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Cahill-Duffy examination and review of laws on the protection of employee interests when assets are separated from the operating entity

Dear Mr Grehan,

As Labour Party Spokesman on Labour Affairs and Workers Rights, I make this submission on behalf of the Party, as our response to the proposals in the Cahill-Duffy report.

My then colleague Minister Bruton and I commissioned this report so as to ensure that limited liability and corporate restructuring could not again be used to avoid a company's obligations to its employees. The examination was to look specifically at situations where assets of significant value are separated from the operating entity.

The move to commission this report was inspired by the overnight closure of Clerys, in a manner which I believe scandalised the nation. Hundreds of dedicated and loyal workers were left on the street, treated as collateral damage in a multi-million euro corporate power play.

The principal disquiet arises from the fact that the insolvency was preceded by a company restructuring which involved a separation of the trading business that employed the staff from its major asset, the Clerys building.

When the operating company was declared insolvent and put into liquidation, the employees lost their employment without notice or consultation and without payment of their statutory entitlements.

It is important to bear in mind that the employees were not out of pocket as regards statutory entitlements, since the State became obliged to pay all sums due to the company's employees. It is the Department of Social Protection that bears this loss.

However, employees in such a situation do lose the possibility of negotiating an enhanced redundancy package going beyond the statutory minimum.

The expert report provides a comprehensive analysis of the relevant provisions of employment law. It makes a number of proposals for reform.

This report recommends that the opportunity should exist for employees to be consulted before any collective redundancies can take effect – regardless of whether the firm is insolvent or not. It also proposes that the law should include an obligation to inform employees of proposals on the restructuring of a company that could result in collective redundancies when, for example, the sale of a significant asset is being considered.

We support the proposals for reform set out in the report and believe them to be both appropriate and proportionate.

But we believe they form part of a suite of actions the Government should now undertake. In Government Richard Bruton and I took several steps to bring about changes to better protect workers caught up in Clerys type situations.

First, in July last year I published a report on the sale and liquidation of Clerys. Specifically, the report outlined Companies Act provisions relevant to the powers of the courts to ensure that all assets that ought properly to be available to the creditors of a company are clawed back for their benefit.

The as yet untested s. 599 of the 2014 Act featured in the analysis. My cautiously drafted report concluded that –

> "Given the status that the Minister for Social Protection will acquire as a preferred creditor in the winding up, she and her advisers will no doubt subject the transactions involved and the proceedings as they unfold to careful scrutiny. She will be armed with legal advice as to both the facts and to their potential legal implications for her as Minister and for the taxpayer.
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> "The extent to which the various rules of company law to which I have referred in this report will be relevant to the Clerys liquidation will be only be known when the liquidators explore the corporate structure and recent activities of the company. It will be for the liquidators and/or any creditor to make their case in due course, when the facts become better established.
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> "In general terms, I can report that the law does make remedies potentially available where the use of a corporate group structure results in profits and assets being kept in one company while losses accumulate in another, and the insolvent loss-making entity is then liquidated.
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> "However, it is too early in the process to judge whether those legal provisions will have any relevance in this liquidation. We do not yet know, therefore, whether rules enacted by us as legislators to achieve a certain outcome in certain cases will in fact be tested in this case.
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> "My provisional opinion, at this preliminary stage, is that we have as yet no reason to believe that the measures I have listed are inadequate to ensure the intended policy outcome: to ensure, in other words, that all the assets that should properly be available to the liquidators of a company can be recovered by them.

> "If it emerges that this is not so, then clearly the scope and impact of these important provisions will need to be reviewed."

Subsequent to that report, the Minister for Social Protection had a Departmental representative appointed to the liquidators' committee. The hope was that the information acquired would assist in arriving at a conclusion as to whether to pursue any of these Companies Act remedies.

Cahill-Duffy does not propose any amendments to company law. Instead they state their opinion that existing company law provisions provide "substantial weaponry that could be used against directors and related companies to redress the effects of, and deter, harmful transactions" but these provisions are only of weight "if they are employed and seen to be employed".

The authors say in paragraph 13.2 that, by contrast with applicable employment legislation, the provisions of the Companies Acts that are already available "do not appear to be in need of amendment, but more in need of use".

> "It is striking that many of the provisions of the Companies Act which may be of assistance are not frequently invoked (such as section 608) or are not invoked at all (such as section 599). The reason for this appears to relate to the costs and risks associated with such applications, rather than the formulation of the provisions themselves."

These comments seem apt. We have Companies Act provisions which may be appropriate to dealing with this situation but we do not know whether they work or not, because we have never attempted to work them.

In this case the Minister for Social Protection has standing as a creditor to take a case and test the law. Ultimately, it is only through litigation that we will find out how effective s. 599 and other provisions of the Companies Act actually are.

Second, contravention of the Protection of Employment Acts 1977-2007 is an offence punishable on summary conviction with a fine of €5,000. There is a 12 month time limit on prosecutions, which are brought in the name of the Minister.

While the steps taken before the Clerys liquidation were designed to separate the company in liquidation from the rest of the group, there are questions as to how effective at a technical level this was. Authorised officers under the 1977 Act were appointed to assemble detailed information, so as to piece together the exact chain of events and the state of knowledge of the actors at each stage.

I am aware that a High Court challenge has been brought against these officers. Having regard to the 12 month deadline, it may be that a prosecution would not be feasible, regardless of the outcome of those proceedings.

A prosecution might have clarified the exact requirements of the 1977 Act, the details of which are obscure and complicated. If a court decision does not bring clarity to the matter, then it should be clarified by amending legislation.

Third, at the same time, the Department should I believe also take the necessary steps to make sure that a successful prosecution and conviction for contravention of the 1977 Act operates to disqualify persons from serving as company directors.

In conclusion, I believe our priority must be to ensure that a situation like Clerys cannot happen again. And, if the law is tested and proves to be ineffective, then it must be corrected.

Yours sincerely,

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Senator Ged Nash
Labour Party Spokesman on Labour Affairs and Workers Rights