in this report and that are contained in Chapter 6 of Part 11 of the Companies Act 2014. Concerns were expressed that the risk of having costs awarded against a liquidator personally could act as a significant deterrent to the taking of action on foot of these provisions.

9.1 The *Ballyrider* Principles

The so-called "Ballyrider principles", set out the main rules governing the awarding of costs by the courts in cases involving liquidations. The principles were enumerated by McKechnie J. in a judgement in the Supreme Court in the case of *The Revenue Commissioners v. Anthony J. Fitzpatrick in his capacity as Liquidator of Ballyrider Limited (in voluntary liquidation)*[64]. These have been referred to and/or applied on a number of occasions subsequently[65]. The principles set out by McKechnie J. are as follows:

> *"(1) Where proceedings are initiated or defended by the liquidator in the name of and on behalf of the company, he has no personal liability in respect of any cost order made in favour of an adverse litigant: any such order is against the company. Such a litigant may seek security for costs.*
>
> *(2) Where the proceedings in question are in his own name and even if acting as such, then subject to the point next made the normal rules, vis-ά-vis an adverse litigant will apply. If a cost order is made the liquidator incurs a personal liability in respect of same: as such the sufficiency or insufficiency of the company's assets is irrelevant.*
>
> *(3) In this situation, a distinction exists between where the liquidator is the initiator of such proceedings and where such engagement is forced upon him. In the latter situation case law shows that he must be entitled to defend without the risk of a personal cost order being made against him: public policy so dictates.*
>
> *(4) In the proceedings first mentioned as the liquidator incurs no personal liability the question of seeking to have recourse to the company's assets does not arise.*
>
> *(5) In the proceedings second mentioned, the position will be as follows:*
>
> *(i) Where acting for and on behalf of the company the liquidator will ordinarily be entitled to have recourse to the assets of the company in respect of both the costs incurred by him as a party and also in respect of the cost order awarded in favour of the adverse litigant.*
>
> *(ii) Even when acting for and on behalf of the company, if the liquidator has committed acts or omissions amounting to misconduct, then ordinarily he will not be entitled to have*

[64] Supreme Court, 31 July 2019, Appeal No. 2016/107.

[65] *Eteams International v. The Governor and Company of Bank of Ireland* [2020] IESC 23; *Re Cherryfox Ltd: Fitzpatrick v. Revenue Commissioners* [2020] IECA 123; *Anthony J Fitzpatrick as Liquidator of Elvertex Ltd (in Liquidation) v. O'Sullivan and Lyons* [2021] IEHC 166.

recourse to the assets of the company in respect of the cost order. Examples of the type of conduct which might be so described, include misfeasance, bad faith, negligence, personal unfitness for office and dishonesty.

(iii) On the other hand, where an honest mistake has occurred and has been made in good faith, a liquidator is much less likely to be deprived of such an order.

(iv) Just as there will be cases which are clear-cut on one side or the other, there will also be situations which may be borderline. In such circumstances the provisions of section 631 of the Companies Act 2014 are available and if utilised the court will have regard to section 281 of the 1963 Act and the relevant case law above mentioned. In doing so the Court will consider the representative capacity and the common law and statutory obligations imposed on the litigant, in order to determine whether there are sufficient grounds on the balance of probability to deny him such a course."

In simple terms, the principles confirm that if the proceedings are issued in the name of the company, any costs arising, including any adverse costs order, will be made against the company.

However, if the proceedings are issued in the name of the liquidator, then the costs, including any costs awarded to the other party costs, will usually have to be borne in the first instance by the liquidator. From the principles it seems that liquidators will ordinarily be able to recover such costs out of the funds in the liquidation. The exception is where the proceedings are improperly brought or are brought to further the interests of the liquidator rather than to benefit the liquidation. For example, if a liquidator were to take proceedings seeking to overturn a decision to remove him or her as liquidator. Of course, it should be noted that this is a simplistic summary of the applicable rules and, as noted in the principles, there can be cases that are not clear-cut, and such cases may have to be determined on their merits by the Courts.

The various provisions contained in Chapter 6 of Part 11 specify that actions may be taken by the company in some instances, by the liquidator in others (viz. sections 599, 608 and 610 of the 2014 Act) and are silent in other cases. Thus, in considering taking certain actions, liquidators may face the prospect of having to bear the costs of the proceedings, including the costs of the other party, while the capacity to recover such costs from the liquidation may be uncertain.

9.2 Tests applied by liquidators before initiating legal proceedings

The issue of costs is an important factor in the decision-making process on whether, or not, to initiate various types of proceedings in the interests of a liquidation. The Committee heard that typically, there are three core questions that a liquidator must ask himself or herself before initiating proceedings. These are:

1. Does the liquidator consider that he/she has sufficient evidence to be reasonably confident of succeeding in the proceedings and do the potential benefits to the liquidation outweigh the risks involved if the case is unsuccessful? A prudent liquidator would usually want to have legal advice that supports these positions.

2. Has the respondent, or respondents, the financial resources to meet any determination, including in relation to costs, that might be made by the Courts in favour of the liquidation?

3. Are there sufficient resources in the liquidation to fund both the liquidator's own costs and possible costs awarded to the other party in the event that the action is unsuccessful?

If the answer to either of the first two questions is negative, then it would be difficult to conclude that there was a reasonable basis for initiating the action.

The third question is somewhat more complex. Where the action is one that rests in the liquidator's own name and if there are sufficient resources in the liquidation, then the liquidator can safely proceed without risking personal or firm funds. However, he or she might consider it prudent to consult with the creditors before proceeding given the risk that unsuccessful litigation could seriously deplete the funds otherwise available to creditors.

If there are no, or only limited, funds in the liquidation, there may be other options available to the liquidator. For example, the liquidator could seek funds or an indemnity from the creditors to cover the costs of the action. In this regard, it was noted that the Revenue Commissioners will, in appropriate cases, consider the provision of an indemnity to enable actions to be taken that are considered likely to produce a better outcome for the creditors, including themselves.

The liquidator could seek to take out some form of insurance policy to address this issue. However, it is understood that the cost of this type of insurance tends to be prohibitively expensive in practice.[66]

The liquidator could decide to proceed anyway despite the knowledge that an unsuccessful application could result in him or her having to bear significant costs.

In other jurisdictions, access to third party litigation funding can be of use in these types of situations. This matter has been considered in detail in section 8 above.

If the liquidator is unable to fund or be indemnified against the costs of litigation, then it is unlikely that he or she would initiate proceedings.

9.3 Security for costs orders

Where an action is being taken in the name of the company, the respondent will often seek confirmation that there are sufficient funds to meet their costs in the event that they succeed in the proceedings. If they have any doubt on the matter, they may apply to the Courts for a "security for costs" order. In order to obtain an order for security for costs, a defendant must satisfy the court (a) that it has a *prima facie* defence to the claim, and (b) that the plaintiff company would have insufficient assets to meet an award of costs in the event that the proceedings were unsuccessful[67]. In addition, even where those criteria are satisfied, a plaintiff company may successfully resist the application *inter alia* where it can satisfy the court on a *prima facie* basis that

[66] Of note in this context in *Greenclean Waste Management Ltd v. Leahy* [2015] IECA 97 where an ATE insurance policy was unsuccessfully relied upon by the plaintiff it was noted that the policy in question provided €210,000 worth of cover for the Plaintiff's own solicitor's disbursements and the defendant's costs. The premium payable for that level of cover was €52,500.

[67] Section 52 of the Companies Act 2014.

it would have been able to discharge any costs order made against it were it not for the defendant's alleged wrongdoing[68].

9.4 Priority attaching to costs of litigation

Under section 617 of the 2014 Act, any costs, charges and expenses properly incurred in the winding up of a company, including the remuneration of the liquidator, shall be payable out of the property of the company remaining after payment of *inter alia* the fees and expenses properly incurred in *'preserving, realising and getting in the assets'*. This is expressly subject to any order made by the court in winding up but provides for an order of priority in which the *'necessary disbursements',* including legal costs incurred by the liquidator, rank in priority to their remuneration. Further, while there is no express reference in section 617 to any adverse costs order made against the company, it has been held that where an action is brought by the company after liquidation commences, the costs of a successful litigant will generally rank in priority to all other claims[69], including the liquidator's own costs and remuneration[70].

The position, therefore, appears to be that where a liquidator issues proceedings in the name of the company, the costs of the action will generally rank as a priority expense in the liquidation. Thus, the company's (and liquidator's costs) and those of the adverse litigant will rank above the liquidator's remuneration.

Turning to situations where the action rests with the liquidator, in practice, it also appears to be accepted that the *Ballyrider* principles are authority for the fact that the liquidator will generally be entitled to have recourse to the assets of the company for the costs of proceedings instituted in their own name (both in respect of their own costs and any costs order made against them). There are two issues that cause uncertainty.

The first are statements from the English courts which contradict this position where it has been held that an adverse costs order made against the liquidator personally on foot of statutory claims similar in their terms to section 604 and section 610 would not rank as a cost or expense in 'preserving getting in or realising the assets of the company' as the cause of action and the proceeds therefrom were the property of the liquidator rather than the property of the company.[71]

The second area that lacks clarity is that even if it is assumed in accordance with the *Ballyrider* statements that the liquidator is entitled to seek to have recourse to the assets of the company in relation to costs of litigation brought in his own name, it is not clear, but seems likely that such costs would also rank as a priority expense under section 617.

These specific problems have been addressed in England and Wales through Rules of Court where the Insolvency (England and Wales) Rules 2016, expressly provide (in Rule 6.42 relating to voluntary windings up and in Rule 7.108 relating to compulsory windings up) for priority for "expenses which are properly chargeable or incurred by the liquidator in…the preparation [or] conduct...of any legal proceedings…. which the liquidator has power to bring in the liquidator's own name…."

[68] *Connaughton Road Construction Ltd v. Laing O'Rourke Ireland Ltd* [2009] IEHC 7. See further *Quinn Insurance Ltd v. PricewaterhouseCoopers (A Firm)* [2018] IEHC 15; [2020] IECA 109; [2021] IESC 15.
[69] *Comhlucht Páipéar Ríomhaireachta Teo v. Údarás Na Gaeltachta* [1991] I.R. 320
[70] *Rheffrorhefferone CHA Limited* [1999] 1 I.R. 437; *Re Brandon Plant Hire Ltd* [2021] IEHC 462
[71] Re Floor Fourteen Ltd; Lewis v. Inland Revenue Commissioners [2001] 2 BCLC 392

This approach does appear to provide certainty that the liquidator has a right of recourse to the assets of the company regarding the costs of any action in priority to other expenses in the liquidation, where the action is brought in his or her own name. In addition, the rules also provide that the Courts can order that the costs involved should be paid by the liquidator in cases which might align with the *Ballyrider* principles outlining abusive instances on the part of the liquidator. This addresses both the issue of access to assets to cover costs and the issue of priority.

Given that it appears that in all cases costs will rank above remuneration in the priority for payment, it was suggested to the Committee that the prospect that liquidation funds, that might otherwise be available for liquidator remuneration, would be expended on legal costs could act to inhibit the taking of proceedings under Chapter 6. However, this would not be a factor where there are sufficient funds in a liquidation to cover both any legal costs that might arise and remuneration or in cases where there are little or no funds in the liquidation. Furthermore, a liquidator might seek to protect their entitlement to remuneration in specifying the terms that should apply to any indemnity that might be sought in order to take proceedings.

9.5 Consideration of the provisions in the context of the costs issues.

It is not clear why the provisions considered in this Report differed as to the appropriate applicant – whether the provision mentioned the liquidator, the company or was silent on this issue. This point is returned to in Section 10 of this Report.

It could be the case that following consideration it might be appropriate to recommend that the company would be included as a possible applicant in all cases. This would enable the various types of actions could, in all cases, be taken in the name of the company which would mean that the costs issues would accrue to the company rather than to the liquidator personally.

However, there were concerns expressed by some members of the Committee that an approach which increased the number of corporate entities named as plaintiffs to court proceedings might actually result in greater inhibition of the use of the provisions in Chapter 6 of Part 11 of the 2014 Act, as respondents would invariably seek security for costs unless there was obviously an abundance of assets in the liquidation. Concern was expressed that this could add significant costs to any planned proceedings and could result in cases being struck out at the outset unless liquidators could prove that there would be sufficient assets to meet any possible adverse costs order. It was considered by some members of the Committee that this approach could also prevent liquidators being made liable for costs where they improperly take actions. In addition, some Committee members expressed the view that the potential exposure to personal liability can play an important role in deterring any liquidator that might be tempted to engage carelessly in speculative or inappropriate litigation.

These various concerns were not shared by other members of the Committee.

The Committee was also conscious that the suggestion to include the company as applicant in all cases could give rise to unintended consequences. As an example, a concern was raised to the effect that if the causes of action under sections 599, 608 and 610 were to vest in the company, this could, in a particular case, complicate other issues such as the extent of a charge over the "assets of a company".

10. Who can bring the action?

A final issue which was raised as part of the outline of the original Work Programme relates to who can bring the relevant actions which have been described in this Report. As the Committee considered the wording of the relevant provisions it emerged that in relation to some provisions, for example sections 597 and 598 on invalidity of floating charges and section 604 on unfair preferences, no applicant was specified. In others the cause of action was available to the liquidator but not the company, for example section 608. Yet, section 559 refers to property including 'any right of action by the company or liquidator'.

The distinction between a right of action vesting in the company and/ or the liquidator is significant both in relation to the issues of third-party funding described in Section 8 and the issue of the liquidator's personal liability for costs described in Section 9. The Committee has considered the possibility that allowing an action to be taken by the company may resolve some of the issues arising in relation to the non-litigation of these provisions. However, the Committee is cognisant that there may be unintended effects regarding such a change and that these must be considered carefully.

10.1 Recommendation

The Review Group recommends further consideration of the modernisation of these provisions so as to describe relevant applicants as including the liquidator, the company, a creditor, or contributory in all cases.