Expert Examination and Review of Laws Protecting Employee Interests

Ibec submission to Mr Kevin Duffy and Ms Nessa Cahill B.L

Expert Examination and Review of Laws Protecting Employee Interests

Ibec response 26th February 2016

Ibec welcomes the opportunity to respond to the Expert Examination and Review of Laws Protecting Employee Interests and thanks Mr Duffy and Ms Cahill for seeking its input. The stated purpose of the review is to examine the legal protection available for workers' interests where collective redundancies arise in consequence of certain types of corporate restructuring involving the separation of assets from the operational activity of a business. Ibec would like to take this opportunity to clarify that we have not had any contact with the relevant companies or the liquidator in compiling our response to the review.

The terms of reference[1] place particular emphasis on:

1. The better utilisation of statutory information and consultation rights under a range of existing legislation[2]
2. Whether there is a point in time at which any new measures could protect employees' interests e.g. by way of bond by reference to employees' uncrystallised pecuniary entitlements
3. Whether there are changes to employment rights or company legislation which should be considered, including powers to set aside transfers of assets and time periods for same
4. What solution/framework of measures is required

These issues are addressed point by point below.

1. The better utilisation of statutory information and consultation rights

The first question posed as part of the review is whether more effective use could be made of current legislation to safeguard employees' interests, specifically the information and consultation rights already in existence. The most robust of these rights are outlined in sections 9 and 10 the Protection of Employment Acts 1977 to 2007. These sections prescribe the subject matter on which employers are required to consult with their employees, including the reason for the proposed redundancies, the period within which the redundancies are to take effect, the possibility of avoiding some or all of the redundancies and other relevant matters. A strict time frame of at least 30 days for information and consultation is imposed by the legislation. Failure to observe the provisions is a criminal offence attracting a fine of €5,000 on summary

[1] See "Matters for Consideration" in the terms of reference
[2] Protection of Employment Acts 1977 to 2007
Employees (Provision of Information and Consultation) Act 2006
EC (Protection of Employees on Transfer of Undertakings) Regulations 2003 S.I.131/2003

conviction. Where collective redundancies are effected before this time expires, the employer may face a fine on indictment of €250,000.

As can be seen from the above provisions employment law already places onerous obligations on employers to inform and consult employees on proposed collective redundancies. In the vast majority of cases, while the motivation (being the protection of employment rights) underpinning their introduction is clear, these obligations come at a time of deep strain for businesses. While Ibec is acutely aware of the need to protect employees at times of an employer's financial difficulty, Ibec is concerned about employers' capacity to comply with any further regulation in this area.

Furthermore, Ibec notes that the Protection of Employment Act provides a very limited derogation from its requirements in an insolvency.

The Act provides for an exemption only in respect of

(1) the obligation to notify the Minister of proposed collective redundancies (although an employer must comply with the notification obligation if the Minister so requests) and

(2) the prohibition on collective redundancies taking effect within the 30 day consultation period, where the collective redundancy arises from the employer's business being terminated following bankruptcy or winding up proceedings or for any other reason as a result of a decision of a court of competent jurisdiction.
These, Ibec submits, are very limited derogations for employers facing insolvency.

First, the Minister may, notwithstanding the employer's circumstances, require the employer to notify him/her of proposed redundancies. Second, arguably the derogation does not release employers from the obligation to consult with employees about proposed collective redundancies as it merely exempts employers from the provisions of sections 14(1) and 14(2) , but not the provisions of sections 9, 10 and/or 11. Finally, the exemption only applies to business closures following court ordered bankruptcy or winding up proceedings and does not apply to redundancies effected by a receiver or an examiner.

Furthermore, Ibec notes that the "special circumstances" defence for failure to comply with collective redundancy requirements as open to employers in the UK does not exist in Ireland. Therefore, the reality for most employers is that failure to comply with the requirements of the Protection of Employment Acts constitutes a near strict liability offence in Ireland.

Indeed, Ibec submits that the limited nature of this derogation was highlighted by the former Clery's employees' recent claims to the WRC under the Protection of Employment Acts.

In this case, the claimants successfully argued that OCS Operations t/a Clery's had breached sections 9 and 10 and were awarded compensation as a result. In her determination, Mr Rosaleen Glackin cited the decision of the then European Court of Justice (ECJ) in the case of *Claes v Landsbanki Luxembourg SA, in liquidation [C-235/10]*. In the *Claes* decision, the ECJ stated that even in an insolvency; "an establishment has a duty, up until the moment when its legal personality definitely ceases to exist, to fulfil the obligations arising under Articles 2 and 3 of the Directive 98/59." The ECJ went on to hold that as long as the management of an establishment remains in place, if must fulfil the obligations arising under collective redundancy legislation. It further, and most radically, held that if the management of an establishment is taken over by a liquidator, it is the liquidator that must fulfil the obligations of collective redundancy legislation.

This, Ibec suggests, is a particularly wide interpretation of collective redundancy legislation and serves as evidence of the significant protection offered by the Protection of Employment Acts to employees like the former Clery's workers. It is Ibec's view that it is hard to imagine how the protection could be extended beyond what has been set out in these two cases in situations where a business is being terminated as a result of court ordered bankruptcy or winding up proceedings.

In any case, we question the value to employees of an information and consultation period in the case of an insolvent company. Insolvent companies can no longer trade and, if required to comply with an information and consultation period, would potentially accrue debts they are in no position to discharge. Where is the benefit in retaining staff in employment in such circumstances, expecting them to continue to work where the employer has no resources to pay their wages? Ibec respectfully questions whether such a measure is in the interests of staff. The question also arises, in such circumstances, as to the continued cost to the Exchequer of unpaid wages which are likely to have to be paid from the employers' insolvency fund.

Ibec further notes company law difficulties associated with enforcing an information and consultation period in the case of an insolvent company. Section 604 of the Companies Act 2014 provides for personal liability for individuals who are guilty of reckless trading or are party to the contracting of a debt by a company in circumstances where they did not honestly believe that the company would be able to pay the debt when it fell due for payment. Requiring an insolvent business to continue trading for the sole or even principal purpose of concluding an information and consultation period would surely be at odds with this provision.

Similar points apply to the information and consultation period provided in the Transfer of Undertakings Regulations[3]. Similarly, the Regulations do not apply in circumstances where the employer is the subject of a High Court order for the winding up of the company. What value would there be in engaging in such an exercise, where the outcome has been predetermined? With the employer in liquidation, there is generally no realistic prospect of saving jobs. Likewise, with the company in such financial circumstances there is no realistic prospect of enhanced redundancy terms being paid.

Finally, to address the issue of information and consultation under the 2006 Act[4], Ibec has the following observations to make. The legislation has been in place for almost ten years, but does not appear to have sparked the interest of employees to a sufficient degree to result in very many information and consultation agreements being concluded. As a result, few cases have been litigated under the legislation. It should be clarified that in an organisation in which no information and consultation agreement had been requested or had been put in place, the issue of an offence having been committed under the legislation is unlikely to arise.

It is noteworthy that the Employees (Provision of Information and Consultation) Act 2006 does not appear to have the same exemptions included in the Protection of Employment Acts and the Transfer of Undertakings Regulations with regard to companies which are the subject of a winding up order from the High Court. Furthermore, the failure to observe a range of provisions under the 2006 Act constitutes a criminal offence which attracts a penalty on summary conviction of a fine of up to €3,000 or imprisonment of up to six months or both. On indictment, the fine is set at a rate of up to €30,000 or imprisonment for up to 3 years or both.

These penalties are severe, and upon examination of the various sections in the 2006 Act to which they apply, it is not immediately clear within each section precisely what act or omission constitutes an offence. In any case, Ibec is of the view that the absence of information and consultation in the Clery's case, while it likely contributed to the shock and distress of the employees affected, was not the issue of most concern. The issue at the centre of the matter would appear to be the separation of the Clerys building from the trading arm of the business (in which the employees were employed) as highlighted in the report to Government by Mr Ged Nash TD, Minister for Business and Employment[5] thus placing those assets out of reach of OCS Operations Ltd.'s creditors, including their employees and concessionaires. There may have been genuine reasons for the actions taken and it may well be that all concerned behaved with integrity throughout. However, Ibec accepts that these issues are worthy of examination and believes that no conclusions should be drawn until the liquidator's report is available and until the Director of Corporate

[3] EC (Protection of Employees on Transfer of Undertakings) Regulations S.I. 131/2003
[4] Employees (Provision of Information and Consultation) Act 2006
[5] See "The Sale and Liquidation of Clerys – a report to Government" page 5

Enforcement has considered the matter. We will return to this point later in our response at points 2, 3 and 4 below.

2. **Whether there is a point in time at which any new measures could protect employees' interests e.g. by way of bond by reference to employees' uncrystallised pecuniary entitlements**

Ibec accepts that one of the key issues of concern in this case involves the trading company acquiring the assets of the business, including the employees, intellectual property and goodwill, but not the title to the store. The property company acquired the building, and the trading company became a tenant of the property company. As far as Ibec knows, the liquidators' report relating to the liquidation of OCS Operations Ltd t/a Clery's, although submitted to the Director of Corporate Enforcement, is not yet publicly available. We note that when an insolvent company is wound up, the liquidator is obliged to provide a report to the Director of Corporate Enforcement on the conduct of the directors of the company and to assist the Director in carrying out his functions[6]. Ibec submits that it would be of great benefit to have sight of this report before making any proposals for the introduction of a bond or lien in the circumstances described above. Such a move is likely to be a significant cost burden to companies which may already be in difficulty.

Besides, Ibec understands that there may already be a remedy available under section 599 of the Companies Act 2014. This already provides a liquidator, creditor or contributor with the power to apply to the High Court for an order directing that a related company should contribute to the debts of a company being wound up. In deciding whether to make the order, the Court must have regard to the extent to which the related company took part in the management of the company being wound up, the conduct of the related company towards the creditors of the company being wound up and the effect which the order would have on the creditors of the related company. An order can only be made where the Court is satisfied that the circumstances giving rise to the winding up of the company are attributable to the actions or omissions of the related company. There appears to be a dearth of case law to guide us on the circumstances in which a contribution order would be made in this jurisdiction. It appears therefore that (as creditors) section 559 could provide a potential remedy to the employees in this case. We suggest that the scope of this power should be properly explored before any steps are taken to introduce new measures which have the potential to be costly and burdensome to business.

There also exists a requirement on the part of the liquidator to make an application to the High Court for the restriction of each of the directors of the company being wound up unless the Director of Corporate Enforcement has relieved the liquidator of this obligation[7]. Ibec is of the view that, if properly utilised, this provision together with the provisions of section 682 of the Companies Act 2014 can work to ensure

[6] S, 682 Companies Act 2014
[7] S. 683 Companies Act 2014

that the conduct of directors in liquidations such as the Clery's liquidation is vigorously and thoroughly investigated and, where seen to be dishonest or irresponsible, lead to the restriction of relevant directors.

Clearly, the employees of Clery's and their representatives feel very aggrieved at the manner in which the closure of the business was managed and at their treatment around that time. It would be useful to know what steps were taken to have the employer called to account for the steps taken immediately prior to the winding up of the company under these existing arrangements before recommending any change in the law.

3. **Whether there are changes to employment rights or company legislation which should be considered, including powers to set aside transfers of assets and time periods for same**

With regard to whether changes to employment rights or company legislation would be appropriate at this time, we have expressed the view that no change to existing employment rights legislation is warranted at this point in time for reasons set out in answer to question one above. Ibec is of the view that employment law should not be a vehicle to address poor corporate behaviour. That is a matter for company law. To operate otherwise runs the risk of exposing responsible and compliant employers to a suite of burdensome measures which go beyond what is reasonable when a remedy may a lie or should lie in company law.

As stated above, it would be preferable to have sight of the liquidator's report before forming a final view on whether changes to company law is warranted. The absence of key information leads us to believe that concluding a review is premature in the absence of this information. Recent media reports have highlighted[8] some of key questions which remain to be answered. These include the reallocation of approximately €1 million of insurance proceeds from the flood that damaged Clery's premises from OCS Operations to OCS Properties (the solvent property limb of the business) the night before the property business was sold to Natrium and the fact that the trading company was sold "as a going concern" which had the financial support from its parent company and yet was liquidated hours later. Ibec would hope that the liquidators' report might address some of these questions. Ibec will be further interested to read the liquidators' views on the extent to which the directors complied with their fiduciary duty to have regard to employees' interests[9]. Furthermore, we note that the Office of the Director of Corporate Enforcement has been called upon to investigate the full circumstances of the Clery's closure. The outcome of that investigation should inform any review as to whether there are deficiencies in employment or company law which need to be addressed.

[8] Irish Times 5th January 2016 "Closure of Clerys: the unanswered questions"
[9] As per s. 224 Companies Act 2014

Indeed, we note that the terms of reference of the review make specific reference to the fact that "legal provisions in relation to the lifting of the corporate veil have neither been applied nor tested in these cases". Ibec's proposal is to suggest that before any action is taken to amend either employment rights or company legislation, steps should be taken to fully test the provisions already in place which may be of assistance. If frailties are identified within those provisions a review should be undertaken at that stage to assess what, if any, steps should be taken to amend the law in this area to make it fit for purpose.

Elevation of ex-gratia payments to statutory status

Ibec respectfully submits that amending the law to allow for ex-gratia payments to be included in the suite of statutory entitlements available to employees from the Social Insurance Fund would be a disproportionate and misguided response to the Clery's situation.

In the first instance, Ibec notes that the statutory redundancy entitlements in Ireland are already more favourable than those of our nearest neighbour and competitor, the United Kingdom. Eligible employees in Ireland are entitled to a statutory redundancy payment of two weeks' pay per year of service plus a bonus week. Eligible employees in the UK, on the other hand, are entitled to half a week's pay per year of service under 22, one week's pay per year of service between ages 22 and 40 and one a half week's pay per year of service for ages 41 and over. A week's pay is currently capped at £475 in the UK which, even allowing for current exchange rates, is lower than the €600 cap in Ireland. While there is no maximum statutory redundancy payment in Ireland, the UK imposes a maximum statutory redundancy payment of £14,250 sterling.

Providing for ex-gratia payments to be included in the suite of statutory redundancy entitlements available to employees would create two tiers of redundant employees;

(1) employees made redundant because of reasons unconnected with an employer's insolvency and who would only be statutorily entitled to statutory redundancy payments; and

(2) employees made redundant because of an employer's insolvency and who would be entitled to additional ex-gratia payments on top of their statutory redundancy entitlement.

To Ibec, creating such a two tiered classification of employees seems illogical and grossly unfair.

Furthermore, Ibec is concerned that taking this action would serve to encourage rogue employers to make gratuitous promises to employees, in the knowledge that

they may never be called upon to make good those promises. Rather the taxpayer would have to foot an additional and, potentially excessive, bill for the actions of such non-compliant employers.

Ibec notes the payments already available to employees out of the Insolvency Payments Scheme and the Redundancy Payments Scheme. Ibec understands that employees can suffer delays in receiving payments from these schemes, although we acknowledge that the Department of Social Protection expedited such payments to the former Clery's employees. Ibec is of the view that, rather than placing an additional and excessive burden on an already stretched Exchequer, resources would be better used to

(1) require timely submission by liquidators of claims for payments from the Social Insurance Fund and

(2) ensure efficient administration of such claims.

4. What solution/framework of measures is required?

The manner in which the collective redundancies in Clery's were managed and communicated to employees caused considerable distress. Ibec notes that ultimately, the former Clery's workers received their full statutory entitlements from the Social Insurance Fund. The legislature has identified these basic entitlements as those which employees should have recourse to in the event of their employer's insolvency and it is Ibec's view that they represent an appropriate level of protection for employees in the event of insolvency. It is worth remembering that in other cases where companies effect redundancies in financially straitened circumstances, many employees have access to a statutory payment only. The Clerys' employees are by no means unusual in that respect.

It appears that their legal entitlements have been provided to them, but what remains is the manner in which they were treated at the time. Where does the best remedy lie for lack of consultation and the disrespect with which they feel they were treated? Ibec submits that is not, as outlined above, in a meaningless consultation period which will serve only to increase the cost to the State. Ibec considers that any change to employment rights legislation would be of little relevance here. It would serve only to create an additional heavy administrative and cost burden to the many compliant and responsible employers who regrettably have to implement redundancies from time to time. It would also make Ireland a less attractive place in which to do business.

However, where unnecessary distress is caused to employees, who are in the unfortunate position of being made redundant, or where assets of a business are placed out of their and other creditors' reach, it would appear reasonable to have

access to measures to examine the circumstances leading to the actions taken and remedies made available as appropriate. It appears to Ibec that such measures already exist, particularly in the newly reformed Companies Act [10]which may be of assistance in this regard. These measures should be properly assessed before any other solution or framework is considered.

Conclusion

In a review such as this, regard should be had to the legal maxim that "hard cases make bad law". While not exclusively so, extreme cases, particularly where moral indignation is provoked, can often prove to be a poor basis for a general law that would impact a wide range of less extreme cases. Therefore, any recommendations which result from this review must be subjected to a vigorous assessment of their potential economic and social costs as well as any potential unintended consequences. Existing provisions should be fully explored and tested to establish whether remedies for the acts complained of already exist. In particular, Ibec would respectfully request that Mr Duffy and Ms Cahill ensure that any recommendations which result from this review do not have a wider impact than is intended, or indeed necessary. Ibec would like to reiterate that any review of employment and company law should be concluded only after the report of the Director of Corporate Enforcement has been made available.

END

[10] S.599, S. 682 and S.683 of the Companies Act 2014