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# The sale and liquidation of Clerys

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A report to  
Government

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Ged Nash TD  
Minister for Business  
and Employment

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## Letter to Taoiseach and Tánaiste

Enda Kenny TD  
Taoiseach,  
Joan Burton TD  
Tánaiste,  
Government Buildings,  
Dublin 2.

6<sup>th</sup> July 2015

### **Sale and liquidation of Clerys Department Store**

Dear Taoiseach and Tánaiste,

I was asked to report to the Government on the issues surrounding the sale and subsequent liquidation of Clerys, with particular emphasis on the suitability and efficiency of the relevant legislation.

The Clerys closure is something about which you have both expressed strong views, having described as “absolutely despicable” and “insensitive and appalling” the treatment of workers at the store who lost their jobs on the 12<sup>th</sup> June. Your comments in this regard reflect widespread public concern as to the manner in which Clerys was closed and as to how those whose livelihoods depended on the business were treated. Obviously, I share that concern. Equally obviously, the Government is concerned to obtain an early understanding of the sequence of events which has given rise to this controversy, and of those provisions of the law that may be relevant to it. Clearly, if the law does not provide an adequate response to situations such as this, we need to consider changing it.

The information I have gathered here is intended to provide the basis for an initial, and necessarily preliminary, review of these matters. What I have therefore provided is an outline of the issues that arise. To do this, I have gathered together the facts as presently understood and known. I have also described the response of various State Agencies to the events as they have unfolded. I believe it is important that the Government understand the legal provisions that may be relevant to those who claim they have suffered loss as a result of the liquidation of Clerys, and I have therefore identified and summarised the applicable statute law.

I am anxious to emphasise that it is not the purpose of this report to arrive at any conclusions of fact. The report refers to matters of fact as they appear from publicly available information and other documentation available to me, in particular the papers submitted to the High Court in connection with the winding up application. All these matters are subject to further investigation.

I am also conscious that the liquidators, the concessionaires, the workers and possibly affected Departments of State will have cause to consider and take legal advice on

remedies that may be available to them and that the liquidation of this company may take some time to conclude. Nothing I say here, at this very preliminary stage, should be interpreted as concluding that any particular legal remedy is available to any particular person, or against any particular party.

My concern is to ensure that the Government understands what happened based upon the information presently to hand, and understands also the relevant laws in place to protect employees and creditors and to recover corporate assets in the course of a liquidation.

When commenting on the provisions of company law that I have highlighted, I am interpreting what I believe was the policy intention of the Oireachtas in enacting them. Whether these provisions prove to be relevant in this case will of course be a matter for further and detailed legal consideration. Naturally, I believe that, if the law is tested and proves to be ineffective, then it must be corrected.

I do not, however, at this stage express the view that there are deficiencies in the legislative framework. But it is important that the issues arising in the course of this liquidation are kept under review and are considered by the appropriate bodies, if the law does prove wanting in any respect.

Finally, the report has been prepared without the benefit of consultation with, or the views of, the present or former owners of the business, or the directors of the trading company. It is possible that, with the benefit of the views of such persons, a different view of facts to which I refer would emerge. I hope that they will in early course make publicly known their position on the issues that have given rise to such concern. In that connection, I am publishing with this report my correspondence with the purchasers of the OCS Group, Natrium Ltd.

I hope that this report may prove useful to my colleagues.

Yours sincerely,



Ged Nash TD  
Minister for Business and Employment

## Events leading to the closing of Clerys

### Background

Clerys department store on O'Connell Street in Dublin has a history that goes back to 1853. The current building dates from 1922, the original having been destroyed in the 1916 Easter Rising. It stands at the heart of the main street of our nation's capital city. Clerys is a focal point, Clerys' clock a rendezvous.

The firm has had its trading difficulties over the years. It originally opened as 'The New or Palatial Mart', one of the world's first purpose-built department stores. In 1883 the business was taken over and renamed by MJ Clery. In 1941 the firm was bought, out of receivership, by Denis Guiney. His widow Mary Guiney continued to chair the firm until her death in August 2004, at 103 years of age.

Until 2012, the owners and operators were Clery & Co (1941) plc, Denis Guiney Ltd and Ytterbium Ltd. They also owned Guineys of Talbot Street and Denis Guiney Furnishings, which operated Clerys Home Furnishing stores in Leopardstown and Naas.

In 2012 the company was again put into receivership, by Bank of Ireland. The business had been struggling in recent years, with severely depressed consumer spending and the need to restructure its debts. During receivership it continued to operate business as usual, with most staff unaffected by the move, although the smaller stores were closed. The aim was to sell Clerys as a going concern.

### Gordon Brothers and the OCS Group

In September of that year, Clerys was bought from receivership by Gordon Brothers. The Gordon Brothers Group is described as an advisory, lending and investment firm, with offices worldwide. The parent company is Gordon Brothers Group LLC, incorporated in the State of Delaware and having its registered office and headquarters in Boston, Massachusetts.

Gordon Brothers Europe is the trading name of Gordon Brothers International LLC, which is a wholly owned, UK-incorporated, subsidiary of the US firm. Gordon Brothers Europe describes itself as providing asset valuation and due diligence services, as well as restructuring and disposition solutions, supported with capital, to the retail, wholesale, commercial and industrial brand and property sectors. In the UK the company has been involved with the liquidation, property closures and stock clearances of many high street names.

Gordon Brothers had that August set up a new company structure, the OCS Group, seemingly for the purpose of acquiring Clerys. A holding company, OCS Investment Holdings Ltd, was incorporated on the 15<sup>th</sup> August 2012 and two fully-owned subsidiaries, a trading company, OCS Operations Ltd, and a property owning company, OCS Properties Ltd, were incorporated on the 16<sup>th</sup> August 2012. The three companies each had the same two individuals as their directors.

To complete the picture, the holding company was in turn wholly owned by Gordon Brothers International LLC, the UK firm, while the ultimate parent company was the US firm Gordon Brothers Group LLC.

The winding up petition presented to the High Court on the 12<sup>th</sup> June 2015 provides more details. It discloses that, when the OCS Group bought Clerys, the trading company acquired the assets of the business, including its employees, intellectual property and goodwill but not including the title to the store. The property company acquired the building. The ownership of the building was thus separated from the trading arm of the business. At the time of preparing this report, I have no information as to why this was done, nor is there a clear picture available as to how the ownership of the building and trading operations had been treated prior to the purchase.

The trading company then entered into a 2 year letting agreement with the property company. The 2 year period was extended subsequently but the lease in fact expired on the 16<sup>th</sup> March this year. It does not appear that any attempt was made to extend that lease.

The trading company – the entity that has gone into liquidation – thus proceeded from around September 2012 to carry on the Clerys business, but now as a tenant of the O’Connell Street premises, paying rent to the property company. Its income was generated from sales of its own stock and also from around 50 concession holders, who paid Clerys a percentage of their turnover. The trading company employed around 130 staff and the concession holders had about 330 direct employees.

Clerys’ own staff had transferred to become employees of the trading company with their terms and conditions of employment intact, in keeping with the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003.

Accounts filed in 2014 were prepared by the directors on a going concern basis, as financing facilities provided by its parent company were not required to be repaid until September 2016. The accounts recorded that: “[t]his should enable the company to meet its debts as they fall due”.

The following year’s financial statements were prepared up to the 31<sup>st</sup> January 2015. According to the winding up petition and accompanying affidavit, Gordon Brothers had decided to sell the OCS Group in that month and had retained IBI Corporate Finance to sound out potentially interested parties.

The directors’ report accompanying the financial statements refers to this. Under the heading “Going Concern”, it was again stated that financing facilities from the parent company were not required to be repaid until September 2016. It was further stated that Gordon Brothers had “undertaken a strategic review” of the holding company, the trading company’s parent, and that “[t]his review has delivered a number of expressions of interest in the business as a going concern and it is anticipated that 100% of the shares in OCS Investment Holding Ltd will be sold on this basis. Consequently, the directors consider it appropriate to prepare the company’s financial statements on a going concern basis.”

However, the auditors Grant Thornton gave a qualified opinion in relation to this report. They explained that –

“The audit evidence available to us was limited because the present directors are not in a position to provide visibility as to the continued financing arrangements of the company by prospective purchasers, which is needed for the assessment of the appropriateness of the going concern basis of preparation of the financial statements. Consequently we are unable to take adequate steps to satisfy ourselves that it is appropriate to adopt the going concern basis.”<sup>1</sup>

These financial statements were signed off by the directors and auditors on the 11<sup>th</sup> June, the eve of sale. The winning bid had been made by Natrium Ltd, a joint venture between D2 Private and funds managed by Cheyne Capital Management (UK) LLP. According to its press statement of the 19<sup>th</sup> June 2015, Natrium was established to invest in a range of real estate projects in Dublin and specifically Dublin City Centre. It also states that the acquisition of the Clerys property and adjacent properties is understood to be its first development project.

### Friday the 12<sup>th</sup> June

A number of transactions took place on Friday the 12<sup>th</sup> June 2015, apparently in rapid succession. These steps involved the appointment of new directors of the trading company, which employed the Clerys’ staff. Those new directors were a Mr Brendan Cooney and a Mr Jim Brydie. And, as outlined below, Mr Brydie in return for a payment by him of a sum of €1, acquired the issuedshare of the trading company.

Mr Brydie and Mr. Cooney are insolvency specialists. They were not involved with regard to the sale of the OCS Group and were not part of the negotiations leading to that sale.<sup>2</sup> However, they were approached by Natrium and asked to accept an appointment as directors to the board of the trading company.<sup>3</sup> They were aware that Natrium intended to acquire the OCS Group and to shortly thereafter sell on the shares of the trading company to Mr. Brydie.<sup>4</sup> Upon being asked to accept appointments as directors, Mr. Brydie and Mr. Cooney carried out certain due diligence on the company and sought information on Natrium’s proposed acquisition of OIHL prior to appointment.<sup>5</sup> In particular, and as part of this due diligence exercise, they examined the company’s financial position based on its accounts and the company’s entitlement under the lease.<sup>6</sup>

My understanding of the steps that occurred on Friday June 12<sup>th</sup> 2015 is solely based on the information presented to the High Court in connection with the application to appoint a provisional liquidator over the trading company. According to Mr Brydie’s affidavit, the sequence of events was as follows.

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<sup>1</sup> Exhibit JB7 to affidavit of Jim Brydie sworn on 12<sup>th</sup> June 2015 to ground the petition to wind up OCS Operations Ltd.

<sup>2</sup> Affidavit of Jim Brydie, para 23.

<sup>3</sup> Affidavit of Jim Brydie, para 23.

<sup>4</sup> Affidavit of Jim Brydie, para 23.

<sup>5</sup> Affidavit of Jim Brydie, para 26.

<sup>6</sup> Affidavit of Jim Brydie, para 26.

1. Natrium bought the holding company from Gordon Brothers, by acquiring its shares. Natrium thereby became full owners of the OCS Group, including its two subsidiaries. This occurred on the 12<sup>th</sup> June 2015.<sup>7</sup>
2. The directors of the trading company then resigned and Mr Cooney and Mr Brydie were immediately appointed as its new directors. Mr. Brydie avers that he was appointed ‘on’ the sale of the OCS Group to Natrium.<sup>8</sup> I understand by this is meant that the directors were appointed contemporaneously with or immediately after the sale. According to Mr Brydie’s affidavit, Mr Brydie and Mr Cooney were appointed at 1:15 a.m. on the morning of Friday the 12<sup>th</sup> June<sup>9</sup>. It thus appears to follow that the sale of the holding company occurred at some point between midnight and 1.15 am on that day.
3. The holding company transferred the shares in the trading company to Mr Brydie, one of these two new directors. This occurred ‘*shortly after Natrium’s acquisition*’ of the holding company.<sup>10</sup> It seems to be suggested in the affidavit that it was also after Mr. Brydie had been appointed as a director of the trading company.<sup>11</sup> The affidavit explains that: “*In order to remove the [trading company] from the OCS Group, Natrium wished to ensure that the shares in the company were transferred to an entirely distinct and separate entity and it was on this basis that Mr Brydie was asked to accept the transfer of the shares in the company for the sum of €1*”.<sup>12</sup> The reason that Natrium was so anxious to ensure that the shares in the trading company were transferred to a distinct and separate entity, so soon after acquiring the holding company, is not recorded in the affidavit.
4. The affidavit suggests that following their appointment at 1.15 am , but before the preparation of the affidavit presented to the High Court that afternoon, Mr. Brydie and Mr. Cooney (the former of whom, I should restate has averred that he and Mr. Cooney undertook ‘certain due diligence’ on the trading company before their appointment) did the following :
  - i. they met with the company’s existing management to discuss the company’s financial situation, the employees and the prospects of its survival;<sup>13</sup>
  - ii. they reviewed the company’s financial statements for the periods ending the 1<sup>st</sup> February 2014 and 31<sup>st</sup> January 2015, pro forma management accounts and management future projections;<sup>14</sup>
  - iii. they determined that the company was balance sheet insolvent, decided that the company would have a cash flow deficiency in August of 2015 and would require further additional funding in order to continue to trade;<sup>15</sup>

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<sup>7</sup> Affidavit of Jim Brydie, para 21.

<sup>8</sup> Affidavit of Jim Brydie, para 22.

<sup>9</sup> Affidavit of Jim Brydie, para. 25.

<sup>10</sup> Affidavit of Jim Brydie, para 21.

<sup>11</sup> Affidavit of Jim Brydie, para 21.

<sup>12</sup> Affidavit of Jim Brydie, para 24.

<sup>13</sup> Affidavit of Jim Brydie, para 27.

<sup>14</sup> Affidavit of Jim Brydie, para 27.

<sup>15</sup> Affidavit of Jim Brydie, para 29.



- iv. they were advised that there was an upcoming payment to concession holders due to be paid on the 15<sup>th</sup> June 2015 and that there were insufficient funds to enable the company to effect these payments but that in the past such shortfalls would have been covered by the company's parent, OCS Investment Holdings Ltd;<sup>16</sup>
- v. the two directors discussed the company's need for additional funding and considered whether the holding company might advance further monies;<sup>17</sup>
- vi. they were (presumably following that conversation between themselves) provided with a letter from the holding company confirming unequivocally that it was no longer in a position to provide any further financial support to the company;<sup>18</sup>
- vii. they considered the company's entitlement to occupy the department store;<sup>19</sup>
- viii. it seems that, although no request had been made by the property company that it vacate the premises, the directors decided to write that day to the property company seeking confirmation that they would get a new lease, and they did so write.<sup>20</sup>
- ix. However, they got an immediate reply to their letter, informing them that they would not get a new lease and that, if necessary, a notice to quit the premises would be served on them.<sup>21</sup>
- x. At some point following these actions, Mr. Brydie signed a resolution noting the unanimous recommendation of the directors of the company that in view of its insolvency, the company should be wound up by the Court.<sup>22</sup>

The affidavit presented to the High Court does not state over what time period these various steps occurred. Nor does it state which, if any, of these steps had been planned in advance.

- 5. The petition for the appointment of a provisional liquidator was brought before the court on the afternoon of Friday the 12<sup>th</sup> June. The application was successful.
- 6. At about 5.30pm on the 12<sup>th</sup> June, the workforce were informed that the store would that evening close for good and that they would be immediately laid off. Some 134 Clerys staff were directly affected, while some 330 workers employed by the 50 concession outlets face uncertain futures. The concession workers were due to be given their monthly payments on Monday the 15<sup>th</sup> June, the next business day. These monies are not yet available to them.

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<sup>16</sup> Affidavit of Jim Brydie, para 29.

<sup>17</sup> Affidavit of Jim Brydie, para 30.

<sup>18</sup> Affidavit of Jim Brydie, para 30.

<sup>19</sup> Affidavit of Jim Brydie, para 31.

<sup>20</sup> Affidavit of Jim Brydie, para 32.

<sup>21</sup> Affidavit of Jim Brydie, para 32.

<sup>22</sup> Exhibit JB10 to the Affidavit of Mr. Brydie.

## Events Since

There has been no engagement between Natrium and the workforce or their unions since the closure. I have subsequently met with some of the affected workers and have kept in close contact with their unions, SIPTU and Mandate. I called on the new owners to engage with the staff and their representatives and to outline their plans for the business and this landmark site.

In a statement of the 19<sup>th</sup> June, Natrium said that, while it was conscious that the ‘necessary’ closure of the department store had had a very serious impact on the former employees: “We are advised that all issues with respect to the liquidation of the operating company are legally a matter for the court-appointed liquidator”.

A letter to me of the same date from Ms Deirdre Foley, for and on behalf of Natrium, says: “In the meantime, we can confirm that we will continue to continue to co-operate fully with the Joint Provisional liquidators of OCS Operations Ltd in relation to any information or queries they may have”.

A subsequent letter of the 3<sup>rd</sup> July repeats these points, regrets that Natrium representatives would not be available to meet me until the 13<sup>th</sup> July – which is outside the timeline for my finalising and furnishing this report – and asked me to note in my report that “we offered to meet with you in your report to discuss the future redevelopment of the properties and the creation of a substantial number of sustainable jobs”.

I had met the provisional liquidators, Eamonn Richardson and Kieran Wallace of KPMG, on the previous Tuesday the 16<sup>th</sup> June. They told me that at that stage they had had no engagement with either the previous owners, Gordon Brothers, or the new owners of the OCS Group, Natrium.

The liquidators had, however, met with union representatives. They confirmed to me that the employees would get only basic statutory redundancy, there being no funding available for any additional ex-gratia redundancy payments. The liquidators’ first priority was to ensure that all staff received their P45 forms, so as to facilitate social welfare claims. I understand that all P45s were issued by the 18<sup>th</sup> June. Each former employee is to be met individually by one of the liquidators’ 10-strong team to assist them with their individual claims.

By the morning of the 15<sup>th</sup> June, NERA call centre staff were briefed on the issue by management and were prepared for any calls coming through. The Department worked closely with the Department of Social Protection, providing advice and assistance to affected workers. The Department of Social Protection assembled a team of people to meet with and advise the workers in relation to entitlements to jobseekers payments, secondary payments such as rent supplement and future options in relation to alternative employment, training and education. Arrangements were made for Social Protection staff and staff of the National Employment Rights Authority to meet with workers. The Department of Social Protection informed its network of local offices in the greater Dublin area of these developments to ensure that claims from affected workers are processed in a speedy and sensitive manner. The Department of Social Protection will deal promptly with individual applications submitted in respect of the Insolvency Protection Scheme by the liquidator.

Officials from the Department of Social Protection have worked closely with the liquidator and staff to make sure that payments are expedited and processed. And officials from the National Employment Rights Authority are also working with the Department of Social Protection, to provide advice and assistance to affected workers.

### Claims of concession holders

The particular difficulties faced by the concession holders as a result of the liquidation deserve consideration. As I mentioned earlier, I met representatives of the concession holders on the 17<sup>th</sup> June. They confirmed to me that the practice in Clerys was that the trading company collected cash and other payments from customers throughout the store and then, each month, paid the concession holders the takings it had collected on their behalf, minus its own commission. Payments to concession holders were due to be made on Monday the 15<sup>th</sup> June.

The immediate consequence of the closure of the store was that these concession holders had no access to their own stock, which remained on the premises. I understand that this immediate issue was resolved with the liquidators relatively smoothly, since the assets in question did not belong to the trading company and so do not form part of the liquidation process.

On the separate question of their entitlement to their takings for the previous month, the concession holders have engaged legal representation and are in communication with the liquidators. The liquidators confirmed to the High Court today (6<sup>th</sup> July) that it was their intention to investigate fully the issues raised by the concessionaires. They confirmed that a number of the concession agreements contained clauses which provided that the concessionaire's net trading receipts would be held 'on trust' by the trading company pending remittance of these funds to the concessionaire. The liquidators have reviewed all the concession agreements and identified those that included this wording. The trading company operated one bank account into which all trading receipts were lodged, including both company receipts and concessionaire receipts, and for which all payments were made. The liquidators are taking legal advice on this question of a trust claim by some concessionaires in respect of trade receipts, which may be traceable into the bank account. They informed the High Court it was likely to be necessary to apply to court for directions in respect of these claims.

Clearly, it will fall to the liquidators, under High Court supervision, to consider the claims being advanced on behalf of the concession holders and then to deal with those claims in accordance with the rules governing distributions in a winding up. Until we have all the relevant facts, it would be pointless to express an opinion on these issues.

The directors had recorded in the financial statements that the trading company was a going concern – it could pay its debts as they fell due – because of the financing facilities provided by its parent. The liquidators will no doubt seek to establish whether or when the directors appreciated that such financial support could no longer be relied upon. It may also be necessary for the liquidators to examine closely the question whether any significance should attach to the timing of the sale and winding up application – one working day before significant payments to the concession holders fell due.

## Relevant issues

It cannot be disputed that the sequence of events I have outlined presents, from the perspective of Clerys' employees and their families, and from that of the concessionaries, their employees and their families, a personal disaster. It may well be that those involved have an explanation for the manner in which the closure of the store was executed and in which those dependent upon Clerys for their livelihoods were advised of that fact. It appears that the affair was, to say the very least, handled in a grossly insensitive manner which showed scant respect for those so adversely affected by this course of action.

Concerns have been publicly expressed that this occurred in the context of a '*property play*' and that, while the insolvency of the trading company leaves many suffering significant financial loss, a valuable asset has been seemingly decoupled from the trading company depriving creditors of recourse. Whether this proves to be the case depends on a range of facts which – if the issue arises – are properly addressed by judicial determination or appropriate inquiry.

However, it is important to consider both the level of protection provided by our laws to workers in these scenarios and to address whether the law provides remedies that are generally adequate to ensure that assets that ought properly to be available for creditors are in fact so available. As I have already made clear, in identifying these provisions I am not addressing the particular question whether specific parties may have valid legal claims against any specific person or entity.

## Worker protection

### Statutory payments

The legislation in this area is concerned with ensuring minimum rights, underwritten by the Exchequer, while allowing the parties to agree more substantial or enhanced terms. There can, however, be no such agreement if the employer is insolvent and so cannot fund any additional payments.

First, where jobs are lost due to the closure of a business, the Redundancy Payments Acts 1967–2012 provide a statutory minimum entitlement to redundancy payments for employees who have a set period of service with that employer. Statutory redundancy is a lump-sum payment, based on the pay of the employee.

Any employee aged 16 or over with 104 weeks' continuous service with an employer is entitled to a statutory redundancy payment of two week's gross pay per year of service up to a ceiling of €600 per week plus one week's pay, also subject to the ceiling of €600. This payment is tax-free.

Pay refers to current normal weekly pay, including average regular overtime and benefits-in-kind, but before tax and PRSI deductions, that is gross pay.

Second, the Minimum Notice and Terms of Employment Act 1973 requires employers to give notice of termination, or otherwise to pay employees in lieu of notice.

Third, outstanding wages, holiday pay, commission and bonuses are protected by the Payment of Wages Act 1991.

In the first instance it is up to the employer to pay statutory redundancy. In this case, it falls to the liquidator to seek, on behalf of workers, payment from the Redundancy Payments Scheme in respect of statutory redundancy.

As regards the other outstanding entitlements, legislation provides for the payments of these by the Department of Social Protection in the event of employer insolvency. Under the Protection of Employees (Employers' Insolvency) Acts 1984–2012, subject to certain limits and conditions (including statutory time limits), money due to employees is paid by the Department of Social Protection in a range of situations, including arrears of pay, holiday and sick pay and any entitlements under the minimum notice and terms of employment, employment equality and unfair dismissals legislation.

Again, employees make their claims via the liquidator for payment of outstanding entitlements. Disputes regarding most entitlements under the Acts may be referred to the Employment Appeals Tribunal.

In relation to Clerys, as I have noted earlier, the Department of Social Protection has assembled a team of people to meet with and advise the workers in relation to their entitlements. This also includes advice about jobseeker payments, secondary payments such as rent supplement, as well as future options in relation to alternative employment, training and education.

I understand that individual meetings are being held between the liquidator and workers to determine, on an individual basis, the extent of their entitlements. And I believe the Department of Social Protection is capable of dealing promptly with individual applications submitted by the liquidator.

The situation regarding the staff employed by the concession stores is somewhat different. I have met with representatives from the 50 concessions. Many of those concessions have other outlets, and it may be the case, for example, that staff can be redeployed to other locations. I and my Department will be maintaining close contact with the concession store representatives.

I believe both Departments, NERA and the liquidators are cooperating with each other and with the workforce so as to provide smooth, efficient and humane assistance to individuals who are seeking to secure statutory entitlements at a time of sudden and unexpected need.

#### **Collective redundancies procedure**

A redundancy occurs where any individual loses his or her job, due to circumstances ranging from the closure of a business to a purely internal re-organisation. A collective redundancy, on the other hand, arises where the employees being made redundant amount in number to at least:

- 5 employees where 21-49 are employed
- 10 employees where 50-99 are employed

- 10% of the employees where 100-299 are employed
- 30 employees where 300 or more are employed.

Under the Protection of Employment Acts 1977-2007, an employer who is contemplating a collective redundancy is obliged to enter into consultations, with a view to agreement with staff representatives. These consultations must take place at the earliest opportunity and at least 30 days before notice of redundancy is given. The aim of the consultation is to consider whether there are any alternatives to the redundancies.

The employer must inform staff representatives in writing as to:

- the reasons for the redundancy
- the number and descriptions of the employees affected
- the number and descriptions of employees normally employed
- the period in which the redundancies will happen
- the criteria for selection of employees for redundancy
- the method of calculating any redundancy payment.

The employer is also obliged to inform my Department in writing of the proposed redundancies at least 30 days before the occurrence of the first redundancy.

It has been suggested by employee representatives that the 30 day notice requirement of the Protection of Employment Act 1977 should apply to all collective redundancies, including in circumstances such as the Clerys closure, and that a failure to observe the notice period should void the redundancies and should also result in the company directors being disqualified under company law for a minimum of 5 years.

This proposal requires careful consideration in terms of its practical implications for workers, for employers, liquidators and for the State. At present, certain provisions of the Act of 1977 are expressly stated not to apply to employees in a firm whose business is being terminated in winding-up proceedings. Specifically, the provisions under section 14 (1) and (2), which make it an offence for collective redundancies to be effected before the expiry of the 30 day notice period, do not apply. This disapplication gives effect to Article 4 (4) of Council Directive 98/59/EC on the approximation of the laws of Member States relating to collective redundancies.

It is obvious, in the particular circumstances of the present case, why it was necessary to provide for such disapplication. Where an insolvent firm goes into liquidation, it can no longer trade. It can no longer accrue debts that it is in no position to discharge. It would be difficult to keep staff on books and expect them to work, merely to serve out a 30 day notice period, where the employer has no resources to pay those staff, and it would not appear to be in the interests of the staff themselves.

In addition, section 12 (4) of the Act of 1977 provides that the requirement on the employer to notify the Minister of the proposed collective redundancies does not apply in the case of collective redundancies arising from the employer's business being terminated following winding up proceedings or for any other reason as a result of a court decision, unless the Minister so requests. A question arises as to the circumstances in which the Minister might exercise his discretion to request the

employer to notify him of proposed collective redundancies. It would only appear relevant in circumstances where the business is continuing to trade under a court appointed liquidator (receiver or examiner). This was not the case here. Case law from the CJEU would support this view<sup>23</sup>.

In the present case, following announcement of the redundancies, an early priority was to ensure staff could avail of social welfare supports as quickly as possible and for this purpose to have P45s issue expeditiously. If the Minister were to require notification of the redundancies and a 30 day period of consultation with workers in circumstances where they could not be paid by the company, it was likely this would deprive them of access to P45s and to social welfare and it would inevitably have resulted in the employees not being paid by their employer, being unable to claim due benefits, and only receiving the additional wages owed through eventual claims against the Insolvency Fund.

The law provides for compensation in lieu of notice, guaranteed by the State, because serving out a notice period in a firm where wages cannot be paid would be a meaningless exercise.

Under the Protection of Employment (Exceptional Collective Redundancies and Related Matters) Act 2007, a Redundancy Panel was set up by my Department, in accordance with the partnership agreement *Towards 2016*. Collective redundancies can be referred to the panel to decide if redundancies are being imposed simply in order to replace employees with workers on lower pay or less favourable terms and conditions. These are called ‘exceptional collective redundancies’. If the panel decides that redundancies were carried out for this reason, the employees concerned can take actions for unfair dismissal.

This Act does not apply to the Clerys redundancies, because there is no suggestion that the dismissed employees are to be replaced by others on less favourable terms and conditions.

#### **Employees (Provision of Information and Consultation) Act 2006**

This Act implements EU Directive 2002/14/EC, on establishing a general framework for informing and consulting employees. The Act applies to employers of 50 people or more, covering every “public or private undertaking carrying out an economic activity, whether or not operating for gain”.

The core provision is in section 3, conferring on employees in such undertakings a right to information and consultation – defined as “the exchange of views and establishment of dialogue”.

Information and consultation can take place with employees directly or through their representatives. If an employer refuses to negotiate an information and consultation agreement, or if an agreement cannot be negotiated within 6 months, a set of Standard Rules scheduled to the Act will apply by default.

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<sup>23</sup> (*Claes v Landsbanki Luxembourg SA* Case C-235/10)

Under these Standard Rules, appropriate information and opportunity for consultation is to be provided via a Consultation Forum. The areas to be covered should include –

- the recent and probable development of the undertaking's activities and economic situation,
- the situation, structure and probable development of employment within the undertaking and any anticipatory measures envisaged, in particular where there is a threat to employment, and
- decisions likely to lead to substantial changes in work organisation or in contractual relations.

Information should be given at the time, in the fashion and with the content appropriate to enable the Forum to conduct an adequate study and, where necessary, to prepare for any consultation.

However, nothing in the Act applies to any undertaking unless a written request is made by 10% of employees, to the employer or to the Labour Court, that there should be negotiations to establish information and consultation arrangements.

There was no Information and Consultation Forum in Clerys. To say this is not to make a charge of dereliction on anyone's part. It means that Clerys employees had not exercised their right to request the establishment of such a body.

It accordingly follows that the body provided for by law at which there could be engagement between management and staff on the economic and employment prospects of a business, quite simply, did not exist.

My understanding is that Clerys is by no means unique in this regard. The Act is operational in large public service bodies such as, for example, the HSE but my understanding is that its application elsewhere could best be described as patchy.

It seems that the '10% rule', the requirement for a threshold number of employees to initiate the negotiation process, is considered to be responsible for this state of affairs.

This Act might have been expected to be bring about important innovation in employment relations, by providing structured and constructive dialogue between workers and employers, to the benefit of both. For their part, IBEC have confirmed on behalf of employers that communicating and consulting with employees adds value to every organisation.

It is reasonable to query whether the legislation has lived up to expectations. I intend to invite both sides of industry to submit their views as to whether the process of engagement under Act is working and, if not, why not.

### **Transfer of Undertakings Regulations**

The European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 apply where a business is sold and a new person or company becomes employer. The purpose is to ensure that the new employer takes on the existing staff of the business. The terms and conditions, and the employer's contractual obligations, are automatically transferred to the new employer. From the



employees' point of view, there is continuity of employment, even though they are transitioning to work from one employer to another.

It will be recalled that the Clerys workers benefitted from these regulations in 2012, when ownership of the firm transferred to the OCS Group.

There is no need for the protection given by these Regulations where the same employer remains in existence after a transfer, because there is no risk of contractual continuity being affected.

These Regulations did not therefore apply to the purchase of the OCS Group by Natrium, because the workers' employment contracts were with the trading company, which remained in existence, and so those contracts were unaffected.

While obviously the staff were affected by the liquidation of the trading company and the redundancies that immediately followed, this was not a result of any breach of continuity in their employment or their contractual terms and conditions. In fact, redundancy pay and the other statutory entitlements of the staff were all calculated by reference to the continuous nature of their employment in Clerys.

#### **Conclusion on worker protection**

What happened in Clerys was very shocking. I am unaware of any explanation from those involved as to why it was believed necessary to treat them in the manner I have described above.

But I want to be clear about this. There is no evidence that what happened is due to any discernible failure of our employment laws or a failure on the part of any State body.

Indeed, in economic terms the State may well turn out to be the biggest loser in this transaction. In acting as – in effect – the statutory undertaker for the liabilities of the trading company to its employees, the Department of Social Protection will pay out very significant sums of money over the coming weeks.

For that reason, that Department will have perhaps a particular interest in the second issue I consider, the application of company law to an insolvency such as this. This is because, as I have said, in a winding up the liquidator seeks on behalf of workers payment from that Department in respect of their entitlements, since they cannot be met from company funds.

At this stage section 10 of the Protection of Employees (Employer's Insolvency) Act 1984 comes in to play. The section is headed "Transfer to Minister of certain rights and remedies". The section provides that, where the Minister makes payment to an employee in respect of claims not paid by the insolvent company, then the rights and remedies of that employee in respect of those claims become rights and remedies of the Minister. This includes the employee's right to be paid in priority to other debts.

In other words, the Minister for Social Protection steps into the shoes of the employees and herself becomes a creditor in the liquidation.

## Company law

In the context of the issues arising from the demise of Clerys, the implications of two particular features of company law fall to be considered: directors' duties and certain aspects of the law relevant to the collection of a company's assets in a liquidation.

### Directors' duties

Part 5, chapter 2 of the Companies Act 2014<sup>24</sup> deals with directors' duties. Generally speaking, for example, a director should –

- act in good faith in what he or she considers to be the interests of the company
- act honestly and responsibly in relation to the conduct of the affairs of the company
- not restrict his or her independent judgment
- exercise care, skill and diligence
- have regard to the interests of its members.

In addition, the law imposes a duty on directors in relation to company employees. Section 224 is headed “Directors to have regard to interests of employees”. It provides that the matters to which directors must have regard in the performance of their functions include the interests of the company's employees in general, as well as the interests of its members.

The section makes it clear that the duty to have regard to employees' interests is among the fiduciary duties which are owed by directors to the company, and to the company alone. It is enforceable in the same way as any other fiduciary duty owed by a director to the company. This means that, in an action for breach of a duty owed to the company, the company itself is usually the appropriate plaintiff – or, if the company is in liquidation, its liquidator.

Section 229 may also be relevant. It states that a director may, unless the company's constitution provides otherwise, become a director of a subsidiary. It also states, however, that such an appointment cannot override the separate statutory duties he or she would then owe to each company separately.

A full investigation of the facts and events leading up to the winding up of the trading company will disclose the extent to which these duties, and the other obligations imposed upon directors as now comprehensively recited in section 228, were observed in this case.

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<sup>24</sup> All the company law provisions I refer to in the context of liquidations are as contained in the Companies Act 2014. In respect of anything that occurred before that Act came into operation, there are equivalent sections in the Companies Acts 1963-2013. There are some differences between the provisions of the new legislation and the old Acts but, so far as relevant to the issues under discussion in this report, these are not material. The rules relating to directors' duties are recited comprehensively in statute for the first time in the Companies Act 2014, although the obligations of directors to consider the interests of employees appeared also in the Companies Act 1990. Before the 2014 Act, the content of directors' duties were defined by judicial decision.

### Collecting the assets of the trading company

In a liquidation certain fundamental and to some extent competing principles of company law are involved.

On the one hand, it is a core proposition of law that a company is an artificial legal entity that exists separate and apart from its members, the shareholders. Its assets are not their assets and its liabilities are not their liabilities.

Where a trading company is profitable, then its profits are available for distribution among the shareholders. If it is loss-making, then the shareholders' liability to make good those losses is limited, to a purely nominal amount.

Indeed, the law requires a limited company to have the word 'limited' included in its name precisely in order to serve as a warning to third parties that its shareholders have only a limited liability for the company's debts.

A corollary aspect of this is the common and legitimate business practice of using the principle of the separate corporate identity of every company so as to create group structures, involving holding and subsidiary companies. This is not an unusual or controversial arrangement. A company may organise and conduct its business through subsidiaries, as it sees fit.

At the heart of company and commercial law, therefore, is recognition and respect for these principles of the separate legal identity of companies and the right of commercial enterprises to run their businesses through subsidiary and related companies, each of them a separate entity in law.

On the other hand, the law also recognises the mischief that can result from an unyielding application of the rule of separate corporate identity, particularly the separate identity of parents and subsidiaries in a web of corporate holdings.

To this end, the Companies Act 2014 enables liquidators and creditors of a company in liquidation, in different circumstances, to have recourse to provisions that allow assets transferred from a company to be recovered and creditors' interests protected.

I have as yet no reason to believe that these provisions are ineffective in striking a reasonable balance between the proper promotion of limited liability on the one hand, and ensuring that the distinction between companies that are functionally a single entity is not misused, on the other. Of course, if it emerges that the law does not properly strike that balance, it will be necessary to review these provisions.

Provisions relevant to the powers of the Courts to ensure all assets that ought properly be made available to the creditors of a company are clawed back for their benefit and breaches of the law by directors remedied, include the following.

- The right to bring proceedings in the course of winding up a company against the directors of that company for breach of duty.<sup>25</sup>

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<sup>25</sup> Section 612.

- The entitlement to bring proceedings against the directors of a holding company on grounds, *inter alia*, of breach of duty in relation to the subsidiary.<sup>26</sup>
- The ability of the Court to impose liability upon officers of the company who are knowingly a party to the carrying on of the business of the company in a reckless manner, including in certain circumstances the contracting of debts by persons who did not honestly believe on reasonable grounds that the company would be able to pay the debt when it fell due for payment as well as its other debts.<sup>27</sup>
- The power of the Court to order the return of assets of a company being wound up which have been improperly transferred.<sup>28</sup> This arises where property of a company is disposed of and the *effect* (but not necessarily *the intent*) of the disposal was to perpetrate a fraud on the company its creditors or members.<sup>29</sup>
- The power of the Court to set aside transfers of assets in favour of certain persons occurring within a period of two years prior to the liquidation.<sup>30</sup>

It is not for me to speculate whether any of these provisions will have a role to play in the situation that has presented itself in Clerys. However, I believe it is important to observe that those in control of different companies within a group can lose their entitlement to insist on the rigid separation of those companies in all circumstances.

### Section 599

Specifically, the Companies Act 1990 introduced a means by which a liquidator, or a creditor or contributor, can bolster the assets of the company being wound up by applying to the court for an order directing that a ‘related’ company should contribute to its debts.

This can bring about a potentially quite dramatic ‘piercing of the corporate veil’ that otherwise gives each company in a group a separate legal identity. It seems that New Zealand is the only other jurisdiction in the common law world with a comparable statutory provision. There seem to be no reported cases considering in detail the proper application of the Irish section.

The section is now re-enacted as section 599 of the Companies Act 2014. Under the section, in deciding whether it is just and equitable to make an order, the court has 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;

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<sup>26</sup> Section 613. The provision defines the relationship between holding company and subsidiary in the present tense (*‘if, in the course of winding up a company which is a subsidiary of another company, it appears that ...’*).

<sup>27</sup> Section 610.

<sup>28</sup> Section 608.

<sup>29</sup> *Le Chatelaine Thudichum Ltd v. Conway* [2010] 1 IR 529; *Re Devey Enterprises Ltd. v. Devey* [2012] 1 IR 127.

<sup>30</sup> Section 604.

- the effect which the order would be likely to have on the creditors of the related company.

An order is not to be made unless 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.

The section states that it is not just and equitable to make an order if the only ground for making the order is the fact that the company was related, or that creditors of the company being wound up had relied on the fact that another company was related.

In the Dáil Committee on the Bill, on the 6<sup>th</sup> March 1990, the then Minister Des O'Malley said of the section (which was at that stage section 118 of the Bill):

“I think I should say a few general words about section 118 to try to put it into context because it is, perhaps, a bit more difficult to follow if you do not have the context. We are all aware of situations that can or do arise with groups of companies whereby the separate legal identity of each member of the group is really only a facade, with the various group companies being run by the same people, effectively, as one company. The courts have, in recent years, shown an increasing willingness to lift the veil of separate legal identity in such circumstances and all we are really doing here is setting this within a statutory framework. Section 118, therefore, will enable the court, on the application of the liquidator or a creditor or contributory of any company that is being wound up, to order that any related company should pay to the liquidator an amount equivalent to the whole or part of all or any of the debts provable in the winding-up.

“Let me say, however, this will not lead to any automatic stripping away of the separate legal identity of related companies. On the contrary, it is clear from the section that the mere fact that the companies are related will not be a ground for an application under the section. The power of the court here will be discretionary, first, whether to make a related company liable in the first place and, secondly, the extent to which it should be made liable. The basic test that the court will apply is the familiar just and equitable one. Subsection (2) follows on from this and gives guidelines for the court to follow in this respect, while subsections (3) and (4) specify various situations where the court cannot make an order ...

“[Replying to John Bruton TD:] I would suggest that he look at section 30 of the Companies (Amendment) Act, 1980 of New Zealand, where a new section 315a is inserted by that section of the New Zealand Act, and it is very similar to this one. This section largely codifies into statutory form, or is intended to, a number of judgments which have been delivered in the High Court and the Supreme Court here in recent years. The chief one is from a judgment of Mr. Justice Costello in *Power Supermarkets Ltd v. Crumlin Investments Ltd and Others*, delivered on 22 June 1981.”

While the section is certainly very similar in its terms to what is now section 271 of the New Zealand Companies Act 1993, it also echoes, as Deputy O'Malley said,

earlier and indeed subsequent case law<sup>31</sup>. Section 599 gives specific and detailed statutory expression to the principles expressed in this case law.

As I noted, we still await an authoritative Irish judgment on the circumstances in which a contribution order will be made as between related companies. What we do know, however, is the legislative policy behind the provision. The similar New Zealand provision had its origin in a recommendation in the 1973 Final Report of the Special Committee to Review the Companies Act (the Macarthur Committee), responding to a submission that in at least two recent cases well-known public companies had abandoned their subsidiaries.

It is clear that a contribution order is not merely an administrative or procedural order but that it affects the substantive rights of those parties interested in the winding up of a company subject to such orders. As one New Zealand judge put it<sup>32</sup>: “Obviously, it contemplates a departure from the priorities laid down in the Companies Act 1955. I think Parliament intended the Court to have the broadest discretion to effect a result which accords with common notions of fairness in all the circumstances, bearing in mind the cardinal principle of insolvency administration, that there shall be equality among creditors of the same standing.”

A court, in considering making a contribution order, must determine whether it is ‘just and equitable’ to do so. Although the legislatures in both Ireland and New Zealand provided a number of similar factors for the court to consider, the circumstances that will amount to just and equitable remain uncertain in the absence of an authoritative Irish judgment. The New Zealand courts have discussed a number of relevant factors, including:

- whether directors of the subsidiary acted in that capacity or rather as employees of the parent
- whether they distinguished between the best interests of the subsidiary and the parent
- whether the subsidiary had financial capacity to continue to trade separately
- whether a parent’s conduct had indicated that it stood behind the subsidiary.
- the interests of shareholders versus those of creditors
- the intermingled nature of the business
- whether the actions of the parent led directly to the liquidation of the subsidiary
- the group’s conduct towards its creditors.

#### **Duty to report on conduct of directors of insolvent companies**

It should be noted that in a winding-up of an insolvent company, the liquidator is obliged to provide, within six months of appointment, 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<sup>33</sup>.

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<sup>31</sup> *Power Supermarkets Ltd v Crumlin Investments Ltd* (Unreported, High Court, Costello J, 22<sup>nd</sup> June 1981); *Fyffes plc v DCC plc* [2005] IEHC 477.

<sup>32</sup> *Re Home Loans Fund (NZ) Ltd* (1983) 1 NZCLC 95,073, 95-583.

<sup>33</sup> Section 682.

The liquidator is also required to make an application to the High Court for the restriction of each of the directors of the company unless the Director of Corporate Enforcement has relieved the liquidator of the obligation to make the application<sup>34</sup>.

The Court may order that the person who is the subject of the declaration should pay the cost of the application and the whole of the costs and expenses incurred by the applicant in investigating and collecting evidence in respect of those matters.

### Conclusion

Companies go out of existence through the process of being put into liquidation. Company assets are collected and disposed of and the resulting proceeds are applied in discharging company debts and liabilities. Certain claims such as taxes and some payments to employees are ranked in priority and must be paid before all other debts,

Naturally, where a company is insolvent, not all creditors will be paid in full. Hence the importance of ensuring that there has been fair dealing with the company's assets and that all property that should be available to the liquidator can be used to discharge the company's debts.

The provisional liquidators in this case are acting under the valid authority of the High Court order appointing them. Statutory obligations under Part 11 of the Companies Act 2014 are imposed on the liquidators. The High Court will supervise the liquidation in the ordinary way.

In an appendix to the report of the joint provisional liquidators handed into court on the 6<sup>th</sup> July, under the heading "Matters to be investigated", they stated that they have received correspondence from concession holders and creditors raising issues of concern, including payments to and any transactions with associated or related companies in the lead up to the winding up petition; the conduct of the directors of the trading company in the lead up to the presentation of the winding up petition; recent payments from the trading company's bank account; and the application of the proceeds of insurance claims made following the flooding of the Clerys store in 2012. They stated that: "If appointed as liquidators we will conduct a comprehensive investigation of the above matters and investigate the conduct of all persons who acted as Director of the Company within 12 months prior to the liquidation."

I would stress that the reference to investigating the conduct of directors is a reference to a normal function of a liquidator of an insolvent company, under sections 682 and 683, noted above. The High Court ordered that both Mr Brydie and Mr Conney, who had served as directors of the trading company for less than one day, and its previous directors should make and file in court a statement as to the affairs of the company.

We are at a very early stage in the Clerys liquidation and, as I have been at pains to emphasise, the full facts have yet to emerge and explanations from those involved have yet to be heard.

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<sup>34</sup> Section 683.

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.

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.

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.

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.

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.