# THE RESTRUCTURING REVIEW

THIRTEENTH EDITION

**Editor**
Dominic McCahill

THE LAWREVIEWS

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# PREFACE

I am very pleased to present this thirteenth edition of *The Restructuring Review*. As with the previous editions, our intention is to help general counsel, government agencies and private practice lawyers understand the conditions that have been prevailing in the global restructuring market in 2020 and to highlight some of the more significant legal and commercial developments and trends during that period.

In particular, I would like to thank Chris Mallon for his editorship of all 12 of the previous editions. Having retired from a long and distinguished career as a restructuring lawyer in private practice, Chris is now a Senior Advisor in the Financial Advisory Group at Lazard, based in London.

2020 began with many market observers expecting a year of overall modest growth for the global economy. Of course, there were political and economic clouds on the horizon, as there usually are, such as the ongoing trade hostilities between the United States and China and the uncertain outcome of the Brexit negotiations between the United Kingdom and the Member States of the EU as the United Kingdom finally withdrew from the EU on 31 January.

However, the world is now in the midst of the covid-19 pandemic. Much of the world is in lockdown or taking tentative steps to emerge from lockdown. While the human cost is paramount, the economic impact has been enormous. This has prompted a huge response from governments and central banks around the world in an effort to support businesses and workers given the unprecedented drop in supply and demand. In some industries, the drop has been precipitous and virtually total. The full extent of the damage is yet to be assessed and the length and trajectory of the road to recovery are uncertain.

One prominent reaction to the crisis has been the emergence of new laws, rules and practices in restructuring, perhaps reflecting the maxim that one should never let a good crisis go to waste. These measures – as can be seen in the following chapters – include not only ones specific to covid-19, but also include broader reform of insolvency and restructuring law. Notwithstanding increasing nationalism in certain parts, the world's economies remain highly connected and interdependent. International, as well as national, efforts will be required to lead towards a full recovery. I hope that *The Restructuring Review* will be a useful guide at a time of evolution for restructuring law and practice internationally.

I would like to extend my gratitude to all the contributors for the support and cooperation they have provided in the preparation of this work, and to our publishers, without whom this would not have been possible.

**Dominic McCahill**
Skadden, Arps, Slate, Meagher & Flom (UK) LLP
London
July 2020

**Chapter 11**

# IRELAND

*Barry Cahir*[1]

## I OVERVIEW OF RESTRUCTURING AND INSOLVENCY ACTIVITY

At the time of writing (mid-June 2020) the Irish government has made available a range of financial, legal and social measures aimed at addressing the covid-19 crisis. For example:

*a* €200 million has been made available through Enterprise Ireland for viable but vulnerable firms that need to restructure or transfer their business;

*b* Microfinance Ireland is offering loans to any business with fewer than 10 employees and an annual turnover of up to €2 million that is not in a position to avail of finance from banks and other commercial lending providers;

*c* various unemployment supports and salary substitution measures have been deployed, including a scheme administered by the tax authorities whereby employees are kept on the books and the salary cost is refunded through a tax scheme;

*d* the Strategic Banking Corporation of Ireland has a covid-19 working capital scheme whereby, if approved, a bank is invited to lend on terms that are effectively guaranteed;

*e* there are various consultancy supports and grants through local enterprise offices ranging from vouchers for €2,500 to assistance in preparing business continuity measures;

*f* rental relief measures include prohibition on termination of tenancies and rent increases;

*g* emergency measures have been enacted to simplify the process by which health professionals who were previously registered with a professional regulator can re-register;

*h* statutory timelines for planning and development purposes have been extended; and

*i* certain Companies Acts requirements, such as the requirement to file annual returns, have been relaxed.

In terms of insolvency measures there have been no specific measures as yet, although it is understood that the government is considering specific measures. It is also clear that a chaotic insolvency pandemic after the public health pandemic is not desirable, but the true impact will not be known until such time as restrictions are lifted and some of the economic supports are withdrawn.

The risks to the economic outlook are heightened further due to the uncertainty from external factors such as a hard Brexit, as well possible changes in internal taxation and trade.[2]

1 Barry Cahir is a partner and head of Insolvency and Corporate Restructuring at Beauchamps.

2 https://ec.europa.eu/info/sites/info/files/economy finance/ecfin_forecast_spring_070519_ie_en.pdf.

## II GENERAL INTRODUCTION TO THE RESTRUCTURING AND INSOLVENCY LEGAL FRAMEWORK

Corporate restructuring and insolvency processes in Ireland are governed by a blend of statute, law and common law, the most important statute being the Companies Act 2014 (the Companies Act).

Notwithstanding that there have been no new insolvency specific measures introduced in response to covid-19, Ireland has two highly effective forms of scheme of arrangement under the Companies Act: the examinership scheme and the Companies Act scheme.

### i The examinership scheme

Examinership legislation was enacted in 1990 and is modelled in large part on US Chapter 11 proceedings. As such, it provides companies (large or small) that are temporarily unable to pay debts as they fall due the opportunity to explore options to ensure their survival.

On filing a court petition, the company is protected from its creditors by an automatic moratorium for a period of up to 100 days.

An independent officer called the examiner is appointed and charged with examining the state of the company's affairs with a view to compiling a restructuring plan for the company's future viability (the examinership scheme).

The court may appoint an examiner to a related company if it would 'facilitate the survival of the company, or of the related company, or both'.[3] There are a number of provisos around this section but the definition of 'related company' is extensive.

There is a strong focus on saving jobs, and the court requires an independent expert's report to the effect that there is a reasonable prospect of survival of the company (or a part of the company) as a going concern.

The directors of the company will generally remain in control of and responsible for the day-to-day running of the business.

An examinership scheme is often achieved through new investment in the company, a write down of debt, forced surrender or termination of property leases or reformulated debt repayments. There are very few, if any, restrictions on the nature of the proposals that the examiner may formulate to achieve this.

Many well-known retailers[4] have used examinership to disclaim or repudiate onerous leases. The residual lease obligations can then be crammed down as part of the examinership scheme. Landlords facing disclaimer or repudiation may negotiate reduced lease obligations or dispute the terms on offer.

Once the examiner has formulated a scheme, the creditors are invited to consider it. Creditors with similar economic and legal interests will be classed together for these meetings.

Voting to accept the scheme is by majority in number representing a majority in value of the claims represented at each class meeting. This is a significantly lower threshold than is required for comparable schemes in other jurisdictions.

It is a statutory requirement that at least one class of impaired creditors has accepted the scheme proposals before the court can confirm it. The court will also consider whether the scheme proposals are fair and equitable to the creditors. Once approved by the court the scheme will take effect.

3 Section 517(2) Companies Act 2014.

4 Examples include Bestseller Retail Ireland Limited (Vero Moda, Jack and Jones), Debenhams & B&Q.

The examinership scheme is enforceable throughout the EU by virtue of being scheduled in the European Insolvency Regulation (EIR)[5] and EIR Recast.[6]

*Eircom Limited*[7] is a good example of the effective use of examinership in a cross-border restructuring of large financial obligations. The Eircom group of companies owed €4.08 billion to financial creditors. Of that amount, €2.659 billion was fully secured first lien debt. The second lien debt amounted to €350 million. This was also secured but subordinated to the first lien debt. A further €350 million was owed to holders of floating rate notes secured on shares in ERC Ireland Holdings Limited. A further €699 million was owed to holders of payment in kind notes. In addition, there were significant trade and other debts.

Due to pre-filing negotiations, the examinership scheme writing €1.4 billion off the total debt was confirmed by the court within 54 days of the filing. It is reported[8] that the senior lenders took a 15 per cent write down on their debt, the second tier received 10 per cent of the value of their debt and the last two layers were crammed down entirely. The senior lenders became the new owners of the business. There was no objection to the scheme.

### ii The Companies Act Scheme

The Companies Act Scheme has been reasonably well used, although more often of late for corporate reorganisations, mergers and de-mergers than for insolvent restructurings.

The essential features of the Companies Act Scheme may be summarised as:

*a* a compromise or arrangement is proposed between a company and its creditors or any class of them;

*b* directors may convene meetings of creditors without court order;

*c* the court may order a moratorium for such period as it sees fit;

*d* creditor approval requires a majority in number representing three-quarters in value (of each class); and

*e* court sanction hearing at which process and form, and a 'fair and equitable' or 'reasonable man' test is applied.

The effectiveness of the Companies Act Scheme is highlighted in a recent judgment where the Irish High Court sanctioned a Companies Act Scheme that aimed to restructure a company's reinsurance obligations and its outstanding indebtedness to enable the residual value in the company to be distributed to the scheme noteholders, despite a US creditor's objection.[9]

The company, Ballantyne Re PLC, is an Irish registered PLC formed as a special-purpose vehicle for the purpose of entering into a reinsurance agreement and (the company). The company applied to the High Court of Ireland to sanction a proposed scheme of arrangement between it and its creditors (the scheme). The sole objecting creditor, ESM Fund I LP (ESM), a limited partnership formed in the United States, opposed the company's application. ESM contended that the scheme was deficient in terms of the information it provided and the impression it created. It further claimed that the Irish court had no jurisdiction to sanction a scheme that provides for third-party releases and that its sanctioning would frustrate existing litigation that ESM had initiated in the United States.

5 Annex A and Annex C of Council Regulation (EC) No. 1346/2000.
6 Annex A and Annex B of Regulation (EU)2015/848 of the European Parliament and of the Council.
7 [2012] IEHC 107.
8 *Financial Times*, 11 June 2012.
9 *Re Ballantyne RE PLC & the Companies Act 2014* [2019] IEHC 407.

The parties accepted that a special majority of creditors voted in favour of the scheme as required by the Act and that adequate notice of the passing of the resolutions in favour of the scheme was established.[10] The High Court endorsed *Re Osiris Insurance Limited*[11] and ultimately held that the scheme was reasonable, fair and equitable to all creditors viewed from the perspective of an honest, intelligent and experienced person of business who is familiar with the scheme.

### iii Receivership

Receivership is, in essence, the enforcement of security by the lender on default of loan or security covenants by the borrower. The most common form of receivership is an appointment by the holder of security created by a mortgage, charge or debenture.

While the remedy of appointing a receiver is not truly a collective insolvency procedure, being a procedure of enforcement of rights under a charge, it is a procedure that may be used in many cases to achieve a sale on a going-concern basis of a company's entire assets and undertaking.

Unlike other processes, however, the appointment of a receiver does not, of itself, affect the legal status of the company. Rather, the appointment of the receiver affects the status of the charged assets.

Most debentures contain specified fixed charges and a floating charge on all the assets and undertakings of the borrower company. Debentures typically provide for enforcement in the event of default by the appointment of a receiver with full power to take possession of and manage all of the secured assets and the power of sale of the assets. The powers and duties of a receiver are governed by the terms of the debenture itself and are supplemented by Part 8 of the Companies Act, which includes the following powers:

*a* to enter into possession and take control of the property of the company;
*b* to lease, let, hire, grant options over or dispose of such property;
*c* to carry on the business of the company; and
*d* to execute documents, bring proceedings and use the seal of the company (a new power) to engage or discharge employees, and to appoint professionals and agents.

The Companies Act does not attempt to delimit the duties of receivers; but does codify in Section 439 the obligation, in selling property of the company, to exercise all reasonable care to obtain the best price reasonably obtainable for the property at the time of sale.

#### *Liquidation*

Liquidation is the ultimate collective insolvency procedure, being a winding up of a company leading to its dissolution. A liquidator assumes full power and authority over the company, realises the assets and applies the proceeds in accordance with the rules set down by the Companies Acts, the Rules of the Superior Courts and a substantial body of case law.

There are two means by which an insolvent company may be wound up or liquidated: creditors' voluntary liquidation or compulsory liquidation.

10 Section 432(2)(a) of the Companies Act outlines the special majority requirements. Notification requirements are stipulated in Section 253(2)(b) of the Companies Act.

11 [1999] 1 B.C.L. 182.

***Creditors' voluntary liquidation***

The vast majority of liquidations are creditors' voluntary liquidations. These are commenced by ordinary resolution of the shareholders, prompted by a recommendation from the board of directors of a company to the effect that, by reason of its liabilities, the company should cease trading.

A meeting of all creditors of the company is convened on at least 10 days written notice. If creditors representing a majority in value of those attending and voting at the meeting resolve to appoint a different person as liquidator to the person nominated by the shareholders, then the person so approved by the creditors shall be the liquidator.

Generally speaking, on the appointment of a liquidator the powers of the directors will cease and the liquidator effectively displaces the directors.

***Compulsory liquidation***

Compulsory liquidations are commenced on the basis of the jurisdiction of the High Court to order the winding up of a company and appoint a liquidator.

The process commences with a petition to court. The parties who may petition the court for an order for the appointment of a liquidator include creditors, members or the company itself.

Section 569 of the Companies Act 2014 provides for a number of circumstances in which the court may order a winding up, including where the company is unable to pay its debts as they fall due.

***Provisional liquidator***

After a petition to have a company wound up is presented, and before making the order for the winding up of a company, the court may order the appointment of a provisional liquidator under Section 573 of the Companies Act. The primary purpose of the appointment of a provisional liquidator is the preservation of assets pending the winding-up order based on a concern or requirement that the value, assets and business of the company are immediately preserved in the interest of creditors.

The provisional liquidator will represent all of the creditors of the company and must act in all of their interests. The compelling grounds to appoint a provisional liquidator must be clearly set out by the petitioner in the grounding affidavit to the winding-up petition.

The powers of a provisional liquidator are limited but can be expanded by the court. For example, a provisional liquidator's power to carry on the business of the company will generally only be to do so insofar as is necessary to facilitate a beneficial winding up of the company.

***Functions of the liquidator***

The principle function of the liquidator is to realise all of the assets of the company and then distribute the proceeds of the sale of the assets broadly in accordance with the following priorities:

*a* the discharge of the costs, fees and expenses of the winding up;

*b* payment to secured and preferential creditors;

*c* payment to unsecured creditors; and

*d* payment of a distribution to members if there is a surplus available after (a), (b) and (c) above.

The liquidator conducts the liquidation independently of all parties and reports on the conduct of the liquidation to meetings of the members and creditors.

***Directors' duties and responsibilities where a company is in financial difficulties***

If a company becomes unable to pay its debts as they fall due, or if there is a prospect (whether based on the cash-flow test or the balance sheet test) that creditors will not be paid in full, the duties owed to the shareholders become secondary to an overriding duty to act in the best interests of the creditors, including contingent or prospective creditors.

Failure by the directors to act in the best interests of creditors at such a point may result in personal liability for all or some of the debts of the company.

In cases where a company is unable to pay its debts as they fall due (i.e., it fails the cash-flow test) it is difficult to justify continued trading unless the directors believe on reasonable grounds that the company can survive and that all debts will be paid.

The critical point is that the duty to act in good faith and to exercise the utmost care, skill and diligence is a duty that in those circumstances is owed to the creditors.

***Potential sanctions***

The Companies Act sets out the sanctions of restriction and disqualification of directors and the circumstances in which a court may impose personal liability on the directors of a company.

***Restriction***

In every insolvent liquidation, the liquidator must bring an application for a restriction order before the High Court unless the liquidator is relieved from doing so by the Office of the Director of Corporate Enforcement (ODCE).[12]

This obligation applies to every person who has been a director in the 12 months prior to the commencement of the winding up (including shadow directors).

The ODCE makes its decision based on a comprehensive report of the liquidator that must be made within six months of his or her appointment.

The burden is on the directors to prove that they have acted honestly and responsibly in relation to the affairs of the company and that they have cooperated with the liquidator.

The effect of a restriction order is that such a person may not act as a director or be concerned in any way in the management of another company for a period of up to five years unless that new company meets defined capital requirements.

***Disqualification***

Section 842 of the Companies Act provides for the disqualification of persons from acting as directors, officers or otherwise being concerned in the management of the company for a period of five years, or for such periods as the court may order.

A disqualification order is more absolute than a restriction order, but such an order will only be made where culpable wrongdoing on the part of the director has been established.

The grounds for making a disqualification order include where the person has been guilty of any fraud in relation to a company or guilty of conduct rendering such a person unfit to be concerned in the management of a company.

12 Section 819 of the Companies Act.

***Restriction and disqualification undertakings***

Where the ODCE believes that a person may properly be subject to a restriction or disqualification application they will be invited to elect to give an undertaking to be subject to a restriction declaration or a disqualification order for the purposes of the legislation.

Requests for undertakings can only be given by the ODCE, and not by the appointed liquidator or receiver.

***Reckless trading***

Section 610 of the 2014 Act imposes personal liability for all the debts of a company on any person who, while an officer of the company, has been knowingly party to the conduct of any business of the company in a reckless manner.

There are a number of instances of conduct that are deemed to constitute reckless trading, including where the director in question ought to have known that his or her actions or those of the company would cause loss to the creditors of the company or to any of them.

***Fraudulent trading***

Section 722 of the Companies Act imposes criminal and civil liability on a person who is knowingly party to the carrying on of the business of the company with intent to defraud creditors of the company.

***Floating charges***

A floating charge created within 12 months before the commencement of the winding up is invalid unless it is proven that the company was solvent immediately after the creation of the charge. This provision in Section 577 of the Companies Act does not apply in respect of money actually advanced or paid, or the actual price or value of goods or services sold or supplied to the company at the time of, or subsequent to the creation of, the floating charge, and is consideration for the charge.

Where the chargee is a party connected to the company, the period of 12 months for testing the floating charge is extended to two years.

***Contribution by a related company***

The High Court may order a related company to contribute to the whole or part of the debts of a company being wound up if satisfied in accordance with Section 599 of the Companies Act that such an order is just and equitable.

In making such an order, the court must have regard to (1) the extent to which the related company took part in the management of the company being wound up; (2) the conduct of the related company towards the creditors of the company being wound up; and (3) the effects that such an order would be likely to have on the creditors of the related company.

***Pooling assets of related companies and effective consolidation orders***

The grounds for a pooling order under Section 600 of the Companies Act are based on (1) the extent of involvement by one company in the management of the other; (2) the conduct of each company towards the creditor of the others; (3) the extent to which the circumstances giving rise to the winding up of the companies are attributable to the conduct of each other; and (4) the extent to which the businesses of the companies have been intermingled.

Where a court makes a pooling order, it must respect the rights of secured creditors (both fixed and floating charge holders) in each company separately. Otherwise, the claims of unsecured creditors rank equally in the consolidated entity.

***Unfair preference***

Any disposal or other action by an insolvent company in favour of a creditor made with a view to giving that creditor a preference over other creditors is invalid as an unfair preference. Section 604 of the Companies Act applies if a winding up commences within a period of six months from the date of the disposal or other action in favour of a creditor. Where the transaction is in favour of a party connected to the company, the six-month scrutiny period is extended to two years and there is a statutory presumption of intent to prefer.

***Assets improperly transferred (Section 608)***

A court may, under Section 608 of the Companies Act, order restitution against a disponee where the effect of a disposal of the property of a company is to perpetrate a fraud on the company, its creditors or members. The test is whether the transaction has the effect of depriving the company or its creditors of assets that would otherwise have been available to it.

## III RECENT LEGAL DEVELOPMENTS

### i Personal Insolvency Amendment Act 2015 (the 2015 Act)

The 2015 Act amended the Personal Insolvency Act 2012 and enabled the court to confirm a personal insolvency arrangement (PIA) that had been rejected by majority vote of the secured lender.

The Act provides that a personal insolvency arrangement could be used to write down secured debt up to €3 million. A debtor is eligible for a PIA if he or she fulfilled certain criteria and had aggregate secured debts of up to €3 million. The limit of €3 million may be waived where all creditors agree.

Prior to March 2020 there was a consistent trend of bankruptcies declining, wherein 526 were filed in 2016 and 397 were filed in 2018.[13]

## IV SIGNIFICANT TRANSACTIONS, KEY DEVELOPMENTS AND MOST ACTIVE INDUSTRIES

The first wave of insolvencies as a result of covid-19 have been court liquidations of the already distressed high street fashion chains Warehouse, Oasis and Debenhams.

While the number of examinerships has been relatively low of late, this is set to change. Companies in the construction, energy and retail sectors have been the most prominent recent candidates. Reflecting the effects of covid-19 on air travel, CityJet DAC, Europe's largest provider of wet-lease services is, in June 2020, under the protection of the court as it undergoes an examinership.

13 ISI Quarterly Statistics Report available at http://www.isi.gov.ie/en/isi/pages/media_&_statistics.

## V INTERNATIONAL

### i EIR applies

Liquidations and examinership are enforceable throughout the European Union by virtue of being scheduled in the EIR[14] and now in the EIR Recast.[15]

Chapter 15 of the Companies Act contains specific provisions to facilitate the operation of the Insolvency Regulation in Ireland, including provisions governing the publication of the opening of insolvency proceedings, court confirmation of the appointment of a liquidator in a voluntary liquidation, and provision for the translation of claims of creditors into the Irish or English language, as required by the liquidator in individual cases.

### ii EU 'Second Chance' Directive

As of 15 May 2019, the EU Directive on Preventive Restructuring Frameworks[16] has been adopted. The Directive is based on and closely resembles examinership.

Ireland and all applicable EU Member States will now be required to transpose the Directive's provisions into the legal system within two years.

The stated aim of the Directive is to provide increased access to preventive restructuring frameworks at an early stage for viable enterprises in financial difficulties.

### iii UNCITRAL Model Law on Cross-Border Insolvency

The Company Law Review Group (CLRG) is a statutory body established to advise the Irish Minister for Enterprise, Trade and Employment on the reform and modernisation of Irish company law.

The CLRG recently published a detailed report[17] recommending that the UNCITRAL Model Law on Cross-Border Insolvency be adopted.

With an eye on supporting further foreign direct investment and on Brexit, the adoption of the Model Law in Ireland would provide greater certainty and predictability for companies to which the EU Regulation does not apply, and their creditors, as to how cross-border insolvencies are treated in Ireland.

## VI FUTURE DEVELOPMENTS

Assessing the likely scale of insolvencies over the coming period, it is expected that in addition to large-scale formal insolvencies, there will be an increased focus on turnarounds and informal arrangements with creditors, especially for small and medium-sized enterprises.

In any event, recent improvements to company law generally, coupled with recent and anticipated changes to insolvency law in particular, should mean that businesses seeking timely advice will be well placed to restructure a business before it deteriorates to the point of no return.

14 Annex A and Annex C of Council Regulation (EC) No. 1346/2000.

15 Annex A and Annex B of Regulation (EU)2015/848 of the European Parliament and of the Council.

16 (EU) 2017/1132.

17 http://www.clrg.org/Publications/.

**Appendix 1**

# ABOUT THE AUTHORS

## BARRY CAHIR

*Beauchamps*

Barry heads the market-leading insolvency and corporate recovery team at Beauchamps in Dublin, where he advises a wide range of clients on contentious and non-contentious restructuring, insolvency and corporate recovery issues.

Barry is a Fellow of INSOL International and a member of the council for INSOL Europe, where he is also part of the Brexit group.

Barry previously chaired the insolvency law committee of the statutory Company Law Review Group (CLRG), where he represented the Irish Society of Insolvency Practitioners. He chaired the report recommending the adoption of the UNCITRAL Model Law on Cross-Border Insolvency.

Barry is a past chairman of the Irish Society of Insolvency Practitioners and an active member of the UK Insolvency Lawyers' Association.


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