The Honourable Mr Justice Kelly
President of the High Court
Chairman of the Review of the Administration of Civil Justice

16 February 2018

By E-mail – submissions@civiljusticereview.ie

Re: Submission to the Review of the Administration of Civil Justice in respect of (a), (b), (c), (d) and (e)

Dear Mr Justice Kelly

1. Introduction

1.1 The Irish Society of Insolvency Practitioners ("**ISIP**") is an organisation of insolvency practitioners from the accountancy and solicitor professions established in 2004 to create a forum to enhance the knowledge and expertise of its members. ISIP also allows members to share experience between those accountants and lawyers in Ireland who specialise in turnaround and insolvency and amongst practitioners working in the insolvency profession in Ireland generally[1].

1.2 ISIP has established a sub-committee within its Law Reform Committee (the "**Review Sub-Committee**") with responsibility for engaging with the group established for the review of the administration of civil justice in Ireland (the "**Review Group**"). ISIP previously made submissions on law reform and other matters including submissions to the Company Law Review Group, on which it is represented by Mr Barry Cahir, and the Department of Justice regarding proposals for the reform and amendment of insolvency law in Ireland.

[1] Further information regarding ISIP, including details regarding its membership, is available on its website www.isip.ie.

1.3 We welcome the creation of the Review Group and support its principal objectives including improving access to justice, reducing the costs of litigation and improving practices and procedures. The members of ISIP have a broad experience of the administration of civil justice in the State and are regular court users both as parties to proceedings and officers of the court.

1.4 In this submission, we have addressed a number of issues that would benefit from reform under the headings identified in the request for submissions.

(a) IMPROVING PRACTICES AND PROCEDURES AND REMOVAL OF OBSOLETE, UNNECESSARY AND OVER-COMPLEX RULES OF PROCEDURE

2. *Lis Pendens*

2.1 ISIP has previously met with Mr Noel Rubotham and Mr Sean Barton of the Superior Court Rules Committee (the "**Rules Committee**") to discuss our members' concerns regarding abuse of the process for the registration of *lis pendens*. Following that engagement Mr Mark Woodcock, solicitor and chairman of the Law Reform Committee, wrote to the Department of Justice recommending certain reforms that are outlined below.

2.2 A *lis pendens* may be registered pursuant to Section 121 of the Land and Conveyancing Law Reform Act 2009 (the "**2009 Act**") in respect of:

2.2.1 any action in the Circuit Court or the High Court in which a claim is made to an estate or interest in land (including such an estate or interest which a person receives, whether in whole or in part, by an order made in the action) whether by way of claim or counterclaim in the action; or

2.2.2 any proceedings to have a conveyance of an estate or interest in land declared void.

2.3 The procedure to register a *lis pendens* is extremely straightforward and involves the filing of the following documents in Judgments Section of the Central Office:

2.3.1 Form No. 31 as provided for in Order 72A of the Rules of the Superior Courts (the "**RSC**") (in duplicate)

2.3.2 A copy of the originating document i.e. Summons or Civil Bill;

2.3.3 A Form 64 under the Property Registration Authority (if the property in questions is registered land).

2.4 In contrast, the procedure to vacate a *lis pendens* is onerous and expensive. A formal application must be brought before the relevant court. In such an application, one of the issues that the court will consider is whether the criteria stipulated for the registration of the *lis pendens* under the 2009 Act have been satisfied. Such criteria are not considered at the actual time of filing the *lis pendens*.

2.5 Our members have experienced numerous instances where the process is utilised by an aggrieved and/or defaulting borrower for the purpose of frustrating the sale of a property by a receiver or secured lender.

2.6 Even where a receiver successfully applies to court to release the *lis pendens*, another is often registered with relative ease and minimal expense, without any requirement for court approval.

2.7 This can lead to very significant and avoidable expense being incurred by a receiver in releasing the *lis pendens* which is ultimately at a cost to the aggrieved borrower albeit indirectly through the underlying security.

2.8 Arising from the discussions with the Rules Committee, it was agreed that the Committee might consider amendments to the contents Form No. 31 including a requirement for details showing why the determination of the legal proceedings issued is required before the property to be the subject of the *lis pendens* can be sold to a third party.

2.9 However in order to reduce the risk that the registration of a *lis pendens* is abused we have recommended to the Department of Justice and recommend to the Review Group that the process should be reformed, including as necessary an amendment to Section 121 of the 2009 Act, such that:

2.9.1 When a *lis pendens* is filed in the Central Office, the applicant is required to issue the Summons (as is currently the practise) and a motion for directions seeking an order from the court confirming the registration of the *lis pendens* and directions in relation

to the exchange of pleadings in the applicant's proceedings. The motion would be on notice to all affected parties.

2.9.2 This method would not deny an applicant's right to register a *lis pendens* at short notice to protect a legitimate claim, but would require that such registration would be an interim relief only, pending a final order of confirmation from the court.

2.9.3 It would allow any party affected by the *lis pendens* an opportunity to challenge the grounds upon which it was registered at the hearing of the motion for directions.

2.9.4 It would ensure that the Summons filed is legitimate and would require the applicant to pursue the claim expeditiously in the interests of all parties.

or

2.9.5 At a minimum, there should be a requirement that the applicant issue a Summons and a motion seeking confirmation of the *lis pendens* from the court. This motion would also be on notice to all affected parties.

(B) REVIEWING THE LAW OF DISCOVERY

3. Costs of Discovery

3.1 The substantial and burdensome costs of discovery are well known to our members and, together with other significant costs, can act as a bar to the pursuit of legitimate claims by insolvency office holders against former directors, debtors and other parties. Consequently, we support any reforms that are likely to reduce the costs and complexity of the discovery process.

3.2 One discrete matter worth considering as part of the review of discovery is the intersection and/or overlap of data access requests under the Data Protection Acts 1988 and 2003 and the discovery process. In particular, it may be worth considering whether any changes to the RSC would include a provision addressing a common situation where a party, such as a liquidator, has already fully complied with a data access request under the Data Protection Acts 1988 and 2003 prior to completing the discovery process which can result in significant repetition and

potentially unwarranted costs to the extent that party must then disclose the same documentation that was captured by the data access request.

(C) ENCOURAGING ALTERNATIVE MEANS OF DISPUTE RESOLUTION

4. Alternative Dispute Resolution

4.1 The Mediation Act 2017 came into force in January 2018 and it is hoped that it will lead to a greater consideration and deployment of mediation prior to and during legal proceedings. We expect that the new obligations imposed on all solicitors to advise clients of the advantage of mediation before issuing proceedings will support this. Whilst further utilisation of alternative dispute resolution processes may be beneficial it is questionable, following the enactment of the Mediation Act 2017 together with the updated Order 56A of the RSC, whether further encouragement of alternative dispute resolution processes of commercial disputes is warranted at this time.

(D) REVIEWING THE USE OF ELECTRONIC METHODS OF COMMUNICATIONS INCLUDING E-LITIGATION AND POSSIBILITIES FOR MAKING COURT DOCUMENTS (INCLUDING SUBMISSIONS AND PLEADINGS) AVAILABLE OR ACCESSIBLE ON THE INTERNET

5. Electronic filing of Court Papers

5.1 The recent introduction of the Rules of the Superior Courts (Service) 2017 (Statutory Instrument No. 475/2017) facilitating service by electronic means and the increased use of email between practitioners and court registrars is of significant benefit to court users. In addition, the extended use of electronic methods of communication and deployment of e-litigation are likely to lead to considerable procedural improvements and reduce the reliance upon vast amounts of printed documentation in commercial and/or complex trials.

5.2 One clear area where increased use of electronic methods of communication could benefit all parties is the electronic filing of court papers. "E-filing" is regularly used in commercial courts in various jurisdictions including the New York District Court and the Royal Courts of Justice in London. In fact, following an 18-month pilot, e-filing has been made compulsory in all cases before the Royal Courts of Justice in London since 25 April 2017. The Royal Courts of Justice in London utilise a system called Courts Electronic Filing system (CE-File) that enables parties

to issue claims, file documents electronically and pay court fees online 24 hours a day all year round.

5.3 Documents are filed in PDF and court fees are paid automatically by credit card and/or through a fee account.

5.4 E-filing would allow the Courts Service to reduce costs and re-deploy staff in other areas. In addition, a system whereby documents can be filed online would reduce costs for all practitioners and ultimately court users particularly those practitioners who are not located in Dublin (with respect to High Court actions). In addition, a system of e-filing would present opportunities to link in with another stated goal of the Review Group which is to make court documents available on the Internet in certain circumstances.

5.5 From the perspective of our members the introduction of e-filing would not only present the possibility of reduced costs and increased efficiencies but would, in the context of certain court processes such as examinership applications, present some hugely beneficial flexibilities.

5.6 By its nature, whether at the beginning, middle or end, the examinership process is extremely time sensitive and involves crucial presentation and filing deadlines. In circumstances where a company is deemed to be under the protection of the court from the time of the presentation of a petition in relation to that company[2] the availability of e-filing would potentially provide significant flexibility to a petitioner with respect to out of court hours filings. This would be particularly so where any system would produce confirmation of the filing of the petition (and the independent accountant's report) that could be produced and/or shared with creditors of the company to prove that the company had filed the petition and was under the protection of the court albeit subject to the hearing of the petition or other order of the court. Such a process would be similar to the process utilised in England and Wales for appointments of administrators save that the appointment of the examiner and continuation of the period of protection would remain a matter for the determination by the court.

5.7 The requirement concerning formal service of petitions need not be compromised by an e-filing system.

[2] Section 520(2) of the Companies Act 2014.

6. Making Court Documents Available on the Internet

6.1 We note the objective of making court documents available on the Internet and expect that it would increase the visibility and transparency of the court process to the general public. In addition it is likely to lead to greater sharing of knowledge and practices amongst practitioners. However, it presents certain risks and issues.

6.2 First, whilst Article 34.1 of the Constitution provides that "*justice….. shall be administered in public*" there are certain issues that are confidential, whether they are matters relating to personal privacy or business dealings, that would become readily available to the public on the court documents being made available on the Internet. This may make some parties reluctant to disclose sensitive information in court documents or possibly even to pursue legal proceedings.

6.3 Therefore, to the extent that court documents are made available on the Internet there should be some protections applied to private and/or confidential information whether through redaction and/or restriction of access to solicitors on record. The Courts Electronic Filing software used by the Royal Courts of Justice in London permits the filing party to classify a document as confidential upon filing such that it is not accessible by the general public. Although it is not clear from the applicable practice direction it appears that the filed documents are reviewed and the confidential classification can be withdrawn if it is not warranted.

6.4 Secondly, the filing of all court papers creates the risk of copyright infringement particularly in the case of written submissions that would not otherwise be available to the general public. Ultimately this may be a cost and risk faced by practitioners in pursuance of this objective.

(E) ACHIEVING MORE EFFECTIVE OUTCOMES FOR COURT USERS, PARTICULARLY VULNERABLE COURT USERS

7. Litigation Funding

7.1 One key issue for our members in improving access to justice is the availability of third party litigation funding. Our members, particularly those acting as liquidators of insolvent companies, all too regularly encounter scenarios where a company or its liquidator may have a substantive and robust claim against former company officers, counterparties or other parties which if

pursued would benefit the creditors of the company. In some cases such claims and/or proceedings may be in being at the commencement of the liquidation. However, invariably by the time the company has entered liquidation there are insufficient assets to fund litigation against such parties.

7.2 This situation arises from the basic insolvency of the company or individual where the assets available are insufficient (and are often exhausted in pursuit of a liquidator's principal statutory obligations and duties including to report to the Office of Director of Corporate Enforcement on the conduct of the former directors[3] and pursue applications to restrict such directions[4]) and the costs of bringing such applications (which are typically before the High Court under the Companies Act 2014).

7.3 In addition, given the *pari passu* ranking of unsecured creditors means that it is extremely rare that any single or group of unsecured creditors, being parties with "*legitimate interests*[5]" in such proceedings, are willing to fund the required proceedings. Frequently, it is only creditors with preferential status who are willing to fund such actions.

7.4 This dynamic may in fact encourage unscrupulous company directors to adopt a 'scorched earth' approach in running a company that has become insolvent such that when a liquidator is appointed there are effectively no assets available to pursue any actions against those same directors. In other cases, this situation may arise because of comprehensive security held by a secured lender or simply from the basic failure of the business. In either case, absent external funding the insolvency office holder will be unable to pursue legal proceedings that could otherwise improve the position of the creditors of the debtor. In the rare cases where such assets are available the option of third party litigation funding reduces the risk that the available assets would be exhausted in pursuance of such claims.

7.5 Consequently better outcomes for creditors are foregone and potentially significant misfeasance and breaches of directors' duties are left unresolved.

7.6 The principal restrictions on third party litigation funding in Ireland arise from the torts of maintenance and champerty that were originally legislated for in the Maintenance and

[3] Section 682 of the Companies Act 2014.
[4] Section 683 of the Companies Act 2014.
[5] Within the meaning adopted in *Thema International Fund plc v HSBC Institutional Trust Services (Irl) Limited* [2011] IEHC 357.

Embracery Act 1634 which was retained by the Statute Law Revision Act 20007. Whilst certain sections of the Maintenance and Embracery Act 1634 were repealed by the Land Law and Conveyancing Reform Act 2009 the sections addressing maintenance and champerty remain in force and were recently applied in the high profile court decision in *Persona Digital Telephony Limited v Minister for Public Enterprise*[6]*.* Whilst after-the-event insurance policies, which cover the risk of adverse costs orders and certain disbursements, are considered permissible under Irish law[7] they do not address the principal issues faced by insolvency office holders in funding necessary litigation.

7.7 We acknowledge that there are legitimate public policy reasons to restrict third party litigation funding generally, however the restriction on litigation funding in insolvency litigation means that significant potential returns to creditors of insolvent companies are foregone. It is our submission that a reform of the law that facilitates, albeit subject to appropriate criteria, litigation funding in insolvency cases only could have a significantly positive impact for Irish society. In such circumstances potential causes of action that would improve the outcome for unsecured creditors need no longer be foregone due to the impecunious position of the liquidator plaintiff. In addition the fact that liquidators would be in a better position to enforce compliance with company law for the benefit of company creditors may act as a significant cautionary warning to directors in discharging their duties.

7.8 We note that the Law Reform Committee in its Issue Paper on Contempt of Court and other Offences and Torts Involving the Administration of Justice[8] stated that:

> *"In light of the importance of providing access to justice, it is certainly arguable that legislation should be introduced to allow for third party funding of litigation by a person or body who does not have a legitimate interest in the proceedings*[9]*."*

7.9 As that Issue Paper notes third party litigation funding is permitted in England and Wales, where funders are subject to a non-statutory Code of Conduct for Litigation Funders (the "**Code**"), and in Australia, where it was recognised by the High Court of Australia as facilitating

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6 [2016] IEHC 187.
7 *Greenclean Waste Management Limited v Leahy (No. 2)* [2014] IEHC 314.
8 Published on 26 June 2015 and available at https://publications.lawreform.ie/Portal/External/en-GB/RecordView/Index/37627.
9 Paragraph 6.33.

access to justice[10]. In addition, jurisdictions such as Singapore (with Hong Kong following) has abolished the torts of maintenance and champerty and legislated for third part litigation funding relating to international arbitration. Separately, the High Court in Singapore held in 2015[11] that the assignment by a liquidator of part of the proceeds of a claim to the shareholders of the company as part of a funding agreement was within the liquidator's powers under Singapore's company law.

7.10 Given the public policy considerations alluded to in the decision of Ms Justice Donnelly in *Persona Digital Telephony Limited v Minister for Public Enterprise* we acknowledge that there are legitimate grounds for restrictions upon third party litigation funding. In that regard we note the contents of the Code[12] which sets guidelines on key areas such as promotional literature, confidentiality, restrictions on the funder's influence on the funded proceedings, availability of adequate financial resources (including required a minimum of GBP£2m in capital), restrictions on a funder's right to withdraw funding and a complaints procedure. These rules are consistent with a number of issues that have concerned courts in other jurisdictions where the laws of champerty and maintenance have been removed or relaxed.

7.11 Ultimately we would propose reforms to law on litigation funding such that third party funding of litigation would be available to liquidators, receivers, administrators (appointed under the Insurance (No.2) Act 1983), the Official Assignee or trustees in bankruptcy to fund legal proceedings that are intended to increase the pool of assets available to creditors of insolvent debtors. Such funding could be subject to a number of restrictions including that the insolvency office holder must be satisfied that there is a reasonable case against the proposed defendant which will result in increasing the available pool of assets. We would propose the introduction of rules in a similar form to the Code which would regulate the provision of third party litigation funding. In addition, the nature of third party litigation funding is that it is an investment by the funder. That should mean that only cases with a significant likelihood of success will be funded by a third party litigation funder such that the risk of vexatious or spurious claims is limited.

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10 *Campbells Cash and Carry Limited v Fostif Pty* [2006] HCA41

11 *Re Vanguard Energy Pte Limited* [2015] SGHC 156.

12 A copy of which is available at http://associationoflitigationfunders.com/wp-content/uploads/2014/02/Code-of-conduct-Jan-2014-Final-PDFv2-2.pdf

8. Conclusion

8.1 We are grateful for the opportunity to make submissions to the important work of the Review Group and we are available to assist with any work to be undertaken by the Review Group, whether through attendance at the meetings of the Review Group or engagement on any future proposals or requests for submissions

8.2 In addition, we are available to elaborate on any of the matters discussed in this submission.

Yours sincerely

Mark Woodcock
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Sent by email and accordingly bears no signatures