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# CEA Inaugural Conference

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*The new proposed directive INSOL III  
Directors' Duties in the twilight zone  
Simplified Liquidation Measures and a new Pre-  
Pack.*

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# Background to the proposed INSOL III Directive

## STAKEHOLDER CONSULTATIONS

- Capital Markets Union Action Plan
- Public consultations
- Committee of Experts on Insolvency and Restructuring
- Draft now at Council and Parliament

## CONTENTS

- Transactional Avoidance- Title II
- Asset Tracing- Title III
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Directors' Duties  
Companies Act  
2014 –context  
leading up to  
reform.

- Sections 224, 227 and 228 Companies Act 2014

Section 224 'take into account the interests of employees'

Section 227(1)

'duties owed to the company (*and the company alone*)'

Section 227(4)

take effect in place of common law rules and equitable principles..

and (5)

'regard shall be had to the corresponding common law rules and equitable principles in interpreting those duties and applying those provisions'

consequent problems with enforcement.....

Section 228 outlined the duties but the duty described in *Re Frederick Inns* [1994] was not codified at this point in time.

Recommendations from the CLRG (2017, pp. 33-39) and CLRG (2021, p 19) eventually added in section 224 A Companies Act 2014 ...see further below.



## The common law duty to creditors

- *Re Frederick Inns* [1994 IRLM 387
- *BTI v Sequana* [2022] UKSC 25
- *Hunt v Singh* [2023] EWHC 1784

The key issue which has emerged in the case law is the question of what exactly triggers the duty of directors to consider the interests of creditors.

Is it necessary to establish some form of knowledge on the part of the director or is the fact of insolvency sufficient? If some form of knowledge is required the next question is whether this is subjective or objective.

*Sequana* did not reach a conclusion on this point but had other observations on the nature of the duty mostly around the probability as distinct from likelihood of insolvency.

## The common law duty- some further issues

- For the creditor duty to arise the director must know or ought to know that the company is insolvent or bordering on insolvency or that an insolvent liquidation is probable.
- But when a decision is made which affects these probabilities is that different? The 'bet the company' decision...
- Interesting point regarding groups in *Hong Kong decision Tradepower (Holdings) Ltd. V Tradepower (Hong Kong) Ltd.* 2009 12 HKCFAR

Developments at  
EU

- Preventive Restructuring Directive 2019/1023
  - Article 19 has led to.....
  - Section 224A of the 2014 Act (as inserted by the European Union (Preventative Restructuring) Regulations 2022, S.I. No 380 of 2022) created, for the first time, a statutory duty on the part of the director who believes, or has reasonable cause to believe that the company is, or is likely to be, unable to pay its debts to have regard to (a) the interests of creditors; (b) the need to take steps to avoid insolvency; and (c) the need to avoid deliberate or grossly negligent conduct that threatens the viability of the company's business.

Companies Act  
2014 ss. 224 and s.  
228 amendments

- Section 224A is now included and codifies the duty expressed by the Supreme Court in *Re Frederick Inns* BUT with some add ons
- Section 228 also includes an amendment from the the European Union (Preventative Restructuring) Regulations 2022, S.I. No 380 of 2022) Regulation 5(c) adding the following to s.228(1)(i) [after para. (h) ]
- “(i) in addition to the duties under section 224A (directors to have regard to certain matters where company is, or is likely to be, unable to pay its debts), have regard to the interests of its creditors where the directors become aware of the company’s insolvency.”.



**Proposed Directive on Harmonising Certain Aspects of  
Insolvency Law  
Articles 36 and 37**

**Further EU  
Developments  
...how to  
lose your audience**

**Article 36 "Member States shall ensure that, where a legal entity becomes insolvent, its directors are obliged to submit a request for the opening of insolvency proceedings with the court no later than 3 months after the directors became aware or can reasonably be expected to have been aware that the legal entity is insolvent."**

**Article 37**

**"1. Member States shall ensure that the insolvent legal entity's directors are liable for damages incurred by creditors as a result of their failure to comply with the obligation laid down in Article 36.**

**2. Paragraph 1 shall be without prejudice to national rules on civil liability for the breach of the duty of directors to submit a request for the opening of insolvency proceedings as set out in Article 36 that are stricter towards directors."**

## The state of play

### EU DEVELOPMENTS

- Some comments on the directors' duties element of the directive.
- The progress of the directive. What is important , what is not important.

### REMAINING ISSUES

- Enforcement – public or private?
- Difficulties with pursuing less than certain actions.
- CLRG Report 2021

## ISSUES SUPPORTED BY A STRONG POLICY IMPETUS

Other elements to  
the INSOL III  
Directive

- Transactional avoidance
- Asset Tracing

## ISSUES WITH A SURPRISE ELEMENT

- Simplified Liquidation Measures
- Pre-pack proceedings.
- Creditors' Committees.

Thank you!

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