COMPANY LAW REVIEW GROUP

ANNUAL REPORT 2015

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

Richard Bruton T.D.,
Minister for Jobs, Enterprise and Innovation
23 Kildare Street
Dublin 2

09 March 2016

Dear Minister,

It is my pleasure to present to you the Annual Report of the Company Law Review Group (the 'Review Group') for 2015. As the Review Group's work programme, which runs from June 2014 to May 2016, is coming to its conclusion, the enclosed Annual Report gives an account of our work during this time.

2015 has seen the fruition of many years of advice, analysis and recommendations from the Review Group, working with the Department of Jobs, Enterprise and Innovation, leading to the enactment of the Companies Act 2014 in December 2014 and its commencement in June 2015. Ireland was recently ranked as the least complex country for business compliance in the TMF Group's Global Benchmark Complexity Index 2015. I was heartened to see that one of the main reasons cited for Ireland's strong performance was the introduction of the new Companies Act 2014, designed to reduce red tape and business complexity in the country.

Looking to the future, the Review Group is pleased to continue in its advisory role to you in relation to the Companies Act 2014. The Review Group will aim to assist in the continuing development of company law arising from new business models and methods, changes in EU law and monitoring best practice worldwide.

Along with the priority item of the Companies Bill 2012 culminating in the Companies Act 2014, there are two other substantive items included in this annual report arising from the Review Group work programme 2014-2016.

The Review Group was asked by you to examine and make recommendations on whether it is necessary or desirable to provide for amendments to the law relating to the representation of a company before the Courts. A report on the representation of a company before the Courts has been prepared for your attention with a recommendation for legislative change and is set out in Chapter 3.

Arising from your request to the Review Group in July 2015, a report was prepared in relation to the judgment of the Supreme Court on 9th July 2015 in the Belgard Motors liquidation case. The report examines the judgment in the case and its implications for the priority of payments to creditors in company liquidations. It recommends a legislative amendment to restore the understanding of the crystallisation of floating charges in Ireland to what it was in practice, but not expressly provided for in law, prior to the Supreme Court judgment in this case. The report forms Chapter 4 of this report.

Keeping company law modern and effective never ends. The work of the Review Group is ongoing and it will continue to advise you on how it considers it best to update and improve company law, ensuring that Ireland continues to rank as a leading place to conduct business.

Company law is undoubtedly one of the more technical and complex areas of your brief and I would like to acknowledge, with sincere thanks, the interest you took in company law and for your prioritisation - in the face of many competing priorities - of the Companies Bill 2012.

The officials with whom the Review Group had most contact in assisting the Department in advising on the Companies Bill 2014 were Ms Elaine Cassidy and Ms Tara Coogan. I would like to acknowledge their tremendous work in securing the Bill's smooth passage through the Houses of the Oireachtas and to their openness to considering the many technical improvements suggested by the Review Group. I would like to wish Ms Elaine Cassidy the very best in her new role as Deputy Financial Services Ombudsman, following her transfer from your Department and to thank her for her work on the Companies Act 2014.

I would also like to acknowledge the support provided by your Department to the Review Group. We were very fortunate to have the services of Ms Sabha Greene as secretary to the Review Group for the last number of years before her transfer to other duties. Her efficient organisation of our business, coupled with her unfailing courtesy were the hallmarks of her service as Secretary to the Review Group for which we are all hugely appreciative. In wishing Sabha well in her future career, we welcome the appointment of Ms Síona Ryan as secretary to the Review Group.

Yours sincerely,

Dr Thomas B Courtney
Chairperson

1. Introduction to the Annual Report 2015

1.1. The Company Law Review Group

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

The goal of the Company Law Review Group is that Ireland should have an efficient world-class company law infrastructure. To that end, the Review Group seeks to promote enterprise, facilitate commerce and encourage commercial probity.

The Review Group is comprised of practitioners of company law and of company administration, representatives of business, unions, the accounting profession, and nominees of regulators and the Department of Jobs, Enterprise and Innovation ("the Department"). The Secretariat to the Review Group is provided by the Company Law Development and EU Unit of the Department.

1.2 Highlights 2014-2016

The Review Group has devoted the majority of its efforts, since its establishment in 2001, to advising the Minister on the preparation of the general scheme of the Companies Bill 2012, making recommendations for inclusion and working towards the eventual enactment of the Companies Act 2014.

The Companies Bill 2012 was signed by President Michael D. Higgins on 23 December 2014, and was enacted as the Companies Act 2014 (Act No. 38 of 2014). The Act was commenced by Statutory Instrument with effect from 1 June 2015. The Act consolidates the existing 17 Companies Acts (dating from 1963 to 2013) and numerous statutory instruments which, together, constituted the company law framework.

As well as contributing to the progress of the Companies Act 2014, the Review Group focussed on other company law related matters, which are listed in the work programme for 2014 - 2016. The Review Group has adopted reports on the representation of a company before the Courts (item 3) and the Supreme Court judgment of the 9th July 2015 in the Belgard Motors liquidation (item 7). These have been submitted to the Minister with recommendations for consideration and are each reproduced in full in Chapters 3 and 4 of this report respectively.

1.3 Contact information

The Review Group maintains a website www.clrg.org, where it publishes its reports and the minutes of its meetings. The website also lists the members and sets out the current and previous work programmes.

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

Ms. Síona Ryan
Secretary to the Company Law Review Group
Department of Jobs, Enterprise and Innovation
Earlsfort Centre
Lower Hatch Street
Dublin 2

Tel: (+353-(0) 1) 631 2774
Email: siona.ryan@djei.ie

2: The Company Law Review Group

2.1 Membership of the Company Law Review Group

The Minister appointed the current members of the Review Group in May 2014, and their term of office runs to 31 May 2016. The full current membership is –

Dr. Thomas B. Courtney	Chairperson
Deirdre-Ann Barr	Ministerial nominee
Sinead Boyle	Irish Auditing & Accounting Supervisory Authority
Jonathan Buttimore	Office of the Attorney General
Barry Cahir	Irish Society of Insolvency Practitioners
Eleanor Daly	Law Society of Ireland
Marie Daly	Irish Business & Employers' Confederation
Jeanette Doonan	The Revenue Commissioners
Stephen Dowling	Bar Council
Ian Drennan	Director of Corporate Enforcement
Paul Egan	Ministerial nominee
Bernice Evoy	Banking & Payments Federation Ireland
Mark Fielding	Irish Small & Medium Enterprises Association (ISME)
Michael Halpenny	Irish Congress of Trade Unions
Brian Hutchinson	Ministerial nominee
William Johnston	Ministerial nominee
Brian Kelliher	Irish Funds Industry Association
Gillian Leeson	Irish Stock Exchange
John Loughlin	Consultative Committee of Accountancy Bodies – Ireland

Ralph MacDarby	Institute of Directors in Ireland
Vincent Madigan	Ministerial nominee
Kathryn Maybury	Small Firms Association
Deirdre O'Higgins	Department of Jobs, Enterprise & Innovation
Lynn O'Sullivan	Department of Jobs, Enterprise & Innovation
Maureen O'Sullivan	Registrar of Companies
Nora Rice	Companies Registration Office
Eadaoin Rock	Central Bank of Ireland
Jon Rock	Institute of Chartered Secretaries & Administrators in Ireland
Noel Rubotham	The Courts Service

In the course of 2015, Brian Boyle of the Revenue Commissioners completed several years of service on the Group, leaving to take up new duties within the Revenue Commissioners. He was replaced by Jeanette Doonan. Joseph Gavin left the Central Bank and was replaced by Eadaoin Rock as its nominee to the Review Group. Legal Advisor to the Department of Jobs, Enterprise and Innovation, Marion Berry returned on promotion to the Office of the Attorney General and was replaced by Lynn O'Sullivan. John O'Malley served as the representative of the IAASA and was replaced in 2015 by Helen Hall who in turn was subsequently replaced in 2016 by Sinead Boyle.

Some members have nominated alternates for specific periods of time or areas of work. They are –

Anthony Collins	Institute of Directors
Aidan Lambe	Consultative Committee of Accountancy Bodies – Ireland
Esther Lynch	Irish Congress of Trade Unions
Conor O'Mahony	Office of the Director of Corporate Enforcement
Kevin Prendergast	Office of the Director of Corporate Enforcement
Paddy Purtill	The Revenue Commissioners

Over the course of its 2014 - 2016 work programme, the Review Group received assistance from several people. In particular, it would like to thank the following for their time, advice and valuable contribution –

Una Curtis, KPMG
Joe McGrath, UCD
Raymond Byrne, Cormac Forristal, and Tara Smith of the Law Reform Commission
Andrew Munro and Doncha O'Sullivan of the Department of Justice and Equality
Jane Farrell, Henry Matthews, Office of the DPP
Legal Researchers: Naomi Clohisey, Lisa Maher, Anthony Thuillier.

2.2 Company Law Review Group - Work Programme 2014-2016

2.2.1 Introduction to the work programme 2014-2016

The Minister, following consultation with the Review Group, determines the programme of work to be undertaken by the Review Group, on a two year cycle. The current work programme was adopted for the period of June 2014 – May 2016. In July 2015, the Minister asked the Review Group to add a new item (now item 7) to the programme arising from a judgment of the Supreme Court in relation to floating charges and the priority of payments in a liquidation. In January 2016, the Minister wrote to the Review Group to request that the Review Group explore potential safeguards for employees and unsecured creditors in company law (now item 8).

2.2.2 Contents of the work programme

Priority Item

1) Provide ongoing advice to the Department of Jobs, Enterprise and Innovation on the provisions of the Companies Bill 2012, including responding to queries raised by the Parliamentary Counsel and assisting the Department in advising the Minister on matters arising in the course of the passage of the Bill through the Houses of the Oireachtas and, once enacted, its subsequent implementation.

Other Items for Consideration

2) Examine and make recommendations on whether it will be necessary or desirable to amend company law in line with recent case law and submissions received after the publication of the Companies Bill 2012 and which were not included in the Bill, in particular those proposals relating to –

    - Part 6 of the Companies Bill 2012 (Financial statements, annual return and audit)
    - Part 8 of the Companies Bill 2012 (Receivers)
    - Part 10 of the Companies Bill 2012 (Examinerships)
    - Part 11 of the Companies Bill 2012 (Winding Up)
    - Part 12 of the Companies Bill 2012 (Strike Off and Restoration)

3) Examine and make recommendations on whether it is necessary or desirable to provide for amendments to the law relating to the representation of a company before the Courts.

4) Examine and make recommendations on whether it is necessary or desirable to adopt, in Irish company law, the UNCITRAL Model Law on Cross-Border Insolvency.

5) Review the enforcement of company law and, if appropriate, make recommendations for change.

6) Provide ongoing advice to the Department of Jobs, Enterprise and Innovation on EU proposals, as requested by the Department, including proposals arising from –

   - The EU Action Plan on company law and corporate governance
   - The review of the EU's insolvency regime.

7) Review the Supreme Court judgment of 09.07.2015 (Appeal No. 2011/361) and its implications for the priority of payments to creditors in company liquidations. (July 2015)

8) Examine and recommend ways in which company law and indeed the wider legislative code could be potentially amended to ensure better safeguards for a company's employees and unsecured creditors. (January 2016)

2.3 Priority Item: The Companies Act 2014

2.3.1 Introduction

The Companies Act 2014 is the new legal framework for companies in the State. The Act restructures, consolidates and simplifies company law in Ireland. The Act was signed into law on 23 December 2014 and became operative on 1 June 2015. The Company Law Review Group has had a key role in advising the Minister regarding the development of the Companies Act 2014. The Review Group has been involved, since its inception in 2001, in making recommendations on the design and structure of the Act and suggesting proposals for modernising company law so that the Companies Act 2014, the largest Act in the history of the state, represents an innovative and practical approach to key company law principles.

2.3.2 Structure of the Act

For the first time in Irish company law, the most common company type, the private company limited by shares, is placed at the core of the legislation as the default company. By adopting this structure the Act acknowledges the practical reality that almost 90% of the companies currently registered at the Companies Registration Office are private companies limited by shares. In addition the Act rectifies the anomaly in the previous legislation which put the public limited company at the centre of corporate life in Ireland, whereas in reality less than 1% of companies registered are public limited companies. The result is that the architecture of the company law code is now recalibrated to reflect the true landscape of enterprise in the State.

To ensure greater accessibility to the new company law code, the Companies Act is made up of 2 Volumes. Volume 1 (containing Parts 1 to 15 of the Act) sets out the law applicable to the most common company type in the State – the private company limited by shares (LTD). In keeping with the objective of ensuring that the law is clearly accessible, the Act is arranged to reflect the life cycle of the company – starting with the incorporation of a company, followed by matters pertaining to its operation, and finally providing for the company's wind down.

Volume 2 (which contains Parts 16 to 25 of the Act and its Schedules) sets out the other types of company that can exist and how the law contained in Volume 1 is applied, disapplied or varied for each other company type. These other company types are the Designated Activity Company (DAC), the Public Limited Company (PLC), the Guarantee Company (CLG), the Unlimited Company, the Unregistered Company and the Investment Company.

2.3.3 Different company types under the Companies Act 2014

Private company limited by shares (LTD) - *Parts 1 to 14*

This is the new model private company limited by shares under the Act. Approximately 90% of companies registered in Ireland are private companies limited by shares. Such a company is no longer required to have an objects clause under the Act and is permitted to have only 1 director if it so wishes. The maximum number of members of a LTD is capped at 149 and these companies cannot make general offers of shares or debentures to the public.

Designated activity company (DAC) - *Part 16*

This is a new type of company under the Act. There are two types of DAC under the Act – firstly, a private company limited by shares, which effectively corresponds to the previous private company limited by shares under the previous law. Secondly, provision is made for a private company limited by guarantee, having a share capital. The primary defining feature of a DAC will be the continued existence of an objects clause in the constitution of the company. This is in contrast to the new model private company limited by shares (LTD), the constitution of which will no longer contain an objects clause. It is intended that entities which would welcome the continued availability of a private company limited by shares and having an objects clause include special purpose companies – for example those incorporated for joint ventures or for use in a financing transaction. However, the Act does not restrict the availability of DACs to persons engaged in such activities and it is open to any company to incorporate or convert to a DAC. The DAC cannot offer shares to the public, but it may list debt.

Public limited company (PLC) - *Part 17*

A PLC may offer shares to the public in compliance with Prospectus law. The nominal value of the company's allotted share capital must not be less than €25,000, at least 25% of which must be fully paid up before the company commences business or exercises any borrowing powers. This is a requirement under EU law. Enhanced corporate governance requirements and shareholder protections apply to the PLC, due to its public nature.

Company limited by guarantee (CLG) - ***Part 18***

This company type does not have a share capital and the members' liability is limited to the amount they have undertaken to contribute to the assets of the company, in the event it is wound up, not exceeding the amount specified in the memorandum. Many charitable and professional bodies find this form of company to be a suitable vehicle as they wish to secure the benefits of separate legal personality and of limited liability but do not require to raise funds from the members.

Unlimited company - ***Part 19***

An unlimited company is one that places no limit on the liability of the members. Recourse may be had by creditors to the shareholders in respect of any liabilities owed by the company which the company has failed to discharge. Three different types of unlimited companies are catered for under the Act – the private unlimited company with a share capital (ULC), the public unlimited company with a share capital (PUC) and the public unlimited company that has no share capital (PULC).

Unregistered company - ***Part 22***

An unregistered company is a company which was formed prior to "modern" company law, for example companies that were formed under Royal Charter or specific legislation in earlier centuries.

Investment company - ***Part 24***

An investment company is a public company limited by shares, with the sole object of collectively investing funds in property with the aim of spreading investment risk and giving the members of the company the benefit of the results of the management of the investment funds. An investment company will not be permitted to carry on business in the State unless it has been authorised to do so by the Central Bank on the basis of criteria approved by the Minister. This company type corresponds to Part XIII companies under the Companies Act 1990 and is widely used by the investment funds industry in Ireland. Its popularity may start to be replaced by the Irish Collective Asset-management Vehicle (established 2015) in the future.

2.3.4 Key provisions of the Act

Governance provisions to apply by default

Where a company's constitution is silent on an issue, the provisions of the Act will apply by default. Many of the previous Table A provisions now apply as a requirement of the law. This reduces the need to have detailed provisions set out in company constitutions of the type previously required to be set out in the articles of association.

Summary Approval Procedure

The Act introduces a simplified written approval process by directors and members, not requiring any court order, for certain transactions, such as mergers of companies, reductions in capital, a members' voluntary winding-up or the use of pre-acquisition profits. The new procedure involves the passing of a special resolution and the swearing by directors of a declaration of solvency.

Share capital

No requirement for an LTD to have an authorised share capital.

AGM
All single- member companies and multi-member LTDs may dispense with holding an AGM.

Directors' Age
Requirement for all directors and secretaries to be at least 18 years of age.

Directors' personal details
The Act empowers the Minister to make regulations providing that any requirement that the usual residential address of an officer appear in a register or be sent to the Registrar of Companies shall not apply to a particular person where certain conditions are met.

Company secretary
The directors are required to make sure that the company secretary has the skills or resources necessary to discharge his or her statutory duties.

Directors Compliance Statement
The Directors' Compliance Statement will apply to PLCs, and to larger private limited companies having a turnover in excess of €25m and a balance sheet of over €12.5m. On appointment a Director will now acknowledge his/her duties and obligations. Thereafter annually directors will either confirm compliance with company and tax law obligations or will explain any non-compliance.

Directors' Duties
The directors of a company owe fiduciary duties to the company, in that they act as agents for the company, and as quasi-trustees in respect of its property. Prior to June 2015, these duties have derived from case law and were not set out in the Companies Acts. However the new Act sets out – for the first time in statute – eight principal fiduciary duties which are owed by directors (including shadow and de facto directors) to the company:

1) act in good faith in what the director considers to be the best interests of the company – this is a subjective test requiring a director to act in what he or she believes to be the best interests of the company; it is implied that directors can have different (valid) opinions as to what is in a company's best interests.
2) act honestly and responsibly in relation to the conduct of the affairs of the company – this was not a common law duty per se but has often arisen in the context of applications to have directors restricted.
3) act in accordance with the company's constitution and exercise his or her powers only for the purposes allowed by law – this requires directors to be aware of the company's constitution and of relevant legal provisions.
4) not use the company's property, information or opportunities for his or her own or anyone else's benefit unless this is expressly permitted by the constitution or approved by resolution of the members in general meeting – this provision reflects the position that directors are quasi-trustees, in that they control the company's property. Directors may not use or benefit from property (including business opportunities) of the company
5) not agree to restrict the director's power to exercise an independent judgment unless this is expressly permitted by the company's constitution or the director believes in good faith

that it is in the interests of the company to fetter his or her discretion – directors must bring an independent judgment to decisions facing the company. It recognises, however, that in some cases it will be in the company's interests to agree to do, or refrain from doing, something at a future point in time and the Act permits this.

6) avoid any conflict between the director's duties to the company and his or her other interests (unless the director is released from this duty by the constitution or by a members' resolution) – in particular, directors must avoid acting in their own interests against those of the company.
7) exercise the care, skill and diligence which would be exercised in the same circumstances by a reasonable person both having the knowledge and experience that may reasonably be expected of a person in the same position as the director and having the knowledge and experience of that director.
8) in addition to the general duty owed to employees, have regard to the interests of its members - this requires directors to have regard to members' interests, members being the owners of the company. This duty establishes that it is permissible to have regard to the interests of other parties but still be required to act in the best interests of the company. Directors may have regard to other peoples' interests, provided that they first and foremost act in the interests of the company.

Categorisation of criminal offences

A four-fold classification of offences is created where category 1 is the most serious and category 4 the most minor.

Disclosable interest

The Act contains a new exemption from what is a disclosable interest in a case where the shares or share options held by a director or secretary amount to less than 1% of the company's issued share capital.

Priority of charges

The definition of a "charge" is modified (including removing from it a charge created over an interest in cash or in the balance of a financial account or deposit), and registration procedures will change considerably. A single-stage procedure will be similar to the previous system, but a new two stage procedure will permit a lender, by filing an advance notice with the CRO, to improve the priority of its security by the time that the detailed notice is filed (within 21 days of the charge being created). Also, unless the priority of a charge is governed by another legal regime (such as Property Registration Authority rules), the priority of a charge will be determined by reference to the date on which the CRO receives the prescribed particulars.

Audit exemption

A company may avail of the audit exemption where at least two of the prescribed conditions in respect of the particular year are satisfied i.e. any two of (a) the balance sheet total of the company does not exceed €4.4m, (b) the amount of the turnover does not exceed €8.8m; and (c) the average number of employees does not exceed 50. Audit exemption is not available to PLCs

Defective financial statements

Provision is made for a mechanism that allows for the preparation and approval and filing of revised financial statements in respect of a financial year where the original financial statements did not comply with legislative requirements.

Loans to and by Directors

The prohibition on loans to directors is relaxed, subject to compliance with new formalities. Loans by directors must also comply with new formalities- in the absence of which the loans are deemed subordinated and unsecured.

2.4 Implementation of the Work Programme 2014 - 2016 – Other items for consideration

2.4.1 Subcommittees of the Review Group

The Review Group has convened subcommittees which meet, as the need arises, in relation to items on the work programme, issues arising from the implementation of the Companies Act 2014 or events such as the recent Supreme Court judgment which required a recommendation from the Review Group. There are nine subcommittees which facilitate the on-going review of company law and the membership of these subcommittees is set out in Appendix 2 (A). There is also one current ad-hoc committee which was convened on foot of the Minister's request in January 2016 in relation to protections for employees and unsecured creditors (item 8) and the membership can also be found in Appendix 2 (B).

2.4.2 Ongoing activities

Aside from the main focus of the Review Group on the Companies Act 2014 during 2014-2016, progress has been ongoing in relation to the other items for consideration on the work programme. Under item 2 of the Work Programme, the subcommittees are proceeding with the evaluation of submissions received prior to and subsequent to the enactment of the Companies Act 2014 referred to it by the Department. The corporate insolvency subcommittee is also looking at matters related to item 4 on whether the UNCITRAL Model Law on Cross-Border Insolvency would be appropriate in Irish company law.

A report on the enforcement of company law (item 5) is currently in preparation. The purpose of the report will be to review the way in which company law is utilised and enforced in both the civil and criminal areas of liability which attach to wrongdoing in the area of company law. With the introduction of the Companies Act 2014, it is opportune to review perceptions, determine realities and make appropriate recommendations in relation to compliance with company law and the enforcement of company law offences. The central question posed by the report is whether the enforcement of company law in Ireland can be better facilitated. It is intended to publish the report later in 2016.

2.4.3 Protection of employees and unsecured creditors

The Chair of the Review Group received a request from Minister Bruton on 14th January 2016, to examine and recommend ways in which company law and indeed 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 may 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 has been 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. In the consideration of this matter, the Review Group was asked to explore, inter alia:

- Instances where the corporate veil can and should be lifted that could be adopted in statute.
- The potential strengthening of obligations on Directors to a company's employees as part of Directors' duties.
- Building-in checks and balances in statute which would strengthen obligations to employees for better protection in company restructuring.
- Circumstances in a liquidation of an insolvent company where the debts or liabilities of that company can be met from solvent companies in the same group or in related companies.

An ad-hoc committee of the Company Law Review Group was convened and met on the 4th February 2016, chaired by Mr. Vincent Madigan and comprising members of the Company Law Review Group that volunteered to participate on the ad-hoc committee as well as officials from relevant government departments (see Appendix 2(B)). The ad-hoc committee has met three times to date and in due course the Review Group will report to the Minister on all the matters set out in the Minister's request.

2.4.4 Report of the Company Law Review Group Committee on the Representation of Companies in Court

The Review Group was tasked, under item 3 of the work programme, to examine and make recommendations on whether it is necessary or desirable to provide for amendments to the law relating to the representation of a company before the Courts. A subcommittee chaired by Brian Hutchinson, University College Dublin, examined the matter and produced a report which was adopted by the Review Group at their plenary meeting on 9th March 2016.

The Report examines the status quo in Ireland under the common-law rule that companies can only appear or be represented in court by a solicitor or counsel. This carries with it the consequence that some companies are unable to appear in court at all, and that courts are sometimes forced to deal with cases involving absent companies. It explores how this rule is applied in other common law countries and finds that in Irish Courts, like many others, the rule is applied strictly; and although there can be exceptions in exceptional circumstances, there are few examples of such cases.

The report recommends that, in the absence of a general overhaul of civil procedure rules or concerted action with the Rules Committees of the Courts, the most that can be achieved by means of a change to the Companies Act is a statutory restatement of the rule. Any further relaxation of the rule by means of a provision in the Companies Act 2014 should be limited to specific corporate proceedings such as applications to extend the time for filing of Annual Returns. Wider reform would have consequences for policies on access to justice and rights of audience in the civil courts – matters beyond the remit of the Review Group. The report recommends that the Review Group would make itself available to the relevant bodies as part of any such wider reform as a number of specific company related issues might be addressed in such measures. The report is reproduced in full in Chapter 3.

2.4.5 Report on the Review of the Implications of the Supreme Court Judgment: In the matter of J.D. Brian Ltd (In Liquidation) t/a East Coast Print and Publicity and Re East Coast Car Parts Ltd [2015] IESC 62 (Laffoy J.)

The Chair of the Company Law Review Group received a request from Minister Bruton, on 14th July 2015 regarding the Supreme Court judgment of the 9th July 2015 in the Belgard Motors liquidation. The Minister asked the Company Law Review Group to examine the judgment in the case and its implications for the priority of payments to creditors in company liquidations.

An ad-hoc committee of the Company Law Review Group was convened and the arising report was subsequently adopted by the Company Law Review Group at its plenary meeting on 13th November 2015.

The report sets out the background to the Supreme Court judgment and recommends a legislative amendment which would restore the understanding of the crystallisation of floating charges in Ireland to what it was in practice, but not expressly provided for in law, prior to the Supreme Court judgment in this case. The report is reproduced in full in Chapter 4.

Appendix 2(A) Subcommittees of the Company Law Review Group

(* denotes a representative who is not a formal member of the Company Law Review Group)

2(A)1 General Issues and Registration

Maureen O'Sullivan	(Vice Chairperson) Registrar of Companies
Brian Hutchinson	(Vice Chairperson) Ministerial nominee
Helen Curley*	Department of Jobs, Enterprise & Innovation
Eleanor Daly	Law Society of Ireland
Maresa Hempenstall*	The Revenue Commissioners
Ralph MacDarby	Institute of Directors in Ireland
Vincent Madigan	Ministerial nominee
Jon Rock	Institute of Chartered Secretaries & Administrators in Ireland
Nomination pending	Irish Congress of Trade Unions

2(A)2 Shares and Share Capital

Paul Egan	Chairperson
Tara Coogan	Department of Jobs, Enterprise & Innovation
Eleanor Daly	Law Society of Ireland
Marie Daly	Irish Business & Employers' Confederation
Alan Kelly*	The Revenue Commissioners
Gillian Leeson	Irish Stock Exchange
Ralph MacDarby	Institute of Directors in Ireland
Vincent Madigan	Ministerial nominee
Kathryn Maybury	Small Firms Association
Jon Rock	Institute of Chartered Secretaries & Administrators in Ireland

2(A)3 Corporate Governance

Ralph MacDarby	Chairperson
Deirdre-Ann Barr	Ministerial nominee
Helen Curley*	Department of Jobs, Enterprise and Innovation
Marie Daly	Irish Business & Employers' Confederation
Aidan Lambe*	Consultative Committee of Accountancy Bodies – Ireland
Vincent Madigan	Ministerial nominee
Kathryn Maybury	Small Firms Association
Eadaoin Rock	Central Bank of Ireland
Jon Rock	Institute of Chartered Secretaries & Administrators in Ireland
Paul Walsh*	The Revenue Commissioners

2(A)4 Directors' Duties

Dr. Thomas B. Courtney	Chairperson
Deirdre-Ann Barr	Ministerial nominee
Marie Daly	Irish Business & Employers' Confederation
Mark Fielding	Irish Small & Medium Enterprises Association (ISME)
Michael Halpenny	Irish Congress of Trade Unions
Brian Kelliher	Irish Funds Industry Association
Aidan Lambe*	Consultative Committee of Accountancy Bodies – Ireland
Ralph MacDarby	Institute of Directors in Ireland
Vincent Madigan	Ministerial nominee
Kathryn Maybury	Small Firms Association

Deirdre O'Higgins	Department of Jobs, Enterprise & Innovation
Kevin Prendergast*	Office of the Director of Corporate Enforcement
Jon Rock	Institute of Chartered Secretaries & Administrators in Ireland
Paul Walsh	The Revenue Commissioners

2(A)5 Financial Statements, Annual Return and Audit

John Loughlin	Chairperson
Deirdre-Ann Barr	Ministerial nominee
Una Curtis*	KPMG
Jeanette Doonan	The Revenue Commissioners
Aidan Lambe*	Consultative Committee of Accountancy Bodies – Ireland
Vincent Madigan	Ministerial nominee
John Moynihan*	Department of Jobs, Enterprise & Innovation
Orla O'Brien*	Department of Jobs, Enterprise & Innovation
Maureen O'Sullivan	Registrar of Companies
Jon Rock	Institute of Chartered Secretaries & Administrators in Ireland
Nomination pending	Irish Auditing & Accounting Supervisory Authority

2(A)6 Charges and Registration

William Johnston	Chairperson
Helen Curley*	Department of Jobs, Enterprise & Innovation
Bernice Evoy	Banking & Payments Federation Ireland
Brian Kelliher	Irish Funds Industry Association
Vincent Madigan	Ministerial nominee
Maureen O'Sullivan	Registrar of Companies
Jon Rock	Institute of Chartered Secretaries & Administrators in Ireland

2(A)7 Reorganisations, Acquisitions, Mergers and Divisions

Deirdre-Ann Barr	Chairperson
Paul Egan	Ministerial nominee
Alan Kelly*	The Revenue Commissioners
Vincent Madigan	Ministerial nominee
Deirdre O'Higgins	Department of Jobs, Enterprise & Innovation
Jon Rock	Institute of Chartered Secretaries & Administrators in Ireland

2(A)8 Corporate Insolvency

Barry Cahir	Chairperson
Jonathan Buttimore	Office of the Attorney General
Stephen Dowling	Bar Council
Michael Halpenny	Irish Congress of Trade Unions
Vincent Madigan	Ministerial nominee
Deirdre O'Higgins	Department of Jobs, Enterprise & Innovation
Conor O'Mahony*	Office of the Director of Corporate Enforcement
Paddy Purtill*	The Revenue Commissioners
Jon Rock	Institute of Chartered Secretaries & Administrators in Ireland
Noel Rubotham	The Courts Service

2(A)9 Compliance and Enforcement

Kevin Prendergast*	Chairperson
Jonathan Buttimore	Office of the Attorney General
Tara Coogan*	Department of Jobs, Enterprise & Innovation
Stephen Dowling	Bar Council
Maresa Hempenstall*	The Revenue Commissioners
Vincent Madigan	Ministerial nominee
Deirdre O'Higgins	Department of Jobs, Enterprise & Innovation
Jon Rock	Institute of Chartered Secretaries & Administrators in Ireland
Nomination pending	Irish Congress of Trade Unions

Appendix 2(B) Ad-hoc Committee on Protections for Employees and Unsecured Creditors

(* denotes a representative who is not a formal member of the Company Law Review Group)

Vincent Madigan	Chairperson
Jonathan Buttimore	Office of the Attorney General
Barry Cahir	Irish Society of Insolvency Practioners
John Conlon*	Department of Social Protection
Tara Coogan*	Department of Jobs, Enterprise and Innovation
Marie Daly	Irish Business and Employers Confederation (IBEC)
Stephen Dowling	Bar Council
Mark Fielding	Irish Small & Medium Enterprises Association (ISME)
Michael Halpenny	Irish Congress of Trade Unions (ICTU)
Ralph MacDarby	Institute of Directors
Conor O'Mahony*	Office of the Director of Corporate Enforcement
Breda Power*	Department of Jobs, Enterprise and Innovation
Paddy Purtill*	The Revenue Commissioners
Jon Rock	Institute of Chartered Secretaries and Administrators in Ireland
Jim Walsh	Department of Social Protection

3: Report of the Company Law Review Group Committee on Representation of Companies in Court (Item 4)

3.1 Introduction

The Company Law Review Group (the 'Review Group') were tasked by Richard Bruton T.D., Minister for Jobs, Enterprise and Innovation, under item 3 of the Review Group Work Programme 2014-2016, to examine and make recommendations on whether it is necessary or desirable to provide for amendments to the law relating to the representation of a company before the Courts.

A subcommittee of the Review Group was formed and chaired by Brian Hutchinson of University College Dublin. It examined the matter and produced this report which was adopted by the Review Group at their plenary meeting on 9th March 2016. The membership of the subcommittee is set out in Appendix A.

3.2 Executive Summary

The common-law rule that companies can only appear or be represented in court by a solicitor or counsel carries with it the consequence that impecunious companies are often unable to appear in court at all, and that courts are sometimes forced to deal with cases involving absent companies. The Irish Courts, like many others, apply the rule strictly; and though they contemplate exceptions in rare and exceptional circumstances, there are few examples of such cases, if any. Some jurisdictions, notably England and Wales, and certain Australian States, have introduced legislation or procedural rules allowing companies to be represented by their directors or employees in certain circumstances.

Given the stated policy of the Irish Courts to work around the rule where the requirements of justice dictate, and the unique position of the courts to be able to measure the need for such exceptions, the Company Law Review Group remains to be convinced of the need for wider reform of the rule, though it is not indisposed to wider reform in principle if introduced in the proper context.

The Company Law Review Group considers that in the absence of a general overhaul of civil procedure rules or concerted action with the Rules Committees of the Courts, the most that can be achieved by means of a change to the Companies Act 2014 is a statutory restatement of the rule, and that any further relaxation of the rule by means of provision in the Companies Act 2014 should be limited to specific corporate proceedings such as applications to extend the time for filing of Annual Returns. Wider reform would have consequences for grander policies on access to justice and rights of audience in the civil courts – matters beyond the remit of the Company Law Review Group. The Company Law Review Group would make itself available to the relevant bodies as part of any such wider reform as a number of specific company related issues might be addressed in such measures.

3.3 Background

The basic rule (hereafter "the rule") concerning the representation of companies in court is that a company can only be represented, or appear as a party to legal proceedings at all, by a solicitor or counsel, *not* by a member or director or other person.

The rule occurs at the confluence of two well-known legal principles – first the general principle against the unlicensed practice of law before the courts; and second, the basic principle in company law that companies are separate legal persons. The basis for the rule is thus straightforward: companies, as fictitious personae, are inherently incapable of appearing in person or "*pro se*", and must therefore be represented by, or appear through, someone else; but if that person is not a licensed advocate they contravene any requirements about the licensing of advocates in court.

Two practical consequences of the rule are of note. First, companies unable to afford legal representation are effectively unable to appear in court to pursue or defend their rights. Secondly, the courts often face the difficulty of having to deal with complex cases involving companies in the absence of the company concerned. These consequences have been the subject of comment both in the Courts and in the Dáil.

3.4 The Rule in Ireland

In Ireland, the rule is not expressed in legislation or in the Rules of Court.

The rule finds clear expression, however, in the case-law. In the Supreme Court decision in Battle v. Irish Art Promotion Centre Ltd [1968] IR 252, Ó Dálaigh CJ stated –

> *"…in the absence of statutory exception, a limited company cannot be represented in court proceedings by its managing director or other officer or servant. This is an infirmity of the company which derives from its own very nature."*

The rule has been applied consistently and inflexibly in Ireland - even, indeed especially, in recent times.

A limited prospect of an exception to the rule has been countenanced by the Irish Courts. The Courts acknowledge that they enjoy inherent or residual jurisdiction to hear from lay advocates on behalf of any person in "rare and exceptional circumstances": accordingly, in such exceptional circumstances a lay advocate might in principle be permitted to appear on behalf of a company: *Coffey v. Tara Mines Limited* [2008] 1 I.R. 437; *Re an Application by Stella Coffey, NO2GM Ltd & Others* [2013] IEHC 11. However, no such application has yet succeeded in the reported cases, and notably it has recently been confirmed by the High Court that impecuniosity of the company and its shareholders does *not* constitute rare and exceptional circumstances justifying representation by a lay advocate: *Allied Irish Banks Plc -v- Aqua Fresh Fish Limited* [2015] IEHC 184.

An exception may lie for single member private limited companies. In *McDonald -v- McCaughey Developments Limited & Anor* [2014] IEHC 455, Gilligan J, in a thorough judgment, paid passing respect to the "rare and exceptional circumstances" exception before finding that the discretion should not be exercised in favour of allowing a director to represent a company in court. Referring to South African case law (see below) observing that in some cases a person who is the controlling mind of a small corporate entity may know as much about the company's business and financial affairs as an individual would know of his own, Gilligan J observed that there might be certain exceptional circumstances where a company director and significant shareholder on a valid *bona fide* arguable point at the discretion of the court could be allowed to represent the company's interests, provided the court was satisfied that the point was at least arguable on the known facts and the applicable law. Those circumstances did not exist in the case before him, however.

Whilst the rule is inflexibly applied, the Courts have demonstrated pragmatic willingness when possible to ensure that the application of the rule does not occasion injustice. Thus, in *McDonald v. McCaughey Developments Ltd & McCaughey* [2015] IECA 159 (an appeal of the High Court decision discussed in the preceding paragraph) the Court of Appeal noted that the director in that case was joined personally as a second defendant and that in such circumstances there could be no objection to him advancing arguments and adducing evidence relevant to the issues to be tried, even such arguments and evidence as might inure for the benefit of the company. And in *DBP Construction Ltd v. ICC Bank Plc* Supreme Court, 21 May 1998, Keane J, whilst invoking the rule in *Battle,* effectively allowed evidence and arguments on behalf of a company to be put by its managing directors and sole shareholders by way of written submission; though in the event the Court did not need to rely on them since the appeal was denied on other grounds. And in *Re Marble and Granite Tiles Ltd* [2009] IEHC 455, a winding-up petition, Laffoy J allowed a director of a contributory company (Mr O'Gara) to have a say, stating:

> *"The legal position, accordingly, is that Mr. O'Gara is not, as a matter of law, entitled to represent the company in these proceedings. However, as frequently happens on the hearing of a winding up petition when a director or a member of the company appears in Court without legal representation, he was listened to to ensure that no injustice would be perpetrated.*
>
> *There is no evidence before the Court that Mr. O'Gara is a contributory of the company and is entitled to be heard in that capacity."*

Moreover, there is no issue in civil proceedings where lay-representation is automatically permitted, e.g. in the small claims court, or in arbitration, or in ADR procedures.

A statutory exception to the rule occurs by statute in criminal cases prosecuted on indictment – section 868 of the Companies Act 2014 allows a company charged on indictment to appear by a representative who may answer any question and plead on the company's behalf. That provision was originally introduced as section 382 of the Companies Act 1963 to remedy an issue brought to light in the case of *The State (Batchelor and Co (Ireland) Ltd) v O' Leannáin* [1957] IR 1. In that case a decision to send a company forward for trial on indictment for breaches of the Merchandise Marks Act was quashed because the decision of the District Justice to send the company forward for trial was founded on deposition evidence, and the Indictable Offences Act 1849 provided for the examination of deposition witnesses "in the presence of the accused person" and provided for the taking of a statement under caution from "the prisoner". Murnaghan J considered that there was no jurisdiction in the District Court to take evidence on deposition against a corporation because it could not be present at the taking of the deposition. He further held that the jurisdiction to send a person forward for trial on bail could not be exercised against a corporation because there is no prospect of imprisoning a corporation. Section 868 of the 2014 Act remedies the problems highlighted in the case by allowing a company to appear in person via a representative appointed for that purpose. The representative may answer to any question that is required to be put to a person charged with an indictable offence; exercise any right of objection or election conferred upon an accused person by any enactment; and enter a plea on behalf of the accused company. But the representative cannot do more: section 868(6) provides that appointment as representative under the section does not qualify him or her to act on behalf of the company before any court for any other purpose. The section also provides that where a company chooses not to appear via a representative the District Judge may still send it forward for trial on a not-guilty plea.

3.5 The Rule Elsewhere

The basic rule is followed throughout the common law world– notably in the US, New Zealand, South Africa, Scotland, Canada, Hong Kong, and with modification in England, Northern Ireland and Australia, – and the precedent applying the rule is voluminous.

In the United States the rule is followed, with few exceptions, in the Federal and State Courts; indeed the Washington Courts have held that lawyers established as single member companies require separate representation in court (*Cottinger v. Employment Security Department,* 162 Wn. App. 782 (2011)). Where exceptions arise, they tend to be in the lower courts and small claims courts where proceedings are of a more informal manner and where *pro se* representation generally is more common. Where such exceptions arise they are usually expressly stated in the procedural rules of such courts. The rule has been held to apply equally to not-for-profit and for-profit corporations. Some states will allow an appearance to be filed by a corporate officer to avoid judgment in default; and some states expressly permit corporations to be represented by in-house counsel as long as they are authorised advocates in the court concerned.

In New Zealand a company can be represented in the District Court by any officer (including a director), attorney or agent by virtue of the District Courts Act 1947 s57(2). This concession is not extended to the High Court, but the Court has allowed a director to represent the company in circumstances where the company could not afford to hire counsel and the case was not complex so the Director could adequately represent the company (*Para Ltd v David Ellis Productions Ltd* (1992) 6 NZCLC 67) however, where the case was technical and involved complex legal issues such permission has been denied (G*old Medal Hortech Ltd v Edwards & Williams Greenhouses Ltd* (2001)9 NZCLC 262).

In South Africa the Supreme Court confirmed that the rule applied in the case of *Manong & Associates PTY v. Minister of Public Works and Another* [2009] ZASCA 110. The Supreme Court observed that 'litigation would become very difficult if a Court had to be concerned at every step of the proceedings as to the authority of the person conducting the litigation to make decisions and admissions binding on the company.' The Court was also concerned that corporate officers could cause impecunious companies to litigate hopeless causes without any fear of personal risk. The Court contemplated the prospect of a relaxation of the rule in rare and special circumstances where to do so would best serve the administration of justice.

In Scotland, in 2010 the Inner House of the Scots Court of Sessions in *Secretary of State for Business, Enterprise and Regulatory Reform v UK Bankruptcy Ltd* [2010] CSIH 80 upheld the strict rule and found it consistent with Art 6 of the European Convention on Human Rights. Lord Hodge stated:

> *'Article 6 of the European Convention on Human Rights gives everyone a right to a fair trial. That right includes, in most circumstances, the right to attend a court hearing and participate effectively in the proceedings. Companies and other non-natural persons can be victims in terms of the Convention. But that does not necessarily mean that in relation to representation in court a company should be treated in precisely the same way as a party litigant. A company as a legal person is not the same as a natural person. Where a person chooses to obtain the benefits of limited liability by trading through the medium of a registered company, he has also to accept the disadvantages to which separate legal personality gives rise. Thus as a general rule I see no incompatibility between Article 6 and the requirement that a company be represented in court not by a director but by a suitably qualified legal representative who has responsibilities to the court and who is subject to professional discipline.'*

Lord Hodge went on to state, however, that an exception might be required in exceptional circumstances in order to ensure a fair hearing under Article 6.

The rule is also strictly applied in Hong Kong. In *Wing Hang Bank Limited v. Kit Choy Development Limited & Choy Bing Wing* [2005] HKCA 287, the Court refused to allow a director represent the company at an appeal of a decision to strike out proceedings, even though he was also personally named as a defendant in the proceedings.

3.6 The Approach in England, Northern Ireland, and Australia

Wider discretion is apparent in English and some Australian cases. Most notable is the decision of Scott J. in the English case of *Arbuthnot Leasing Ltd. v. Havelet Leasing Ltd.* [1990] BCLC 802 where the learned judge recognised the inherent right of the English Courts to permit any person to act as lay advocate for another provided exceptional circumstances so warrant. In that respect the decision differs little from the Irish Courts' decisions in *Coffey v. Tara Mines Limited* and *Re an Application by Stella Coffey, NO2GM Ltd & Others,* above. What is of interest, however, is that Scott J. considered the cost of litigation and the inability of the company to pay for representation as a significant factor in the exercise of the Court's discretion; he said:

> *"I can see no sound reason of practice, procedure or policy which obliges the court to say to the director who desires to make such an application, 'your only remedy is to put your hand in your pocket and instruct solicitors and counsel to appear on the company's behalf.' I*

> *repeat, I see no reason why an individual should be forced to incur the horrendous cost of commercial litigation if he is willing to appear in person"*

In *Arbuthnot* a decisive factor may also have been the fact that the assets of the Company were frozen by injunction. In later cases (Radford v. Freeway Classics [1994] 1 BCLC 445; *Floods of Queensferry Ltd* v *Shand Construction Ltd and others* [1997] 81 BLR 49) mere financial difficulty alone was held *not* to amount to exceptional circumstances justifying departure from the rule that a company must be represented in court by a lawyer.

The decision has been overtaken to some extent by civil procedure reforms in England and Wales. In his 1996 Report *Access to Justice*, Lord Woolf recommended that the rules of court should no longer require a company to act by a solicitor and that the court should normally exercise its discretion to allow an employee of a company to take any steps on behalf of the company which a litigant in person could take (paras 61-72 and recommendations 152 and 153). These recommendations were in the context of a complete overhaul of the civil procedure rules which also provided for extensive case management and for the power to award costs against non-parties.

Rule 39.6 of the Civil Procedure Rules now expressly gives the court discretion to allow a company to be represented by a non-lawyer on a case-by-case basis. It provides simply:

> *A company or other corporation may be represented at trial by an employee if –*
>
> *(a) the employee has been authorised by the company or corporation to appear at trial on its behalf; and*
>
> *(b) the court gives permission.*

The accompanying Practice Direction requires the company to produce information about the intended representative in a written statement, as well as the requisite authority, to enable to the court to determine whether the employee has the knowledge and capacity to make a meaningful contribution to the proceedings.

The cases applying rule 39.6 of the Civil Procedure Rules reveal generally that the rule is "not an indulgence and still less unlimited" (*Pall Mall Investments Ltd v Leeds City Council* [2013] EWHC 3307 (Admin)) and "the exception rather than the rule" (*Shared Network Services Ltd v Nextiraone UK Ltd* [2011] EWHC 3845 (Comm) (QBD (Comm)). Particularly interesting also is the decision in *Watson v Bluemoor Properties Ltd* [2002] EWCA Civ 1875 where the Court of Appeal noted that a former director of a company was in effect the *alter ego* of the company and therefore effectively represented the company in court when he appeared in court himself.

The position in Northern Ireland reflects the approach adopted in England and Wales: *Ulster Weavers Home Fashions Limited v. Waterfall NI Limited* [2013] NI Master 2.

In Australia, approaches differ from State to State; in Victoria the Supreme Court Rules require a company to appear through a solicitor save where the rules or stature provide otherwise; in New

South Wales, however, the Uniform Civil Procedure Rules permit a corporation to appear in any court by a solicitor or by a director of the company, and in the local courts by a duly authorised officer or employee of the company.

3.7 The Validity of the Rule

The Scottish Court of Sessions in *Secretary of State for Business, Enterprise and Regulatory Reform v UK Bankruptcy Ltd*, *above,* upheld the strict rule and found it consistent with Art 6 of the European Convention on Human Rights. In Ireland, the rule is understood not to offend against the Irish Constitutional right of access to the courts either (*Abbey Films v Attorney General* [1981] IR 158). And in *Schreibman v. Walter E. Heller & Co. (In re Las Colinas Dev. Corp.),* 585 F.2d 7 (1st Cir. 1978) the US First Circuit found that the rule did not breach anti-trust (competition) law. Even the European General Court has embraced the rule to a significant extent in the context of in-house lawyers employed by a company in relation to proceedings involving the company; *Prezes Urzedu Komunikacji Elektronicznej v European Commission*, *Case T-226/10*. And in *Allied Irish Banks Plc -v- Aqua Fresh Fish Limited* [2015] IEHC 184 Keane J held that the coming into force of the Lisbon Treaty has not in any way affected the validity of the rule or the binding effect of that rule upon the Court.

3.8 Matters considered by this Committee

3.8.1 Whether there is a need for legislative action in this area?

The Review Group remains to be convinced of the need for a radical overhaul of the law in this area. Though it remains sympathetic to the plight of the many companies that fell victim to the collapse of the property market, and recognises that in the absence of available funding a number of companies have been unable to have their objections to summary judgment heard, the Review Group recognises that the Courts retain the discretion to hear from non-lawyers where justice requires and are best placed to determine whether justice so requires in the case of companies who are party to court proceedings. In particular the Review Group does not recommend that legislation should introduce a blanket permission to companies to be represented by their shareholders, officers, or others, or a general entitlement to so act where they are in financial difficulty.

The Review Group observes that the general rule against *pro se* representation of companies in court is well established in Ireland and almost universally followed in other jurisdictions. There is no suggestion that the Irish approach is significantly out of line with the approach in most other jurisdictions; indeed the Irish Supreme Court's decision in *Battle* has itself been cited with approval in the courts of many other jurisdictions. That in itself is not a justification for the rule but it is an indicator that it is not arbitrary or absurd. Whilst the strict application of the rule may on occasion lead to apparent or real hardship, such consequences can be considered the *quid pro quo* for the concession of separate legal personality. As O'Dálaigh CJ stated in *Battle* -

> *"The creation of the company is the act of its subscribers; the subscribers, in discarding their own personae for the persona of the company, doubtless did so for the advantages which*

> *incorporation offers to traders. In seeking incorporation they thereby lose their legal right of audience which they would have as individuals; but the choice has been their own."*

The Review Group notes also that the rule is derived from principles that are fundamental to the procedure of the Courts in general (the principle against unlicensed practice of law before the Courts) and fundamental to company law in particular (the principle of separate corporate personality); and the Constitutional validity of the rule and its compliance with Human Rights law and European Union Law has been upheld in various forums.

The Review Group also notes that the Irish Courts retain the discretion to relax the rule in circumstances where the requirements of justice permit, and that the Courts themselves are well placed to determine the requirements of justice in any particular case. The Review Group is sensitive to the danger that legislative intervention in this area may have knock on consequences in other areas – for example in the general principles regarding lay litigants, in the licensing of legal practice, and in the capacity of the courts and court services to manage the ever increasing number of cases being sent to litigation.

The Review Group is also conscious that significant practical implications may arise for the effective conduct of litigation in the courts if the rule is to be dispensed generally. The proportion of litigation involving natural legal persons before the courts has increased very substantially in recent decades. While a natural legal person is, of course, fully entitled to prosecute or defend proceedings without legal representation, the presence of a professionally unrepresented litigant in proceedings can add very considerably to the time requiring to be devoted to a the case both by the court and the other party or parties involved, and consequently to the costs of resolving the dispute. In *R.B. v A.S.* [2002] 2 IR 428, Keane CJ observed (at page 447):

> *"The conduct of a case by a lay litigant naturally presents difficulties for a trial court. Professional advocates are familiar with the rules of procedure and practice which must be observed if the business of the courts is to be disposed of in as expeditious and economic a manner as is reconcilable with the requirements of justice. That is not necessarily the case with lay litigants. Advocates, moreover, are expected to approach cases with a degree of professional detachment which assists in their expeditious and economic disposition: one cannot expect the same of lay litigants…*
>
> *The trial of cases involving lay litigants thus requires patience and understanding on the part of trial judges. They have to ensure, as best they can, that justice is not put at risk by the absence of expert legal representation on one side of the case. At the same time, they have to bear constantly in mind that the party with legal representation is not to be unfairly penalised because he or she is so represented. It can be difficult to achieve the balance which justice requires ..."*

A distinguished commentator in a neighbouring jurisdiction has concluded:

> *"However hard the courts try to accommodate personal litigants it is unrealistic to suggest that such litigants are not often at a considerable disadvantage. So too is the court. The adversarial system depends, not only for the justice of the ultimate outcome, but also for the efficiency with which the proceedings are conducted, upon the assumption that the competing cases are being put by professionals who have the skills necessary to marshal evidence and argument, to identify the issues to be determined, to present the facts capably, and to understand and argue the law. For a system based upon that assumption, self-represented litigants are a serious problem."*

[Master Evan Bell, Court of Judicature of Northern Ireland, "*Judges, Fairness and Litigants in Person*", Judicial Studies Institute Journal (2010), Vol. 2, pages 75 to 76]

The extension of a general right of self-representation to companies could result in a further increase in the proportion of litigation before the courts in which one or more of the parties is unrepresented, adding to the length of hearings of pre-trial applications and trials, and placing additional pressure on court lists and waiting times for disposal of cases. Aside from the effect on the courts system itself, however, litigation prosecuted or defended by an inexpert litigant imposes burdens on the other party or parties to the case, by virtue of the additional time expended in and complication of addressing it, and the additional legal costs which that may entail.

A danger of allowing self-representation to companies is that it may facilitate the circumventing of restraints on the bringing of frivolous or vexatious claims. A significant deterrent to the bringing of such claims is the prospect that the plaintiff concerned – who almost invariably will be self-represented and free from the constraints which professional legal representation impose - may face personal liability for costs awarded against them on the proceedings being struck out. In serial instances, the individual may be the subject of an *Isaac Wunder* order. However, were it possible for a claim of that nature to be brought through the medium of a company without the need for legal representation, the prospect of a costs sanction against the company would not likely be dissuasive. Furthermore, an *Isaac Wunder* order would be of little value were it possible to defeat it by litigating afresh through a newly formed company.

That said, the Review Group is generally supportive of efforts to improve access to justice, and of measures to simplify the interaction between companies and the courts and regulators; bearing in mind particularly that the vast majority of Irish companies are small private companies. To this end, the Review Group considered a range of matters, discussed in the following paragraphs.

3.8.2 A legislative restatement of the rule?

As part of its policy of simplifying company law the Review Group in its First Report 2000-2001 recommended the statutory restatement of a number of common law principles, principally the fiduciary duties of directors, which are now listed expressly in section 228 of the Companies Act 2014. The Review Group has considered whether a statutory restatement of the rule regarding the representation of companies in court, which is also a common law rule and not stated in the Companies Act 2014, might also improve the landscape for the users of the Companies Act 2014.

On balance the Review Group did not consider that a legislative restatement of the rule was a high priority, but overall there was no resistance to the idea, provided such a restatement remained true to the original principle whilst maintaining the discretion of the Court and did not trespass on the domain of the Rules Committees of the Courts with regard to the general regulation of the court procedure. The advantage of a restatement would be that the rule would be more accessible – or perhaps less of a surprise - to the users of the Companies Act 2014, and to the Courts. A disadvantage might be that the Supreme Court would be deprived of the possibility of revisiting the decision in *Battle* - though that may seem remote given recent decisions here and elsewhere.

As to form – how would the rule be restated? The Review Group suggests that the rule would comprise two elements: the general prohibition, and the reservation of the discretion. This might be worded thus:

> **“Appearance and Representation of a Company in Court**
>
> (1) Save as provided by law, a Company may not appear or be represented in court unless by a solicitor or by counsel instructed by the solicitor for the company.
>
> (2) Subsection (1) shall not restrict a court from exercising its discretion in exceptional circumstances to allow a company to appear in court or be represented by someone who is not a solicitor or counsel instructed by the solicitor for the company.”

The saving in subsection (1) is designed to allow for any exceptions that might be carved out elsewhere in the Companies Act 2014 (see section 0 above and section 03 below) or in other Acts or the Rules of Court. Further detail might be required to preserve any relaxation of the representation rules applicable in the Small Claims Court. The Review Group also notes that representation rules in private arbitration and other forms of Alternative Dispute Resolution differ to the rules applicable in court and the above provision is not intended to change that situation.

The use of the words “solicitor” and “counsel instructed by the solicitor for the company” follows the pattern of Order 6 of the District Court Rules providing for rights of audience before the courts (there is no analogous express rule in the Rules of the Superior Court or the Circuit Court Rules) and is phrased thus to avoid any implication of a general right of direct access to barristers by companies in contentious matters.

The use of the formula “exceptional circumstances” departs from the formula “rare and exceptional circumstances” which is found in the case-law. The Review Group considered that the word “rare” connoted a degree of empirical consideration which would be difficult to quantify and which might deter a court from exercising the discretion in otherwise worthy cases.

The Review Group considered that the court’s discretion is best preserved when the provision does not list, by way of individual examples or by way of general principle (e.g. “where the justice of the case so requires”) the circumstances in which the court might exercise its discretion. There might, however, be some merit in a limitation for the avoidance of doubt to the effect that economic difficulties and insolvency are not normally of themselves "exceptional circumstances" for the purposes of the provision.

3.8.3 A relaxation of the rule for certain proceedings or courts?

The Review Group noted that in jurisdictions where the rule had been relaxed by legislation it was often in the context the lower courts where proceedings might be more informal in any event. In this regard the question arose as to whether the rule might be relaxed for, say, the District Court. Given the concerns expressed above the Review Group felt that such blanket changes should not lightly be made, if at all, and should at a minimum involve the District Court Rules Committee.

That said, the Review Group was positively disposed to a suggestion from the Companies Registration Office that the rule should not apply 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 Review Group would recommend 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.

A provision implementing the above recommendation might be made by the addition of a new subsection, subsection 13, to section 343 of the Companies Act 2014 as follows:

> *"(13) Notwithstanding subsection (1) of section [the section proposed at section 6.3.2 above], an application under subsection (5) may be made by someone who is not a solicitor or counsel instructed by the solicitor for the company, but the court shall have discretion to refuse to hear someone who is not a director, officer, or employee having authority to make the application, who does not have direct knowledge of the circumstances grounding the application."*

The Review Group was also concerned 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 Review Group was of the view that any similar such procedures introduced in the future should benefit from the provision suggested above, 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.

3.8.4 Reform of the Rule in Criminal Cases

As regards criminal cases, noted in section 3.4 paragraph 7 above, a statutory exception already exists in section 868 of the Companies Act 2014 permitting companies prosecuted on indictment to appear by a representative who may answer any question and plead on the company's behalf. The section does not confer a general right on companies to be represented by a non-lawyer for all purposes in criminal cases, and the Review Group, for reasons stated at section 3.8.1 *et seq* above, does not propose any change to this position.

The enactment of section 868 of the Companies Act 2014 concerning trials on indictment does, however, create an apparent anomaly whereby a company prosecuted on indictment can appear by an authorised representative whilst a company prosecuted summarily must appear by a solicitor or barrister. Though the Review Group has not heard that this apparent anomaly has caused any difficulty or concern, it is disposed towards removing the anomaly by extending the permission given by section 868 of the Companies Act 2014 to companies who are defendants in summary prosecutions. This could be achieved by the deletion of the word "indictable" wherever it appears in the section, or, by the adoption of a provision along the following lines:

1) A company charged with a summary offence may appear at all stages of the proceedings by a representative who may answer any question, exercise any right of objection or election, and enter any plea on the company's behalf.
2) In this section, "representative" in relation to a company means a person duly appointed by the company to represent it for the purpose of doing any act or thing which the representative of a company is authorised by this section to do.
3) A representative of a company shall not, by virtue only of being appointed for the purpose referred to in subsection (2), be qualified to act on behalf of the company before any court for any other purpose.
4) A representative for the purpose of this section need not be appointed under the seal of the company.
5) A statement in writing purporting to be signed by a managing director of the company or some other person (by whatever name called) who manages, or is one of the persons who manage, the affairs of the company, to the effect that the person named in the statement has been appointed as the representative of the company for the purposes of this section shall be admissible without further proof as evidence that that person has been so appointed.

3.8.5 Wider reform involving other agencies?

As noted above the Review Group would not recommend the relaxation of the rule further by means of a provision in the Companies Act 2014, despite the criticism that the rule sometimes appears harsh or unjust. The Review Group considers that any further relaxation should only be in a context of wider policy reforms on access to justice and rights of audience in the civil courts.

The Review Group would make itself available to the appropriate agencies in any relevant reform of the general procedural rules regarding representation in court. The Review Group notes in particular that changes to the rules regarding representation of companies in court in England and Wales were part of a general overhaul of civil procedure rules, and were matched by changes strengthening the power of the courts to strike-out vexatious or delayed litigation and the power to award costs against non-parties.

Other issues that might be considered in the context of such a review and upon which the Review Group might be able to advise include:

1) Whether a specific exception should be made for corporate (in-house) counsel without having to meet local recognition requirements?
2) Whether a distinction might be made between corporate plaintiffs and corporate defendants?
3) Whether special provision is justified for not-for-profit companies or registered charities?
4) Whether certain persons should specifically be excluded from acting as corporate representatives in Court?
5) Whether corporations can recover their costs when represented by a director or employee?

2)

Appendix 3(A) Members of the Company Law Review Group Committee on representation of a company before the Courts

Brian Hutchinson	Chairperson
Jonathan Buttimore	Office of the Attorney General
Jim Byrne	Revenue Commissioners
Helen Dixon	Companies Registration Office
Stephen Dowling	Bar Council
Tanya Holly	Department of Jobs, Enterprise and Innovation
Ralph MacDarby	Institute of Directors
Vincent Madigan	Ministerial nominee
Kevin Prendergast	Office of the Director of Corporate Enforcement
Noel Rubotham	Courts Service
Conor Verdon	Department of Jobs, Enterprise and Innovation

4: Review of the Implications of the Supreme Court Judgment: In the matter of J.D. Brian Ltd t/a East Coast Print and Publicity and Re East Coast Car Parts Ltd [2015] IESC 62 (Laffoy J.)

4.1 Introduction

The Chair of the Company Law Review Group (the Review Group) received a request from Richard Bruton, T.D.,_Minister for Jobs, Enterprise and Innovation on 14th July 2015 regarding the Supreme Court judgment of the 9th July 2015[1]. The Minister asked the Company Law Review Group "*to examine the judgment (the 'Belgard Motors case') and its implications for the priority of payments to creditors in company liquidations and to recommend what, if any, changes should be made to the Companies Act 2014, particularly having regard to paragraphs 91 – 98 of the judgment*".

An ad-hoc committee was convened comprising of the chairs of both the Review Group subcommittee on Charges and Registration (William Johnston), and the Review Group subcommittee on Corporate Insolvency (Barry Cahir), along with members of these subcommittees who volunteered to participate on the ad-hoc committee. A full list of members can be found in section 4.11 below.

This report sets out the findings and a recommendation by the Company Law Review Group adopted at its plenary meeting on Friday 13th November 2015.

4.2 Overview of the Case

The main facts of the case were that each company created a floating charge in favour of Bank of Ireland as security for finance made available to it by the Bank. The Bank served a notice on each company, in accordance with the terms of the debenture (under which a floating charge was created), crystallising the floating charge into a fixed charge. Subsequently a liquidator was appointed to each company. The Supreme Court confirmed that the result of an effective crystallisation, prior to the appointment of a liquidator, is to improve the priority of the chargeholder ahead of the preferential creditors in respect of the assets caught by the crystallisation.

4.3 Order of Priority of Creditors of an Insolvent Company

Upon a company's receivership or liquidation, the effective priority of payments made to creditors after expenses ranks as follows:

- First, payments in respect of certain social welfare payments and payments that may arise to the Revenue Commissioners under Section 1001 of the Taxes Consolidation Act 1997 ("Section 1001"),

[1] http://www.supremecourt.ie/Judgments.nsf/1b0757edc371032e802572ea0061450e/8bdc10fdc70b5644802 57e7e003deb10?OpenDocument

- secondly, payments out of assets subject to a fixed charge to the fixed charge holder (on the grounds that such assets have been effectively assigned to the chargeholder and do not form part of the chargor's assets available to the receiver or liquidator),
- thirdly, certain payments to what are known as preferential creditors, principally the Revenue Commissioners (with regard to certain specific liabilities), local authorities for rates, and employees,
- fourthly, payments out of the assets the subject of the floating charge to the floating charge holder,
- fifthly, unsecured creditors,
- sixthly, subordinated creditors, and
- finally, shareholders.

If a floating charge is crystallised prior to the appointment of a receiver or liquidator to the chargor, the charge effectively becomes a fixed charge; the priority of the holder of the floating charge effectively leap frogs preferential creditors it would otherwise have ranked behind.

However, there was no widespread practice of such crystallisation as it was considered cumbersome to have an effective crystallisation through the necessity of imposing control and effective lock down of assets used by the company in its day to day trading – a point effectively re-iterated by the High Court judgment in the Belgard Motors case. There was thus no need to consider legislative amendments to ensure the priority order would not be disturbed.

4.4 Issues Raised by the Case

In the Belgard Motors case, the security provided, as is now common, that upon any of certain stipulated events happening, the Bank could, by a notice to the company, and unknown to other creditors, convert the floating charge into a fixed charge. This is what the Bank did in the case in point.

Two principal issues arose when the Bank’s notice of crystallisation was challenged. The first point was whether or not a floating charge holder could crystallise a charge in this manner. Although documentation providing for this has been market practice for perhaps 20 years there is no caselaw on this in Ireland (it had received approval in Australia).

In the Belgard Motors case, both the High Court and the Supreme Court decided that a floating charge could be crystallised provided it was done in accordance with the contractual terms of the security between the chargor and the chargeholder.

The second question is whether the crystallisation was effective. The High Court decided it was not, as the charge after crystallisation did not have the appropriate characteristics and control associated with a fixed charge. However, the Supreme Court decided, as it was the parties’ intention to turn the charge into a fixed charge, effect should be given to that intention. The Supreme Court indicated also that as a result of that decision chargeholders could, without good cause turn a floating into a fixed charge, giving it priority over the preferential creditors and effectively utilise what it described as a flaw in the legislation. The Supreme Court's decision, without evidence that the chargeholder imposed any controls on the assets subject to the crystallised charge, has the potential to create an increased likelihood of floating chargeholders imposing their priority in cases where the chargor is likely to become insolvent.

A summary of the legal issues surrounding the Supreme Court's decision is set out in Appendix 4 (B) below.

4.5 Floating and Fixed Charges – The Basic Differences

The description, floating charge or fixed charge, which is given to any given charge is not determinative of the true nature of the charge. The law has developed so that charges are judged by their effect and not just by their description. In the UK, the House of Lords decision in National Westminster Bank Plc v Spectrum made it clear that the central feature which distinguished a floating charge from a fixed charge lay in the chargor's ability to control and manage the charged assets freely and without the chargee's consent. The effect then of the crystallisation of the floating charge into a fixed charge can be quite dramatic on a company as essentially it can no longer freely deal with any assets covered by the fixed charge.

4.6 Development of Floating Charge and Preferential Payments

The first recorded decision of the effectiveness of a floating charge was in 1870 but it was described by Lord MacNaghten as:

> *"an equitable charge on the assets for the time being of a going concern. It attaches to the subject charged in the varying condition in which it happens to be from time to time. It is of the essence of such a charge that it remains dormant until the undertaking charged ceases to be a going concern, or until the person in whose favour the charge is created intervenes. His right to intervene may of course be suspended by agreement. But if there is no agreement for suspension, he may exercise his right whenever he pleases after default".* [2]

The principal advantage of this form of charge was that it enabled a company to receive finance and give security while at the same time continue to trade with its assets, usually stock and receivables, in the ordinary course of business without interference from the chargeholder.

In 1883, the Companies Act of that year introduced the concept of preferential payments in a company's winding up for wages and salaries.[3] The preference was extended to rates by the Preferential Payments in Bankruptcy (Ireland) Act 1889.

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[2] House of Lords decision in Governments Stock and Other Securities Investment Company v Manila Railway Company [1897 A.C. 81]

[3] Companies Act 1883, c.28 s.4

Subsequently under the Agricultural Credit Act 1927, both a fixed chattel mortgage and a floating chattel mortgage were specifically recognised. The Act provided for the conversion of a floating chattel mortgage into a fixed chattel mortgage upon certain requirements and constraints (this was subsequently amended and reiterated in the Agricultural Credit Act 1978). The measures in the Act were introduced specifically to facilitate farmers borrowing money to better their holdings.

The concept of preferential payments was retained and set out in Section 285 of the Companies Act 1963 which has been replaced by Section 621 of the Companies Act 2014. Bank financing in the 1960s typically involved a trading company giving a debenture to the bank to secure a specified sum of money; the debenture would incorporate a fixed charge over the company's premises and a floating charge over other assets principally stock and book debts. The leap-frogging as between the preferential creditors and the floating chargeholder continued in the 1970s with the extension of Revenue priority, in particular, the Value Added Tax Act 1972 which incorporated an increase of the wholesale and sales tax and increased employee entitlements. The extent of preferential payments increased under the Companies (Amendment) Act 1982 and has continued to increase with sporadic legislation the most recent being Section 49 of the Workplace Relations Act 2015.

The next stage of leap-frogging followed the UK High Court decision in *Siebe Gorman v Barclays Bank Limited* (1978)[4], when banks in Ireland provided in their debenture that a fixed charge would be taken over present and future book debts rather than a floating charge. Book debts are an asset which typically change from time to time and would normally in that sense be appropriate for a floating charge. In 1984, the High Court found that a fixed charge over book debts could not be created but this was successfully appealed the following year where the Supreme Court unanimously held a fixed charge to be effective (*Re: Keenan Brothers* [1985] IR).

The leap-frogging continued as within six months of the Keenan Brothers decision, a late amendment was introduced to the Finance Bill which became Section 115 of the Finance Act 1986, now Section 1001 of the Taxes Consolidation Act 1997. Essentially what this Section provided is that if a chargor is in arrears on its PAYE or VAT obligations on payments to the Revenue, the Revenue can serve a notice on any creditor of the chargor which has a fixed charge over the chargor's book debts to the effect that any monies received by the creditor from the chargor from the time of the notice, not only in respect of book debts but in respect of any other arrangements such as enforcement of security over land, that such monies must be remitted to the Revenue Commissioners in or towards the discharge of the arrears of PAYE or VAT. Thus the Revenue Commissioners obtained what is in effect super-preferential status not only in respect of book debts but in respect of the proceeds of all assets of a company which created a fixed charge over book debts in favour of the creditor**.** This provision, to our knowledge, is not found in other jurisdictions, frequently gives rise to surprise from foreign creditors when considering making finance available to Irish companies.

Subsequently in 1995, a small amendment was made to the Section[5] following recommendations from the Report of the Task Force on Small Businesses chaired by the Minister of State, Seamus

[4] Siebe Gorman & Co Ltd v Barclays Bank Ltd [1979] 2 Lloyd's Rep 142
[5] Finance Act 1995, section 174

Brennan TD, which reported that the Section was hampering the availability of finance to small business.

As a result of the Supreme Court's decision in the Belgard Motors case, the holder of a floating charge who crystallises the charge prior to the chargor's receivership or liquidation may now continue the leap-frogging tradition.

4.7 Consideration of Reform

It could be argued that the "leap-frogging" outlined in the previous paragraphs creates a degree of uncertainty which is unhelpful to conducting business and engaging in trade.

Statutory reform has been considered from time to time over the past 60 years without any substantive outcome. In 1958 the Law Reform Committee recommended the abolition of preference payments but this recommendation was not implemented in the Companies Act 1963. In 1972 the Bankruptcy Law Committee Report recommended the abolition of preferential payments. In 1994 the Company Law Review Group was asked to consider whether farmer creditors should be given preferential status. The Group answered in the negative but recommended "that a full examination be undertaken of relative burdens of risk from third party business failure". The Report stated at paragraph 8.8:

> *"We have taken particular note of the argument that the burden of risk in commercial transactions is inequitably distributed in that some parties have a greater capacity than others to secure their risk. The current situation and practices have, as mentioned earlier, developed over time and have been tested in the market-place. Nevertheless, it may be that the relative preferences obtaining should be examined periodically in the light of market-place development. An examination along these lines would include a look at all unsecured creditors generally in relation to other creditors. Such an examination will require consultation with many interests since it will touch on diverse aspects of commercial life and on the interests of the Exchequer. It will also benefit from a study of developments in other jurisdictions. We note that work of a similar nature has been undertaken and steps smaller or greater implemented in other jurisdictions. We refer in particular to the US experience and the Cork Committee report on Insolvency Law and Practice in the United Kingdom (Ref: Cmnd. 8558 - June 1982)."*

The Second Report of the Company Law Review Group,[6] issued in 2004, reviewed in some detail the preferences of employees and the Revenue without concluding on any recommendations. However, a more detailed consideration was given to the subject in the Company Law Review Group Report of 2007[7]. In particular substantive reasoning was set out both for supporting Revenue preferences and for abolishing preferences as well as an outline of the experience of other jurisdictions.

[6] http://www.clrg.org/publications/clrg-second-report-2004.pdf
[7] http://www.clrg.org/publications/clrg-fourth-report-2006-2007.pdf

The 2007 Company Law Review Group's Report on preferential payments concluded with a number of specific recommendations involving the retention of many Revenue and employee priorities and the abolition of some Revenue and employee priorities.

To ensure that the burden of risk is equitably distributed, it may be appropriate to consider in the course of 2016 what, if any, changes should be made to the legislation governing the priority of payments on a company's receivership or liquidation.

4.8 Preferential Payments in Other Jurisdictions

In general, employee's unpaid wages and entitlements enjoy some type of preferential status on insolvency in almost every jurisdiction. There is no uniform approach in respect of a preferential status for revenue in respect of tax liabilities. Notably, the United Kingdom and Australia, have abolished the preference in respect of tax liabilities.

4.8.1 The United Kingdom

Prior to the United Kingdom's abolition of the Crown's preference for revenue debt[8] UK company law was amended (following a court decision in the mid-1980s[9]) to the effect that reference to a floating charge in the Companies Act/Insolvency Act would be treated as a floating charge, as created. In other words, the character of the charge at the time of its creation, rather than at the time of the winding up of the company, became the determinative issue in deciding the order of priority. This mechanism retained the concept of a floating charge and crystallisation thereof for other purposes.

4.8.2 Preferential Payments in selected other Jurisdictions

The Hong Kong legal system is based on common law and accordingly the law of Hong Kong relating to security interests is broadly similar to UK law. A floating charge in an insolvency is defined as a floating charge, 'as created'. Similarly employees and the revenue are preferential creditors and rank ahead of floating charge holders.

As a general rule, in an insolvency in Canada, Australia and New Zealand, statutory preferential payments are paid, in priority of any security interest, out of circulating assets (which are alternatively described as inventory/receivables/current or movable assets).

Further details of the security interests available in each country mentioned above is at Appendix 4 (C) below.

[8] Enterprise Act 2002, s252(2)
[9] Re Brightlife Ltd [1987] Ch 200

4.9 Registration of Charges and Third Parties

Prior to the 2014 Act, particulars of the charge such as details of any negative pledge clauses, details of crystallisation events in relation to floating charges and other restrictive provisions, were typically filed for registration. However Section 412(6) of the Companies Act 2014 implemented the Second Report of the Company Law Review Group (para 8.5.2) by providing that the Registrar shall not enter details of negative pledges or crystallisation events and the filing of any such detail shall have no effect. There is no statutory requirement to 're-register' a crystallised floating charge.

In the UK, it is settled that crystallisation of a floating charge does not lead to the creation of a new charge and hence does not trigger the registration requirements of Section 860 of the Companies Act 2006.

4.10 Company Law Review Group Proposal

The terms of the request from Minister Bruton to the Company Law Review Group in relation to the Supreme Court judgment were "to examine the judgment and its implications for the priority of payments to creditors in company liquidation and to recommend what, if any, changes should be made to the Companies Act 2014, particularly having regard to paragrahs 91-98 of the Judgment". In view of the uncertainty for preferential and other unsecured creditors which now prevails by virtue of the judgment (and the developments in other jurisdictions with strong trading links with the State), it is recommended that the priority of payments on a company's insolvency be given full consideration bearing in mind the necessity to protect the rights of employees, creditors and the State. It should be noted, for the record, that the ad-hoc committee debated whether this recommendation is within the scope of the terms of request from the Minister.

The Review Group has considered three options:

1) Do nothing and await a full and considered review of the priority of payments. In view of the potential opened by the Supreme Court for crystallisation to be effected privately and shortly prior to enforcement, this may be unwise.
2) Make a simple change to the effect that floating charge means a floating charge as created for the purposes of Section 440 and Section 621 of the Companies Act 2014. This restores the position to what it effectively was in practice if not in law. It is a suggestion of the Review Group that it may be appropriate to further explore priority of payments on a company's receivership or liquidation in 2016. The likely implications of this proposal were considered and it was felt that the ability of companies to raise finance would not be adversely affected as there did not seem to be a widespread practice of crystallising floating charges before the appointment of a receiver or liquidator as it was considered the High Court's test for an effective crystallisation as outlined in the Belgard Motors case made it challenging for the secured creditors. It is considered the absence of such practice should not impact on the decision of banks or other lenders to provide credit to a company.
3) Adapt Section 31 of the Agricultural Credit Act 1978 which would tackle the Supreme Court's concern of abuse. The Companies Act 2014 could be amended to provide that whenever any monies become due for payment by a company to a creditor which has a

floating charge over some or all of the company's assets or undertaking and such monies are in arrears for seven days, the chargee may serve on the company, a notice in writing declaring that the floating charge has crystallised and become fixed, and the chargee within seven days after the day on which the notice has been served files a notice in the Companies Registration Office that its floating charge has become fixed, the floating charge shall be deemed to have become fixed from the date and time of the filing of notice to that effect in the Companies Registration Office. This option was discussed as it was considered it would have had the dual advantage of enabling crystallisation in somewhat limited circumstances with transparency. However, it was considered to be somewhat unwieldy and filing a notice in the Companies Registration Office may be of limited value when the crystallisation has already been effected. It was also relevant that the new registration system introduced by Part 7 of the Companies Act 2014 had simplified the registration procedure in many ways and a further registration requirement would not be consistent with that approach.

Recommendation: Accordingly, the Company Law Review Group recommends the second option be adopted and submitted to Minister Bruton. Suggested changes to implement the recommendation in the Companies Act 2014 are set out in Appendix 4 (D) below.

Appendix 4(A) Members of the Company Law Review Group Ad-hoc Committee regarding the Supreme Court judgment of the 9th July 2015

(* denotes a representative who is not a formal member of the Company Law Review Group)

William Johnston	Co-Chairperson, Arthur Cox
Barry Cahir	Co-Chairperson, Irish Society of Insolvency Practitioners
Jonathan Buttimore	Office of the Attorney General
Helen Curley	Department of Jobs, Enterprise and Innovation
Stephen Dowling	Bar Council
Bernice Evoy	Banking and Payments Federation, Ireland
Paddy Purtill*	The Revenue Commissioners
Vincent Madigan	Ministerial nominee
David McFadden*	Companies Registration Office
Jon Rock	Institute of Chartered Secretaries and Administrators in Ireland

Appendix 4(B) Executive Summary of the Legal Issues Surrounding the Supreme Court's Judgment in the matter of J.D. Brian Ltd t/a East Coast Print and Publicity and Re East Coast Car Parts Ltd [2015] IESC 62 (Laffoy J.)

4(B)1 Introduction – The Current Law in Ireland

At the time of the liquidation of the companies in this case, Section 285(7)(b) of the Companies Act 1963 stated that in a winding up the preferential debts of a company shall 'rank equally among themselves and be paid in full'. However, where there are insufficient assets the section provides that 'they shall abate in equal proportions'. Many of the preferential creditors are described in Section 285 of the 1963 Act and are listed there; most notably preferential creditors include the Revenue and certain protected categories of payments for employees. This Section has now been replaced by Section 621 of the Companies Act 2014. However, following the decision of the Supreme Court in *Re J.D. Brian Ltd t/a East Coast Print and Publicity* [2015] IESC 62 (Laffoy J.) ('the Belgard Motors case') debenture holders (such as banks) holding a floating charge, which has crystallised into a fixed charge, will rank in priority to any preferential creditors.

The bank in the Belgard Motors case served a document, which was called a 'Crystallisation Notice', on the beleaguered company prior to the commencement of winding up or the appointment of a receiver and there is now a fear that banks will utilise this 'Crystallisation Notice' to attempt to leap frog preferential creditors in the order of priority.

4(B)2 Floating and Fixed Charges – The Basic Differences

There is currently no definition of a fixed or floating charge in the Companies Act 2014. The title, floating charge or fixed charge, which is given to any given charge in a debenture is not in fact determinative in deciding what the true nature of the charge is. The law has developed so that charges are judged by their effect and not just by their description.

In the Supreme Court in *Re: Keenan Brothers Ltd* [1985] IR 401, Henchy J stated:

> *"One of the essential differences between a fixed charge and a floating charge given by a company is that a fixed charge takes effect, upon its creation, on the assets that are expressed to be subject to it, so that those assets, as they then exist, or, when the charge applies to future assets, as soon as they come into existence, will stand encumbered by the charge, and the company will be able to deal with those assets only to the extent permitted by the terms of the charge".*
>
> *"A floating charge, so long as it remains floating, avoids the restricting (and in some cases, paralysing) effect on the use of the assets of the company resulting from a fixed charge. While a charge remains a floating one, the company may, unless there is agreement to the contrary, deal with its assets in the ordinary course of business just as if there were no floating charge."*

In the United Kingdom, the House of Lords decision in *National Westminster Bank Plc v Spectrum Plus* [2005] UKHL 41 has brought a degree of certainty as to the true nature of fixed and floating charges. The decision made it clear that the central feature which distinguished a floating charge from a fixed charge lay in the chargor's ability to control and manage the charged assets. However, their Lordships agreed that it is still conceptually possible to create a fixed charge over book debts. Lord Hope stated:

> *"in order to create a fixed charge over book debts there must be a restriction in the debenture forbidding their disposal; a requirement that that they be paid into a blocked account and that such account is operated as a blocked account in fact. If the blocked account was never intended to be operated as one in fact and in practice the chargor was free to apply the book debt realisations as it wished then the charge will be construed to be [a] floating charge."*

The effect then of the crystallisation of a floating charge to a fixed charge can be quite dramatic on a business as essentially they are being asked to no longer deal with any assets covered by the charge.

4(B)3 Development of the Floating Charge in Common Law – 'A Defect in the Drafting'

The leading cases in the UK dealing with the crystallisation of floating charges and the priority which arises thereafter are: *Re Griffin Hotel Co. Ltd Joshua Tetley & Son Ltd v The Company* (1941) Ch 129 (*Re Griffin*) and *Re Brightlife Ltd* [1987] Ch. 200.

In *Re Griffin* the court was called upon to consider the proper statutory interpretation of Section 264 (4) of the English Companies Act of 1929. The wording of Section 264(4)(b) is identical in all material respects to Section 285(7)(b).

Bennett J. held that the phrase "any floating charge created by the company" in Section 264 (4) had no application to a charge originally created as a floating charge, but which had become a fixed charge prior to the date of the winding-up order. This ruling was made in reply to an argument that the phrase "any floating charge created by the company" included all charges which had originally been created as floating charges.

In *Re Brightlife Ltd* [1987] Ch. 200 Hoffmann J. (as he then was) considered the use of a crystallisation notice by a chargeholder over a company's assets. He found that the charge in question, although expressed as being a 'first specific charge', was a floating charge since it related to fluctuating assets. Furthermore, while some restriction was placed on the company's freedom to deal with its book debts, the company remained free to collect its debts and pay them into its bank account, which the company could use freely. However, since there was nothing which precluded the parties from stipulating in their agreement that a floating charge would crystallise into a fixed charge on the giving of notice by the chargeholder, by giving that notice exercising its right to do so, the chargeholder had effectively converted its floating charge into a fixed charge. It followed that since the charge had become a fixed charge before the commencement of the winding up of the company, preferential creditors such as the Customs and Excise had no priority under Section

614(2)(b) of the 1985 Act over the chargeholder's claim. This was the first time the effectiveness of the 'Crystallisation Notice' procedure had been tested in the courts.

It should be noted that at the time of Hoffmann J.'s judgement legislative changes were already imminent through the enactment of the Insolvency Act 1986. Irene Lynch Fannon notes in her recent article '*The Floating Charge Debate in Irish Law: The Path to Clarity*' (2015) 17 CLP 2015, 22 (8) 187-195, that in light of the impending legislation, the court in *Re Brightlife* may have felt limited in the options available to it. She notes at page 191 that:

> *"…the decision in Re Brightlife Ltd was delivered by Hoffmann J. in a legislative context where the "defect in the drafting" which had been revealed by Re Griffin Hotel Ltd was being expressly addressed through the enactment of the provisions of the Insolvency Act 1986. The court could therefore be regarded as being somewhat constrained in the approach available to it. Absent such constraint, the observations of Hoffmann J. (cited at para. 53 of the Supreme Court's decision in the Belgard Motors case) are apt:*
>
> *One imagines that [the legislative provisions in question] were intended to ensure that in all cases preferential debts had priority over the holder of a charge originally created as a floating charge. It would be difficult to think of any reason for making distinctions according to the moment at which the change crystallised or the event which brought this about. But Re Griffin Hotel Co. Ltd revealed a defect in the drafting…*
>
> *The observations of Finlay Geoghegan J. regarding both the fact that Hoffman J. felt bound by the former decision and was perhaps being polite regarding the validity of the reasoning are appealing in this context."*

As a result of these legislative developments, which have restated the law in respect of the crystallisation of floating charges, these decisions have been somewhat frozen in time and the issue of the status of a floating charge which has crystallised to a fixed charge has become a moot issue in English law.

4(B)4 Statutory Intervention in the United Kingdom

In 1986 English company law was amended to the effect that any reference to a floating charge in the Companies Act/Insolvency Act would henceforth be categorised as a floating charge **as created**. In other words, a subsequent crystallisation of the floating charge would have no effect on the priority of payments, so that preferential creditors would still rank ahead of the floating chargeholders in the event of a receivership or liquidation.

The cumulative effect of the legislative amendments was that the character of the charge at the time of its creation, rather than at the time of the winding up of the company, became the determinative issue in deciding the order of priority of payments.

At least one unintended consequence of the changes made to the definition of the floating charge in the United Kingdom has been identified. Originally, the subordination of the floating charge in favour of preferential creditors was limited to those preferential claims which arose before the crystallisation of the floating charge. However, after the amendment, the subordination also encompassed those preferential claims which arose after the crystallisation of the charge.

For instance, prior to the amendment of the definition, an employee could recover unpaid wages up to and until the date of the crystallisation of the floating charge into a fixed charge. There was no process for an employee to recover wages which arose after the crystallisation of the charge, but before the cessation of business. After the introduction of the new definition, employees' unpaid wages were recoverable for the entire period up to and including the winding up of the company.

Some attempts were made by banks over the years to side step the statutory interventions, in particular the Insolvency Act 1986, which substantially weakened the effectiveness of a crystallised floating charge. In some circumstances banks thought it was possible to draft an effective fixed charge/mortgage over shifting and circulating assets by providing that the charge/mortgage extends to future property and that the chargee/mortgagee maintains control over the charged asset. This was illustrated by *Siebe Gorman v Barclays Bank Limited* [1979] 2 Lloyds Rep. 142 where the courts upheld as valid an attempt to create a fixed charge over book debts. By the terms of that charge, the chargee exercised sufficient control over the book debts (including requiring the chargor company to pay all proceeds into his account with the chargee bank) that the vital element of the floating charge, namely, the chargor's freedom to manage its assets in the ordinary course of business, was missing.

However, as noted above, such attempts have ultimately not succeeded and many charges/mortgages have been construed by the courts as 'disguised floating charges', notwithstanding the parties' describing the charge/mortgage as 'fixed'. The courts have resisted these 'disguised floating charges' where legally, or in practice, the chargor is given the power to deal with the assets in the ordinary course of business. As considered above, the House of Lords in *National Westminster Bank v Spectrum Plus Ltd* [2005] UKHL 41 clarified the position in respect of book debts and overturned the decision in *Siebe Gorman* retrospectively.

4(B)5 Preferential Payments – International Trends

The treatment of certain creditors in an insolvency as preferential creditors is an area which many other jurisdictions have grappled with. To date, no consensus approach has emerged but certain trends have emerged which are worth noting. In general, employees' unpaid wages and entitlements enjoy some type of preferential status in almost every jurisdiction. There is no uniform approach in respect of a preferential status for the revenue in respect of outstanding tax liabilities. Some common law jurisdictions like Canada, New Zealand and Hong Kong have retained the preferential treatment for revenue debts. Other jurisdictions, most notably the United Kingdom and Australia, have abolished the revenue preference in exchange for legislative amendments providing for the ring fencing of assets in an insolvency for the benefit of unsecured creditors.

4(B)6 Security Interests and Preferential Payments in Other Jurisdictions

A brief comparative analysis of the development of security law and preferential payments in other jurisdictions shows that there are three distinct systems of security interests in operation.

First, in Ireland and the United Kingdom the treatment of various security interests is based on their characterisation as either a fixed or floating charge. In general, floating charges are more vulnerable than fixed charges due to the registration system and the chance that they may be set aside if they have been created within 12 months of an insolvency. Furthermore, floating charges rank below the expansive list of preferential creditors in the UK and Ireland.

The Hong Kong legal system is based on common law and accordingly, the law of Hong Kong relating to security interests is broadly similar to English law as it stood prior to the Enterprise Act 2002. A new definition of a floating charge was introduced in 1987 to reflect the changes in the United Kingdom. As a result, a floating charge in an insolvency is defined as a floating charge, 'as created'. Employees and the revenue are preferential creditors and rank ahead of floating chargeholders.

In contrast, Canada, Australia and New Zealand are just some of the common law jurisdictions which have abandoned the floating charge in favour of more modern forms of security interests, which they have been codified in a manner broadly in line with Article 9 of the Uniform Commercial Code (UCC) in the United States. Article 9 of the UCC is founded on the notion of substance over form. There is a common set of rules for perfection of all security. It is enough for parties to grant 'security' over assets rather than having to specifically mortgage, assign, charge or pledge it. There is also an all-inclusive system of registration of security interests which determines priority. Priority depends on the time of registration or taking of possession of the secured asset.

As a general rule, in an insolvency in Canada, Australia and New Zealand statutory payments in favour of preferential creditors are based on the characterisation of the assets covered by the charge, not the characterisation of the charge itself. As a result, the system provides that statutory preferential payments are paid in priority of any security interest out of circulating assets (which are alternatively described as inventory/receivables/current or movable assets). Thus, the debate on whether a particular charge is a fixed or floating charge is avoided entirely.

Finally, the development of a conservative banking and security interest sector in Denmark, Sweden and Finland has necessitated the introduction of a new form of floating charge. These charges, alternatively referred to as enterprise mortgages or business mortgages, provide a line of credit for businesses in exchange for a floating charge over their trading stock, inventory and receivables. These floating charges all require 'perfection', essentially registration, in order for them to confer priority over unsecured creditors.

Finland and Sweden also operate 'pledge' type security interests over tangible movable property like machinery, bank accounts, shares and patents. Perfection/crystallisation of the pledge is achieved by gaining possession and/or registration of the pledge. In addition, it should be noted that Finland, like the United Kingdom, have adopted a ring fencing approach which protects 50% of the business's assets (apart from real assets) for equal division between unsecured creditors. This is done at the expense of business mortgage/floating charge holders.

4(B)7 Registration of Charges and Third Parties

The question then arises how the crystallisation of floating charges works in reality and in particular, how crystallisation by notice, as was the case in the Belgard Motors litigation, would affect the rights of third parties, especially unsecured creditors like suppliers. The registration of charges effectively renders private crystallisation notices into matters of public record and accordingly merits some consideration.

Under the new Companies Act 2014, all charges should be registered within 21 days of their creation save for charges over assets set out in Section 408 of the Act. The priority as between charges has, to a large extent, been amended to give priority to the first chargee to file rather than the first to create a charge. The Act currently provides that failure to file the prescribed particulars of a registerable charge will render the charge void against any creditor or liquidator of the company.

Prior to the 2014 Act, particulars of the charge, such as details of any negative pledge clauses, details of crystallisation events in relation to floating charges and other restrictive provisions, were collected by the Registrar. However, since the enactment of the new act, Section 413(5) of the Companies Act 2014 restricts the particulars which are capable of being delivered for registration. These details are now considered to be extraneous material and are not capable of registration.

Currently in the United Kingdom, all floating charges need to be registered, whereas not all fixed charges do. Section 859D of the Companies Act 2006 requires that a floating charge is registered and certain detailed particulars of the charge are to be included in the registration documents. These particulars include whether or not the instrument is expressed to contain a floating charge and whether it covers all the property and undertakings of the company. An unregistered charge will also be void against a liquidator, administrator or creditor of the company.

In the United Kingdom it is settled law that the crystallisation of a floating charge does not lead to the creation of a new charge. Accordingly, the crystallisation does not trigger the registration requirements set out above and there is no danger of the crystallised charge being called into question under Section 245 of the Insolvency Act 1986 (which invalidates any floating charges created in the 12 months prior to a company going into a winding up). The courts in the United Kingdom have yet to decide whether or not decrystallisation involves the creation of a new charge. There is no conclusive authority on this point in Irish law.

4(B)8 The Agricultural Credit Act 1978

The final recommendation of the Review Group refers to The Agricultural Credit Act 1978. It's predecessor the Agricultural Credit Act 1927, was introduced to encourage farmers to borrow money to better their holdings. As a *quid pro quo* for lending to farmers the banks were given increased powers to enforce their security at short notice.

The Agricultural Credit Act is an example of a statutory precedent for the use of the 'Crystallisation Notice', in so far as it provided for the conversion of a floating chattel mortgage into a fixed chattel mortgage on notice to the farmer/borrower. Its effect was that a floating chattel mortgage which had been converted by notice to a fixed charge conferred on the bank the right to take possession of the property charged. This could only be done upon the happening of an event specified in the charge. Typically, specified events include: breach of covenant to repay, death or bankruptcy of the farmer or his making a composition or arrangement with creditors. After five clear days, or such less time as may be allowed by the charge, the bank had the power to sell the secured property by auction or private treaty.

Thus, within a short period of time the bank could effectively take possession and sell any secured assets.

Appendix 4(C) A general review of floating charges and preferential creditors in other common law and selected EU jurisdictions

4(C)1 Canada

In Canada the floating charge has been abolished in favour of a statutory fixed charge which attaches to [all of] the debtor's assets from time to time.

This is a fixed security interest which:

(i) attaches to assets as and when the debtor acquires them;

(ii) becomes unattached as and when the debtor disposes of assets with the secured party's express or implied authority; and

(iii) attaches to the proceeds of assets. The key difference between a Personal Property Security Act (PPSA) security interest and a floating charge is, therefore, that a PPSA security interest attaches at the point when the debtor has rights in the collateral, whereas a floating charge does not attach until crystallisation.

The Crown preference operates in Canada through a 'deemed trust' which gives the Crown a proprietary interest in any tax collected in subordination of any security interest (floating or fixed) with the exception of real property mortgages (Income Tax Act 1985, s227 (4.1). Unpaid wages also have priority over secured claims over current assets, defined as 'unrestricted cash, or any other asset that, in the normal course of operations, is expected to be converted into cash or consumed in the production of income within one year or within the normal operating cycle when it is longer than a year'(Section. 2(5) Wage Earner Protection Program Act 2005).

4(C)2 New Zealand

In New Zealand much of the Crown preference has been abolished. There are still a number of preferential creditors who gain priority in both a receivership and a winding up. Before the New Zealand PPSA 1999, (which introduced a regime similar to the US and Canada), these creditors had priority over floating charge holders. After the introduction of the PPSA, the floating charge was abolished. Under the Companies Act 1993 (NZ) Sch 7 cl 2(1), preferential creditors were given priority over the claims of any security interest to the extent that the security interest:

(i) is over all or part of the company's accounts receivable and inventory, and

(ii) is not a purchase money security interest, and

(iii) does not arise from the transfer of an account receivable for which new value

Statutory payments in an insolvency in favour of preferential and general unsecured creditors are based on a characterisation of the assets covered by the charge, not the characterisation of the charge itself. Charges over inventory and receivables are subject to claims by these protected creditors, charges over other assets are not.

4(C)3 Australia

In Australia, the Personal Property Security Act (PPSA) 2009 created a new regime to determine whether an effective security interest has been created. The effectiveness of a security interest is dependent on both “attachment” and “perfection” having occurred. Attachment relates to the creation of the security interest — in order for there to be a security interest at all, it must “attach” to specific assets. The effect of attachment is to give the secured party proprietary rights as against the debtor.

For the security interest to be effective against third parties, it must be ‘perfected’. This is achieved by one of the following:

(i) Possession.

(ii) Control - Broadly speaking, a secured party has control when it is in a position to dispose of the collateral without the grantor's consent.

(iii) Registration.

Australia abolished priority for general tax liabilities in 1993, replacing it with a regime that allowed recovery proceedings to be brought by the Revenue Commissioners earlier, with the potential for penalties against directors personally (Insolvency (Tax Priorities) Legislation Amendment Act 1993).

4(C)4 Hong Kong

The Hong Kong legal system is based on common law. Accordingly, the law of Hong Kong relating to security interests is largely similar to UK law.

The new Companies Ordinance (Cap. 622) has recently been brought into operation in Hong Kong in 2014, in some ways it is comparable to Ireland’s Companies Act 2014 as it has largely updated and codified the company law regime in Hong Kong.

Some of the major reforms it introduced in respect of charges were:

- “automatic” acceleration (or crystallisation) provisions were replaced with a “discretionary” acceleration provision, giving a choice to the lender as to whether the secured amount is to become immediately payable.

The Hong Kong Government is in the process of reforming the larger area of insolvency law and has simply kept its previous company ordinance ‘Cap 32’ provisions which includes a system of preferential creditors which include employees’ unpaid wages and compensation claims and any statutory debts due to the government. These preferred creditors are paid ahead of a holder of a floating charge. In an insolvency, a floating charge is considered to be a floating charge ‘as created’.

4(C)5 Denmark

Unsecured creditors rank as follows:

(i) **Pre-preferential creditors.** Before any debts are paid, pre-preferential claims, for example the cost and expenses of the administration of the estate, are paid in equal proportions.

(ii) **Preferential creditors.** After payment of pre-preferential claims, preferential claims are paid in equal proportions. Preferential claims include reasonable costs and expenses incurred to provide a collective arrangement of the debtor's financial affairs by a reorganisation, dissolution process, composition or similar schemes.

(iii) **Privileged creditors.** Privileged claims (for example, employees' salaries) rank after preferential claims. „

(iv) **Ordinary creditors.** Ordinary claims are, for example, unsecured loans and value added tax. These claims are subordinated to privileged claims.

4(C)6 Sweden

In the case of the borrower's insolvency, creditors have the following priority (Priority of Rights Act 1970)*:*

(i) Debts secured on specific property or by special procedures, such as mortgages over real property, pledges or liens.

(ii) Expenses of winding up the company (that is, the costs and remuneration of the receiver in bankruptcy).

(iii) The administrator's costs and remuneration in a company reorganisation.

(iv) The company's audit costs.

(v) Debts which the Enforcement Authority (*Kronofogdemyndigheten*) has secured on particular assets before the bankruptcy through its debt collection powers

(vi) Debts secured by a floating charge.

(vii) Employees' salaries.

(viii) Unsecured debts.

(ix) Shareholders' equity.

Appendix 4(D) Changes to the Companies Act 2014

4(D)1 Recommendation of the Company Law Review Group

Make a simple change to the effect that floating charge means a floating charge as created for the purposes of Section 440 and Section 621 of the Companies Act 2014. This restores the position to what it effectively was in practice if not in law prior to the Supreme Court Judgment of 9th July 2015.

4(D)2 Recommended changes to the Companies Act 2014

1) In section 440(1)(a) replace “a floating charge” with “a charge created as a floating charge”.
2) In section 621(7)(b) replace “any floating charge” with “any charge created as a floating charge”