EXPERT EXAMINATION AND REVIEW OF LAWS ON THE PROTECTION OF EMPLOYEE INTERESTS WHEN ASSETS ARE SEPARATED FROM THE OPERATING ENTITY

Report to Minister for Jobs, Enterprise and Innovation and the Minister for Business and Employment

Presented by Nessa Cahill B.L. and Kevin Duffy, Chairman of the Labour Court

11th March 2016

1. Introduction

1.1. On 14th January 2016 the Minister for Jobs, Enterprise and Innovation, Mr Richard Bruton T.D and the Minister for Business and Employment Mr Ged Nash T.D commissioned a twin track examination of protections in law for employees, with a particular focus on ways of ensuring limited liability and corporate restructuring are not used to avoid a company's obligations to its employees[1].

1.2. As part of this process the Ministers appointed Nessa Cahill B.L and Kevin Duffy, Chairman of the Labour Court, to examine the legal protections available for employees' interests in situations where assets of significant value are separated from the operating entity which is the employer.

1.3. A copy of the terms of reference for the review ("*the Terms of Reference*") is annexed to this report.

Methodology

1.4. In accordance with the Terms of Reference we have first considered the current corpus of employment law and company law and examined whether the existing provisions could be used to address the type of issues giving rise to this report. In the course of our examination of these issues we invited submissions from the Irish Congress of Trade Unions ("*ICTU*") and from the Irish Business and Employers' Confederation ("*Ibec*"). Comprehensive and helpful submissions were received from both bodies. We also met with both organisations to discuss the content of their submissions.

1.5. We also met with the Company Law Review Group ("*the CLRG*"), which is involved in a parallel examination of related issues from the perspective of company law.

1.6. The views of all bodies consulted have been fully considered and taken into account in formulating our conclusions.

[1] A press release was issued by the Ministers on 14th January 2016 announcing the establishment of the examination, its scope and purpose.

Background

1.7. This examination was commissioned against the background of concerns at the circumstances in which employees formerly employed at Clery's department store in Dublin were made redundant. All of those employees, most of whom had accrued significant service, were made redundant when the company by which they were employed became insolvent and was placed in liquidation. They were dismissed without notice and, it is claimed, the employer did not engage in the type of consultation with their representatives, in this case their trade union, envisaged by the Protection of Employment Acts 1977 to 2014 ("*the Protection of Employment Acts*"). The employer did not pay the statutory redundancy lump sums to which they were entitled under the Redundancy Payments Acts 1967 to 2014 ("*the Redundancy Payments Acts*") nor did they receive payment from the employer of other amounts due to them arising from their employment, such as payment in *lieu* of notice and compensation in respect of accrued holidays.

1.8. The principal disquiet surrounding this case stems from the fact that the employer's insolvency was preceded by a company restructuring which involved a separation into two different entities of the principal property asset and the operations of the business. When the operating entity subsequently became insolvent and went into liquidation, the employees lost their employment without warning or notice and, as an apparent result of the transfer of this asset, the monies owing to the employees were not paid.

1.9. The State will now be obliged to pay those debts out of the Social Insurance Fund under the Insolvency Payments Scheme which is governed by the Protection of Employees (Employers' Insolvency) Act 1984 to 2012 ("*the Employers' Insolvency Act*"), in circumstances in which the primary asset that would otherwise have been available to discharge those debts had been transferred to another company.

1.10. While the transaction that produced this result may have been lawful, it is difficult to avoid the conclusion that it would be preferable if it were not. While, in reality, little can be done to reverse what occurred in the case of the former employees of Clery's, the relevant Ministers wish to have an examination undertaken into ways in which a similar occurrence can be avoided in the future.

2. Terms of Reference

2.1. The Terms of Reference for this exercise identify the matters for consideration in what appears to be a narrow context. We are asked to consider how employees' interests can be protected in situations where assets are separated from the operations and the operating entity subsequently becomes insolvent and goes into liquidation. Hence, the focus of the examination is on how the legitimate interests of employees could more effectively be safeguarded in situations in which collective redundancies arise from the liquidation of an employer following corporate restructuring in which assets that might otherwise have been available to protect those interests are transferred to a related person.

2.2. The Terms of Reference also recognise that in addition to what may be described as statutory entitlements accruing on redundancy, employees may have an expectation of obtaining additional benefits, usually in the form of enhanced redundancy payments. It has been emphasised that in the case of the Clery's closure workers were denied an opportunity to seek to negotiate enhanced terms in line with the general practice within the distributive trade. We are asked to consider how the ability of employees to seek better terms and conditions could be protected and enhanced.

2.3. The Terms of Reference raise certain specific questions, such as

- whether more effective use could be made of existing employment legislation
- when any new measures to protect employees' interests may be triggered, at the time of the transaction or at the time of the liquidation
- whether asset transfers should be capable of being set aside
- whether employees' entitlements could be "*ringfenced*" in the event of the transfer of an asset and
- how employees could negotiate better terms and conditions, beyond their statutory entitlements.

2.4. While the Terms of Reference do mention the cases of Clerys and Connolly Shoes, it must be emphasised that this examination is not intended to and does not address the facts or circumstances of any particular collective redundancy or insolvency situation that has occurred.

3. Executive Summary

3.1. Part I of this examination sets out the existing provisions of employment legislation that may be most relevant to the issues raised in the Terms of Reference. Part II sets out the most relevant provisions of the Companies Act 2014. In Part III, certain proposals for reform are considered. The conclusions are summarised in Part IV.

3.2. The proposals that are made are predominantly concerned with amendments to employment legislation. There are certain proposals for the introduction of provisions that are derived from or relate to provisions of the Companies Act 2014, but there is no proposal to amend the existing provisions of the Companies Act 2014. The focus here is instead on attempting to facilitate and extend the use of the existing provisions of the Companies Act in the protection of employees' interests.

3.3. The proposals that are made need to be considered in conjunction with each other. No one proposal alone will provide the answers sought by the Terms of Reference. Further, the proposals need to be considered in light of the existing provisions of employment and company law, some of which are set out in this examination. The proposals may be summarised as follows:

3.4. Proposal 1 aims to ensure that employees will have the opportunity to consult with their employer for a period of not less than 30 days before any collective redundancy can take effect, whether the employer is insolvent or not. Certain issues and consequences of this proposal are also addressed, including the consequences of non-compliance with the consultation requirement and ramifications for directors under the Companies Act 2014. This proposal must be considered in conjunction with Proposal 4.

3.5. Under Proposal 2, if a person who is related to the employer is contemplating a decision in relation to an asset of significant value, that that person knows (or should know) will lead to collective redundancies in the employer, then there is an obligation on that related person to notify the employer, who in turn is obliged to commence the 30 day consultation period with the employees. This proposal should ensure that if a related person intends to refuse to renew a lease or intends to sell the property in which the employer's business is transacted, for example, there must at that stage be a period of consultation with employees, but only if it is known (or could reasonably be known) that this decision will result in collective redundancies. This should help employees in negotiating better terms and conditions before the decision in question is taken or implemented. Certain

related practical and consequential matters are also considered as part of this proposal.

3.6. Proposal 3 deals with the sanctions and redress available for failing to respect employees' rights to a 30 day consultation period. It is proposed that the compensation limit of four weeks' pay be increased to a maximum of 2 years' pay.

3.7. Proposal 4 addresses the mechanism for recovering an asset or proceeds of an asset in circumstances where the transfer of the asset had the effect of perpetrating a fraud on the employees. This draws directly from section 608 of the Companies Act 2014, but is adapted to cover employers and transferors who are not companies. It also includes provision for a directors' statement and actuarial/accounting report that may be relied upon as a defence to such an application. Provision is made for the Minister to delegate the bringing of such an application to the liquidator, and to provide funding to the liquidator towards that end.

3.8. Proposal 5 is complementary to Proposal 2 and provides for an application for an injunction in specified circumstances.

3.9. Proposal 6 is concerned with enhanced redundancy payments and aims to provide a means of fairly allowing such payments to be calculated and awarded. In situations of insolvency, of course, any such payments would ultimately be borne by the Minister through the Social Insurance Fund and it is therefore necessary to consider this proposal in conjunction with Proposal 4.

Part I

4. Current Employment Legislation

4.1. The terms of reference require us to consider if the safeguarding of employees' interests in this type of situation could be achieved by a more effective use of current legislative provisions. The extent to which there is potential to do so under current employment rights enactments should first be considered. There are four such enactments that have been identified in that regard: -

1. The Protection of Employment Acts 1977 – 2014
2. The Protection of Employee (Employers Insolvency) Acts 1984 – 2012
3. The Employees (Provision of Information and Consultation) Act 1996
4. The European Communities (Protection of Employees on Transfer of Undertakings) Regulations (S.I. No 131 of 2003).

5. Protection of Employment Act

5.1. This Act was enacted to satisfy Ireland's obligations under Council Directive 75/129EEC on the approximation of laws of the Member States on collective redundancies. Directive 75/129 was amended by Directive 92/56/EEC. The principal purpose of the amending Directive was to provide that workers have at their disposal "*effective administrative and / or judicial procedures in order to ensure that the obligations laid down in the Directive are fulfilled*".

5.2. Directive 75/129/EEC and Directive 92/56/EEC were consolidated in 1998 and the obligations of Member States of the European Union where collective redundancies arise are now contained in Directive 98/59/EC.

5.3. Article 2.1 of Directive 98/59/EC provides: -

> *"Where an employer is contemplating collective redundancies, he shall begin consultations with the workers' representatives in good time with a view to reaching an agreement".*

5.4. Two points of particular significance can be extracted from the wording of this Article. Firstly, it provides that consultation must begin when the employer is

contemplating collective redundancies. In case C-188/03, *Junk v Kuhnel*[2], the Court of Justice of the European Union (formally the ECJ) held that the consultation process must commence before notice of dismissal is given. Secondly, the Article makes it clear that the purpose of the consultation required by the Directive is with a view to reaching agreement. In practical terms, in unionised employments in particular, the mandatory consultation process is used to try and conclude a collective agreement on matters relating to the redundancies, including the level of compensation payable to those losing their jobs. In that context the process of consultation required by the Directive equates in practice to collective bargaining.

5.5. Article 2 of the Directive is given effect in Irish law by section 9 of the 1977 Act which provides for a consultation period of at least 30 days before the first notice of dismissal is given. The consultation must be with employee representatives, which includes, *inter alia*, a trade union, an excepted body or a staff association.

5.6. Section 10 of the Act provides, in effect, that for the purpose of consultation, employee representatives must be furnished with all relevant information in relation to the redundancies in contemplation.

5.7. Article 6 of the Directive is also significant. It provides: -

> *"Member States shall ensure that judicial and/or administrative procedures for the enforcement of obligations under this Directive are available to the workers' representatives and/or workers"*

5.8. That Article was given effect in Irish law by the European Communities (Protection of Employment) Regulations 2000 (S.I. 488 of 2000). Those Regulations provide that where an employer contravenes sections .9 or 10 of the 1977 Act a complaint can be made to a Rights Commissioner (now an Adjudication Officer). However, the maximum compensation that can be awarded is the equivalent of four weeks' pay. By way of contrast, most employment rights legislation provides that compensation can be awarded to an employee by way of redress for a contravention of a statutory employment right in an amount up to two years' pay.

5.9. The Act as originally enacted did not make provision for the processing of complaints by employees in cases where their employer failed to comply with the consultation or notification requirements of the Directive. Following the initiation of proceedings against the State for failure to comply with the Directive by the

[2] [2005] ECR 1-885

European Commission, S.I. 488/2000 was enacted by Ministerial Order pursuant to the European Communities Act 1972.

5.10. Section 10A of the Act of 1977 (as inserted by Article 10 of the Protection of Employment Order 1996, S.I. 370 of 1996) provides: -

> *"Sections 9 and 10 shall apply to an employer irrespective of whether the decision regarding collective redundancies is being taken by the employer or by an undertaking which controls the employer and it shall not be a defence on the part of the employer that the necessary information had not been provided to the employer by a controlling party, or parties, which took the decision leading to the collective redundancies."*

5.11. Article 2(4) of Directive 98/59/EC contains a similarly worded provision.

5.12. That section provides, in effect, that it is no defence for the employer to claim that the decision which resulted in the Act being contravened was taken by another undertaking or person.

5.13. In addition to any civil redress that may be ordered to employees, a failure to comply with either section 9 or 10 of the Act constitutes a criminal offence which, on summary conviction, can lead to a fine of €5,000 (s.11 of the Act).

5.14. Section 12 of the Act obliges an employer who is contemplating collective redundancies to inform the Minister for Jobs, Enterprise and Innovation as soon as possible and in any event at least 30 days before the first redundancies are to take effect. Subsection (3) of that section obliges the employer to furnish employee representatives with a copy of the notice sent to the Minister. Employee representatives may then forward any observations that they have relating to the notification. Significantly, subsection (4) of this section (as inserted by Article 11 of the Protection of Employment Order 1996) provides: -

> *"(4) In the case of collective redundancies arising from the employer's business being terminated following bankruptcy or winding up proceedings or for any other reason as a result of a decision of a court of competent jurisdiction the person responsible for the affairs of the business need comply with subsection (1) only if the Minister so requests.".*

A failure to comply with s.12 of the Act constitutes a criminal offence liable to a fine of up to €5,000.

5.15. Section 14(1) of the Act provides that redundancies cannot take effect before the expiry of the 30 day period commencing with the date of notification to the Minister. A failure to comply with that provision constitutes an indictable offence subject to a fine of up to €250,000 (subsection (2)). However, subsection (3) of this section (inserted by Article 12 of the 1996 Order) provides: -

> *"Subsections (1) and (2) shall not apply in the case of collective redundancies arising from the employer's business being terminated following bankruptcy or winding up proceedings or for any other reason as a result of a decision of a court of competent jurisdiction.".*

5.16. Notwithstanding the apparent savers for redundancies occasioned by insolvency, section 22 of the Act effectively provides a further safeguard for employers. It provides: -

> *"Where an employer is convicted of an offence under section 11 or 14, he may plead in mitigation of the penalty for that offence that there were substantial reasons related to his business which made it impracticable for him to comply with the section under which the offence was committed".*

5.17. Section 21 of the Act makes limited provision for holding officers or directors of a company liable for offences committed by a company. It provides: -

> *"Where an offence under this Act committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other officer of the body corporate or any person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly".*

5.18. There may be difficulties in maintaining criminal proceedings where it could be pleaded that immediate closure of the business was the only viable option because the actual employer was insolvent and unable to continue paying wages. But even if a criminal prosecution was taken it would do nothing to alleviate the plight of workers who believe that they were deprived of adequate compensation on losing their employment.

Duty of a Liquidator to Consult

5.19. The Court of Justice of the European Union has made it clear that the obligation to consult with employee representatives and to provide them with relevant

information continued to apply in circumstances where the employer is under the control of a Court appointed liquidator. In case C-235/10, *Claes v Landank Luxembourg SA*[3] the Court of Justice was asked to give a preliminary ruling on whether the employer, which had been placed in liquidation by a National Court, was required to comply with Articles 1-3 of Directive 98/59/EC (which correspond to sections 9, 10 and 12 of the Act of 1977) Article L 125–1(1) of the Luxembourg Code du Travail (Labour Code) provided, in effect, that employment contracts can be terminated with immediate effect in the event of the activities of an employer ceasing, *inter alia*, following a declaration of insolvency except where the activities are carried on by the liquidator.

5.20. In a judgement delivered on 3rd March 2011, the Court held that the Directive does not permit any derogation from the obligations imposed by Articles 1-3 thereof. The Court went on to point out, (at par 53, 54): -

> "*In an insolvency, the legal personality of the establishment whose dissolution and winding up have been ordered by a judicial decision exists for limited purposes only, in particular for the requirements of that procedure and until the publication of the accounts for the closure of the liquidation procedure. Nevertheless, such an establishment has a duty, up until the moment when its legal personality definitively ceases to exist, to fulfil the obligations incumbent on employers under Articles 2 and 3 of Directive 98/59.*
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> *As long as the management of the establishment in question remains in place, even with limited powers of management, it must fulfil the obligations of employers under Articles 2 and 3 of Directive 98/59."*

5.21. This case was recently relied upon by an Adjudication Officer of the WRC in considering a complaint by 61 former employees of Clery's in proceedings under the Act of 1977 and the European Communities (Protection of Employment) Regulations 2000. In her decision the Adjudication Officer found that the Liquidator had contravened sections 9 and 10 of the Act and she awarded the Complainant various amounts in compensation.

5.22. What was in issue in *Claes v Landank Luxembourg SA* was the obligation of a liquidator under Articles 2 and 3 of Directive 98/59 EEC, which concern the obligation to consult employee representatives and to notify the competent national authority (in this jurisdiction, the Minister) in respect to proposed

[3] [2011] I.C.R 1364

collective redundancies. Article 4 of the Directive was not directly in issue in that case.

5.23. Article 4 of the Directive provides, in effect, that collective redundancies cannot be put into effect until the expiry of the 30 day period after the competent authority is informed of the proposed redundancies. That Article is given effect in Irish law by section 14(1) of the Act of 1977. However, as referred to above, subsection (3) of that section provides, in effect, that the constraint imposed by subsection (1) does not apply in the case of collective redundancies arising from the termination of a business as a result of a Court Order[4]. Given that in *Claes v Landank Luxembourg SA* the Court of Justice only ruled on the obligations imposed on a liquidator by Articles 2 and 3 of the Directive, the decision in that case cannot be relied upon as authority from the proposition that section 14(3) of the Act is inconsistent with the Directive.

5.24. Based on the foregoing, it appears that the Act does oblige a liquidator to comply with sections 9 and 10 of the Act where collective redundancies are in contemplation but a liquidator is not restrained by the Act from giving effect to the redundancies before the expiry of the 30 day period following notification to the Minister.

6. The Protection of Employees (Employers Insolvency) Acts 1984 – 2012

6.1. This Act was enacted to implement Directive 80/987/EEC on the protection of employees in the event of the insolvency of their employer. That Directive was amended by Directive 2002/74/EC. The Directives have been consolidated in Directive 2008/94/EC. The Act provides, in effect, for the discharge by the Minister for Social Protection, out of the insolvency fund, of debts owing to employees arising from their employment where those debts cannot be met by their employer due to insolvency.

6.2. The range of debts to which the Act applies are set out at section 6(2). They include awards made by statutory tribunals under specified employment rights enactments. In general the award must have been made *"not earlier than the commencement of the relevant period".* Section 6(2)(b) of the Act provides: -

> *"Any amount, damages, fine or compensation referred to in subparagraphs (viii), (ix), (x), [(xi), (xiv), (xv), (xvi), (xvii), (xviii), (xix), (xx), (xxi), (xxii), (xxiii), (xxiv), (xxv), (xxvi), (xxvii), (xxviii) or (xxix)] of paragraph (a) of this subsection shall be regarded as being a debt to*

[4] This subsection was inserted by Article 12 of the Protection of Employment Order 1996 (S.I. 370 of 1996)

which this section applies if, and only if, the relevant recommendation, decision, determination, award or order was made during, or after the expiration of, the relevant period".

6.3. The expression "*relevant period*" is defined by s. 6(9) as "*the period of 18 months immediately preceding the "relevant date"*. The *relevant date* for this purpose is defined by s.6(9)(a) as: -

"the relevant date*" means—*

(a) in relation to a debt which is an amount, damages, fine or compensation referred to in subparagraph [(iii)(I)], (v), (vi), (viii), (ix), [(x), (xi) (xiii), (xiv), (xv), (xvi), (xvii), (xviii), (xix), (xx), (xxi), (xxii), (xxiii), (xxiv), (xxv), (xxvi), (xxvii), (xxviii) or (xxix)] of subsection (2)(a) of this section, the date on which the relevant employer became insolvent or the date on which the relevant recommendation, decision, determination, award or order is made, whichever is the later"

6.4. The combined effect of these definitions appears to be that an award to which the Act relates is recoverable where it is made in the 18 month period before the date on which employer became insolvent, or after that date. That construction appears to be in line with the understanding of the Department of Social Protection. The Guide to the scheme published by the Department provides, having listed the range of awards covered, as follows: -

"Entitlements under the above legislation are covered only where the determination, decision, order, etc., was made no earlier than 18 months prior to the date of insolvency of the employer or after that date, and has not been appealed, or by which the appeal deadline has passed. The Scheme is extended from time to time to include new entitlements."

6.5. Section 10 of the Act transfers to the Minister all rights and remedies of the employees in respect to debts met out of the Insolvency Fund and those debts are given priority for the purpose of the Bankruptcy Acts and the Companies Acts. For the purpose of the Act the amount of an employee's earning that exceeds €600 per week is disregarded (s.6(4)(a))

6.6. This Act ensures that any monies legally owing to an employee, which cannot be recovered against the employer by reason of the employer's insolvency, can be recovered from the insolvency fund. However, the Act does not apply to any amount that may be agreed in respect of enhanced redundancy payments or such amount as may be recommended by the Labour Court under the Industrial

Relations Acts. That would appear to be the case even in circumstances where enhanced payments are provided for by a collective agreement or established within the employment by custom and practice.

7. The Employees (Provision of Information and Consultation) Act 1996

7.1. This Act was enacted to give effect to Directive 2002/14/EC, which provides a general framework for the provision of information to, and consultation with employees. Information is broadly defined by the Act as the transmission by the employer to employees or their representatives of data in order to acquaint them with the subject matter and to examine it. Consultation is defined as the exchange of views and the establishment of dialogue between the employer and employees or their representatives.

7.2. The principal obligation imposed on employers by the Act is to establish arrangements for the provision of information and for consulting with employees. There is no absolute obligation on an employer to provide such arrangements. The obligation only arises in employments that have at least 50 employees. Moreover, the obligation only arises where the employer is requested to establish arrangements by 10% of employees or 100 employees, whichever is the lessor. Section 14(4) of the Act allows an employer to withhold information which, on objective criteria, would be prejudicial or harmful to the undertaking

7.3. For present purposes, the most significant feature of this legislation is the absence of any general right of redress in circumstances in which an employer fails to provide information to, or to consult with, employees. Section 15 make provision for the reference of disputes to the Labour Court concerning a limited range of issues, including a refusal of an employer to provide information on grounds that it would be prejudicial or harmful to the undertaking or where the employer refuses to provide information on grounds that it is prohibited from doing so by any enactment. This provision has never been tested. But it would appear that it could only arise where an employee seeks specific information and it is refused on one of the grounds listed.

7.4. Overall it is difficult to envisage how this legislation could be of any utility in dealing with the type of situation giving rise to this examination. Firstly, a dispute can only be referred to the Labour Court in relation to a refusal to provide information on the grounds referred to a subsections (4) and (5) of s.14, rather than in relation to a failure to provide information. Secondly, where corporate restructuring occurs information in relation to it may only become available to the employer after it has occurred.

8. The European Communities (Protection of Employees on Transfer of Undertakings) Regulations (S.I. No 131 of 2003)

8.1. These Regulations give effect in Irish Law to Directive 2001/23/EC. That is the third Directive on the approximation of laws of the Member States on the safeguarding of employees' rights in the event of a transfer of an undertaking, business or part of a business.

The Regulations apply to: -

> *".....any transfer of an undertaking, business, or part of an undertaking or business from one employer to another employer as a result of a legal transfer (including the assignment or forfeiture of a lease) or merger"*

8.2. In the Regulations *"transfer"* means the transfer of an economic entity which retains its identity. The term *"economic entity"* means an organised grouping of resources which has the objective of pursuing an economic activity whether or not that activity is for profit or whether it is central or ancillary to another economic or administrative entity.

8.3. In case C-13/97 *Süzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice and Lefarth GmbH*[5] the CJEU described the objective of the Directive thus (at paragraph 10): -

> *"The aim of the directive is to ensure continuity of employment relationships within a business, irrespective of any change of ownership. The decisive criterion for establishing the existence of a transfer within the meaning of the directive is whether the entity in question retains its identity, as indicated inter alia by the fact that its operation is actually continued or resumed."*

Later, at paragraph 12, the Court said: -

> *"As has been held—most recently in Merckx and Neuhuys—the directive is applicable wherever, in the context of contractual relations, there is a change in the natural or legal person who is responsible for carrying on the business and who incurs the obligations of an employer towards employees of the undertaking."*

8.4. In Case C-24/85 *Spijkers v Gebroeders Benedik Abattoir CV and Another*[6] the Court of Justice held that in deciding if there has been a transfer it is necessary to

[5] [1997] ECR 1- 1259

determine whether what has been sold is an economic entity which is still in existence, and this will be apparent from the fact that its operation is actually being continued or has been taken over by the new employer, with the same economic or similar activities. The Court went on to hold that in considering whether these conditions are fulfilled it is necessary to take account of all the factual circumstances of the transaction in question, including: -

(a) the type of undertaking or business concerned;

(b) whether the assets of the undertaking were transferred assets meaning buildings and movable property;

(c) the value of its intangible assets, which include the goodwill of the undertaking;

(d) were the majority of the employees of the business taken over by the transferee;

(e) whether the customers were transferred;

(f) the level of similarity between the activities of the undertaking before transfer and those after the transfer;

(g) the extent of the time break, if any, between the date of transfer and the date of the resumption of the business.

8.5. This is not an exhaustive list and any other factors that may be relevant to a particular case should be considered. All the circumstances must be considered together in deciding whether there has been a transfer of an undertaking, business or part of a business within the meaning of the Directive. In considering that question it is the substance and not the form that will matter.

8.6. In *Spijkers* the Court considered if a transfer occurred where a business was closed and the premises from which it operated was sold. Mr Spijkers claimed that the purchaser of the premises was liable to him for unpaid wages. In answering a question referred by the Netherlands Court, the Court of Justice ruled as follows: -

> *"Article 1(1) of Directive 77/187 of 14 February 1977 must be interpreted to the effect that the expression 'transfer of an undertaking, business or part of a business to another employer' envisages the case in which the business in question retains its identity. In order to establish*

[6] [1986] 2 C.M.L.R. 296

whether or not such a transfer has taken place in a case such as that before the national court, it is necessary to consider whether, having regard to all the facts characterising the transaction, the business was disposed of as a going concern, as would be indicated inter alia *by the fact that its operation was actually continued or resumed by the new employer, with the same or similar activities."*

8.7. No case has been identified in which judicial consideration has been given to the question of whether the transfer of an asset of a business, in and of itself, could constitute a transfer within the meaning of the Regulations. However, it is unlikely that a positive outcome would result from taking such a case. As was stated by the Court of Justice in *Spijkers* and *Süzen,* the decisive criterion is whether the entity in question retains its identity, as indicated *inter alia* by the fact that its operation is actually continued or resumed. It would appear that in the type of situation giving rise to this examination the business was transferred to the operations company rather than to the company receiving the assets although in reality the operations company could not realistically continue trading without the assets in question and that may have been known when the decision on the restructuring was taken. Nevertheless, in this type of situation it could not realistically be said that the entity holding the assets retains the character of the former business.

8.8. It would appear reasonably clear that neither the Directive nor the regulations provide any realistic mechanism for protecting workers' interests in cases where the essential assets of a business, as opposed to the business itself, are transferred.

9. Possible Approaches

9.1. Based on the forgoing analysis, none of the employment law enactments considered, as they currently stand, could safely be relied upon to redress the type of situation giving rise to this examination. It is, therefore, necessary to consider what legislative change could be considered to these enactments in order to deal with the problem.

9.2. Before addressing potential legislative changes, it is necessary to consider whether there are relevant provisions of company law which may be availed of in their current form or which may need to be amended or adapted.

Part II

10. Companies Act 2014: Introduction

10.1. It is important to emphasise that not every situation of collective redundancy arising from an employer's insolvency concerns a company. Further, not every transfer of a valuable asset that may impact on an employer's insolvency is a transfer to or involving a company. However, the Terms of Reference refer to liquidations and to bodies corporate and expressly require an examination of company law and that is therefore the primary focus of this examination.

10.2. It must also be emphasised at the outset that this examination does not consider every provision of the Companies Act 2014 that may be relevant to the circumstances outlined in the Terms of Reference. The purpose of this examination is, on the contrary, to identify whether there are adequate mechanisms already in existence in the Companies Act 2014 to protect employees of an insolvent employer and to reverse the effects of a transaction in which an asset of significant value was transferred leaving an employer with inadequate resources to discharge employees' accrued entitlements.

10.3. Thus, from the perspective of the Companies Act, there are two types of issues raised by the Terms of Reference. The first concerns the protection of employees' rights when a company is at or close to the point of insolvent liquidation.

10.4. The second issue relates to the treatment of transactions by a company that have had the effect of depleting the assets available in the liquidation.

11. Companies Act 2014: Protection of rights of employees of insolvent company

11.1. The most significant provision of the Companies Act 2014 in respect of the first issue is section 621. This section provides for special protection of employees in the context of liquidations, by ensuring that certain employee debts rank as preferential debts in a liquidation. The Act specifies the order in which debts and liabilities are discharged in a liquidation, which involves the payment of all costs and expenses incurred in the winding up, followed by rates, revenue debts and then various categories of employee claims. Section 621(2) provides that, "*In a winding up there shall be paid in priority to all other debts*", the defined categories of rates and revenue debts, followed by:

> *"(b) all wages or salary—*

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

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

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

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

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

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

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

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

(i) before the relevant date, and

(ii) in the course of the person's employment with the company,

save to the extent that the company is not effectively indemnified by insurers against such damages and costs,

(f) all sums due to any employee pursuant to any scheme or arrangement for the provision of payments to the employee while he or she is absent from employment due to ill health,

(g) any payments due at any time by the company pursuant to any scheme or arrangement for the provision of superannuation benefits to or in respect of employees of the company whether such payments are due—

(i) in respect of the company's contribution to that scheme or under that arrangement, or

(ii) in respect of such contributions payable by the employees to the company under that scheme or arrangement which have been deducted from the wages or salaries of employees."

11.2. Other legislation, such as the Redundancy Payments Acts 1967 to 2014 (section 42) provide for priority for statutory redundancy payments. With the exception of the preferential ranking of such claims, the Companies Act does not provide particular protection for employees of a company in liquidation.

11.3. It may be noted that, if an asset is subject to a fixed charge, mortgage or trust, it may not fall into the pool of assets available for distribution. This is due to the particular status of those assets, which status must of necessity pre-date the liquidation. We do not believe, however, that it is possible under the Companies Act 2014 for particular assets or proceeds that are recovered by a liquidator in an insolvent liquidation and which are not subject to a pre-existing encumbrance or charge to be used only in the discharge of one class of creditors' indebtedness.

12. Companies Act 2014: Recovery of assets or contributions for benefit of company in liquidation

12.1. The second issue is the treatment of transactions between related companies that have had the effect of depleting the assets available in the liquidation of one of the companies.

12.2. Under the Companies Act 2014, there are different approaches to such transactions.

12.3. Sections 604 and 608 are directed specifically towards transactions that have had the object or effect of perpetrating a fraud on creditors and aim to redress the harm caused by such transactions. Sections 599 and 600 are concerned with the relationship between related companies more generally and provide mechanisms whereby one company can be required to contribute to the indebtedness of the other.

12.4. There are other provisions of the Companies Act 2014 which may also be relevant to recovering funds for the company in liquidation. Section 610, for example,

provides for liability for the company's debts to be imposed on a director who was knowingly a party to the carrying on of the company's business with intent to defraud creditors. Such provisions are not however within the scope of the Terms of Reference, as they are concerned with imposing liability on directors, and are not examined here. For the purposes of this examination, section 604 is similarly not relevant, as that provision is solely concerned with payments to creditors. Section 600 only operates when both related companies are in liquidation, and it is therefore not applicable here.

12.5. The primary provisions of the Companies Act 2014 which may be relevant are therefore section 608 and section 599, each of which will now be considered.

Section 608: Delivery up of an asset or proceeds to liquidator

12.6. Section 608 provides that, when a company is in liquidation, the liquidator or a creditor or contributory of the company can apply for, and the court can grant, an order that a person who appears to have the use, control or possession of a property or the proceeds of sale of that property, must deliver that property or pay that sum to the liquidator. This is only possible if it can be shown to the court's satisfaction that the property in question was disposed of and the effect of the disposal was to perpetrate a fraud on the company, its creditors or its members.

12.7. The "*property*" and "*disposal*" that are covered by section 608 are broadly formulated. The property in question can be property "*of any kind whatsoever*" and the manner of its disposal can be "*either by way of conveyance, transfer, mortgage, security, loan, or in any way whatsoever whether by act or omission, direct or indirect*."

12.8. Further, to prove that the *effect* of a disposal was to perpetrate a fraud on the company, its creditors or members, does not require proof that the *intention* of the disposal was to perpetrate a fraud. This has been stated in several judgments on the predecessor to section 608, section 139 of the Companies Act 1990, including the judgment of Murphy J in *Le Chatelaine Thudichum (In liq.) Ltd. v. Conway*:[7]

> "*The final question I have to address in determining whether a fraudulent disposition occurred is whether the effect of that disposition was to perpetrate a fraud on the company, its creditors or members. While this question does not seem to have been judicially considered, assistance can be drawn from commentators on the area. It has been suggested that unlike s. 286 of the Companies Act 1963, as amended,*

[7] *Le Chatelaine Thudichum (In liq.) Ltd. v. Conway* [2010] 1 IR 529 at para 35.

which focuses on intention, the fraud criterion in s. 139 of the Companies Act 1990, merely requires that the company, its creditors or members be deprived of something to which it is, or to which they are, lawfully entitled (Courtney,The Law of Private Companies, (2nd ed., 2002, Dublin) at para. 27.093). I would adopt this proposition as a correct statement of the law."

12.9. The Court applied the provision as follows to the circumstances of that case:

> "***[41]*** *I am satisfied that the disposition in favour of the respondent had the effect of perpetrating a fraud on the applicant in depriving it of its assets, and on the creditors in diminishing the pool of assets available for distribution upon liquidation. The creditors were thus denied the possibility of having a portion of the debts owed to them repaid, and were accordingly deprived of a benefit to which they were lawfully entitled.*
>
> ***[42]*** *Since the respondent acquired the cash and the proceeds of sale of stock he appears to have had the use, control or possession of such monies and is accordingly a person to whom the section applies.*"

12.10. It may be noted that, in a more recent case, the High Court has required some "*additional ingredient*" in a section 139 application. In the case of *Re Tucon Process Installations Limited*,[8] the High Court (Hunt J) held that a transaction by an insolvent company is not automatically captured by section 608 (then section 139) and that some additional ingredient is necessary:

> "*A simple payment made to an unsecured creditor when the company is insolvent will not, without more, trigger the operation of the section. It is not the case that every otherwise lawful payment made by an insolvent company to a legitimate unsecured creditor will automatically amount to a fraudulent disposition. ...The additional ingredient must amount to an impropriety before the provisions of the section are engaged*."

12.11. This judgment appears to be under appeal, and it cannot be predicted whether the approach of the High Court to this question will be upheld. It seems safe to assume that the threshold for proving that a transaction has a fraudulent effect remains low. However, there is another aspect of this provision which needs to be examined.

[8] *Re Tucon Process Installations Limited* [2015] IEHC 312.

12.12. The court can only make an order under section 608 "*if it deems it just and equitable to do so*". Section 608(4) then states,

> *"In deciding whether it is just and equitable to make an order under this section, the court shall have regard to the rights of persons who have bona fide and for value acquired an interest in the property the subject of the application.*"

12.13. The courts have on occasion refused to make an order under section 608 to the extent that the proceeds of the disposal were applied in the discharge of employee claims or other debts of the company in liquidation and that it was not therefore *"just and equitable*" to apply section 139 in respect of those amounts. This is what occurred in *Re Citywest Hire Limited, Kirby v. Petrolo Limited*.[9]

12.14. The question of whether a person was a *bona fide* purchaser for value within the meaning of the predecessor to section 608(4) was considered by Murphy J in *Le Chatelaine Thudichum (In liq.) Ltd. v. Conway*:[10]

> "*Since he acquired the stock and cash knowing that the company could not fully discharge its debts to its other creditors, he cannot be said to have acquired the property bona fide, and accordingly s. 139(3) of the Companies Act 1990 has no application to the present proceedings. The court may therefore require the respondent to pay a sum to the company in respect of the property acquired*."

12.15. It seems on the basis of this judgment that, provided the counter-party to the impugned transaction knew the company could not fully discharge its debts to its creditors, section 608(4) cannot apply.

12.16. This overview of the scope of section 608 demonstrates the following: if a company disposes of property to a third party for less than full value, with the effect (although not necessarily the intention) that, when the company subsequently goes into liquidation, there are inadequate assets to meet the entitlements of creditors, section 608 *prima facie* applies. If, however, the counter party to the transaction can prove a lack of knowledge that the company was or would be unable to pay its debts, a court may find that it is not just and equitable to make an order under that section.

12.17. This provision could be availed of if a company that is in insolvent liquidation is proved to have disposed of a valuable property for less than full value, with the

[9] *Re Citywest Hire Limited, Kirby v. Petrolo Limited* [2014] IEHC 279.
[10] *Le Chatelaine Thudichum (In liq.) Ltd. v. Conway* [2010] 1 IR 529 at para 42.

effect of leaving inadequate or no assets to meet the claims of employees. In such circumstances, the entity in possession of that asset or the proceeds of sale of same could be required to return that asset to the liquidator, if the court finds that it is just and equitable to do so. One relevant factor will be whether that transferor knew that the company would not be able to discharge its debts to employees following the disposal of the asset.

12.18. While the predecessor to section 608 (section 139 of the Companies Act 1990) was not frequently applied and there are no judgments on section 608, the breadth of the provision and the court's discretion under it are clear. It is a mechanism that currently exists under the Companies Act 2014 for the recovery of an asset that was transferred out of a company with the effect of defrauding creditors of that company.

12.19. The real issue is that the potential applicants under section 608 are the liquidator, a creditor or a contributory of a company. The likely complexity of such an application and the costs that it would be likely to entail, may make it an unattractive prospect for creditors or liquidators with limited resources. However, in terms of its formulation, the provision as currently drafted does provide a mechanism for looking back at transactions that were undertaken by a company and that depleted the assets available for distribution in the liquidation. There are no obvious amendments to the language of the provision itself that would enhance its utility for this purpose.

Section 599: Contribution to the debts of a related company

12.20. Section 599 of the Companies Act 2014 provides 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;

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

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

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

(6)Notwithstanding any other provision, it shall not be just and equitable to make an order under this section if the only ground for making the order is—

(a)the fact that a company is related to another company, or

(b) that creditors of the company being wound up have relied on the fact that another company is or has been related to the first-mentioned company."

12.21. There are a number of important points about this provision.

12.22. First, the overriding rule is that an order of contribution will only be made if the Court is satisfied that the order is just and equitable.

12.23. Second, in determining whether it is just and equitable, the Court must take into account the factors set out in that section, namely

- the extent of the related company's involvement in the management of the company in liquidation;
- the conduct of the related company towards the creditors of the company that is being wound up; and
- the effect an order of contribution would have on the creditors of the related company.

12.24. Finally, an order of contribution cannot be made on the sole basis that the companies in question are related to each other or that the creditors of the company being wound up have relied on the fact that they are so related.

12.25. As there is no Irish authority directly interpreting this provision, it is instructive to have regard to the comparative example of New Zealand, which introduced a provision similar to section 140 in 1980 (and which apparently was the precedent for the Irish provision). The relevant contribution provision is now contained in section 271 of the Companies Act 1993. This provision was recently applied by the New Zealand High Court (MacKenzie J) in the judgment in *Lewis Holdings Limited v. Steel & Tube Holdings Ltd*.[11]

12.26. The plaintiff, Lewis Holdings Ltd (Lewis), was the owner of a property, which was leased to Stube Industries Ltd (Stube), a wholly owned subsidiary of the defendant Steel & Tube Holdings Ltd (STH). Stube was put into liquidation by a shareholders' resolution and a few days later, the liquidators disclaimed the lease as onerous property. Lewis filed a proof of debt with the liquidators and Lewis and the liquidators made a claim against STH, under s 271(1)(a), for the payment to the liquidator of the whole of Lewis' claim in the liquidation.

12.27. The facts as so found by the Court were that Stube had no employees and was effectively managed by STH, with STH paying the rent for which Stube was liable under the lease. The directors of Stube were the CFO and CEO of STH. No formal board meetings of the directors of Stube were held. There appears to have been no real attempt to separate the companies. Further, the decision to put Stube into liquidation followed unsuccessful attempts by Stube to exit the lease.

12.28. MacKenzie J referred to the fact that only Ireland and New Zealand have a provision of this nature: *"Section 271 has not been frequently invoked. It is, apart from a similar provision in Ireland, unique to New Zealand in the common law world, so no assistance is available from other similar jurisdictions*."

12.29. The Court considered the fundamental principle of separate corporate personality and noted at para 21:

> "*A particular aspect of the separate corporate identity of a company which must be taken into account in the balancing exercise is the common business practice of using the principle of separate corporate identity in the creation of group structures. The evidence shows, if indeed evidence was necessary, that it is common practice in company groups that a range of services are undertaken centrally, group staff are used to manage subsidiaries, and senior officers of the parent act as directors of the subsidiary. STH places considerable reliance on such matters. Those propositions are largely uncontroversial as statements of general*

[11] *Lewis Holdings Limited v. Steel & Tube Holdings Ltd.* [2014] NZHC 3311.

practice. What is required is a factual assessment of the practices adopted in this case, to determine whether there is some conduct or other circumstance falling within the s 272 guidelines that disentitles STH from relying on the separate legal existence of Stube."

12.30. The first criterion assessed by the court was the management of the companies. The Court therefore conducted a detailed examination of the operation of the companies and the facts surrounding their management and interaction, which included cross-examination of witnesses, such as the directors of Stube. The Court concluded that the directors of Stube managed that company in their capacity as CFO and CEO of STH.

12.31. The Court then considered the financial affairs of the companies in the group and noted at para 51:

> *"Stube was treated as a division of STH, for financial purposes. Stube had no separate bank account. All receipts and payments on its behalf had to be made through STH's bank account. The use of the parent's bank account would not of itself indicate involvement by the parent in the management of the subsidiary, at least so long as a clear record of the transactions was kept within the internal records of the group. However, the evidence shows that the financial intermingling of the affairs of Stube and STH went well beyond the use of a common bank account. Receipts and payment were not only transacted through STH's bank account, they were accounted for as STH's transactions*."

12.32. The Court concluded,

> "*STH took part in the management of Stube to an extent which was total in all essential respects. Mr Crossland describes Stube as a 'slave' of STH. Another metaphor might be 'puppet'. The separate legal entity which was Stube was devoid of any capacity to conduct its own affairs*."

12.33. The second criterion was (like section 599(4)(b)) the conduct towards the creditors of the company in liquidation. In this regard, MacKenzie J held that, while Lewis knew Stube was the nominal lessee, STH created the impression that it would discharge all liabilities and would not insist on the separate corporate entities in the group.

12.34. The third matter considered by the Court was whether the liquidation of Stube was attributable to STH. In this regard, MacKenzie J held, "*I find that the circumstances that gave rise to the liquidation of Stube are attributable entirely to*

the actions of STH, in deciding to withdraw the support which it had previously provided to Stube."

12.35. The Court considered various other matters and concluded at para 108:

> "*As I have held, it is perfectly proper and usual commercial practice to appoint employees of the holding company as directors of a subsidiary. It is also permissible for those employee directors to act in accordance with the best interests of the holding company, even although that may not be in the best interests of the subsidiary, provided the constitution so provides, as it does here. What is not permitted is that those employee directors have regard only to the interests of the holding company, without giving separate consideration to the separate legal existence of the subsidiary, or the separate best interests of the subsidiary*."

12.36. On the basis of the various findings of fact outlined above, the Court ordered that STH contributed to the debts of Stube under section 271.

12.37. While the decision in *Lewis Holdings Limited v. Steel & Tube Holdings Ltd.*[12] would not have any binding effect on an Irish court, it may provide some indication of how an Irish court would approach the interpretation of section 599. It demonstrates that the enquiry that must be undertaken is a heavily fact-specific one. It was only on the basis of detailed evidence, including oral evidence, that the Court was able to assess whether a contribution order was warranted. What is interesting is the Court's ready acceptance that the actions of the parent company gave rise to the liquidation of the related company. While there were particular facts in that case surrounding the financial management of the companies, the Court did find that the withdrawal of financial support was responsible for the liquidation.

12.38. If it is to be applied to the circumstances outlined in the Terms of Reference, section 599 would require proof that the employer's insolvency is attributable to the acts or omission of the company to which the asset was transferred and would require evidence as to the involvement by the latter in the management and affairs of the company in liquidation. The Court then has a broad discretion to determine whether it is "*just and equitable*" that the related company should be required to contribute to the debts of the company in liquidation.

12.39. It is impossible to state with any certainty how an Irish court would approach the exercise of this discretion. However, in principle, the criteria of section 599 may

[12] *Lewis Holdings Limited v. Steel & Tube Holdings Ltd.* [2014] NZHC 33.

well be satisfied in the circumstances outlined in the Terms of Reference. The grounds on which section 599 may not be available could include the following:

- Lack of evidence that the acts or omissions of the related company contributed to the insolvency of the employer;
- Lack of evidence that the related company was involved in the management of the related company
- The significance of such an order for the creditors of the related company.

12.40. While an order under section 599 may be refused on these grounds, this appears to be a fair and just outcome. It would not appear just, for example, for a related company to be required to discharge the indebtedness of a company if there is no evidence that the insolvency of the latter was due to any act or omission of the former or if the consequence of such an order would be to make the related company insolvent.

12.41. It therefore seems that section 599 is a potentially useful provision to address the concerns outlined in the Terms of Reference. It is only when this provision has been tested by the courts that any necessary amendments may become apparent.

12. Other provisions of the Companies Act 2014

12.42. There are many provisions of the Companies Act 2014 that may be invoked to sanction and punish directors of companies in liquidation where there has been dishonest or irresponsible conduct, fraudulent trading or other fraudulent transactions.[13] In such circumstances, directors may be restricted from acting as directors, disqualified from so acting or they may be liable to criminal conviction. There are also provisions of the Companies Act that may be used to make directors liable for the debts of a company in liquidation and to require various persons to return property to the company in liquidation. This may be ordered, for example, where the property was misapplied or where there was misfeasance or breach of duty.[14]

12.43. However, the Terms of Reference do not extend to measures against directors and they are not therefore addressed here, although it must be noted that these provisions could be of real significance in the circumstances outlined in the Terms of Reference, both as a deterrent and as a means of sanctioning the conduct described therein.

[13] See for example, sections 717, 722, 819, 842 of the Companies Act 2014.
[14] See for example section 612 of the Companies Act 2014.

12.44. It is nonetheless worth noting that if the directors of an operating company misapplied the property of that company or committed a breach of duty by transferring that property to a third party for less than full value, section 612 of the Companies Act 2014 could be invoked. If an application was made under section 612 by the Director of Corporate Enforcement, a creditor or the liquidator, a court could make an order restoring that property to the company in liquidation or an order for the payment of compensation for such misapplication.

12.45. While we are not concerned with examining the liability of persons such as directors or officers of companies in liquidation, the existence of such provisions as section 612 is highly relevant to an assessment of the utility of the existing legislation and the amendments that are necessary to ensure a just outcome for creditors of insolvent companies, such as employees.

Part III

OPTIONS FOR REFORM

13. General

13.1. There are a number of possible options which could, either individually or in combination, go some way towards addressing the problems identified in the Terms of Reference. Each of these proposals would require legislative change in current employment law provisions. The options addressed here focus on those areas where there appears to be a case for legislative amendment.

13.2. The proposals that are made must be read in conjunction with the provisions of the Companies Act 2014 that were addressed earlier in this examination, among others. By contrast with the applicable employment legislation, the provisions of the Companies Act 2014 that are already available do not appear to be in need of amendment, but more in need of use. It is striking that many of the provisions of the Companies Act which may be of assistance are not frequently invoked (such as section 608) or are not invoked at all (such as section 599). The reason for this appears to relate to the costs and risks associated with such applications, rather than the formulation of the provisions themselves. For this reason, one of our proposals includes conferring power on the Minister, as creditor of an insolvent employer (having paid the employee claims through the Social Insurance Fund), to delegate the taking of statutory applications to a liquidator and to provide funding to the liquidator for that purpose.

13.3. There is also a case for adapting and applying the mechanisms in the Companies Act to cover employers not within the scope of that Act, such as partnerships, individuals or unincorporated associations. We address these points as part of our proposals, but only in passing, as the Terms of Reference relate to liquidations, to which the provisions of the Companies Act 2014 would apply.

13.4. The changes that are proposed would require careful drafting so as to confine their effect to the type of situation that they are intended to address and have no broader or unforeseen consequences in either field. We do not engage in such drafting here, but instead highlight the types of measures that we believe would assist in addressing the issues raised in the Terms of Reference.

14. Proposal 1 - Remove the insolvency exception from the prohibition on implementing collective redundancies during the consultation period

14.1. A central complaint articulated by the Unions representing the former Clerys' employees related to the peremptory manner of their dismissal. This objection could be addressed by deleting the statutory exemption at section 14(4) of the Protection of Employment Act from the prohibition against the giving effect to collective redundancies until the expiry of 30 days after the notification to the Minister in circumstances of insolvency.

14.2. The effect of removing the exemption would be to prohibit a liquidator from dismissing workers by way of a collective redundancy until the expiry of the consultation process. While the Protection of Employment Act does not expressly provide that a purported dismissal in contravention of section 14(1) is void, the removal of the current exemption would place all employees in the same position, whether the redundancies arise from insolvency or not.

14.3. Further, there is no reason in principle why the Act could not be amended so as to expressly provide that, in addition to the other remedies and sanctions that are available where the Act is contravened, a dismissal in contravention of section 14(1) would be treated as a legal nullity. A provision to similar effect is contained at section 23 of the Maternity Protection Act 1994 where a purported dismissal of a woman while on leave to which she is entitled under that Act is rendered void *ab initio*.

14.4. A provision which prohibited dismissal until the expiry of the mandatory period would need to be supported by effective sanction where the provision is contravened. This could include both criminal sanctions and effective civil redress. In respect to the latter, the current maximum compensation that can be awarded to an aggrieved employee (four weeks' pay) may not constitute an effective remedy having deterrent effect. This is addressed further in Proposal 3 below.

14.5. It might also be necessary to provide that the consultation / notification period required could not run concurrently with the notice period that applies under the Minimum Notice and Terms of Employment Acts 1973 to 2005, so as, in effect, notice of dismissal could not be given until the end of the statutory consultation / notification period.

14.6. Such a provision, if made, would not have the effect of requiring an insolvent business to continue trading during the 30 day period. The insolvent entity could not implement the redundancies during that period of time, but would not be

required to carry on business or contract any other debts. Further this proposal would not prevent the appointment of a liquidator during the 30 day period.

14.7. Rather, its net effect would be to give employees an entitlement to payment of their normal wages and an opportunity to consult with their employer while still in employment during the consultation period. In cases where the employer is unable to pay the wages the payments would ultimately be made out of the Social Insurance Fund. That may not be considered a desirable outcome unless the amounts paid out of the Fund could be recovered from another undertaking (as considered in Proposal 4, below). There is a policy question involved in this assessment on which we do not express a view.

14.8. We are mindful that continuing to trade while insolvent may attract certain sanctions for a company's directors under the Companies Act 2014, such as liability for the company's debts.[15] There may be a concern that directors of insolvent companies could fall foul of such provisions of the Companies Act 2014 if they are required to suspend the implementation of collective redundancies for a 30 day period, while the company is insolvent. This could be addressed by the insertion of a provision in the Protection of Employment Act to the effect that the contracting of such debts as are necessary to secure a company's compliance with the requirements of the Act, shall not of itself constitute fraudulent or reckless trading or trading while insolvent for the purpose of the Companies Act 2014. Alternatively, this could be formulated as a defence: it shall be a defence to a claim of fraudulent or reckless trading or trading while insolvent, that the company was only so trading for the purpose and to the extent required, to comply with the Protection of Employment Acts.

14.9. Presumably, the exemption in cases of insolvency from the normal requirement to retain employees in employment for the mandatory period was intended to recognise the practical difficulties that would otherwise ensue where a liquidator does not have funds from which to pay wages during the statutory period. This could operate to the disadvantage of employees who might not be entitled to claim job seekers benefits from the Department of Social Protection because they have not been technically unemployed. While unpaid wages could eventually be recovered from the Social Insurance Fund, in the interim, workers could be left without an income.

[15] See for example section 610 of the Companies Act 2014 which imposes civil liability for reckless and fraudulent trading.

14.10. These are questions that require further consideration and may require some modifications in the social welfare code but are not within the scope of the Terms of Reference for this examination.

14.11. A further matter that may be addressed as part of the proposed amendment is that an employer could be required to provide certain information to employees and/or their representatives during the consultation period. For example, if an employer did transfer an asset of significant value to another person and it is believed that this transfer may have had the effect of perpetrating a fraud on the employees, the employees could be entitled to copies of the actuarial/accounting report and directors' statement that were prepared at the time of that transfer, as provided for in Proposal 4 below. This may facilitate employees and/or their representatives in assessing whether there may be grounds for an application under section 599 or section 608 of the Companies Act 2014 (or such other similar provisions as may have been enacted pursuant to Proposal 4).

15. Proposal 2. - Place an obligation on the *de facto* decision maker

15.1. The Protection of Employment Act could be amended so as to provide that where a decision is in contemplation by a person in relation to an asset of significant value over which it exercises control and it is known, or ought to be known, that collective redundancies will arise in a related person in consequence of that decision, if implemented, that undertaking shall: -

(a) Inform the employer concerned of the proposal to take the decision,

(b) Provide the employer concerned with such information as may be necessary for that employer to ascertain: -

(I) The number of redundancies that may occur

(II) The timeframe within which the redundancies may occur

(III) The financial and other resources that may be available to the employer from which debts to employees in respect to the matters referred to section 6(2) of the Protection of Employment Act can be met by the employer

15.2. In such cases the employer concerned should also be obligated to notify the Minister in accordance with section 12 of the Protection of Employment Act.

15.3. The consultation period of 30 days prescribed by sections 9 and 12 of the Protection of Employment Act should apply. In addition to the matters referred to at section 9(2) of the Act, this consultation period should be used to ascertain the extent of the employer's liability in respect to the matters referred to at section 6(2) of the Act.

15.4. It could also be provided that a decision to which the provision relates could not be implemented until after the expiry of the consultation period.

15.5. A failure on the part of a related person in control of the asset in question to comply with its obligation in this regard should constitute a criminal offence. In addition to any criminal sanction that may be provided, provision could also be made that in such circumstances the related person who failed to comply with the notification requirement could be rendered liable to discharge the accrued liabilities of the employer (including the claims of its employees).

15.6. With regard to the term "*related person*", there is merit in using existing definitions and not proposing new definitions and concepts unnecessarily. A "*person*" is defined broadly in the Interpretation Act 2005 "*as importing a body corporate (whether a corporation aggregate or a corporation sole) and an unincorporated body of persons, as well as an individual, and the subsequent use of any pronoun in place of a further use of "person" shall be read accordingly*."[16]

15.7. Section 2(10) of the Companies Act 2014 sets out a comprehensive definition of "*related companies*". This definition could be adapted to define a "*related person*" as follows:

> "*... an employer is related to another person if—*
>
> *(a) that other person is its holding company or subsidiary; or*
>
> *(b) the employer is a company limited by shares and more than half in nominal value of its equity share capital is held by the other person and persons related to that other person (whether directly or indirectly, but other than in a fiduciary capacity); or*
>
> *(c) the employer and the other person are both companies limited by shares and more than half in nominal value of the equity share capital of each of them is held by members of the other (whether directly or indirectly, but other than in a fiduciary capacity); or*

[16] Section 18(c) of the Interpretation Act 2005.

(d) that other person or a person or persons related to that other person, or that other person together with a person or persons related to it, are entitled to control the exercise of more than one half of the voting power at any general meeting of the employer; or

(e) the businesses of the employer and that other person have been so carried on that the separate business of each, or a substantial part thereof, is not readily identifiable; or

(f) there is another person to which both the employer and the other person are related,

and "related person" has a corresponding meaning..."

16. **Proposal 3**. –**Redress for a failure to notify and consult**

16.1. Article 6 of the European Communities (Protection of Employment) Regulations 2000, S.I 488/2000 makes provision for the bringing of complaints before an Adjudication Officer of the WRC that an employer has contravened sections 9 or 10 of the Protection of Employment Acts[17]. The maximum compensation that can be provided under the Regulations is set at the equivalent of four weeks' pay. There is no provision in the Regulations for civil redress where collective redundancies are given effect before the expiration of the 30 notification period to the Minister in contravention of section 14(1) of the Act.

16.2. A contravention of sections 9.10 and 14(1) of the Protection of Employment Acts can have consequences of varying degrees of gravity for the employees concerned. The purpose of consultation is set out at section 9(2) of the Act and includes the possibility of avoiding some or all of the redundancies and of mitigating their consequences. That can include such matters as offering redeployment, retraining or financial compensation. Where an employer fails to respect its statutory duty to engage in the process of consultation required by the Act employees are deprived of the opportunity to pursue all or any of these possibilities and to put forward their own proposals as to how they might be achieved.

[17] In its original form this Order did not provide for an appeal against a decision on a complaint under Article 6. However, section 44 of the Workplace Relations Act 2015 now provides that an appeal shall lie to the Labour Court against every decision of a Adjudication Officer. Section 46 of the Workplace Relations Act 2015 provides that every determination of the Labour Court under that Act may be appealed to the High Court on a point of law.

16.3. Against that background an award of the amount currently allowed for may not provide adequate redress where the rights of employees are not respected, nor can it have a sufficient deterrent effect in all cases. The monetary jurisdiction of an Adjudication Officer and the Labour Court on appeal, under most employment rights enactments is limited to an award of up two years pay. Consideration should be given to bringing the amount that can be awarded for a relevant contravention of the Protection of Employment Act up to that amount. Further, a complaint concerning a contravention of section 14(1) of the Protection of Employment Act should be brought within the ambit of Article 6 of the European Communities (Protection of Employment) Regulations 2000.

17. Proposal 4 - Recovery of assets or proceeds

17.1. One issue raised in the Terms of Reference is the possibility of "*ringfencing*" certain monetary entitlements of employees on the transfer of an asset, whether by means of a bond or lien or otherwise. There are difficulties with creating a trust, bond, lien or other interest in respect of an asset or the proceeds of sale of an asset, without significant restrictions and conditions. In particular, it seems necessary that the persons for whom the lien, trust or bond is being created should have a defined interest in the asset itself before any restrictions could be imposed on dealings with the asset. It could be a disproportionate and unduly restrictive measure to prevent a company or other person entering into transactions to transfer an asset, unless it can be shown that there is a competing claim to the ownership of the asset or an established basis for requiring the company or person not to dispose of the assert.

17.2. In light of the difficulties with such a proposal, a useful starting point is to consider the mechanisms that already exist under the Companies Act 2014 for reversing the effects of a transfer which had the result of leaving insufficient assets in the liquidation to discharge the company's liabilities.

17.3. Section 608 appears to be particularly appropriate here and a provision similar to section 608 could be adapted in the employment law context to be available in respect of employers and persons not within the scope of the Companies Act 2014. According to such a provision, where an asset or assets of significant value are transferred by the employer to another person, it should be possible to have recourse to the asset, assets or proceeds of sale of same, if that transfer has the fraudulent effect of leaving inadequate resources in the employer to discharge the entitlements of the employees who are subsequently made redundant as a result of the employer's insolvency.

17.4. This proposal could be achieved by a statutory provision along the following lines: -

(a) Where collective redundancies arise in circumstances in which the employer is insolvent,

(b) The employer is unable to fully discharge the debts owing to employees,

(c) The Minister for Social Protection has made payments under the Social Insurance Fund,

(d) an asset of significant value had been disposed of either by way of conveyance, transfer, mortgage, security, loan, or in any way whatsoever whether by act or omission, direct or indirect, and

(e) the effect of such disposal was to perpetrate a fraud on the company's employees, and

(f) it is just and equitable to do so

the person who appears to have the use, control or possession of the property concerned, or the proceeds of the sale or development of the property can be ordered to restore the asset or its value to the employer.

17.5. The asset or its value would then form part of the assets of the employer for the purposes of the liquidation (or other form of distribution, if not a body corporate), and could be distributed in accordance with section 621 of the Companies Act 2014 (if applicable). We do not express a view on whether employees should be entitled to priority over other preferential creditors with regard to the distribution of the asset or its value. This is a matter of policy beyond the scope of this examination.

17.6. To mitigate the potential severity of this provision, it could be provided that it is a defence to such an application for the employer and/or the transferee to produce a directors' statement prepared at the time of the transaction to the effect that all accrued liabilities of the employer were quantified and assessed and the transfer was executed in reliance on a report of an actuary or an accountant to the effect that the employer was in a position to discharge all accrued employee entitlements after the transfer was implemented. Such a provision could also ease the evidential burden of an applicant, as the absence of a directors' statement and actuarial/accounting report could be *prima facie* evidence that the transfer was one with the effect of perpetrating a fraud on employees. The residual question

of whether it is just and equitable to make an order under the provision would remain to be assessed.

17.7. As a practical matter, it seems the Minister would be the person with standing to pursue an application of this nature, once payments have been made from the Social Insurance Fund. This is provided by section 10 of the Employers' Insolvency Act. To facilitate an application for the recovery of an asset or the proceeds, and to maximise the use of the powers of investigation and evidence-gathering available under the Companies Act 2014, a provision could be inserted to the effect that the Minister may delegate the power to pursue such an application to the liquidator and may fund the liquidator for that purpose. The liquidator could then use the powers of investigation and information-gathering that are available under the Act to advance the application. The Minister's power to delegate the application to the liquidator may be qualified by the requirement that it must be established that the likelihood and value of a successful outcome justifies such an application.

17.8. We focus here on section 608 as it is the provision that is most relevant to the issues raised in the Terms of Reference. However, there may be a case for similarly adapting other provisions of the Companies Act 2014, such as section 599, to allow their use in situations where the employer and/or the related party are not companies, but are other forms of natural or legal persons who have engaged in conduct of the type captured by section 599 (or indeed have engaged in unfair preferences under section 604).

17.9. There may also be a case for extending the power of the Minister to delegate to the liquidator responsibility for making an application under section 608, and the related power to put the liquidate in funds for that purpose, as proposed above, to several other available provisions of the Companies Act 2014 (including such provisions as may be extended to other forms of legal entities under these proposals). This could be done by means by a general amendment to section 10 of the Employers' Insolvency Act.

18. Proposal 5 - Statutory Injunction

18.1. A further possibility that is worthy of consideration is to provide for recourse to a statutory *Mareva*-type injunction (possibility in the Circuit Court) to prevent the dissipation of assets. In that regard there is an interesting decision of the High Court in *Fleming and Others v Ranks (Ireland) Ltd*[18] (which predated the enactment of the 1984 Act) in which the plaintiff sought an injunction to prevent

[18] *Fleming and Others v Ranks (Ireland) Ltd* [1983] I.L.R.M.

the dissipation below an amount necessary to discharge liabilities that he believed were due to him. While the injunction was refused McWilliam J confirmed in his judgment that a Mareva injunction could be granted in such a case, even where the defendant is resident within the State.

18.2. Coupled with an obligation to inform employees (and the Minister) of proposals on restructuring that could result in collective redundancies, a statutory provision could be considered which would allow an application to the Courts (probably the Circuit Court) to prevent the reduction of a company's assets below the level necessary to discharge accrued liabilities to employees.

19. Proposal 6 - Enhanced redundancy payments

19.1. When a collective redundancy arises the debts owing to employees can be many and varied. They usually include redundancy lump sum payments due under the Redundancy Payments Acts, payments in lieu of notice under the Minimum Notice and Terms of Employment Acts 1973 to 2005 and payments due under the Organisation of Working Time Act 1997, in respect of accrued and untaken holidays. They can also include outstanding wages, pension contributions and outstanding awards due to individuals in respect of claims pursued under employment rights legislation.

19.2. In addition to considering how statutory rights may be protected, we are expressly required by the Terms of Reference to consider how employees could negotiate better terms and conditions in circumstances where the employer entity is separating assets from the operations entity. In that regard, there is another category of claims that can arise where collective redundancies take place. A practice has become established of employers and trade unions negotiating enhanced or *ex-gratia* redundancy payments where either voluntary or compulsory redundancies are in contemplation.

19.3. That practice can mean that employees who lose their employment by reason of redundancy may have an expectation that they will receive compensation in excess of that provided for by statute, which reflects the extent of their service to the employer and their contribution to the business. That expectation can be based on the existence of collective agreements providing for enhanced redundancy payment or on an established custom and practice either within the

employment concerned or within the trade or sector in which the employment is located[19].

19.4. These claims for enhanced redundancy payment are generally pursued as industrial relations claims using established industrial relations dispute resolution processes. That normally involves negotiation between the employer and trade unions in the first instance. Where the dispute is not resolved in negotiation, it is referred to the conciliation service of the Workplace Relations Commission ("*WRC*") and ultimately to the Labour Court under the Industrial Relations Acts 1946-2015. In such cases the Labour Court issues a recommendation to the parties which is not binding in law but is usually accepted as a matter of good employment or industrial relations practice.

19.5. In these cases the Labour Court is usually guided by such considerations as the terms of any prior agreement or practice on enhanced redundancy payments within the particular employment, the terms of settlement of similar disputes in comparable employments and the economic circumstances of the employer. However, any sum recommended for payment by the employer cannot be regarded as a legally enforceable debt owing to the employees and binding on a liquidator. Nor are they regarded as a debt recoverable from the Social Insurance Fund.

19.6. ICTU regard the loss of this expectation of enhanced redundancy compensation as a major issue that may need to be addressed. Ibec, for its part, do not accept that there is any warrant or justification for elevating any putative expectation of enhanced redundancy payment to the level of a statutory right. It is, however, a matter that we are required to address by the Terms of Reference.

19.7. Finding a mechanism by which such expectations could give rise to a legally enforceable right is problematic. Where there is a collective agreement which provides for enhanced redundancy payments, it may be possible to provide that the terms of the agreement can be enforced. However, in general, collective agreements are not accorded contractual status in Irish law although in some cases the terms of the agreement may be incorporated in the individual contract of employment. Further, it is settled that a term can be implied in a contract of

[19] A comprehensive statement of the law regarding the circumstances in which a term can be implied in a contract of employment by custom and practice can be seen in the decision of the High Court in *O'Reilly v Irish Press* [1937] 71 I.L.R.M

employment by utilising either the "*officious bystander*" test or by custom and practice.[20]

19.8. It is, however, difficult to see any justification for making special provision for the enforcement of putative contractual entitlement to enhanced redundancy payments, in the case of collective redundancies arising from insolvency, and not make a similar provision in the case of all redundancies. That point was strongly emphasised by Ibec in its submission..

19.9. In the normal course of events the statutory consultation period before collective redundancies can take effect will be used by trade unions to negotiate enhanced terms in return for an orderly close down of the business. If agreement cannot be reached the industrial relations machinery of the State is utilised in order to resolve the dispute. In the majority of cases where collective redundancies arise that system works. A problem can, however, arise where employment is terminated with immediate effect and the possibility of reaching a negotiated settlement of employee claims is thereby negated.

19.10. There are difficulties in practice and in principle in addressing this aspect of our terms of reference. In our view it is not desirable to create a special class of redundant worker with legal rights that go beyond those of the generality of workers who lose their employment in circumstances of redundancy. However, where workers have a sustainable claim to enhanced redundancy payments based on a contractual or quasi-contractual entitlement, there is cogency in the argument that a practical mechanism should be provided by which those claims can be pursued.

19.11. If it is considered desirable to make provision for the pursuit of this category of claims, it could best be achieved by increasing the level of compensation that can be awarded where the Protection of Employment Acts is contravened, as discussed in Proposal 3. This could enable those who suffer adverse consequence from a contravention of the Act to be put in a position akin to employees whose rights are respected under that legislation who should already have had the opportunity to address the entitlements to such enhanced payments. If that approach were to be adopted it would be possible for an Adjudication Officer, and the Labour Court on appeal, to take into account any prejudice suffered by employees in consequence of their employer's failure to comply with the Act. That could include a failure to obtain enhanced redundancy payments on foot of an express or implied terms incorporated in the employees' contracts of

[20] See *McCarthy v HSE* [2010] 21 ELR 165, see also *Albion Automotive Limited v Walker and Others* [2002] EWCA Civ 946 *,and Park Cakes Ltd v Shumba & Ors* [2013] EWCA Civ 974

employment, whether through a pre-existing collective agreement or established by custom and practice. The amount awarded would then be recoverable under the Employers' Insolvency Act in circumstances in which it cannot be discharged by the employer due to insolvency. The process proposed in Proposal 4 could then be utilised in seeking to recover the amount paid out of the Social Insurance Fund in circumstances in which the employer's insolvency arose from a transfer of assets.

19.12. In the context of what is proposed here, difficulties may arise in determining whether an entitlement to enhanced redundancy payments in fact arises. That difficulty could be ameliorated by making provision in the Terms of Employment (Information) Act 1994 for the inclusion amongst the terms of employment that must be particularised in the statement required by section 3 of that Act of the payments that will be made in the event of the employee's employment ending by reason of redundancy. Section 3(1) of that Act requires an employer to furnish such a statement within two months after the commencement of the employee's employment. Section 7 of that Act provides a mechanism by which a dispute concerning the accuracy of the statement provided pursuant to section 3 can be pursued. A statement provided under that Act would be of strong evidential value in deciding what if any entitlement existed to enhanced redundancy. Moreover, any dispute on that question could be resolved long before any redundancy arises.

19.13. The consequence of the foregoing is that any amounts awarded by way of compensation on the basis of enhanced redundancy payments could then be included among the preferential payments to which employees are entitled in the context of a liquidation under section 621 of the Companies Act 2014. If this is considered desirable as a matter of policy, the amendment could be introduced by way of amendment to the relevant employment legislation, rather than necessitating an amendment to the Companies Act 2014.

PART IV

20. CONCLUSIONS

20.1. The proposals that are considered in this examination are designed to address the specific concerns raised in the Terms of Reference. The success of any such proposals in deterring the conduct referred to or in remedying the effects of such conduct, will be heavily dependent on the use that is made of existing provisions of employment and company law, as well as the sanctions and measures proposed here (if acted upon).

20.2. In terms of civil remedies, the possibility of imposing civil liability on a *de facto* decision-maker who fails to comply with the steps required under Proposal 2 may have some significance in deterring unscrupulous transactions that would deplete the resources available for employees' claims, as could the possibility of an injunction to prevent the depletion of assets under Proposal 5 and the risk of an order under Proposal 4 for the return of an asset or the proceeds of same to the insolvent employer. The existing provisions of the Companies Act 2014 also provide some substantial weaponry that could be used against directors and related companies to redress the effects of, and deter, harmful transactions. However, these provisions are only of weight if they are employed and seen to be employed. The proposals made here attempt to facilitate and ease the making of relevant applications, but the new proposals made here and the existing available mechanisms must be utilised if they are to be of any effect.

20.3. Further, the prosecution of offences is an important element in securing compliance with the obligations imposed on employers in the event of collective redundancies arising. In this regard, it is noted that section 37 of the Workplace Relations Act 2015 provides that the power to bring and prosecute summary proceedings for an offence under employment enactments is now vested in the Workplace Relations Commission. Measures should be taken to ensure that the Commission is adequately resourced to effectively discharge that function where offences relating to the matters within our Terms of Reference are detected.

20.4. Even if the available civil remedies are pursued more readily and criminal prosecutions brought more frequently, it is impossible to prevent or reverse every form of transaction involving an employer which depletes the assets of the employer and results in employees being made redundant without proper consultation and without resources being available to discharge their entitlements, .

20.5. However, these proposals taken together aim to ensure that employees are treated with dignity and that, if collective redundancies are to occur, that there is an opportunity for employees to engage and be consulted, armed with the leverage of a threat of statutory applications to recover assets and funds, including the possibility of applications against related persons. If effectively enforced, the proposed increased sanctions for failing to respect the rights of employees to be consulted would, it is hoped, also deter conduct of the type identified in the Terms of Reference.

Nessa Cahill B.L.

Kevin Duffy

11th March 2016