

77th Plenary Meeting of the Company Law Review Group

Date: Wednesday 9th March 2016

Time: 09:30 – 11:30

Venue: National Emergency Coordination Centre (NECC),
Agriculture House, Kildare Street, Dublin 2.

Chairperson: Dr Thomas B Courtney.

Attendance: Deirdre-Ann Barr, Sinead Boyle, Jonathan Buttimore, Barry Cahir, Marie Daly, Jeanette Doonan, Paul Egan, Mark Fielding, Michael Halpenny, Brian Hutchinson, Neil Keenan, Brian Kelliher, Gillian Leeson, John Loughlin, Ralph MacDarby, Vincent Madigan, Kathryn Maybury, Deirdre O’Higgins, Grace O’Mahony, Lynn O’Sullivan, Maureen O’Sullivan, Kevin Prendergast, Nora Rice, Jon Rock, Noel Rubotham.

Secretary: Síona Ryan.

In attendance: Tara Coogan, Helen Curley, Sabha Greene.

Observers: Lisa Maher, Ciaran McLoughlin.

Apologies: Eleanor Daly, Stephen Dowling, Ian Drennan, Bernice Evoy, William Johnston, Eadaoin Rock.

The Chair welcomed Ms. Sinead Boyle of IAASA who has replaced Ms. Helen Hall as nominee to the CLRG and Ms. Jeanette Doonan of the Revenue Commissioners who has replaced Mr. Brian Boyle.

The Chair also introduced Ms. Helen Curley of the Department of Jobs, Enterprise and Innovation who has taken over responsibility for Company Law: Development and EU in the Department. He thanked Ms. Elaine Cassidy for serving company law extremely well during her time in the Department and wished her every success, on behalf of the Company Law Review Group, in her new role as Deputy Ombudsman for Financial Services.

1. Minutes & Matters arising

The minutes of the meeting of 11th November 2015 were circulated on 24th November. The secretariat received a request for amendment to clarify remarks made in relation to directorships and differences between the CRO and Revenue requirements. Apologies were also recorded for Marie Daly. The minutes were adopted by the Review Group. There were no matters arising.

Following a request from a member, the Chair agreed to take agenda item 3 before agenda item 2.

3. Report on the evaluation of the representation of a company before the Courts (Item 3 of the Work Programme)

The chairperson of the subcommittee on the Review of the Rules governing Legal Representation of Companies before the Courts, Mr. Brian Hutchinson, outlined how he had presented the subcommittee's draft report to the last plenary of the Company Law Review Group for adoption. There was discussion at the last meeting in relation to the wording in the draft report regarding a possible relaxation of the rule for certain proceedings or Courts under section 6.3. The Chairperson of the subcommittee undertook to rephrase this section of report in light of the observations made. The last plenary session had agreed to the adoption of the report subject to an amendment of section 6.3.

Arising from the subsequent deliberations and redrafting of the report, a proposal for legislative amendment was recommended. Given this development, the Chair of the subcommittee considered that this should be returned to the Review Group for final adoption prior to submission to the Minister and publication. The Chair of the subcommittee set out the changes in the proposed report which had been circulated with changes tracked.

The change proposed would allow a director, officer or authorised employee of a company to represent a company in the District Court in applications to extend the time for filing an Annual Return with the CRO under section 343(5) of the Companies Act 2014, since that is a limited corporate procedure which does not involve third parties and does not otherwise trespass on the general principles of procedure before that Court. It is the only non-criminal procedure of the District Court under the Companies Act 2014. The Report recommends that the District Judge should retain the discretion to refuse to allow the company to be represented by someone who is not a director, officer or authorised employee of the company; or who does not have direct knowledge of the circumstances grounding the application.

It was explored whether that the introduction of such an exception would create a precedent for the relaxation of the rule in respect of other corporate applications in other courts. The application in section 343 is the only one of its kind under the Companies Act 2014 in which an application is made to court on notice to the Registrar and which does not involve third parties directly or indirectly. The Report sets out that any similar such procedures introduced in the future could benefit from such an exemption, provided: they do not involve private third parties; they do not involve complex arguments on issues of law; and they require the representative to have direct knowledge of the facts at issue.

A further change is set out in section 6.4 of the Report to address an apparent anomaly whereby a company prosecuted on indictment can appear by an authorised representative (section 868 of the Companies Act 2014) whilst a company prosecuted summarily must

appear by a solicitor or barrister. The Report recommends removing the anomaly by extending the permission given by section 868 to companies who are defendants in summary prosecutions.

The Chair thanked the chair and the subcommittee for their deliberations and the production of the report and recommended the report for adoption.

The Report was adopted by the Company Law Review Group.

2. Progress on Companies (Accounting) Bill 2016 and transposition of the EU Audit Reform

Ms Sabha Greene of the Department of Jobs, Enterprise and Innovation gave an update to the Review Group on progress in forthcoming legislation. The Companies (Accounting) Bill is in the final drafting stage and will be published at the earliest possible opportunity. It will transpose the EU Accounting Directive. It will also introduce measures that are designed to address some issues in the Companies Act 2014 that have come to light since its commencement last June. Government permission and approval is required to publish and initiate the Bill in the Houses of the Oireachtas, and the Department will present the draft Bill at the earliest opportunity.

On the EU audit reform, the Department is preparing Heads of a Bill to transpose the Audit Directive and give effect to the accompanying EU Regulation on audit. The Department is keen to facilitate engagement and consultation on the draft legislation. In response to a query from a member of the Review Group as to whether the caretaker government could make a decision to publish the Heads in the absence of a new government being formed expediently, Ms. Greene said that it could be possible if the Government considered it urgent and/or essential but it is difficult to say for certain.

A further query was raised in relation to the options for Member States contained in the Directive and Ms. Greene confirmed that the heads of the Bill have been drafted arising from Minister Bruton's indicative position prior to commencement of drafting. The options contained in the Heads of Bill could be subject to change depending on the policy position adopted by the next government.

The evaluation of the requirements of the Directive 2014/57/EU on criminal sanctions for market abuse for Part 23 of the Companies Act 2014 was raised. Ms. Greene confirmed that the Department is aware of this Directive and that the Department of Finance have responsibility for transposing it.

4. Ad-Hoc Committee on Protections for employees and unsecured creditors (Item 8 of the Work Programme)

The Chair of the Review Group outlined how he had received a request from Minister Bruton on 14th January 2016, to examine and recommend ways in which company law and the wider legislative code could be potentially amended to ensure better safeguards for a company's employees and unsecured creditors. The Minister suggested that the following areas could merit particular consideration: corporate governance; corporate insolvency; share capital; directors' duties and personal liability along with more general provisions in company law. The Review Group was asked to consider whether there are potential contexts in which the privilege of limited liability for a company could be used to avoid a company's obligations to its employees and to unsecured creditors.

As the Minister's request spanned a wide cross section of company law, an ad-hoc committee of the Company Law Review Group was set-up comprising of members of the Company Law Review Group and officials from relevant government departments.

The chair of the ad-hoc committee, Mr. Vincent Madigan, stated that the committee met for the first time on the 4th February 2016, and had met three times to date. Mr. Madigan outlined the approach that has been adopted by the ad-hoc committee in response to the Minister's request. It is examining the provisions contained in existing law with the intention to bring forward a considered outline of the issues that arise and what remedy, if applicable, is proposed in company law to the matters concerned. It is intended to bring a report to the Review Group and, subject to adoption, to report to the Minister on all the matters set out in the Minister's request.

The Chair of the Review Group also confirmed that Ministers Bruton and Nash had also appointed two experts to examine the legal protections for workers, particularly where operations and assets may be moved to separate legal entities as part of a restructuring. Their examination includes situations where valuable assets in a company are separated from the operating entity, and how the position of employees can be better protected in such situations. The experts were asked by the Ministers to submit their report by the 11th March 2016.

The Chair informed the Review Group that, along with the ad-hoc committee chair Mr. Madigan and Ms. Ryan, he had met with Mr. Kevin Duffy and Ms. Nessa Cahill the previous day to have an exchange of views and discuss progress on their respective tasks. He described the meeting a very productive and confirmed that it was agreed to arrange for Mr. Duffy and Ms. Cahill to meet with the ad-hoc committee after their final report was submitted to Ministers Nash and Bruton. In response to a query regarding the potential for overlap in the respective tasks of both the work of the ad-hoc committee and that of Mr. Duffy and Ms. Cahill, the Chair confirmed that he considered that the work would be complimentary given the differences in the respective terms reference of the groups and on the basis of the discussion at the meeting the previous day. The Chair asked the secretariat

to circulate a copy of the report of Mr. Duffy and Ms. Cahill to the members of the Company Law Review Group as soon as it is publically available.

The Chair thanked the chair of the ad-hoc committee for the ongoing work and the commitment visible from the frequency of meetings and progress to date.

5. Annual Report of the Company Law Review Group

The secretary outlined that the Company Law Review Group is required under section 962 of the Companies Act 2014, to make a report to the Minister no later than three months after the end of each year. The report is then subsequently laid before the Houses of the Oireachtas no later than two months after the date of receipt of the report by the Minister. A draft annual report for 2015 was circulated to the Company Law Review Group on 4th March 2016.

The current work programme was adopted for the period of June 2014 – May 2016. Although the term of the work programme is still current, the draft annual report includes an overview of the progress made on the work programme to date.

The main items included in the annual report:

- Overview of the Company Law Review Group including membership;
- Progress on the implementation of the work programme 2014-2016;
- Report of the Company Law Review Group Committee on Representation of Companies in Court;
- Report on the Review of the Supreme Court Judgment in the 'Belgard Motors' Case.

The annual report was presented for adoption and subsequently adopted by the Company Law Review Group.

6. AOB

The forthcoming submission from the Business Law Committee of the Law Society was raised. It was described how the Business Law Committee has been operating as a clearing house for issues arising in the operation of the Companies Act 2014 for members of the Law Society. It was confirmed that it is the intention of the Business Law Committee to shortly make a submission to the Department of Jobs, Enterprise and Innovation.

Several specific items were raised as possible issues with the current operation of the Companies Act 2014:

- The capacity of a group treasury company to lend to limited companies in their group structure by reason of such activity being open to be considered the activity of a credit institution.

- Share capital anomalies where the reduction of share capital available to limited companies not available to non-limited companies.
- Issues surrounding the inability to file electronically and whether there could be an onsite scanner in the CRO to facilitate electronic delivery.
- Exception for creating a charge over shares which only applies to an Irish company, such that charges over shares in other bodies corporate appear to fall outside the exemption.

The Chair confirmed the Department's open door policy for submissions from stakeholders. The Department stated that some of the matters raised above are the subject of amendments due for inclusion in forthcoming legislation discussed under item 2.

The Chair also informed the Review Group that a selection of matters related to the Companies Act 2014 that had previously been raised with the Department had recently been reviewed and sent to the chairs of the relevant Review Group subcommittees to seek views on the matters concerned. These issues relate to a variety of matters such as general policy and the operation of the Companies Act 2014.

The Chair also drew the attention of the members of the Review Group to the approaching deadlines in relation to the approaching end of the transition period for conversions and inclusion of the company type suffix in the company name, urging expediency and to be cognisant that the coming months be a very busy time for the Companies Registration Office. Caution was advised in relation to the use of the word 'company' when converting the company name as well a more general caution for companies who convert to be mindful of the legal nature of the corporate name and the use of 'ltd' on such things as bank accounts, cheque books and company stationery. Mindful that many of the Review Group's members represented users of the Companies Act, the Chair asked the Review Group's members to encourage such persons to engage with re-registrations in a timely manner.

The Chair thanked Members for their contributions and the meeting concluded.