

**'AN EXAMINATION OF THE EXTENT TO WHICH RECKLESS CONDUCT
PRECIPITATED THE CONTEMPORARY GLOBAL FINANCIAL CRISIS AND AN
ENSUING EVALUATION OF EXISTING AND POTENTIAL APPROPRIATE
SANCTIONS AND OFFENCES FOR DEEMED RECKLESS CONDUCT IN
RESPECT OF CORPORATE GOVERNANCE AND WITH AN EXPRESS FOCUS
ON THE FINANCIAL SECTOR'**



This dissertation is submitted for the Master in Laws Degree

LL.M

2016

Rachel Geraghty

Trinity College Dublin

DECLARATION

- 1) I declare that this thesis has not been submitted as an exercise for a degree at this or any other university and it is entirely my own work
- 2) I agree to deposit this thesis in the University's open access institutional repository and/or the LL.M Course Office or allow the library to do so on my behalf, subject to Irish Copyright Legislation and Trinity College Library conditions of use and acknowledgement.
- 3) I have read and I understand the plagiarism provisions in the General Regulations of the University Calendar for the current year, found at <http://www.tcd.ie/calendar>
- 4) I have also completed the Online Tutorial on avoiding plagiarism 'Ready, Steady, Write', located at <http://tcd-ie.libguides.com/plagiarism/ready-steady-write>

In accordance with the School of Law guidelines, this dissertation does not exceed 25,000 words.

Signed: _____

Date: _____

Rachel Geraghty BCL (NUI Galway)

Trinity College Dublin

For Jack

CONTENTS

1 ABSTRACT.....	4
2 THE ESSENCE OF THIS SUBMISSION	5
[1.1] Introduction	
[1.2] Risk culture and the perception of fraud	
[1.3] Central research question and the ambit of the submission	
3 THE GLOBAL FINANCIAL CRISIS, THE FINANCIAL SECTOR AND RECKLESS CONDUCT..	15
[2.1] Introduction	
[2.2] The global financial crisis 2008	
[2.3] The crises in Ireland and Iceland	
[2.4] The damnation of the financial sectors and the perception of high-level fraud	
[2.5] Was excessive risk taking and recklessness a factor	
4 RECKLESSNESS AS A CONCEPT IN LAW AND RECKLESS TRADING IN IRELAND	29
[3.1] Introduction	
[3.2] Recklessness - in and of itself a nebulous concept at law	
[3.3] Civil liability for reckless trading under Irish Law	
[3.4] The potential for an offence of criminal reckless trading under Irish law	
5 THE APPROACH IN OTHER JURISDICTIONS	44
6 CONCLUDING REMARKS AND RECOMMENDATIONS.....	53
[5.1] Review of what has been discussed	
[5.2] Remarks and observations	
7 TABLE OF LEGISLATION	56
9 TABLE OF CASES.....	57
8 BIBLIOGRAPHY	58
9 ACKNOWLEDGEMENTS	64

Abstract

The curious question of further expanding legal provisions to deter against reckless conduct and excessive risk-taking, having regard to the financial sectors and indeed corporate governance generally, is undoubtedly one which would be met with controversy and opposition. Nonetheless, the potential need for such provisions is something that has been considered by both the Law Reform Commission and the Office of the Director of Corporate Enforcement in Ireland. Fundamentally at odds with the essential spirit of entrepreneurial behaviour and capitalism, there is a certain reluctance to regulate risk in circumstances whereby risk is inherent. However, particularly taking account of the recent economic epoch that we are slowly recovering from, it is critical to look back on the conduct of the past; particularly with a view to attenuating future prospective financial crises.

One cannot ignore the potential role that excessive risk-taking and perhaps even reckless conduct, most significantly in the banking and securities sectors, played in the global financial crisis of 2008. Hence, the potential for legislative and regulatory reform and indeed, how such might be received and permitted to operate in practise, must be examined. While there is an undoubted paucity of academic commentary on the area, it is hoped that this endeavour may be of some contribution.

CHAPTER 1

THE ESSENCE OF THIS SUBMISSION

[1.1] Introduction

The social consensus, indeed, that the prosecutions in the wake of the truly infamous global financial crisis that erupted in 2008 were entirely incommensurate to the incomprehensible detriment caused to the global community, is an unanimity that is of extant significance. While it is appreciated that such is an epoch evaluated almost to the point of exhaustion, it is absolutely necessary that the dissatisfaction that persistently resonates does not remain unheeded. It is further asserted that such official indifference and persistent procrastination¹ by those in a legislative and juridical capacity; in respect of such an essential and coveted invocation of the justice system, is entirely repugnant to the fundamental principle of equality under the law². Fundamentally, that is, if the boundless view of pervasive fraud and unforgivable imprudence by proverbial ‘white-collar’ criminals can be deemed correct. As the former United States Financial Crisis Inquiry Commission Chairman, Phil Angelides, considered, seemingly speaking on behalf of the masses; “there’s a question here: do we have a dual justice system? One for ordinary people and then one for people with money and enormous wealth and power.”³ Indeed, the Kantian aphorism comes mind here; “a failure to punish those who deserve it leaves guilt upon the society.”⁴

¹ To adopt the vocabulary of a very poignantly titled examination of *Sinnott v Minister for Education* [2001] 2 IR 545 in respect of the Irish constitutional right to education. Shivaun Quinlivan and Mary Keys, ‘Official Indifference and Persistent Procrastination: An analysis of Sinnott’ (2002) 2(2) *Judicial Studies Institute Journal* 163.

² Robert Quigley, ‘The impulse towards individual criminal punishment after the financial crisis’ (2015) 22(1) *Virginia Journal of Social Policy & the Law* 105, 110.

³ Quoting Phil Angelides, Barry Ritholtz, ‘America is a “Failed State” with a “Dual Justice System”’ <<http://www.washingtonsblog.com/2011/04/america-is-a-failed-state-with-a-dual-justice-system-one-for-ordinary-people-and-then-one-for-people-with-money-and-enormous-wealth-and-power.html>> accessed 13 June 2016.

⁴ See Kent Greenawalt, ‘Punishment’ (1983) 74 *J Crim L & Criminology* 343, 347.

With regard to the extent of its destruction, the global financial crisis of 2008 has been regarded as “the most severe and the most global since the great depression of the 1930’s”⁵. In respect of the Irish travesty of recovery, the Former Central Bank Governor, Patrick Honohan, has speculated that rescuing the banks could ultimately cost Irish taxpayers €40 billion⁶ and it has also been estimated, having regard to the United States exemplification, that between \$6 and \$14 trillion were foregone due to the recession.⁷ Undoubtedly, when austerity measures were adopted and the implications of such were directly perceived by civilians, the inevitable reaction of outrage naturally transitioned into a pursuit for those responsible. In respect of the social desire for justice, the United States reaction is evident in the signing of a ‘MoveOn’ petition by nearly 150,000 people which asks President Obama to take “immediate steps to break up the big banks and prosecute the criminals who used them to destroy our economy”⁸. In the United Kingdom, The Evening Standard published details on the 9th of October 2012 of a public opinion survey conducted by YouGov, on behalf of Avaaz, a global non-government campaigning organisation, which revealed that 89% of a sampled group in the UK wanted sentences of imprisonment for bankers who manipulated the financial markets⁹. Most significantly, this article also notes that more than three-quarters of the survey samples in Germany and France want EU-level penalties to be set¹⁰.

⁵ Charles P Kindleberger and Robert Z Aliber, *Manias, Panics and Crashes: A History of Financial Crises* (6th edn, Palgrave Macmillan 2011) 1.

⁶ Fiona Gartland and Steven Carroll, ‘Bank rescue could ultimately cost taxpayers €40 billion’ *The Irish Times* (Dublin, 16 January 2015). Report on Patrick Honohan speaking at the Oireachtas Joint Committee of Inquiry into the Bank Crisis <<http://www.irishtimes.com/news/politics/oireachtas/bank-rescue-could-ultimately-cost-taxpayers-40-billion-1.2067703>> accessed 14 June 2016.

⁷ Federal Reserve Bank of Dallas, Staff Working Papers, Tyler Atkinson, David Luttrell and Harvey Rosenblum, *How bad was it? The costs and consequences of the 2007-09 Financial Crisis*, (July 2013) <<https://dallasfed.org/assets/documents/research/staff/staff1301.pdf>> accessed 13 June 2016.

⁸ Brian Kettenring, ‘ACTION: Tell Obama to end too big to jail’ MoveOn.org Petition.

⁹ Author unavailable, ‘Nine out of ten want to see bankers jailed (if they are found guilty of crimes)’ *London Evening Standard* (London, 9 October 2012) <<http://www.standard.co.uk/news/uk/nine-out-of-ten-want-to-see-bankers-jailed-if-they-are-found-guilty-of-crimes-8203103.html>> accessed 2 June 2016.

YouGov, Avaaz Survey conducted in the United Kingdom, France and Germany. See survey results <https://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/8uw8rxn930/AVAAZ%20Results%20121004%20Banking%20UK.pdf>

<https://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/utqoah9zai/AVAAZ%20Results%20121004%20Banking%20Germany.pdf>

<https://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/d1pdi6kffn/AVAAZ%20Results%20121004%20Banking%20France.pdf>

Directed to survey by Jonathan Fisher, ‘Risk, recklessness and policing the financial markets’ in [Nicholas Ryder](#), [Umut Turksen](#) and [Sabine Hassler](#) (eds), *Fighting Financial Crime in the Global Economic Crisis (The Law of Financial Crime)* (Routledge 2014).

¹⁰ Ibid.

Rather paradoxically, and all the more perplexing to the ordinary taxpayer, it has been conclusively stated there was no single specific cause or catalyst¹¹ that can be deemed the direct stimulus behind what transpired to be a macroeconomic and fiscal crisis¹² in the Irish context, and what was essentially a sovereign debt crisis¹³ in Greece, Ireland, Portugal and Spain. In consideration of the fact that such events were quite so catastrophic, very few unequivocal explanations have been provided to the many questions posed by the society that had to ultimately pick up the bill. Notwithstanding a mammoth meta-analysis of twenty-one books on the crisis, Professor Andrew W. Lo concluded “we may never settle on a single narrative that explains all the facts; such a ‘super-narrative’ may not even exist”.¹⁴ What is crucial, however, is that the United States Congress appointed Financial Crisis Inquiry Commission did assert that the crisis was “avoidable” and was “the result of human action and inaction, not of Mother Nature or computer models gone haywire¹⁵” Hence, it is this human action and inaction that one must direct one’s mind to so as to delve further into the pursuit of answers, not only with an appreciation for the justice that is sought, but also with a view to attenuating prospective crises.

[1.2] Risk culture and the perception of fraud

It is apparent that fraudulent conduct, be that within the ambit of legal consequence or not, is commonly perceived as being one of the critical instrumentalities which effectuated the formidable economic downturn. In a very provocatively titled commentary ‘The Financial

¹¹ In the United States context, Congress appointed the Financial Crisis Inquiry Commission (hereinafter FCIC) to investigate twenty-two topics designated by statute. Financial Crisis Inquiry Commission, *The Financial Crisis Inquiry Report; Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States* (xi, 2011). As Robert Quigley notes; “Two years, millions of pages of documents, and seven hundred witnesses later, the FCIC issued a 662-page report that identified a number of factors that contributed to the crisis, but found no smoking gun.” He further concisely observed “and when everything is important, nothing is.” Robert Quigley, ‘The impulse towards individual criminal punishment after the financial crisis’ (2015) 22(1) Virginia Journal of Social Policy & the Law 105, 112.

¹² See Bas van Aarle, Joris Tielens and Jan Van Hove, ‘The financial crisis and its aftermath: the case of Ireland’ (2015) 12(3) International Economics and Economic Policy 393.

¹³ See Phillip R Lane, ‘The European Sovereign Debt Crisis’ (2012) 26 (3) Journal of Economic Perspectives 49.

¹⁴ Andrew W Lo, ‘Reading about the Financial Crisis: A twenty-one book review’ (2012) 50 J Econ Literature 151, 177.

¹⁵ Financial Crisis Inquiry Commission, *The Financial Crisis Inquiry Report; Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States* (xi, 2011).

Crisis: Why Have No High-Level Executives Been Prosecuted'¹⁶ the very influential New York judge, Jed Rakoff, asserted that "the crisis was in material respects the product of intentional fraud"¹⁷. Another prominent figure in the United States, former Democratic Senator Ted Kaufman expressed the belief that "fraud and potential criminal conduct were at the heart of the financial crisis" and he further reasoned "if we uncover bad behaviour that was nonetheless lawful... then we should review our legal rules... and perhaps change them so that certain misleading behaviour cannot go unpunished again."¹⁸ However, the argument that blatant fraudulent and dishonest conduct precipitated the crisis is somewhat lacking when one considers the holistic picture. Oxford dictionaries define fraud as "wrongful or criminal deception intended to result in financial or personal gain"¹⁹. An actor's, or indeed a group of actor's, deceitful, knowledgeable and malicious efforts for albeit lucrative benefit, may have only indirect relevance in explaining a mass socioeconomic event²⁰.

It is such a line of reasoning that encourages one to further delve into and try to gain an insight into what is an almost tangible institutional ethos or mentality, that appears to emanate from a culture within the financial sectors and certain corporate spheres. Such a motivation, which is endemic to the markets and evident in the attitudes of many corporate powerhouses, it is perceived, is indeed risk-appetite. This insatiable hunger for profits and wins has the potential to blind participants to the extent that they do not appreciate the risks that they are running. Within an essentially liberal regime, many such excessive risks are so prevalent that they are acceptable and they are seemingly largely unhampered by legal restraint or regulation.

All the more fascinating, yet challenging for law-makers, is the notion of trying to regulate excessive risk in a climate whereby risk is inherent to the market. Many devout capitalists would be outraged at the thought of regulating risk within the financial sectors and

¹⁶ Jed S Rakoff, 'The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?' (2014) The New York Review of Books. Available online <<http://www.nybooks.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions/>> accessed 18 May 2016.

¹⁷ Ibid.

¹⁸ Simon Johnson, 'Senator Kaufman: Fraud Still at the Heart of Wall Street' *Huffington Post* (New York, 15 May 2010).

¹⁹ Oxford dictionaries online < <http://www.oxforddictionaries.com/definition/english/fraud>>.

²⁰ Robert Quigley, 'The impulse towards individual criminal punishment after the financial crisis' (2015) 22(1) *Virginia Journal of Social Policy & the Law* 105, 142.

it has been observed that “over-regulation is killing the market”²¹. Such an attitude fits the criteria of what O’Hanlon describes as the market/pluralist model, with regard to ‘The Ideology of Bureaucracy in American Law’²², whereby the discipline of the market place or the demands of the political process are relied upon to curb abuses of power²³. However, one can always be rather dubious of any sector ability to effectively self-regulate, and whether such should ultimately be permitted will be delved into at a later point.

Furthermore, capitalism has been described as “the epitome of risk-taking”; hence the extent to which risk culture permeates the corporate form, in general, is of paramount concern. With corporate governance in mind, one commentator asserts “where the likelihood of default is high, research indicates that directors may react in a manner that exacerbates the situation”²⁴ and social experiments have even been conducted to assert this very point. Kahnman and Tversky, as analysed by Bernstein²⁵, conducted work and experiments on what they termed the ‘prospect theory’. Their research ultimately demonstrated that whereby a choice involves gains: individuals are risk averse, but when a choice involves losses: they are risk seekers²⁶. Brealey and Myers²⁷ also contemplate the engagement in ‘risk shifting games’ by directors when a company is in financial distress and such games may even lead to financial distress. Such ‘games’ involve; favouring risky projects and investments, delaying the settlement of outstanding debts and rapidly increasing the amount of debt a company has, consequently compromising all of the company’s debts. Most significantly, all of this is done so as to benefit shareholders and is to the detriment of creditors²⁸, and the forsaken creditors will be dealt with in due course.

²¹ Don McLean, Trinity College Dublin, Lecturer in EU Financial Services Law, permission obtained 21 June 2016.

²² See Gerald Frug, ‘The Ideology of Bureaucracy in American Law’ (1989) 97 Harvard Law Review 1276; Niall O’Hanlon, ‘The Corporate Form and Reckless Trading: A Modern Pandora Epimetheus’ [2006] 28 Dublin University Law Journal 254.

²³ Niall O’Hanlon, ‘The Corporate Form and Reckless Trading: A Modern Pandora Epimetheus’ [2006] 28 Dublin University Law Journal 254, 256.

²⁴ Ibid 255.

²⁵ Peter L Bernstein, *Against the Gods: The remarkable story of risk* (John Wiley and Sons, 1996) 21.

²⁶ Niall O’Hanlon, ‘The Corporate Form and Reckless Trading: A Modern Pandora Epimetheus’ [2006] 28 Dublin University Law Journal 254, 255.

²⁷ R A Brealey and S C Myers, *Principles of Corporate Finance*, (5th edn, McGraw Hill College 1996) 173-194.

²⁸ Niall O’Hanlon, ‘The Corporate Form and Reckless Trading: A Modern Pandora Epimetheus’ [2006] 28 Dublin University Law Journal 254, 255.

Taking account of such risk tendencies, as one commentator appreciates; “the harm wrought by the global financial crisis is colossal, and whilst it is impossible to estimate the extent to which reckless risk-taking precipitated the economic catastrophe which beset the world in 2008, common sense dictates that it was undoubtedly a contributory cause.”²⁹

It is envisioned that it is entirely necessary to appreciate recklessness and excessive risk-taking in both a corporate governance sense and within the financial sector. Such is because, the efficacy of corporate governance laws and regulation in this jurisdiction generally is entirely relevant, when one considers the impact that insolvency, or trading difficulties can have on creditors, shareholders and of course stakeholders generally and in particular employees and the community. Furthermore, companies within the financial sector are entirely subjected to corporate governance laws and regulations themselves. To demonstrate this essential relevance, as one author precisely notes;

Recent episodes of financial instability have highlighted the potential fragility of financial systems and the effect that financial instability can have on the wider economy. In recognition of this, much international attention is now being given to understanding the causes and dynamics of financial crises and to developing policy frameworks for promoting robust and efficient financial systems. An important part of this work relates to corporate governance arrangements and the role that these can play in encouraging sound risk management practices”³⁰.

All the more intriguing, when one considers corporate risk culture, is the line of questioning as to whether financial market participants are a breed of professional gamblers? Oxford dictionaries defines a ‘gamble’ as 1) Play[ing] games of chance for money; and 2) Tak[ing] risky action in the hope of a desired result. As fisher considers in this regard:

Rogue financial markets traders such as Kweku Adoboli, Jerome Kerviel, Yasuo Hamanaka and Nick Leeson were all handed down lengthy prison sentences for their

²⁹ Jonathan Fisher, ‘Risk, recklessness and policing the financial markets’ in [Nicholas Ryder, Umut Turksen and Sabine Hassler](#) (eds), *Fighting Financial Crime in the Global Economic Crisis (The Law of Financial Crime)* (Routledge 2014). Available at 9 <http://www.devereuxchambers.co.uk/assets/docs/publications/risk_recklessness_and_policing_the_financial_markets_jf_2015.pdf>.

³⁰ Geof Mortlock, ‘Corporate Governance in the Financial Sector’ Reserve Bank of New Zealand: Bulletin Vol. 65 No. 2 12.

conduct in fraudulently concealing their losses. However, it has been examined that it was their reckless conduct as traders which caused the losses in the first place and yet it was not the reckless risk taking that engaged the criminal law. Instead, the prosecutors stigmatised the cover-up as more culpable fraudulent conduct rather than concentrating underlying reckless misconduct which they sought to conceal³¹.

While there is, as previously mentioned, a common perception that the fraudulent conduct of high-level executives in the financial sectors was a major catalyst behind the economic downturn, it will prove quite interesting to examine the accuracy of these perceptions in chapter 2, as it is imagined that these may well have been mere links in an already compromised chain. The aforementioned case examples of rogue traders also make for an interesting line of questioning as to whether reckless conduct is really the kind of criminal culpability that legislators and regulators should be concerned about. As Fisher considers on this point “the key question in the context of reckless risk taking on the financial markets is whether it is possible for reckless conduct to satisfy the criterion of dishonesty for the purposes of the criminal law”³². On this point he delves into the case of *Welham v DPP*³³, whereby the House of Lords content to permit conscious risk-taking to satisfy the requirement “in cases involving fraudulent conduct where the taking of risk prejudices another person’s economic interests”³⁴. As the Law Lords contemplated, to “defraud” or to “act fraudulently” is to act in a manner which prejudices or to take the risk of prejudicing another’s right, knowing that you have no right to do so³⁵. It is submitted that such might well largely fit the bill for reckless conduct in the financial sectors whereby one goes about a transaction or

³¹ Jonathan Fisher, ‘Risk, recklessness and policing the financial markets’ in [Nicholas Ryder, Umut Turksen](#) and [Sabine Hassler](#) (eds), *Fighting Financial Crime in the Global Economic Crisis (The Law of Financial Crime)* (Routledge 2014). Available at 4 <http://www.devereuxchambers.co.uk/assets/docs/publications/risk_recklessness_and_policing_the_financial_markets_jf_2015.pdf>.

³² Ibid 6.

³³ *Welham v DPP* [1961] AC 103. UK CASE

³⁴ Jonathan Fisher, ‘Risk, recklessness and policing the financial markets’ in [Nicholas Ryder, Umut Turksen](#) and [Sabine Hassler](#) (eds), *Fighting Financial Crime in the Global Economic Crisis (The Law of Financial Crime)* (Routledge 2014). Available at 6 <http://www.devereuxchambers.co.uk/assets/docs/publications/risk_recklessness_and_policing_the_financial_markets_jf_2015.pdf> .

³⁵ Jonathan Fisher, ‘Risk, recklessness and policing the financial markets’ in [Nicholas Ryder, Umut Turksen](#) and [Sabine Hassler](#) (eds), *Fighting Financial Crime in the Global Economic Crisis (The Law of Financial Crime)* (Routledge 2014). Available at 6 <http://www.devereuxchambers.co.uk/assets/docs/publications/risk_recklessness_and_policing_the_financial_markets_jf_2015.pdf>.

activity with blatant disregard for any other person's right which might be affected by the transaction. The perpetrators only concern is for the proceeds of the transaction (perhaps, even, one involving excessive risk taking on the financial markets) and he does not care whether or not another's property is affected. The damage to the other's property is merely a by-product of his actions. Whether such conduct could fall within the ambit of legal definitional recklessness, will be examined accordingly.

[1.3] Central research question and the ambit of the submission

Crucial to the overarching purpose of this submission, it is requisite to fully immerse oneself in the central research question assumed. Such will be delved into and acknowledged throughout this thesis and the ultimate formulation of the central research question is:

'An examination of the extent to which reckless conduct precipitated the contemporary global financial crisis and an ensuing evaluation of existing and potential appropriate sanctions and offences for deemed reckless conduct in respect of corporate governance and with an express focus on the financial sector'.

Accordingly, the ambit of what will be discussed in this submission must now be outlined. The features of the global financial crisis will first be concisely examined, so as to gain an insight into the respective roles in which each of the financial sectors played in what culminated in a catastrophic economic downturn. The banking and securities sectors will necessarily be delved into to a greater extent, because from the early stages of research it became quite evident that it was within these sectors that the most significant trouble was caused. The perception that high-level and elitist fraudsters were the culprits behind the crisis will also be addressed and the ultimate question branching away from this is whether it was in fact reckless conduct which played a significant role in precipitating events. The third chapter will deal with legal definitional recklessness, indeed the nebulous concept that it is in law. Thereafter, the operation of the civil reckless trading provisions in this jurisdiction will be looked at and whether reckless conduct in the financial sectors could be appropriately dealt with under this legislation will be examined. Following on from the Law Reform

Commission Issue Paper released earlier this year³⁶, the viability of a criminal reckless trading offence in Ireland will be investigated. It will also be necessary to observe the approach in other jurisdictions so as to gain a holistic picture as to how to deter reckless conduct in corporations and the financial sector with a view to attenuating potential future crises and one will be immersed in this exercise in chapter four. Finally, recommendations and conclusions will be drawn in chapter 5 with a particular focus on what would amount to ‘potential and appropriate sanctions for deemed reckless conduct’ having regard to the corporate form and the financial sectors. A particular poignant quote uncovered during research is one formulated by Fisher:

[j]ust as a reckless motorist who takes a risk when overtaking blindly on the other side of the road is held criminally responsible for his action, there is no reason why a reckless trader and his manager should not also be held to account in the criminal courts when they act in the same way in relation to the financial markets³⁷.

Keeping in mind the reservations of capitalists, such poses a very strong argument for criminalising the reckless taking of a risk in the financial sectors, whereby nobody is criminalising driving *per se* in this scenario, nor is anyone advocating for the criminalisation of risk and venture in the financial sectors. What is being critiqued is excessive risk taking and recklessness having regard to participants in the relevant sectors. It is also asserted that, particularly in thinking of the civil reckless trading provisions existent in this country, a wider appreciation for stakeholders other than the forsaken creditors must be had. While the plight of creditors is not here being undermined, it is simply being recognised that there are other stakeholders who must be considered when the avoidance of insolvency is in issue. Employees and indeed the national economy come to mind when the winding-up is concerning large companies such as the ill-fated Anglo Irish Bank and Quinn Insurance. The ultimate question that resonates here is: how can we strike the requisite balance between

³⁶ Law Reform Commission, *Issue Paper: Regulatory Enforcement and Corporate Offences* (LRC IP 8 - 2016).

³⁷ Jonathan Fisher, ‘Risk, recklessness and policing the financial markets’ in [Nicholas Ryder](#), [Umut Turksen](#) and [Sabine Hassler](#) (eds), *Fighting Financial Crime in the Global Economic Crisis (The Law of Financial Crime)* (Routledge 2014). Available at 10 <http://www.devereuxchambers.co.uk/assets/docs/publications/risk_recklessness_and_policing_the_financial_markets_jf_2015.pdf>.

preserving the essence of the market and entrepreneurial behaviour and also maintaining the appeal of the position of director vis-à-vis protecting the national economy?

CHAPTER 2

THE GLOBAL FINANCIAL CRISIS, THE FINANCIAL SECTOR AND RECKLESS CONDUCT

[2.1] Introduction

In this first material chapter, it has been deemed necessary to outline an account of events in respect of the financial crisis which delineates the role in which the financial sectors played in bringing about the economic downturn. As will become evident, the banking and securities sectors in particular must assume a quite measureable amount of responsibility in respect of facilitating the crisis. The Icelandic and Irish experiences will be delved into as these particular case studies are demonstrative of the fact that the collapse of the largest financial institutions in a state can effectively bring down with it the state itself. The social perception that high-level fraud caused the crisis will also be observed with a view to showing that it was in fact really reckless conduct that played a significant role. Aggressive growth strategies are also to be examined as these are envisaged as having potentially fatal impacts when adopted.

[2.2] The Global Financial Crisis 2008

The infamous collapse of Lehman Brothers in September 2008 is very frequently deemed the sinister point at which the world economy changed utterly. The ill-fated investment bank “a sprawling global bank” is regarded as having “almost brought down the world’s financial system [whereby] it took huge taxpayer-financed bail-outs to shore up the industry”³⁸. Further research also suggests that European banks borrowed temerarily in American money markets and used such funds to buy questionable securities prior to the

³⁸ Author unavailable, ‘The origins of the financial crisis: crash course’ *The Economist* (London, 7 September 2013) <<http://www.economist.com/news/schoolsbrief/21584534-effects-financial-crisis-are-still-being-felt-five-years-article>> accessed 28 June 2016.

crisis³⁹. In an article depicting the “upheaval”⁴⁰, the commentator first attributes blame to the “folly of the financiers”⁴¹. Indeed, narratives of the crisis tend to branch out differently, however, they do share a common root: the securitisation of residential mortgages, particularly those of the abominable ‘sub-prime’ variety, and the development and propagation of financial instruments: the value of which were entirely contingent on these mortgages, played a very significant role in precipitating the crisis⁴². Critically, it has been envisaged that this deep exposure to mortgage-related instruments ultimately brought down the New York based investment banks Bear Stearns and Lehman Brothers⁴³. This flood of irresponsible mortgage lending (to borrowers with poor credit histories) was subsequently passed on to financial engineers at large banks who in turn converted them into ‘low-risk’ securities (known as ‘collateralised debt obligations’) by pooling substantial numbers of these mortgages together⁴⁴. These ‘CDOs’ were sliced into tranches by degree of exposure to default and whereby the proverbial plot thickens, rating agencies such as Moody’s and Standard and Poor’s were overly generous and unrealistic in their assessment of them, often awarding the coveted ‘triple-A’ credit ratings. Investors consequently bought these ‘safer’ instruments and following the cataclysmic fall of the housing market in the United States, something of a chain of events exposed the fragilities in the financial system. When the supposedly ‘safe’ CDOs transpired to be worthless, it became difficult to sell suspect assets at any price and hence, they could not be used as collateral for the short-term funding that the banks were entirely reliant on⁴⁵. The banks’ capital was thereupon compromised due to ‘fire-sale prices’ and ‘mark-to-market accounting rules’, made more stringent following the unveiling of the Sarbanes Oxley Act⁴⁶, which required assets to be valued at current prices

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Robert Quigley, ‘The Impulse Towards Individual Criminal Punishment After the Financial Crisis’ [2015] 22:1 Virginia Journal of Social Policy & the Law 105, 112.

⁴³ Ibid at 112.

⁴⁴ Author unavailable, ‘The origins of the financial crisis: crash course’ *The Economist* (London, 7 September 2013) <<http://www.economist.com/news/schoolsbrief/21584534-effects-financial-crisis-are-still-being-felt-five-years-article>> accessed 28 June 2016.

⁴⁵ Ibid.

⁴⁶ The Sarbanes-Oxley Act/The Public Company Accounting Reform and Investor Protection Act 2002 Pub L 107-204, 116 Stat 74.

and thus had to acknowledge losses on paper that may not necessarily be incurred in practise⁴⁷. It has been observed in respect of the United States exemplification that:

A core component of the federal government's bailout of the financial sector at the apex of the crisis was its allotment of \$700 billion to purchase residential or commercial mortgages and any securities, obligations, or other instruments that are based on or related to such mortgages⁴⁸.

Trust and market confidence are two crucial pre-requisites in respect of any profitable, efficient or indeed, functioning financial system. Trust was observed as beginning to dissolve on 2007 whereby the banks started questioning the viability of their counterparties and consequently began to withhold short-term credit⁴⁹. The demise of Northern Rock was essentially rooted in its reliance on short term credit. What started as a local building society founded in 1860, the institution's strategy of growing its assets aggressively, while not simultaneously growing its funding base, proved fatal whereby the bank became more and more dependent on globally sourced short-term funding⁵⁰. This fatal flaw ultimately occasioned the first run on a British bank for many years.

Thereafter, one can almost envisage the widening gyre whereby complex chains of debt within the financial ecosystem were vulnerable to just one link breaking. Credit-default swaps (whereby the seller agrees to compensate the buyer if a third party defaults on a loan), financial instruments designed to disperse risk, ended up concentrating it⁵¹. All in all, the system in its entirety was exposed as having been built on compromised foundations. Banks had permitted their balance sheets to bloat, but did not have adequate capital requirements

⁴⁷ Author unavailable, 'The origins of the financial crisis: crash course' *The Economist* (London, 7 September 2013) <<http://www.economist.com/news/schoolsbrief/21584534-effects-financial-crisis-are-still-being-felt-five-years-article>> accessed 28 June 2016.

⁴⁸ Robert Quigley, 'The Impulse Towards Individual Criminal Punishment After the Financial Crisis' [2015] 22:1 Virginia Journal of Social Policy & the Law 105, 113.

⁴⁹ Author unavailable, 'The origins of the financial crisis: crash course' *The Economist* (London, 7 September 2013) <<http://www.economist.com/news/schoolsbrief/21584534-effects-financial-crisis-are-still-being-felt-five-years-article>> accessed 28 June 2016.

⁵⁰ Patrick McConnell, 'Strategic risk: The beanstalk syndrome' (2013) 6:3 Journal of Risk Management in Financial Institutions 229, 237.

⁵¹ Author unavailable, 'The origins of the financial crisis: crash course' *The Economist* (London, 7 September 2013) <<http://www.economist.com/news/schoolsbrief/21584534-effects-financial-crisis-are-still-being-felt-five-years-article>> accessed 28 June 2016.

in stable assets to absorb such losses. Essentially “they had bet on themselves with borrowed money, a gamble that had paid off in the good times but proved catastrophic in bad”⁵².

Something of a projection emanating from the former statement, is the writing on the wall depicting the rough beast of banking as being the diabolical creature whose *modus operandi* was cumulatively the genesis of the crisis. In this regard, it is understandable as to why bankers and the institutions which house them are often perceived as being worthy of punishment. It would seem that the pre-crisis banking appetite for expansion and acquisition, euphemistically referred to as “strategic risk”⁵³, was essentially what drove the sector into the ground. While the extent of the bankers’ fault will be delved into latterly, it is deemed first necessary to examine the banking crises in Ireland and Iceland to gain an insight into the significance of this particular facet of the financial sector.

[2.3] The financial crises in Ireland and Iceland

As one author acutely observes “there is much that is comparable between the Icelandic and Irish crises: both involved a collapse of the banking system, in both cases a severe recession was triggered and both nations had to resort to outside financial assistance”⁵⁴. Following the collapse of Lehman Brothers in mid-September 2008 the sheer extent of the vulnerability of the Irish banking sector was to be nationally fully appreciated. A void of approximately €200 billion existed between what the banks had lent (primarily to property developers) and deposits taken in and such had to be filled by borrowing in international markets⁵⁵. The notorious Anglo Irish Bank (once humorously labelled the world’s ‘best bank’⁵⁶ by one of the world’s largest consultancies; Mercer Oliver Wyman),

⁵² Author unavailable, ‘The origins of the financial crisis: crash course’ *The Economist* (London, 7 September 2013) <<http://www.economist.com/news/schoolsbrief/21584534-effects-financial-crisis-are-still-being-felt-five-years-article>> accessed 28 June 2016.

⁵³ Patrick McConnell, ‘Strategic risk: The beanstalk syndrome’ (2013) 6:3 *Journal of Risk Management in Financial Institutions* 229.

⁵⁴ Baldur Thorhallsson and Peadar Kirby, ‘Financial Crises in Iceland and Ireland: Does European and Euro Membership Matter?’ (2012) 50:5 *Journal of Common Market Studies* 801.

⁵⁵ *Ibid* 801.

⁵⁶ Cyril Hardiman, ‘Anglo Irish Bank is world’s top performer’ *Irish Independent* (Dublin, 27 January 2006) <<http://www.independent.ie/business/irish/anglo-irish-bank-is-worlds-top-performer-26406330.html>> accessed 28 June 2016.

began to lose deposits of around €1 billion a day because it was the bank most exposed to the property market⁵⁷. Mere days later it became obvious that most other Irish banks were also in difficulty and on September 29th, the Irish Government announced a blanket guarantee of the banks' liabilities. Simultaneously, a severe national budgetary crisis emerged and by the end of 2009 the budget deficit had increased to 14.4 per cent of GDP⁵⁸. By late 2010, once the full financial burden of supporting the banks was borne, the deficit had risen to nearly 32 per cent of GDP⁵⁹. The societal exposure to what were (imaginably) initially perceived intangible governmental and institutional difficulties, was entirely appreciated by mid-2011 whereby unemployment stood at 13.3 per cent⁶⁰. The uncertainty regarding Ireland's ability to meet its huge debts was reflected in a loss of confidence on the international markets and such necessitated the Irish Government accepting a rescue package from the European Union (EU) and International Monetary Fund (IMF); the terms of which were agreed in late November 2010. The price of recovery was arguably oppression in that the package was heavily criticised for the associated high interest rates as well as the austerity implications. Keeping in mind the essence of the Irish experience in the context of the crisis: it is quite easy to fathom why there was a consequent social demand for justice and prosecutions.

Having regard to the Icelandic experience, the extent of such was punctuated by public anger, popular protest, trade union meetings and a demand for the restructuring of government. The Iceland króna (ISK) depreciated significantly in March 2008 following the loss of market confidence in the State's ability to defend itself and its financial position⁶¹. As is directly related to the former statement, there is something that must be acknowledged at this point, indeed; the extent to which market confidence actually dictates an economy's wellbeing, and the Irish and Icelandic positions in the aftermath of the crisis are entirely demonstrative of this. Following on from the depreciation of the national currency, Iceland's largest banks; Glitnir, Landsbanki and Kaupthing (banks which had expanded rapidly both

⁵⁷ Baldur Thorhallsson and Peadar Kirby, 'Financial Crises in Iceland and Ireland: Does European and Euro Membership Matter?' (2012) 50:5 *Journal of Common Market Studies* 802.

⁵⁸ *Ibid* 802.

⁵⁹ *Ibid* 802.

⁶⁰ *Ibid* 802.

⁶¹ Baldur Thorhallsson and Peadar Kirby, 'Financial Crises in Iceland and Ireland: Does European and Euro Membership Matter?' (2012) 50:5 *Journal of Common Market Studies* 801, 803.

domestically and internationally in the years immediately preceding the crisis with investments in more dubious and overvalued assets such as retail chains), were permitted to go into receivership and controversially allowed to fail in the first week of October 2008. The three banks that collapsed amounted to 85 per cent of the country's financial sector and what was most unfortunate was the fact that rescuing these banks was entirely impractical and essentially not an option in that these rotten banks' loans and assets totalled at more than ten times the country's Gross Domestic Product (GDP)⁶². Because the Icelandic state only guaranteed the domestic liabilities of its largest banks, it was not on this occasion the taxpayers that had to foot the bill: it was instead the creditors of the banks that had to bear the unfathomable extent of these losses⁶³. While one might argue the social discontentment should have been consequently to a lesser degree by comparison with other jurisdictions who had to feel the extent of austerity in their own back-pockets; it was the curse of unemployment that wholly frustrated the Icelandic people. Indeed; what transpired was a transposition from almost full employment to historical annual averages of 8 per cent in 2009⁶⁴. Ultimately the IMF had to intervene, not just as having concern for the Icelandic people, but also having regard to the necessity of reimbursement to the British and Dutch governments, each of which compensated their citizens' loss of savings in Icelandic banks, worth a total of €3.8 billion.

As is entirely evident from both the Icelandic and Irish scenarios, it is indeed the banking sector that must be observed as requiring serious supervision, given their institutional propensity to wholly undermine an entire national economy. Furthermore, and with such in mind, the ultimate question that resonates is whether a criminal offence with deterring properties would be an entirely unreasonable pursuit when it comes to the excessive risk taking of senior management within such institutions?

⁶² Ibid 805.

⁶³ Ibid 805.

⁶⁴ Baldur Thorhallsson and Peadar Kirby, 'Financial Crises in Iceland and Ireland: Does European and Euro Membership Matter?' (2012) 50:5 *Journal of Common Market Studies* 801, 805.

[2.4] The Damnation of the Financial Sectors and the Perception of High-Level Fraud

While the pension sector attracted a somewhat lesser degree of attention as the intricacies of the crisis began to unravel (other than the fact that many had lost their retirement savings having invested them in questionable instruments such as investment bonds backed by Anglo Irish Bank⁶⁵), it was largely the banking and securities sectors that were perceived as being the formidable culprits. It must be observed also that the operations of the insurance sector were somewhat scrutinised following the collapse of Quinn Insurance, whereby there was an exposed inadequacy of the entirely requisite level of capital requirements in the company and there was a consequent levy of 2 per cent placed on all non-life insurance premiums (Séan Quinn having invested a large proportion of his empire and acquiring an almost 30 per cent stake in the ill-fated Anglo Irish Bank using highly risky and complex financial instruments known as ‘contracts for difference’⁶⁶). The demise of Quinn Insurance has thus far necessitated the collecting of approximately €240 million, and the insurance compensation scheme (a type of ex-post funding) in its continued operation is expected to cost a further €900 million⁶⁷. Indeed, rather comparatively; small-time fraud in the insurance sector can be perceived as something somewhat less of a threat to the industry taking account of these figures. Such is also largely demonstrative of the interrelationship existent between the sectors and indeed; risk appetite quite clearly defines the integrated operation of each of the sectors.

It is now deemed necessary to delve into the activities of the disreputable securities and banking sectors in order to wholly immerse oneself in the wicked web woven. Having regard to the securities sector, as one commentator asserts “[p]ublic officials have blamed

⁶⁵ Niall Brady, ‘Payout for lost Anglo Savings’ *The Sunday Times* (Dublin, 29 September 2013)

<<http://www.thesundaytimes.co.uk/sto/news/ireland/article1320208.ece>> accessed 29 June 2016.

⁶⁶ See Richard Curran, ‘Irish Contracts for Difference punters are alive, well and still managing to lose money’ *Irish Independent* (Dublin, 26 November 2015) <<http://www.independent.ie/business/irish-contracts-for-difference-punters-are-alive-well-and-still-managing-to-lose-money-34234534.html>> accessed 29 June 2016.

⁶⁷ See Peter O’Dwyer, ‘Quinn Insurance collapse to cost another €912m’ *Irish Examiner* (Dublin, 28 November 2015) <<http://www.irishexaminer.com/business/quinn-insurance-collapse-to-cost-another-912m-367603.html>> accessed 29 June 2016.

Wall Street and its complex financial products for causing the 2008 economic downturn”⁶⁸. Occupy Wall Street and similar progressive activist groups are most demonstrative of this social consensus as to the perpetrators of the crisis. This physical occupation of Zuccotti Park in Lower Manhattan (their location and proximity to Wall Street obviating the directionality of to whom they were apportioning blame for the crisis) sparked further protests in major cities around the world⁶⁹. The essential message of such movements was that “99 [per cent] of the broad masses of people have been robbed of their due share of society’s wealth and opportunities by millionaires and billionaires, i.e. by the 1 [per cent]”⁷⁰. Indeed, this notion of “robbery” refers not only to the inherent unfairness of the bank bail-outs generally, but also refers to a sense of criminality⁷¹, it is submitted. It is to be observed also that Occupy Wall Street do not merely represent a small minority of philosophical bohemian demonstrators and iconoclasts. Empirical data exists which reflects the social desire for justice:

Just over half of Americans believed that the government had not ‘sufficiently prosecuted bankers for their role in the financial crisis’ as of September 2013 according to one poll [and according to another poll conducted in the same month] seventh-nine percent of Americans believe that more ‘bankers and employees of financial institutions [should have been] prosecuted for their role in the financial crisis of 2008’⁷².

While there were initially a number of prosecutions underway concerning Wall Street Executives, prosecutors rather abruptly dropped investigations of top executives at firms including Lehman Brothers, Countrywide and AIG with no indictments⁷³. The reason for such

⁶⁸Edward Peter Stringham, ‘It’s not me it’s you: the functioning of Wall Street during the 2008 economic downturn’ (2014) 161 *Public Choice* 269.

⁶⁹ Robert Quigley, ‘The Impulse Towards Individual Criminal Punishment After the Financial Crisis’ [2015] 22:1 *Virginia Journal of Social Policy & the Law* 105, 128.

⁷⁰ *Ibid* 129.

⁷¹ *Ibid* 129.

⁷² Michael Erman, ‘Five years after Lehman, Americans still angry at Wall Street:Reuters/Ipsos poll’ *Reuters* (London, 15 September 2013) <<http://www.reuters.com/article/us-wallstreet-crisis-idUSBRE98E06Q20130915>> accessed 29 June 2016; The New York Times and CBS News Poll, ‘America’s Views on President Obama’ *The New York Times* (New York, 25 September 2013) <<http://www.nytimes.com/interactive/2013/09/25/us/politics/nyt-poll-obama.html>> accessed 29 June 2016; Robert Quigley, ‘The Impulse Towards Individual Criminal Punishment After the Financial Crisis’ [2015] 22:1 *Virginia Journal of Social Policy & the Law* 105, 128.

⁷³ Robert Quigley, ‘The Impulse Towards Individual Criminal Punishment After the Financial Crisis’ [2015] 22:1 *Virginia Journal of Social Policy & the Law* 105, 106.

was considered to be the fact that a jury acquitted two former hedge fund managers for Bear Stearns who were on trial for charges of conspiracy, securities and wire fraud in relation to the sale of subprime mortgage-backed securities⁷⁴. This defeat served as a significant blow to an already under-resourced Department of Justice having to deal with such complex white-collar crime cases. Furthermore, the few prosecutions that did concern prominent individuals in the financial sector tended to be related to Ponzi schemes and insider trading connected to hedge funds. Providing a few examples; former NASDAQ chairman Bernard Madoff, billionaire financier Allen Stanford and billionaire hedge fund manager Raj Rajaratnam, were all successfully prosecuted because such cases are comparatively easier to prove. When compared, that is, with the other types of corporate, white collar and regulatory cases that can arise. Unfortunately, these are rather pathetic successes in the grand scheme of things. While individual hedge fund managers are more likely to “strike it rich” when compared with individual bankers, institutionally speaking; banks are “an order of magnitude larger”⁷⁵. SAC Capital, one of the largest and highest-paying hedge funds on Wall Street prior to the crisis, had 1,000 employees and \$14 billion under its management (prior to its “unravelling in 2013”)⁷⁶. By a very substantial comparison, Lehman Brothers had 26,200 employees and \$639 billion in assets. Such also rouses questions of impact on the community, as discussed in chapter one⁷⁷, whereby a financial institution meets its maker: it is more than the forsaken creditors that can expect devastating consequences, indeed, regard must be had for employees and their families also.

As the world observed the economic catastrophe unfold in 2008, questions as to the extent that fraudulent conduct engaged in by high-level executives precipitated the crisis surfaced. Indeed, it soon became something of a common perception that these white-collar folk had a great deal to answer for and it was further reasoned that their actions were fraudulent and criminal (not taking account of whether such activities actually fell within the remit of the criminal law). Demonstrative of this social perception were the comments made by former United States Democratic Senator, Ted Kaufman who stated “fraud and potential

⁷⁴ Ibid 106.

⁷⁵ Ibid 150.

⁷⁶ Ibid 150.

⁷⁷ See chapter one of this submission, 14.

criminal conduct were at the heart of the financial crisis”⁷⁸. Similarly, the very prominent New York judge, Jed Rakoff, asserted “the crisis was in material respects the product of intentional fraud”⁷⁹. However, the ordinary man’s appreciation for the accurate legal definition of fraud may not be sufficiently concise and it is reasonable to assume that such vocabulary is rather casually dispersed. Furthermore, as Quigley concisely observes, having regard for the extent to which fraudulent conduct precipitated the crisis “[f]raud may piggyback on the booms and perhaps make the busts worse as a result, but its potency comes from its interactions with lawful but undesirable dynamics”⁸⁰. Hence, it is envisaged that fraud may only represent a few links in the overall chain reaction. It may be in this regard, and with a view to attenuating prospective crises, necessary to address the risk-culture within the financial institutions, indeed, the aforementioned almost tangible institutional ethos dealt with in the former chapter. Such appropriately touches upon the critical line of questioning engaged by this submission: the best way to address such risk appetite is by adopting provisions deterring against reckless conduct.

[2.5] Was excessive risk-taking and recklessness a factor?

Financial journalist and non-fiction author, Michael Lewis, argues that serious problems were caused because “in some cases senior management in investment banks were so reckless they did not even understand the risks they were running”⁸¹. Inimical to this statement some commentators assert that “the much maligned mortgage-backed securities, collateralised debt obligations, credit default swaps, and unregistered hedge funds functioned almost exactly as designed”⁸². However, one must distinguish between

⁷⁸ Robert Quigley, ‘The Impulse Towards Individual Criminal Punishment After the Financial Crisis’ [2015] 22:1 Virginia Journal of Social Policy & the Law 105, 130.

⁷⁹ Jed S Rakoff, ‘The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?’ (2014) The New York Review of Books. Available online <<http://www.nybooks.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions/>> accessed 18 May 2016.

⁸⁰ Robert Quigley, ‘The Impulse Towards Individual Criminal Punishment After the Financial Crisis’ [2015] 22:1 Virginia Journal of Social Policy & the Law 105, 153.

⁸¹ Michael Lewis, *The Big Short: Inside the Doomsday Machine* (WW Norton and Company 2011); Jonathan Fisher QC, ‘Risk, recklessness and policing the financial markets’ in [Nicholas Ryder](#), [Umut Turksen](#) and [Sabine Hassler](#) (eds), *Fighting Financial Crime in the Global Economic Crisis (The Law of Financial Crime)* (Routledge 2014).

⁸² Edward Peter Stringham, ‘It’s not me it’s you: the functioning of Wall Street during the 2008 economic downturn’ (2014) 161 Public Choice 269.

“problems that manifested themselves in markets and problems with the market itself”⁸³. Greed has the fantastic ability to inhibit the decision making process and influence individuals to progress beyond what would be regarded as a reasonable risk to run. Furthermore, moral hazard (essentially the lack of motivation to guard against risk whereby one is insulated from such risk) and overly ambitious growth strategies within the banking and securities sectors have a great deal of the apportionment of the blame to assume. Indeed, it was notions of moral hazard which were largely manifested in the “too big to fail” and “too big to jail” conceptualisations. Most concerning (but as yet unsurprising) as some commentators recognise, is the fact that entire remuneration and compensation regimes within the financial sectors are premised on the award of such incentives as stock options and earning’s based performance bonuses which may increase risk in numerous ways⁸⁴. In the banking sector the risks inherent to compensation contracts can lead to particularly destabilising trends “due mainly to their high leverage, and the interaction between equity-based compensation awards and capital structure”⁸⁵. Most significantly it has been noted that bank managers awarded through stock options have;

strong incentives to expand the balance sheet of their institutions and increase leverage. Paradoxically, this state of affairs is not helped by the use of so-called managerial ‘disciplining’ devices including stock options, takeover threats, or board monitoring of managerial performance, each of which increases the likelihood of higher leverage⁸⁶.

Bringing such fundamental internal operational policies to the forefront of one’s mind, it becomes a great deal more credible as to how an institutional ethos incorporating an aggressive growth strategy could potentially bring down entire globally systemically important banks. “Blinded by the apparent success of their growth strategy, there was clearly little attention being paid to risks at either the divisional, senior management or board

⁸³ Ibid 269.

⁸⁴ Jay Cullen and Guðrún Johnsen, ‘Promoting Bank Stability Through Compensation Reform: Lessons from Iceland’ (2015) 11:2 Icelandic Review of Politics and Administration 333, 336.

⁸⁵ Ibid 336.

⁸⁶ Ibid 336.

level”⁸⁷. McConnell ultimately considers that the demise of Anglo Irish Bank, Bank of Scotland, Lehman brothers, Northern Rock and Washington Mutual was crucially brought about by a policy of “grow[ing] assets at all costs” and the portfolio of Anglo assets prior to the crisis is undeniable evidence of this. Recalling the essence of the central research question of this submission, it is not imagined that fraud was the dominant breed of undesired conduct that the directors and senior management of these institutions engaged in when they contributed to the economic downturn. They did not necessarily intend to deceive so as to gain. Recklessness however; they could be condemned for. Perhaps even legal definitional recklessness. The directors and senior managers of these monstrous banking institutions had an undeniable social responsibility to maintain the liquid wellbeing of the institutions for which they had a fiduciary duty to. It is submitted that where the stakes are so high, these senior managers should be held to a higher than normal standard of care having regard to the propensity that their respective institutions have (or ‘had’ as the case may be) to detrimentally impact the economy. While some consider that such would deter many otherwise suitable candidates from accepting these such positions, they are nonetheless inevitably (and perhaps rightly) going to be particularly well remunerated for such roles and such should quite easily balance any suggested or anticipated disincentive.

It is envisaged that what would be entirely requisite are defined standards and regulations stipulating what constitutes excessive risk and indeed what encroaches onto reckless territory. Examples of such suggested standardisations will be dually dealt with in the concluding chapter of this dissertation.

It must also be investigated as to whether civil liability or criminal culpability might appropriately apply on the financial markets and within the securities sector. Such would be all the more controversial, it is imagined, given the basic and natural functioning of the sector which is effectively premised on professional gambling. It is particularly within this sector that over-regulation is perceived as “killing the market”, taking account of the fact that risk truly is inherent to the market in this context. While it is appreciated also that successful banking in a capitalist western democracy, in conjunction with the securities sector, necessitates risk and market participation: the national and potentially global (hence ‘globally

⁸⁷ Patrick McConnell, ‘Strategic risk: The beanstalk syndrome’ (2013) 6:3 *Journal of Risk Management in Financial Institutions* 229, 234.

systemically important banks') significance of these such institutions does require a more separate and stringent degree of regulation.

For one to devil with the inception of creating legal disincentives for engaging in reckless conduct on the financial markets, one must first look to the traders who partake in such activities. Indeed, it is accepted that primary responsibility must first rest with the traders "who buy and sell derivative instruments in incredibly high volumes and with astonishing rapidity"⁸⁸. Thereafter, it would only be the supervisory role of senior management, within such institutions in the securities sector like the former SAC Capital, who would be called to account for their employees' compliance with such hypothetical recklessness provisions. In and of itself such supervision, it is appreciated, would be quite difficult given the algorithmic speeds at which the markets operate. Nonetheless, there is evidence which suggests that:

Reckless behaviour by derivative traders is not an unknown phenomenon and in the period prior to the global financial crisis there were traders who were gambling with the purchase and sale of derivative instruments instead of making their decisions in a more considered basis⁸⁹.

Essentially, while economic shocks and unsatisfactory macroeconomic practise, it is acknowledged play a significant part in contributing to financial instability, the substantive assertions of this chapter are demonstrative of the fact that inadequate risk management within banks and other financial institutions is the critical catalyst behind most episodes of financial system distress⁹⁰.

Furthermore, as Mortlock again concisely observes to appropriately conclude this chapter and directly concurring with the specific assertions made:

⁸⁸ Jonathan Fisher, 'Risk, recklessness and policing the financial markets' in [Nicholas Ryder, Umut Turksen and Sabine Hassler](#) (eds), *Fighting Financial Crime in the Global Economic Crisis (The Law of Financial Crime)* (Routledge 2014). Available at 3 <http://www.devereuxchambers.co.uk/assets/docs/publications/risk_recklessness_and_policing_the_financial_markets_jf_2015.pdf>.

⁸⁹ Ibid 3.

⁹⁰ Geof Mortlock, 'Corporate Governance in the Financial Sector' Reserve Bank of New Zealand: Bulletin Vol. 65 No. 2 13.

a frequent underlying cause of poor risk management is inadequate corporate governance in the corporate and financial sectors. Weak governance in the corporate sector increases the risk profile of borrowing companies and exposes banks and other lending institutions to a greater risk of loss than would otherwise be the case. Weaknesses in corporate governance arrangements in banks and other financial institutions reduce their capacity to identify, monitor and manage their business risks, and can result in poor quality lending practices and excessive risk-taking⁹¹.

Indeed, it is very hard to see why the criminal law should in fact remain impotent in respect of holding accountable financial market participants “both traders and senior management, who facilitate reckless trading on the financial markets, without making a considered assessment of the risks involved or worse still, without having an iota of understanding of the risks involved”⁹².

⁹¹ Geof Mortlock, ‘Corporate Governance in the Financial Sector’ Reserve Bank of New Zealand: Bulletin Vol. 65 No. 2 13.

⁹² Jonathan Fisher, ‘Risk, recklessness and policing the financial markets’ in [Nicholas Ryder](#), [Umut Turksen](#) and [Sabine Hassler](#) (eds), *Fighting Financial Crime in the Global Economic Crisis (The Law of Financial Crime)* (Routledge 2014). Available at 9 <http://www.devereuxchambers.co.uk/assets/docs/publications/risk_recklessness_and_policing_the_financial_markets_jf_2015.pdf>.

CHAPTER 3

RECKLESSNESS AS A CONCEPT IN LAW AND RECKLESS TRADING IN IRELAND

[3.1] Introduction

In this chapter, the general legal application and definition of recklessness in both the civil and criminal contexts will be examined. The difficulties that are existent in respect of the definition and scope of 'reckless' conduct in terms of responsibility and culpability will first be delved into. Thereafter, the ambit of the civil reckless trading provisions in this jurisdiction will be set out and subsequently critiqued. It will ultimately be examined as to whether the particular misconduct of the boards of directors and senior management of the institutions predominantly blamed as having precipitated the crisis could be dealt with under the civil reckless trading provisions. If such were to prove feasible, the perpetrators could be regarded as having been served with their proverbial 'just deserts', as has been appreciated in chapter one with regard to the social demand for justice in the aftermath of the crisis. Finally, the potential form and application that a criminal reckless trading offence might assume will be explored. Keeping in mind the ultimate question generated within this submission; this chapter will be devoted to trying to establish whether a proportion of the conduct that precipitated the global financial crisis in 2008 could have been appropriately regarded as recklessness within the law. Once such conduct can be deemed as fitting within the legal definition of recklessness, whether laws exist which would deter such conduct shall be examined. If it is established that such laws do not exist, recommendations will be put forth having regard to what might be all of the necessary elements of such prospective legislative enactments or regulations, as the case may be. As discussed in the previous chapter, as opposed to being fraudulent, certain conduct could have been appropriately classed as reckless. As such, the social dissatisfaction at a lack of prosecutions could have been effectively dealt with by sanctions for reckless behaviour, were such conduct to fall square within the civil provisions. Whether the existing sanctions would have been suitable for this

purpose has yet to be ascertained. Should the answer to the former be in the negative, and appreciating that introducing sanctions and applying them retrospectively is contradictory to the rule of law, then it is submitted that the government and legislature should seriously examine the need for such provisions in their pursuit of effectively attenuating prospective crises.

[3.2] Recklessness – in and of itself a nebulous concept at law

“[A]s a concept, recklessness has been long neglected by scholars, frequently abused by practitioners, and all too often misunderstood by judges”⁹³. Undoubtedly, unearthing concise definitions of ‘reckless’ and indeed ‘recklessness’, in respect of the etymology and operation of the concept in the legal realm, is a task that academics and even the judiciary have struggled with since such approximate conduct has presented itself as culpable. Much to the detriment of the esteem that can be attributed to the word itself, the concept of recklessness is “hopelessly versatile”⁹⁴ and is “unpredictable and content-specific, and covers a broad range of behaviours and forms of intent”⁹⁵. To demonstrate the extent of difficulty in which legislators would be presented with when expected to theoretically design any offence or sanction for reckless conduct, the “nebulous”⁹⁶ notion of recklessness in law will now be delved into.

As Olazábal and Abril concisely observed in their thought-provoking and articulate examination entitled “Recklessness as a State of Mind” in the context of reckless statements under the Securities Exchange Act⁹⁷; “[i]ndeed the concept of recklessness appears to be unworkably vague, making it more of an ex post label to describe bad behaviour than a prescriptive, ex ante liability standard”⁹⁸. Such precisely invokes one of the crucial lines of questioning delved into within this submission, indeed that; the perceived perpetrators

⁹³ Ann M Olazábal and Patricia S Abril, ‘Recklessness as a State of Mind in 10(B) Cases: The Civil-Criminal Dialectic’ (2005) 18 New York University Journal of Legislation and Public Policy 305, 309.

⁹⁴ *Farmer v Brennan* (1994) 511 US 825, 836 (Souter J).

⁹⁵ Ann M Olazábal and Patricia S Abril, ‘Recklessness as a State of Mind in 10(B) Cases: The Civil-Criminal Dialectic’ (2005) 18 New York University Journal of Legislation and Public Policy 305, 332.

⁹⁶ *Farmer v Brennan* (1994) 511 US 825, 836 (Souter J).

⁹⁷ Securities Exchange Act 1934, S 10(b), 15 USC s 78j(b) (2013), (US).

⁹⁸ Ann M Olazábal and Patricia S Abril, ‘Recklessness as a State of Mind in 10(B) Cases: The Civil-Criminal Dialectic’ (2005) 18 New York University Journal of Legislation and Public Policy 305, 309.

behind the contemporary global financial crisis, are often the subject of a societal conjecture and casual labelling of such persons as being 'reckless'. However, it has yet to be investigated whether such conduct was necessarily proscribed under law. Could such persons be more appropriately labelled as 'feckless' rather than 'reckless', and furthermore was such conduct essentially the product of an institutionally acceptable breed of corporate mismanagement?

The operation of culpable recklessness essentially entails; "(1) the conscious disregard of (2) a substantial and unjustifiable risk that (3) a forbidden result may occur or that relevant circumstances exist"⁹⁹. While such may present as a rather unequivocal delineation, this "straightforward definition has, in application, confused even the most experienced of commentators and jurists, including Supreme Court Justices"^{100 101}.

To acknowledge the historical background, the recognition of a breed of recklessness was first appreciated by the Criminal Law Commissioners, in Victorian times, whereby they considered a doctrine of implied malice, as it applied to murder^{102 103}. In this regard, Norrie further asserts that the Commissioners in fact reinterpreted the words used by the 18th century lawyer, Sir Michael Foster, which extended liability beyond foresight and restricted the concept to a "question of subjective advertence" which "was a means of depositivising, de-moralising and thereby rendering certain the law of recklessness with regard to homicide"^{104 105}.

Though tangential, but fundamentally relevant, the origins of the word 'reckless' itself "betrays the broad spectrum of the different types of consciousness it encompasses"¹⁰⁶. The Old English roots (*receleas*) define the word as "careless, thoughtless,

⁹⁹ Larry Alexander and Kimberly Kessler Ferzan, *Crime and Culpability: A Theory of Criminal Law* (Cambridge University Press 2009) 23.

¹⁰⁰ Ann M Olazábal and Patricia S Abril, 'Recklessness as a State of Mind in 10(B) Cases: The Civil-Criminal Dialectic' (2005) 18 *New York University Journal of Legislation and Public Policy* 305, 309.

¹⁰¹ *Smith v Wade* (1983) 461 US 30, 37-38 para 6: Rehnquist J (US Supreme Court judge); consistently confuses, and attempts to blend together, the quite distinct concepts of 'intent to cause injury', on one hand, and 'subjective consciousness' of risk of injury – or of unlawfulness – on the other.

¹⁰² A W Norrie, *Crime, Reason and History* (2nd edn, Butterworths 2001) 76.

¹⁰³ Cath Crosby, 'Recklessness - the Continuing Search for a Definition' (2008) 72 *Journal of Criminal Law* 313.

¹⁰⁴ *Ibid* 314.

¹⁰⁵ A W Norrie, *Crime, Reason and History* (2nd edn, Butterworths 2001) 77.

¹⁰⁶ Ann M Olazábal and Patricia S Abril, 'Recklessness as a State of Mind in 10(B) Cases: The Civil-Criminal Dialectic' (2005) 18 *New York University Journal of Legislation and Public Policy* 305, 311.

or heedless”¹⁰⁷ a standard which bares much resemblance to the ambit of negligence¹⁰⁸. Something of a departure from this is the term’s German (*ruchlos*) and Dutch (*roekeloos*) roots which translate as “wicked”¹⁰⁹ – and such strikes much similarity to actual intent¹¹⁰. Furthermore; “[s]itting in the grey area between heedlessness and wickedness, recklessness can mimic purposefulness when the actor is aware of the risk that his actions will likely harm others and yet he does not care whether or not harm materialises”¹¹¹.

Whereby the origin and etymology in and of itself presents such ambiguity, it is reasonable to see how the law in turn developed to such a problematic extent and insofar as the issues that persistently arise, such is of extant significance. Fundamentally, one is considered to have acted recklessly whereby one does not intend to cause a harmful result but takes an unjustifiable risk of causing it¹¹². Indeed, in respect of recklessness; the prohibited consequence is merely a by-product of the accused’s act/omission¹¹³. Greatly to the detriment of this very necessary concept in law, recklessness is not a consistently or widely understood concept and as has been incredibly well observed in this respect; “when standards are ill defined, they are apt to confuse, diluting their ability to regulate behaviour, and... risking incongruous outcomes”¹¹⁴. Consequently, it will be absolutely necessary to very clearly delineate and define the ambit of any prospective criminal offence or civil sanction for reckless conduct applicable in the corporate governance sense.

The ultimate questions that resonates with regard to deciding how to formulate a ‘recklessness’ sanction or offence will essentially revolve around whether the accused/respondent will be judged under the equally controversial objective or subjective criteria. In order to wholly delve into the concepts of objective and subjective recklessness,

¹⁰⁷ Douglas Harper, ‘Online Etymology Dictionary’ (Reckless)

<http://www.etymonline.com/index.php?allowed_in_frame=0&search=reckless> accessed 31 May 2016.

¹⁰⁸ Ann M Olazábal and Patricia S Abril, ‘Recklessness as a State of Mind in 10(B) Cases: The Civil-Criminal Dialectic’ (2005) 18 New York University Journal of Legislation and Public Policy 305, 312.

¹⁰⁹ Douglas Harper, ‘Online Etymology Dictionary’ (Reckless)

<http://www.etymonline.com/index.php?allowed_in_frame=0&search=reckless> accessed 31 May 2016.

¹¹⁰ Ann M Olazábal and Patricia S Abril, ‘Recklessness as a State of Mind in 10(B) Cases: The Civil-Criminal Dialectic’ (2005) 18 New York University Journal of Legislation and Public Policy 305, 312.

¹¹¹ Ibid 312.

¹¹² Liz Campbell, Shane Kilcommins and Catherine O’Sullivan, *Criminal Law in Ireland: Cases and Commentary* (Clarus Press Ltd 2010) 131.

¹¹³ A P Simester and G R Sullivan, *Criminal Law: Theory and Doctrine*, (3rd edn, Hart Publishing 2007) 135.

¹¹⁴ Ann M Olazábal and Patricia S Abril, ‘Recklessness as a State of Mind in 10(B) Cases: The Civil-Criminal Dialectic’ (2005) 18 New York University Journal of Legislation and Public Policy 305, 309.

it is best to appreciate the observations of the learned Supreme Court Justices (emeritus) in the seminal Irish case of *People (DPP) v Murray*¹¹⁵. As was observed by Walsh J, describing concisely the existent varieties of recklessness:

Recklessness may be either purely subjective in the sense that it is the conscious taking of an unjustified risk of which the accused actually knows and thus imports foresight, or the purely objective test of the conscious taking of an unjustified risk of which the accused does not actually know but of which he ought to have been aware.¹¹⁶

Setting a very significant precedent in this case, whereby both of the accused were on trial for the offence of capital murder, Henchy J affirmed the subjective definition of recklessness as being the appropriate standard to adopt in Ireland, asserting that the required intent (*mens rea*; in the criminal context) is subjective and not objective recklessness¹¹⁷. The subjective test of recklessness was subsequently approved in Irish Law in the more recent Supreme Court case of *The People (DPP) v Cagney and McGrath*¹¹⁸, whereby Hardiman J insisted that reckless criminal intent requires that “an accused... must have foreseen the risk that his conduct would bring about the relevant result, but ha[d] elected to proceed with his conduct nonetheless”¹¹⁹. This case dealt with the offence of reckless endangerment under section 13 of the Non-Fatal Offences Against the Person Act 1997¹²⁰.

Rather distinctly, the United Kingdom have on the contrary tended to prefer objective recklessness to a greater or lesser extent over the years¹²¹. However, the landmark case of *R v G and R*¹²² settled the law as the objective standard proved to be rather controversial with regard to its application for more serious crimes whereby the accused had no appreciation of the risk involved. In *R v G and R*¹²³, it was concluded that a conviction

¹¹⁵ *People (DPP) v Murray* [1977] IR 360.

¹¹⁶ *Ibid* (Walsh J).

¹¹⁷ *People (DPP) v Murray* [1977] IR 360; Law Reform Commission, *Issue Paper: Regulatory Enforcement and Corporate Offences* (LRC IP 8 - 2016) 135 and 136.

¹¹⁸ *People (DPP) v Cagney and McGrath* [2007] IESC 26, [2008] 2 IR 111.

¹¹⁹ *Ibid* (Hardiman J).

¹²⁰ Non-Fatal Offences Against the Person Act 1997, s 13.

¹²¹ See *Commissioner of the Police for the Metropolis v Caldwell* [1982] AC 314; *R v Lawrence* [1981] 1 All ER 794 and *Elliott v C (A minor)* [1983] 1 WLR 939.

¹²² *R v G and R* [2003] UKHL 50, [2004] 4 All ER 765.

¹²³ *Ibid*.

should depend on proof not simply that a defendant caused an injurious result to another, but that his state of mind when so acting was culpable.

The objective interpretation not only allows for liability to be attached to an individual who was aware of a risk, but also to an individual who was not so aware, but reasonably ought to have been. The logic behind such can be contemplated to the extent that the results of an inadvertent risk can be just as detrimental as if the individual was aware of the risk¹²⁴.

While legal history has been demonstrative of the fact that the objective standard can prove unforgivably harsh¹²⁵, it may well be worth noting that an objective approach could be more suitable in the professional realm. Amirthalingham¹²⁶ warns that “blind adherence to subjectivism can result in a gap between the legal test of *mens rea* and the community’s sense of moral wrongdoing” and furthermore, even if we adopt a subjective definition of recklessness it should nevertheless have an objective element to it, which is the taking of “an unjustified risk”.¹²⁷ With this in mind, the “unjustified risk” would be measured against established standards of good corporate governance and practise. Such an objective standard may well be necessary in what is a constantly developing and complex financial sector and whereby an expert evidential opinion adduced in court may prove quite useful whereby one testifies as to what course of action a similar, reasonable professional might have done in like circumstances. Such would be proper given the fact that directors are normally appointed for their expertise and tend to receive generous remuneration for their efforts.

Smith¹²⁸, however, pinpoints the countervailing scenario, indeed; whereby a defendant with special knowledge identifies a risk that would not be obvious to the ordinary prudent man. Such a person would have been convicted under the subjective test because he foresaw the risk and yet would unjustifiably escape liability on an objective test because the ordinary prudent individual would have lacked the expertise to realise that a risk

¹²⁴ Law Reform Commission, *Issue Paper: Regulatory Enforcement and Corporate Offences* (LRC IP 8 - 2016) 136.

¹²⁵ See *Elliott v C (A minor)* [1983] 1WLR 939.

¹²⁶ K Amirthalingham, ‘*Caldwell* Recklessness is Dead, Long Live *Mens Rea*’s Fecklessness’ (2004) 67 MLR 491.

¹²⁷ Cath Crosby, ‘Recklessness - the Continuing Search for a Definition’ (2008) 72 Journal of Criminal Law 313.

¹²⁸ J C Smith, ‘Commentary on *Caldwell*’ [1981] Crim LR 392, 394; Cath Crosby, ‘Recklessness - the Continuing Search for a Definition’ (2008) 72 Journal of Criminal Law 313, 315.

existed¹²⁹. Furthermore, it is clear as per the law set out in the aforementioned *Murray*¹³⁰ and *Cagney and McGrath*¹³¹ cases, that the subjective test of recklessness is favoured under Irish law and the creation of a new offence of reckless trading would therefore be assumed to conform to such¹³², although the objective standard should nonetheless be considered by law-makers.

As Campbell, Kilcommins & O’Sullivan note¹³³, in respect of the criminal context, (and as is equally relevant having regard to the civil law given the tendency for there to be ambiguity) it is crucial to retain the boundaries between the three *mens rea* states of intention, recklessness and negligence because “...where the line is drawn can determine whether an accused falls within or outside the parameters of a particular offence or even the criminal law”¹³⁴. Of greatest significance, in contemplation of director’s duties and corporate governance, is the fine line between negligence and recklessness and such is of paramount concern.

Of more practical quotidian significance is the distinction between negligence and recklessness... the distinction... hinges on foresight and consequences. [T]he first stage is whether or not the risk was a justifiable one. In other words, not all risk-taking constitutes recklessness.¹³⁵

Having regard to the nature of the risk, such is measured by an objective standard. It is envisioned in the corporate governance context that such should “[depend] on, for example, the social value of the activity involved relative to the probability and gravity of the harm that might be caused by it”¹³⁶. One might contrast, in this regard, the activities of a surgeon vis à vis persons playing Russian Roulette¹³⁷. Translated into the corporate context, such might apply to the extent that “individuals who act in the name of the firm do

¹²⁹ Ibid 394.

¹³⁰ *People (DPP) v Murray* [1977] IR 360.

¹³¹ *People (DPP) v Cagney and McGrath* [2007] IESC 26, [2008] 2 IR 111.

¹³² Law Reform Commission, *Issue Paper: Regulatory Enforcement and Corporate Offences* (LRC IP 8 - 2016) 136.

¹³³ Liz Campbell, Shane Kilcommins and Catherine O’Sullivan, *Criminal Law in Ireland: Cases and Commentary* (Clarus Press Ltd 2010) 131.

¹³⁴ Ibid 131.

¹³⁵ Ibid 133.

¹³⁶ Liz Campbell, Shane Kilcommins and Catherine O’Sullivan, *Criminal Law in Ireland: Cases and Commentary* (Clarus Press Ltd 2010) 133.

¹³⁷ Ibid 133.

not always act in its best interests..."¹³⁸ and as such it would be necessary to inquire into the nature and purpose of the activities engaged in by the accused/respondent and whether there might have been an exceptional potential profit involved for the individual.

[3.3] Civil liability for reckless trading under Irish Law

What would be otherwise regarded as a potentially very useful weapon in the armoury of creditors defaulted, the civil reckless trading remedy has been described by practicing commentators as a "notoriously difficult case to make by creditors (and liquidators) because the burden of proof was traditionally so high"¹³⁹. Indeed, there has been meagre judicial opportunity to deliberate over the issue, let alone develop the concept. As Ahern reasons, such is the combined product of the difficulty in proving reckless trading and the once illustrious position occupied by the restriction regime under s.150 of the Companies Act of 1990¹⁴⁰ with regard to the evaluation of a director's conduct which may have precipitated the winding-up of a company¹⁴¹. With this in mind, whereby directorial behaviour amounts to reckless trading; but may also sufficiently fit the criteria for the restriction and disqualification regime under Part 14 of the Companies Act 2014¹⁴², the reckless trading declaration should be sought at the first instance as the compensatory aspect would be lost if no application for the imposition of personal liability is made¹⁴³.

The Irish Law in respect of civil liability for reckless trading is today governed by section 610 of the *Companies Act 2014*¹⁴⁴. This provision replaced the previously authoritative s297A of the Companies Act 1990¹⁴⁵. It is appropriate to mention also in this regard that, originally, the reckless trading provisions came to exist under section 33 of the

¹³⁸ Robert Quigley, 'The Impulse Towards Individual Criminal Punishment After the Financial Crisis' [2015] 22:1 Virginia Journal of Social Policy & the Law 105, 154.

¹³⁹ Mark Woodcock and Jack Cronolly, 'High Court considers reckless trading for the first time in years' (2015) Mc Dowell Purcell <<http://www.mcdowellpurcell.ie/news/high-court-considers-reckless-trading-first-time-years/>>.

¹⁴⁰ Companies Act 1990, s 150.

¹⁴¹ Deirdre Ahern, *Directors Duties* (Round Hall 2009) 474.

¹⁴² Companies Act 2014, Part 14.

¹⁴³ Deirdre Ahern, *Directors Duties* (Round Hall 2009) 482.

¹⁴⁴ Companies Act 2014, s 610.

¹⁴⁵ Companies Act 1990, s 197(a).

Companies Act 1963¹⁴⁶ following the identification of a need for the provision of such an offence by the United Kingdom Jenkins Committee of 1962¹⁴⁷. However, the 1963 provision was limited to the extent that it could only be invoked in circumstances of examinership whereas the 1990 Act broadened the classes of persons who may apply under the section and also permitted the section to be invoked in the case of a winding up or where the then section 251 of the Companies Act 1990 (on dormant companies) had been declared applicable to the relevant company¹⁴⁸.

The applicable provisions are essentially a statutory incursion into the general principle that directors are shielded from liability with regard to the contractual responsibilities of the company¹⁴⁹ and as such they only apply whereby the directorial acts or omissions attract a large measure of culpability¹⁵⁰. It is undoubtedly public policy considerations which have brought about such legislative interventions¹⁵¹, particularly having regard to creditors whereby a company is experiencing trading difficulties. It is an established principle of company law that there is a duty on directors to wind up an insolvent company¹⁵².

Newly housed under section 610 of *Companies Act 2014*, the provisions providing for civil liability for reckless trading assert that a director is personally liable for all or part of the company's debts whereby he or she was "knowingly a party to the carrying on of any business of the company in a reckless manner"¹⁵³. While recklessness is not defined in the 2014 Act (rather unfortunately for this purpose), section 610 provides that a company officer shall be deemed to have been knowingly a party to reckless trading if ¹⁵⁴:

- (a) The person was a party to the carrying on of the company's business and, having regard to the general knowledge, skill and experience that may

¹⁴⁶ Companies Act 1963, s 33.

¹⁴⁷ Jenkins Committee Report, United Kingdom 1962 Cmnd 1749.

¹⁴⁸ Niall O'Hanlon, 'The Corporate Form and Reckless Trading: A Modern Pandora Epimetheus' [2006] 28 Dublin University Law Journal 254, 260.

¹⁴⁹ *Ferguson v Wilson* (1886) LR 2 Ch App 77; Deirdre Ahern, *Directors Duties* (Round Hall 2009) 453.

¹⁵⁰ Deirdre Ahern, *Directors Duties* (Round Hall 2009) 453.

¹⁵¹ *Ibid* 453.

¹⁵² See *Martin v Farrell* [2005] IEHC 62, unreported March 4 2005, (Clarke J).

¹⁵³ Companies Act 2014, s 610 (1)(a).

¹⁵⁴ Law Reform Commission, *Issue Paper: Regulatory Enforcement and Corporate Offences* (LRC IP 8 - 2016) 134.

reasonably be expected of a person in his or her position, the person ought to have known that his or her actions or those of the company would cause loss to the creditors of the company, or any of them, or

- (b) The person was a party to the contracting of a debt by the company and 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 all its other debts (taken into account the contingent and prospective liabilities)¹⁵⁵

In respect of the judicial comments in the *Re Appleyard Motors*¹⁵⁶ case, further discussed below, it is assumed that the new legislation will have the same application of knowing and deemed recklessness per sections (a) and (b) respectively, as existed prior to the introduction of the new Companies Act in 2014.

What may be criticised, having regard to the wording and ambit of the act, are the limitations that are existent in this formulation. The reference to 'known', indeed, requiring one to have knowledge, tends to err on the side of fraudulent conduct and legal definitions of fraud. Indeed, according to the Merriam Webster legal dictionary fraud may be defined generally as:

[A]ny act, expression, omission, or concealment calculated to deceive another to his or her disadvantage; specifically: a misrepresentation or concealment with reference to some fact material to a transaction that is made with knowledge of its falsity¹⁵⁷.

Recklessness, however, having regard to the state of mind of the accused or respondent, only requires that one 'consciously takes an unjustified risk'. Hence, it is not known indefinitely by the perpetrator that his actions will unquestionably result in him causing harm to another or another's interest. He does not set about causing the bad result, he goes about his actions and activities having appreciated that a parallel running risk exists. The reason that the law punishes such behaviour is because of the awareness that through his activities, the perpetrator contemplates that there is a risk that he may harm another's interests. However, he proceeds with his own agenda, simply because it is to that he

¹⁵⁵ Companies Act 2014, s 610 (3)(a)-(b).

¹⁵⁶ *Re Appleyard Motors Group* [2015] IEHC 28.

¹⁵⁷ Merriam-Webster, 'Definition of Fraud', online legal dictionary <<http://www.merriam-webster.com/dictionary/fraud>> accessed 29 June 2016.

chooses to give priority. It is further submitted that this reference to 'known' may also set the bar higher as judges may consciously or subconsciously equate knowledge with the standard for fraud, hence making it more difficult to secure a verdict against a reckless perpetrator under the reckless trading provisions.

Significantly, section 610 essentially mirrors the proviso for civil reckless trading engendered in section 297A of the Companies Act 1963¹⁵⁸, as inserted by section 138 of the 1990 Act¹⁵⁹. As the Law Reform Commission considers in this regard¹⁶⁰, the case law in respect of section 297A will consequently retain its cogency. The aforementioned, in their relevant issue paper, assert that it has been held that recklessness in respect of s297A of the 1963 Act is to be assessed using an objective standard as per the seminal case of *Re Hefferon Kearns (No 2)*¹⁶¹, contrary to the dominant subjective standard evident in the Irish criminal law setting.¹⁶² Following on from this; "it therefore appears that the tests applied to determine civil liability for reckless trading differ from the tests that apply in connection with crimes that may be committed with reckless intent"¹⁶³.

Accordingly, the case law pertaining to the former sections 297A¹⁶⁴ and 138¹⁶⁵ will now be dealt with; not only to investigate the applicable ambit of the law but also to demonstrate the difficulties associated with proving such cases.

A company's propensity to default is influenced by a number of factors such as; the doctrine of separate legal personality, the concept of limited liability, the segregation of ownership and control (a feature of modern corporations¹⁶⁶), asymmetric access to information whereby directors tend to be more acutely aware of the true financial state of a company than finance providers (frequently a feature that impedes the efficiency of the capital markets) and finally the possibility of directors pursuing goals other than profit

¹⁵⁸ As inserted by s 138 of the Companies Act 1990.

¹⁵⁹ Companies Act 1990, s 138.

¹⁶⁰ Law Reform Commission, *Issue Paper: Regulatory Enforcement and Corporate Offences* (LRC IP 8 - 2016) 134.

¹⁶¹ *Re Hefferon Kearns (No 2)* [1993] 3 IR 191.

¹⁶² Law Reform Commission, *Issue Paper: Regulatory Enforcement and Corporate Offences* (LRC IP 8 - 2016) 134.

¹⁶³ Law Reform Commission, *Issue Paper: Regulatory Enforcement and Corporate Offences* (LRC IP 8 - 2016) 135.

¹⁶⁴ Companies Act 1963, section 297A.

¹⁶⁵ Companies Act 1990.

¹⁶⁶ Berle and Means, *The Modern Corporation and Private Property*, (1932)

maximisation and the best interests of the company¹⁶⁷. With all of this in mind; the utmost level of consideration must be had for shareholders as well as creditors in that an increased risk of default, indeed whereby a company is no longer able to meet its debts repayments as they fall due, can very quickly result in inevitable insolvency¹⁶⁸. The provisions on reckless trading represent something of a statutory departure from the *laissez-faire* approach of the common law to the operations of a company, instead providing for a Judicial review model to deal with the difficulties identified above¹⁶⁹. As O’Hanlon considers; “The court’s function... is to prevent any serious abuse of power that a bureaucracy organized in accordance with the formalist or expertise models might otherwise generate”¹⁷⁰. Ahern notes, again bearing in mind the central research question assumed by this submission, that the law appreciates that a certain degree of risk-taking behaviour is acceptable and indeed, inherent to entrepreneurial behaviour¹⁷¹. Traditionally, the common law was actually rather sanguine about the possibility of a company incurring losses¹⁷². It was famously considered by Lord Watson in *Trevor v Whitworth*¹⁷³ that “[p]aid-up capital may be diminished or lost in the course of the company’s trading: that is a result which no legislation can prevent...”¹⁷⁴.

Having regard to the fact that the reckless trading provisions do represent a statutory incursion into the principle of limited liability and the protection awarded to directors afforded by the veil of incorporation, the judiciary have seemingly been consequently quite reluctant to award the personal liability remedy to forlorn creditors. So much so, it would appear that the legislation provided something of a “get out clause” for directors which permitted a court to find one guilty of reckless trading but in turn, and at the courts’ discretion, relieving him of personal liability whereby he had acted honestly in

¹⁶⁷ Niall O’Hanlon, ‘The Corporate Form and Reckless Trading: A Modern Pandora Epimetheus’ [2006] 28 Dublin University Law Journal 254, 255.

¹⁶⁸ Niall O’Hanlon, ‘The Corporate Form and Reckless Trading: A Modern Pandora Epimetheus’ [2006] 28 Dublin University Law Journal 254, 255.

¹⁶⁹ Niall O’Hanlon, ‘The Corporate Form and Reckless Trading: A Modern Pandora Epimetheus’ [2006] 28 Dublin University Law Journal 254, 256.

¹⁷⁰ Niall O’Hanlon, ‘The Corporate Form and Reckless Trading: A Modern Pandora Epimetheus’ [2006] 28 Dublin University Law Journal 254, 256.

¹⁷¹ Deirdre Ahern, *Directors Duties* (Round Hall 2009) 453.

¹⁷² Niall O’Hanlon, ‘The Corporate Form and Reckless Trading: A Modern Pandora Epimetheus’ [2006] 28 Dublin University Law Journal 254, 256.

¹⁷³ *Trevor v Whitworth* (1887) 12 App Cas.

¹⁷⁴ *Trevor v Whitworth* (1887) 12 App Cas.

relation to the conduct of the affairs of the company¹⁷⁵. Such was established by Lynch J in the seminal case of *Re Hefferon Kearns (No 2)*¹⁷⁶, and as Ahern acutely considers in this regard “It is difficult to consider how a person may be said to have acted recklessly but also responsibly”¹⁷⁷. Such, it is submitted, wholly undermines the deterring purposefulness of the legislation, which is already seldom used by creditors.

The first two significant cases of *Re Frederick Inns*¹⁷⁸ in 1994 and *Re Hefferon Kearns*¹⁷⁹ in 1993 provided the first judicial discernment on the reckless trading provisions. These cases “set the burden of proof so high that they deterred liquidators from seeking to rely on it as a remedy to swell the assets of a company and creditors from availing of it to recover debt”¹⁸⁰. There was no further substantive analysis of reckless trading by the High Court again for nearly twenty years. Unfortunately, the case of *PSK Construction*¹⁸¹ in 2009 did nothing to encourage creditors to avail of this remedy.

Fortunately, in the very recent case of *Re Appleyard Motors Group*¹⁸², the remedy was successfully sought by creditors whereby the High Court “delivered a well-reasoned decision on reckless trading and the civil liability of guilty directors”¹⁸³. Essentially, it was held that despite the fact that the directors had acted honestly and responsibly up to almost a month before the company went into liquidation, it was considered a crucial mistake for the directors to have failed to take professional advice concerning the future of the company. The court effectively imposed a date whereupon any objective analysis of the affairs of the company would have concluded that it should have been wound up and their continuance of trading was therefore deemed irresponsible in light of all the information

¹⁷⁵ Mark Woodcock and Jack Cronolly, ‘High Court considers reckless trading for the first time in years’ (2015) Mc Dowell Purcell <<http://www.mcdowellpurcell.ie/news/high-court-considers-reckless-trading-first-time-years/>>.

¹⁷⁶ *Re Hefferon Kearns (No 2)* [1993] 3 IR 191.

¹⁷⁷ Deirdre Ahern, *Directors Duties* (Round Hall 2009) 453.

¹⁷⁸ *Re Frederick Inns* [1994] 1 ILRM.

¹⁷⁹ *Re Hefferon Kearns (No 2)* [1993] 3 IR 191.

¹⁸⁰ Mark Woodcock and Jack Cronolly, ‘High Court considers reckless trading for the first time in years’ (2015) Mc Dowell Purcell <<http://www.mcdowellpurcell.ie/news/high-court-considers-reckless-trading-first-time-years/>>.

¹⁸¹ *Re PSK Construction*[2009] IEHC 538.

¹⁸² *Re Appleyard Motors Group* [2015] IEHC 28.

¹⁸³ Mark Woodcock and Jack Cronolly, ‘High Court considers reckless trading for the first time in years’ (2015) Mc Dowell Purcell <<http://www.mcdowellpurcell.ie/news/high-court-considers-reckless-trading-first-time-years/>>.

available to them in relation to the company¹⁸⁴. The court concluded that the directors could be deemed to be reckless having regard also to the general knowledge, skill and experience that may reasonably be expected of persons in their position, and that they ought to have known that their actions would cause loss to creditors of the Company¹⁸⁵.

It is entirely necessary to note also that the reckless trading provisions apply to not only formally appointed directors and secretaries but also to; company secretaries, auditors, liquidators, receivers and shadow directors. Essentially they relate to the conduct of any person while having the status of an officer of the company; and this is the effect of understanding of the term “officer” given in s297A (10) of the Companies Act 1963¹⁸⁶. In contemplation of the reckless trading provisions being applied to directors and senior management of corporate institutions in the financial sector, the civil remedy would be somewhat limited in that the company must actually be going into examinership or winding up for the provisions to apply. The Australian approach, which will be dealt with in the next chapter, does not require these pre-requisites and as such the effectiveness of this regime will be examined in due course. Furthermore, only creditors may apply for this remedy and such makes the remedy a great deal narrower in its application. It is submitted that it would be appropriate for an entity such as the Office of the Director of Corporate Enforcement in Ireland, to bring such actions having regard to institutions in the financial sectors. The legislation should be even further expanded to the extent that it is not limited only to situations whereby the directors should recognise that the company is no longer operating as a going concern. Subsequent elaborations in this regard will be appropriately dealt with in chapter 5.

¹⁸⁴ *Re Appleyard Motors Group* [2015] IEHC 28.

¹⁸⁵ Mark Woodcock and Jack Cronolly, ‘High Court considers reckless trading for the first time in years’ (2015) Mc Dowell Purcell <<http://www.mcdowellpurcell.ie/news/high-court-considers-reckless-trading-first-time-years/>>.

¹⁸⁶ Companies Act 1963, s297A(10); Deirdre Ahern, *Directors Duties* (Round Hall 2009) 475.

[3.4] The potential for an offence of criminal reckless trading under Irish Law

As the Law Reform Commission ascertains, having regard to the potential impact that a criminal reckless trading offence might have “civil liability for reckless trading may be distinguished from criminal liability for fraudulent trading which carries the stigma of a criminal conviction”¹⁸⁷. Crucial to the legislative decision making process in consideration of whether implementing a criminal offence of reckless trading, would be this very point. Indeed, not only does one having a criminal record carry an undoubted stigma, a further concern of paramount importance is the punishment associated with criminal offences. The right to liberty, enshrined in the constitution of any normal functioning democracy, will only be undermined and taken away by the State in very limited circumstances. Having acknowledged the limitations associated with the civil reckless trading provisions in this jurisdiction, it would not be appropriate for the legislature to simply translate the civil legislation into the prospective delineation of the criminal offence. If law-makers were to proceed with creating such an offence, it would have to be done having regard to large corporations and conglomerates, particularly those in the financial sector. Hence, a legislative enactment rather similar to that recently adopted in the United Kingdom¹⁸⁸ would be most appropriate. Whether such an offence could reasonably be expected to be implemented in practise here is a question which will be delved into in chapter 5.

¹⁸⁷ Law Reform Commission, *Issue Paper: Regulatory Enforcement and Corporate Offences* (LRC IP 8 - 2016) 135.

¹⁸⁸ Financial Services Banking Reform Act 2013, s36. (UK)

CHAPTER 4

THE APPROACH IN OTHER JURISDICTIONS

[4.1] Introduction

It is difficult to envision any endeavour towards legal reform in Ireland, let alone the pursuit of such, without first looking to the approach of other jurisdictions so as to gauge what may prove feasible and indeed, as the case may be; unsuccessful. The use of the word 'feasible' is appropriate to the extent that any manifestation of legislative or regulatory reform is never met with full social or political approval. Having the benefit of the common law, it is entirely useful in the Irish context to look to particular jurisdictions for inspiration. It is often necessary to wait a period of time, following a legislative or regulatory introduction elsewhere, to observe how such new laws are received and permitted to develop. Undoubtedly, the introduction of sanctions and offences designed to prohibit reckless and excessively risky conduct in the financial sectors and within corporate powerhouses would be an entirely controversial move in the applicable institutions and such would of course be a move hotly contested by interested parties. Furthermore, it is not uncommon for members of the judiciary to not wish to push the boundaries on what is recognised as socially or politically unpalatable. With such in mind, and as is well known by those involved in law reform, it will be entirely necessary to tread carefully with new offences and/or sanctions in mind.

In this chapter, it has been deemed useful to observe the operations of legal regimes directly or tangentially relating to the central research question of this submission. Of particular relevance are the legislative enactments of; the United Kingdom, Australia, New Zealand and the United States. Indeed, all of the aforementioned have rather different approaches in mind concerning directorial behaviour generally, as well as those directors holding such positions in the financial sector. It is hoped that an assessment of what has seemingly worked well abroad, will ultimately be a good indication as to what should be introduced in Ireland.

Accurately reflecting a range of positions, one commentator concisely notes in an otherwise rather dated article from 2007 “[n]umerous jurisdictions provide for statutory civil liability of directors should they make themselves guilty of managing the business of a company in a reckless, wrongful or fraudulent manner or engage in insolvent trading. Such provisions can play an important role in protecting the interests of corporate creditors, provided that they are properly formulated”¹⁸⁹. It is observed that two particular points of significance may be raised from this statement. Firstly; as appreciated in previous chapters, there is a certain tendency to place emphasis on the forsaken creditor with regard to existent legal regimes that are designed to deter reckless conduct. Such is rather unsatisfactory to the extent that there is a failure of appreciation for other company stakeholders that might well be entirely detrimentally effected by the foolhardy and imprudent behaviour of directors and those in a senior management capacity. Whereby jobs are lost; there is an inevitable disservice done to the community and in the case of conglomerates and large corporations, whereby integrated economies are undermined; an entire nation can be impacted. The political and largely capitalist arguments in favour of essentially unregulated (or as they may fathom ‘market regulated’) capital markets tend to be socially far more acceptable when it is contemplated that only creditors, indeed; other business owners, will be effected by the reckless actions of directors. These are largely to be understood as the ‘intangibles’ as far as any ordinary citizen would be concerned, indeed the white collar, business class, bourgeoisie. Entirely in a league of their own, the wrongs these such persons may continue to commit against each other will be largely unappreciated, and perhaps misunderstood, by the everyday hardworking taxpayer given the complex nature of the financial markets and in some respects, the corporate form. Of course such will be of little significance to the “man on the Clapham omnibus”¹⁹⁰, provided the impact of such is not perceived in his back pocket. However, if the fallout from a significant negative economic event, originating in some hypothetical company, were to have consequential implications on our everyman, then of course the social demands for justice will kick in. With the insatiable risk-appetite of traders and entrepreneurs in mind¹⁹¹,

¹⁸⁹ Sulette Lombard, ‘Claims Against Negligent or Fraudulent Directors: Proposed Amendments to South African Legislation’ (2007) 16 Int Insolv Rev 75, 75 ARTICLE

¹⁹⁰ (Greer LJ); *Hall v Brooklands Auto-Racing Club* (1932) 1 KB 205 CASE

¹⁹¹ See chapter one of this submission.

it is critical that more than just creditors are protected when the worst happens as a direct result of an excessive risk taken with pure and blatant disregard for those by-products of such conduct, indeed; those by-products being the effected stakeholders.

“The crisis has elicited complex and contradictory national responses, often conditioned by local antagonisms, ideologies, histories and institutional structures”¹⁹². In this regard, it is quite intriguing to look to the approaches of various jurisdictions and of course, while observing, it will be of paramount concern to keep to the back of one’s mind the possibility that much of the reform implemented may well be the product of knee-jerk reactions to public and political concerns. Such provisions may well be of limited usefulness whereby legislators are looking backwards rather than forwards and not contemplating what might potentially be a catalyst for the next crisis.

[4.2] Changes in the United Kingdom

Clearly also having envisaged the same logic as put forth in the first three chapters of this submission, the UK government in one element of its response to the global financial crisis has enacted a criminal offence which punishes the reckless management of a bank¹⁹³. The Financial Services Banking Reform Act of 2013¹⁹⁴, while a welcome addition, assumes its own particular limitations to the extent that it only engages the criminal law whereby the offence is committed by a senior manager and the reckless risk-taking leads to the financial institution’s failure. Such fails to encompass the acts of rogue traders, as observed in chapters one and two and also fails to deter against the excesses of the very prevalent institutional ethos of unconscionable risk-taking. For the offence to have more practical bite, the prerequisite necessity of precipitating the collapse of the accused’s employer; the financial institution, should be abandoned¹⁹⁵. As Fisher concisely observes on this point “[t]he victim’s

¹⁹² Prem Sikka, ‘The corrosive effects of neoliberalism on the UK financial crises and auditing practises: a dead end for reforms’ (2015) 39 Accounting Forum 1.

¹⁹³ Jonathan Fisher, ‘Risk, recklessness and policing the financial markets’ in [Nicholas Ryder](#), [Umut Turksen](#) and [Sabine Hassler](#) (eds), *Fighting Financial Crime in the Global Economic Crisis (The Law of Financial Crime)* (Routledge 2014). Available at 11 <http://www.devereuxchambers.co.uk/assets/docs/publications/risk_recklessness_and_policing_the_financial_markets_jf_2015.pdf>.

¹⁹⁴ Financial Services (Banking Reform) Act 2013, s36. (UK)

¹⁹⁵ Jonathan Fisher, ‘Risk, recklessness and policing the financial markets’ in [Nicholas Ryder](#), [Umut Turksen](#) and [Sabine Hassler](#) (eds), *Fighting Financial Crime in the Global Economic Crisis (The Law of Financial*

total devastation does not need to be established in other financial crimes and there is no reason why it should be required in this case”¹⁹⁶.

A “financial institution” is defined for the purpose of the criminal offence as “a business which has permission under the Financial Services and Markets Act 2002¹⁹⁷ to carry on the regulated activity of accepting deposits or is in an investment firm within the meaning of section 424A of that act.¹⁹⁸ Furthermore; “[a] financial institution will be deemed to have failed where it becomes insolvent, or where stabilisation measures need to be taken in relation to it under Part 1 of the Banking Act 2009¹⁹⁹, or whether it is regarded by the Financial Services Compensation Scheme as being unable, or likely to be unable, to satisfy any claims made against it”²⁰⁰. Finally, while recklessness is not included as a definitional element of the offence, having regard to the fact that the offence is committed where the manager senior recognised the risk and decided to ignore it, by deliberately closing his eyes to it²⁰¹.

While introducing criminal liability undoubtedly projects a strong signal in respect of society’s disapproval of the conduct that largely precipitated the crisis, it also:

address[es] the view that the scope of the criminal law is in some sense unjust because it criminalises smaller scale misconduct but does not hold powerful businessmen responsible for the economic destruction wrought by the financial crisis. It is also hoped that it would prompt directors and senior managers to radically improve their own standards of behaviour, and those within the organisations that they manage²⁰².

It remains to be seen just how successful this relatively new legislative enactment in the United Kingdom will be. As part of the research methodology engaged in for the purpose of this submission, a Skype call was partaken in with a prominent London Queen’s Counsel who specialises on this particular area of the law. He was of the opinion that the Banking Reform

Crime) (Routledge 2014). Available at 9

<http://www.devereuxchambers.co.uk/assets/docs/publications/risk_recklessness_and_policing_the_financial_markets_jf_2015.pdf>.

¹⁹⁶ Ibid 11.

¹⁹⁷ Financial Services and Markets Act 2002, s424A (UK)

¹⁹⁸ Ibid 10.

¹⁹⁹ Banking Act 2009 (UK).

²⁰⁰ Ibid 10.

²⁰¹ Ibid 10.

²⁰² Robert Quigley, ‘The Impulse Towards Individual Criminal Punishment After the Financial Crisis’ [2015] 22:1 Virginia Journal of Social Policy & the Law 105, 157.

Act will be of absolutely no significance and will have essentially no practical application due to the fact that risk is inherent to the nature of the market. As such it may well have just been a legislative design enacted with a view to gaining political and social appeasement.

[4.3] Antipodean experiences

In Australia, a contravention of some of the existent statutory director's duties may give rise to criminal liability²⁰³. Of particular relevance in this regard, in contemplation of the essence of the central research question attributed to this submission, is the fact that it is a recognised duty of a director in Ireland to wind up an insolvent company, as was seen in chapter 3. Following on from this, a further duty could be attributed to a director (relating to the obligation to act in the best interests of the company) to not engage in such reckless or excessively conduct as would jeopardise operation of the company as a going concern.

Directors commit a criminal offence under the Corporations Act 2001²⁰⁴ whereby they:

- (a) are reckless; or (b) are intentionally dishonest; and fail to exercise their powers and discharge their duties: (c) in good faith in the best interests of the corporation; or (d) for a proper purpose²⁰⁵.

A director also commits a criminal offence if he uses his position or certain types of information dishonestly:

- (a) with the intention of directly or indirectly gaining an advantage for themselves, or someone else, or causing detriment to the corporation; or (b) recklessly as to whether the use may result in themselves or someone else directly or indirectly gaining an advantage, or in causing detriment to the corporation²⁰⁶.

Undoubtedly the remit of these provisions are quite broad and would be a welcome addition and introduction to this jurisdiction. The benefits of its latitude retains the ambit

²⁰³ Andrew Keay and Michelle Welsh, 'Enforcing breaches of directors' duties by a public body and antipodean experiences' (2015) 15:2 Journal of Corporate Law Studies 255, 266.

²⁰⁴ Corporations Act 2001, s184(1) (Aust).

²⁰⁵ Corporations Act 2001, s184(1) (Aust).

²⁰⁶ Corporations Act 2001, s184 (2) and (3) (Aust).

for judicial discretion. The members of the judiciary would be best suited and trusted to factor the particular facts of a given case into the application of the legislation and there would be consequent room for appropriate harshness or leniency as would be necessary.

Indeed, the criminal offences and civil penalty regimes in Australia do not operate in mutual exclusivity to each other. As Keay and Welsh very concisely weigh up in this regard:

These types of overlapping enforcement regimes can protect society from both under-enforcement and over-enforcement [and] civil penalty regimes can be utilised in situations where the conduct, although wrongful, is not severe enough to justify the commencement of a criminal prosecution. In these situations, if civil penalties were not available, there could be no option for public enforcement, and under-enforcement may result²⁰⁷.

Under the Australian civil penalty regime, somewhat similar to the Irish position, the orders that may be sought are pecuniary penalties, disqualification orders and compensation orders. Crucially, Australia has a corporate enforcer (the Australian Securities and Investments Commission 'ASIC') which is robust and reasonably well-funded²⁰⁸. By comparison, the Irish corporate enforcer, the Office of the Director of Corporate Enforcement, is not always particularly well-funded (alongside most statutory bodies, perhaps with the exception of the Central Bank).

As with all regimes, the Australian exemplification is not without its share of problems. Among some of the issues are; a compensation order has never been sought by itself (disqualification is fundamentally pursued), procedural difficulties (such as judicial reluctance) impact in ASIC's ability to make full use of their effective provisions²⁰⁹, and the possibility that otherwise well-suited persons might be deterred from assuming directorial positions given the somewhat stricter regime: are all factors.

²⁰⁷ Andrew Keay and Michelle Welsh, 'Enforcing breaches of directors' duties by a public body and antipodean experiences' (2015) 15:2 *Journal of Corporate Law Studies* 255, 263.

²⁰⁸ *Ibid* 265.

²⁰⁹ *Ibid* 274.

However, having regard to the last point as Keay and Welsh concisely observe “directors are generally well remunerated and hold positions of prestige, and the office of director will continue to attract competent, diligent and intelligent people.²¹⁰”

While the Australian regime is undoubtedly quite well established and positive in practise within the jurisdiction in most respects, having regard to the likelihood of similar provisions being adopted in the United Kingdom and Ireland:

Certainly the uproar in the corporate world that occurred in New Zealand on the announcement that the government there would introduce criminal offences for breach of directors’ duties would pale into significance compared with the adverse reaction that would be very likely to occur in the UK if similar action were to be taken²¹¹.

[4.4] The United States exemplification

Before wholly immersing oneself in the United States exemplification, it is deemed requisite to first delve into the operations involved in the corporate governance sector which is largely driven by a capitalist ethos.

The US is often seen as being the paradigmatic case of the shareholder-oriented or market-based approach to corporate governance. Ownership of corporations is dispersed, but involves high engagement from institutional investors, such as pension funds. Corporate boards are small, have a high proportion of outside or independent members, and utilize committees to improve board processes. Executive pay links pay to top managers’ salaries to shareholder returns. The internal and external aspects of corporate governance are linked through the monitoring of gatekeepers, such as audit firms, that certify the flow of information

²¹⁰ Andrew Keay and Michelle Welsh, ‘Enforcing breaches of directors’ duties by a public body and antipodean experiences’ (2015) 15:2 *Journal of Corporate Law Studies* 255, 280.

²¹¹ *Ibid* 269.

from managers to capital markets. And the market for corporate control exerts a final discipline on poorly performing firms, who face a heightened risk of takeover²¹².

As is understandable, bringing about new regulation and legislation which would operate to suppress the taking of risk and indeed recklessness, would be an entirely controversial move and such is always met with significant lobbying against such enactments. Hence, it normally occasions scandals (such as Enron, Worldcom and Lehman Brothers) within the corporate and financial sectors which precipitates the creation of new legal sanctions. While the United States are normally considered to have a good and effective model of corporate governance the continuous evolution and debates within the US regarding the reality of corporate governance in practice are ongoing²¹³.

The problem with reform legislation passed in the wake of scandals and crises is often criticized for looking backwards at the last problem without addressing future problems²¹⁴. The United States is undoubtedly a jurisdiction within which a great deal of significant legislation has been passed as a reaction or response to contemporary economic issues. The Sarbanes-Oxley Act²¹⁵ was passed after the accounting scandals of the early 2000s and was meant to prevent reckless corporate risk-taking; however, its strict 'mark-to-market' accounting rules played something of a role in adding to the 2008 economic downturn.

The provocatively named 'Dodd-Frank Wall Street Reform & Consumer Protection Act'²¹⁶ does not mince its words having regard to the sector in which the legislation is designed to target. Treading on capitalist toes, one author considers an inherent tension under Dodd-Frank "to regulate the swaps market and the need to avoid strangling that same market through over-regulation"²¹⁷. Such demonstrates a serious balance which needs to be struck between maintaining the spirit of the market and regulating to the extent necessary to ensure financial stability.

²¹² Gregory Jackson, 'Understanding Corporate Governance in the United States: an historical and theoretical reassessment' (2010) *Unternehmensmitbestimmung und Unternehmenssteuerung*: Hans-Böckler-Stiftung, 9

²¹³ *Ibid* 9.

²¹⁴ Robert Quigley, 'The Impulse Towards Individual Criminal Punishment After the Financial Crisis' [2015] 22:1 *Virginia Journal of Social Policy & the Law* 105, 154.

²¹⁵ Sarbanes Oxley Act (2012).

²¹⁶ Dodd Frank Act (2012).

²¹⁷ Craig R Enochs, 'Update on the Dodd-Frank Act' [2014] 36:2 *Houston Journal of International Law* 341, 377.

In conclusion and as Quigley concisely observes; “[i]t remains to be seen whether Dodd-Frank does the job. Its critics have argued that it focuses on minutiae but doesn’t fix the defects in the American financial sector that made the crisis possible”²¹⁸. In particular, it does not address the dangerous concentration on the banking system that creates the systemic risk and moral hazard of too-big-to-fail institutions.

²¹⁸ Robert Quigley, ‘The Impulse Towards Individual Criminal Punishment After the Financial Crisis’ [2015] 22:1 Virginia Journal of Social Policy & the Law 105, 153.

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

[5.1] Review of what has been discussed

To finalise this submission it is deemed appropriate to review the essential points delved into in the former chapters. The ultimate questions that were addressed were:

- the ambit of the central research question
- reckless conduct in the financial sectors was a significant contributing factor to the economic downturn
- excessive risk taking in, particularly the banking and securities sectors, is an institutional ethos which must be supervised and regulated
- suggested legal sanctions or offences regulating and deterring against excessive risk taking and recklessness in the financial sectors might undermine the fundamental spirit of the market
- corporate governance is the appropriate context within which to potentially deal with reckless conduct by directors and senior managements within the financial sectors
- a public enforcer or regulator could reasonably be expected to oversee the compliance with potential reckless conduct provisions
- the existent civil reckless trading provisions in this jurisdiction sufficiently deters against the conduct it is designed to prevent
- a criminal reckless trading provision should be introduced in this jurisdiction, having regard to the Law Reform Commission Issue Paper²¹⁹ released earlier this year
- Ireland should introduce an offence similar to that advanced in the United Kingdom under the Financial Services (Banking Reform) Act 2013
- the provisions examined in chapter 4 adopted in other jurisdictions might be useful in an Irish context
- overall, there would be role for reckless provisions to play in the financial sectors

[5.2] Remarks and observations

To recall, the central research question delved into in this submission was;

‘An examination of the extent to which reckless conduct precipitated the global financial crisis and an ensuing evaluation of existing and potential appropriate sanctions and offences for deemed reckless conduct in respect of corporate governance and with an express focus on the financial sector.’

Having endeavoured to address this assumed dedication to a satisfactory extent, it is hoped that the essence of the questions envisaged as resonating from this statement were delved into appropriately. It was intended to demonstrate that the global financial crisis had implications which extended beyond the ‘intangible’ economy itself. Hence, an appreciation for the wider community is necessary whereby law-makers are delineating new enactments.

While we are thankfully on the road to economic recovery (it would seem) in this jurisdiction, it is essential not to forget the mistakes of the past. Greed and risk-appetite can have wicked consequences. It is ultimately submitted that reckless conduct did in fact precipitate the global financial crisis to a significant extent. However, it is further asserted that it would require very crafty adaptations of existing laws so as to capture reckless financial sector participants and such would be an entirely unlikely occurrence.

In consideration of whether potential appropriate sanctions or offences might be adopted, it is envisaged that the holistic Australian approach should be adopted. It is furthermore suggested that the offence of causing a financial institution to fail, as it exists in Britain should be adopted. However, it is appreciated that such is quite an unrealistic quest. Even if similar provisions were to be adopted, it is imagined that given the reluctance of the courts to hand down declarations of personal liability under the existing civil reckless trading provisions, it would undoubtedly be highly unlikely that a conviction for recklessly causing a financial institution to fail would ever be handed down. However, there is room to further expand our existing civil reckless trading provisions and it is considered that this should be done. The financial sector can no longer be reasonably expected to efficiently self-regulate against excessively risky conduct.

TABLE OF LEGISLATION

Ireland

Companies Act 2014, s 610 (1)(a)

Companies Act 1990, s 138

Companies Act 1963, s 33

Non-Fatal Offences Against the Person Act 1997, s 13

United States

Securities Exchange Act 1934, S 10(b), 15 USC s 78j(b) (2013), (US)

The Sarbanes-Oxley Act/The Public Company Accounting Reform and Investor Protection Act 2002 Pub L 107-204, 116 Stat 74

Australia

Corporations Act 2001, s184(1)

United Kingdom

Financial Services and Markets Act 2002, s424A

Financial Services (Banking Reform) Act 2013, s36

TABLE OF CASES

Ireland

Martin v Farrell [2005] IEHC 62, unreported March 4 2005
O'Keefe v Ferris [1997] 3 IR 463, 469
People (DPP) v Cagney and McGrath [2007] IESC 26, [2008] 2 IR 111
People (DPP) v Murray [1977] IR 360
Sinnott v Minister for Education [2001] 2 IR 545
Re Appleyard Motors Group [2015] IEHC 28
Re Frederick Inns [1994] 1 ILRM
Re Hefferon Kearns (No 2) [1993] 3 IR 191
Re PSK Construction[2009] IEHC 538

United Kingdom

Ferguson v Wilson (1886) LR 2 Ch App 77
Elliott v C (A minor) [1983] 1WLR 939
Hall v Brooklands Auto-Racing Club (1932) 1 KB 205
Metropolis v Caldwell [1982] AC 314
R v G and R [2003] UKHL 50, [2004] 4 All ER 765
R v Lawrence [1981] 1 All ER 794
Trevor v Whitworth (1887) 12 App Cas
Welham v DPP [1961] AC 103

United States

Farmer v Brennan (1994) 511 US 825, 836
v Wade (1983) 461 US 30, 37-38 para 6

BIBLIOGRAPHY

OFFICIAL PUBLICATIONS

Crisis inquiry Commission, *The Financial Crisis Inquiry Report; Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States* (xi, 2011)

Federal Reserve Bank of Dallas, Staff Working Papers, Tyler Atkinson, David Luttrell and Harvey Rosenblum, *How bad was it? The costs and consequences of the 2007-09 Financial Crisis*, (July 2013)

<<https://dallasfed.org/assets/documents/research/staff/staff1301.pdf>>

Financial Crisis Inquiry Commission, *The Financial Crisis Inquiry Report; Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States* (xi, 2011)

Jenkins Committee Report, United Kingdom 1962 Cmnd 1749

Law Reform Commission, *Issue Paper: Regulatory Enforcement and Corporate Offences* (LRC IP 8 - 2016)

People (DPP) v Murray [1977] IR 360; Law Reform Commission, *Issue Paper: Regulatory Enforcement and Corporate Offences* (LRC IP 8 - 2016)

BOOKS

Ahern D, *Directors Duties* (Round Hall 2009)

Alexander L and Ferzan KK, *Crime and Culpability: A Theory of Criminal Law* (Cambridge University Press 2009)

Bernstein PL, *Against the Gods: The remarkable story of risk* (John Wiley and Sons, 1996)

Brealey RA and Myers SC, *Principles of Corporate Finance*, (5th edn, McGraw Hill College 1996)

Campbell L, Kilcommins S and O'Sullivan C, *Criminal Law in Ireland: Cases and Commentary* (Clarus Press Ltd 2010)

Fisher J, 'Risk, recklessness and policing the financial markets' in [Ryder N](#), [Turksen U](#) and [Hassler S](#) (eds), *Fighting Financial Crime in the Global Economic Crisis (The Law of Financial Crime)* (Routledge 2014)

Kindleberger CP and Aliber RZ, *Manias, Panics and Crashes: A History of Financial Crises* (6th edn, Palgrave Macmillan 2011)

Larry Alexander and Kimberly Kessler Ferzan, *Crime and Culpability: A Theory of Criminal Law* (Cambridge University Press 2009)

Lewis M, *The Big Short: Inside the Doomsday Machine* (WW Norton and Company 2011)

Norrie AW, *Crime, Reason and History* (2nd edn, Butterworths 2001)

Ryder N, Turksen U and Hassler S (eds), *Fighting Financial Crime in the Global Economic Crisis (The Law of Financial Crime)* (Routledge 2014)

Simester AP and Sullivan GR, *Criminal Law: Theory and Doctrine*, (3rd edn, Hart Publishing 2007)

ACADEMIC ARTICLES AND ESSAYS

Amirthalingham K, 'Caldwell Recklessness is Dead, Long Live *Mens Rea's* Fecklessness' (2004) 67 MLR 491

Crosby C, 'Recklessness - the Continuing Search for a Definition' (2008) 72 Journal of Criminal Law 313

Cullen J and Johnsen G, 'Promoting Bank Stability Through Compensation Reform: Lessons from Iceland' (2015) 11:2 Icelandic Review of Politics and Administration 333

Enochs CR, 'Update on the Dodd-Frank Act' [2014] 36:2 Houston Journal of International Law 341

Frug G, 'The Ideology of Bureaucracy in American Law' (1989) 97 Harvard Law Review 1276

Greenawalt K, 'Punishment' (1983) 74 J Crim L & Criminology 343

Jackson G, 'Understanding Corporate Governance in the United States: an historical and theoretical reassessment' (2010) Unternehmensmitbestimmung und Unternehmenssteuerung: Hans-Böckler-Stiftung 1, 9

Keay A and Welsh M, 'Enforcing breaches of directors' duties by a public body and antipodean experiences' (2015) 15:2 Journal of Corporate Law Studies 255

Lane PH, 'The European Sovereign Debt Crisis' (2012) 26 (3) Journal of Economic Perspectives 49

Lo AW, 'Reading about the Financial Crisis: A twenty-one book review' (2012) 50 J Econ Literature 151

Lombard S, 'Claims Against Negligent or Fraudulent Directors: Proposed Amendments to South African Legislation' (2007) 16 Int Insolv Rev 75

McConnell P, 'Strategic risk: The beanstalk syndrome' (2013) 6:3 Journal of Risk Management in Financial Institutions 229

Mortlock G, 'Corporate Governance in the Financial Sector' Reserve Bank of New Zealand: Bulletin Vol. 65 No. 2 12

O'Hanlon N, 'The Corporate Form and Reckless Trading: A Modern Pandora Epimetheus' [2006] 28 Dublin University Law Journal 254

Olazábal AM and Abril PS, 'Recklessness as a State of Mind in 10(B) Cases: The Civil-Criminal Dialectic' (2005) 18 New York University Journal of Legislation and Public Policy 305

Quinlivan S and Keys M, 'Official Indifference and Persistent Procrastination: An analysis of Sinnott' (2002) 2(2) Judicial Studies Institute Journal 163

Quigley R, 'The impulse towards individual criminal punishment after the financial crisis' (2015) 22(1) Virginia Journal of Social Policy & the Law 105

Rakoff JS, 'The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?' (2014) The New York Review of Books
<<http://www.nybooks.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions/>>

Sikka P, 'The corrosive effects of neoliberalism on the UK financial crises and auditing practises: a dead end for reforms' (2015) 39 Accounting Forum 1

Smith JC, 'Commentary on *Caldwell*' [1981] Crim LR 392, 394

Stringham EP, 'It's not me it's you: the functioning of Wall Street during the 2008 economic downturn' (2014) 161 Public Choice 269

Thorhallsson B and Kirby P, 'Financial Crises in Iceland and Ireland: Does European and Euro Membership Matter?' (2012) 50:5 Journal of Common Market Studies 801

Van Aarle B, Tielens T and Van Hove J, 'The financial crisis and its aftermath: the case of Ireland' (2015) 12(3) International Economics and Economic Policy 393

NEWSPAPER ARTICLES (ONLINE)

Author unavailable, 'Nine out of ten want to see bankers jailed (if they are found guilty of crimes)' *London Evening Standard* (London, 9 October 2012)

<<http://www.standard.co.uk/news/uk/nine-out-of-ten-want-to-see-bankers-jailed-if-they-are-found-guilty-of-crimes-8203103.html>>

Author unavailable, 'The origins of the financial crisis: crash course' *The Economist* (London, 7 September 2013)

<<http://www.economist.com/news/schoolsbrief/21584534-effects-financial-crisis-are-still-being-felt-five-years-article>>

Brady N, 'Payout for lost Anglo Savings' *The Sunday Times* (Dublin, 29 September 2013)

<<http://www.thesundaytimes.co.uk/sto/news/ireland/article1320208.ece>>

Curran R, 'Irish Contracts for Difference punters are alive, well and still managing to lose money' *Irish Independent* (Dublin, 26 November 2015)

<<http://www.independent.ie/business/irish-contracts-for-difference-punters-are-alive-well-and-still-managing-to-lose-money-34234534.html>>

Erman M, 'Five years after Lehman, Americans still angry at Wall Street:Reuters/Ipsos poll' *Reuters* (London, 15 September 2013)

<<http://www.reuters.com/article/us-wallstreet-crisis-idUSBRE98E06Q20130915>>

Gartland F and Carroll S, 'Bank rescue could ultimately cost taxpayers €40 billion' *The Irish Times* (Dublin, 16 January 2015)

<<http://www.irishtimes.com/news/politics/oireachtas/bank-rescue-could-ultimately-cost-taxpayers-40-billion-1.2067703>>

Hardiman C, 'Anglo Irish Bank is world's top performer' *Irish Independent* (Dublin, 27 January 2006)

<<http://www.independent.ie/business/irish/anglo-irish-bank-is-worlds-top-performer-26406330.html>>

Johnson S, 'Senator Kaufman: Fraud Still at the Heart of Wall Street' *Huffington Post* (New York, 15 May 2010)

O'Dwyer P, 'Quinn Insurance collapse to cost another €912m' *Irish Examiner* (Dublin, 28 November 2015)

< <http://www.irishexaminer.com/business/quinn-insurance-collapse-to-cost-another-912m-367603.html>>

The New York Times and CBS News Poll, 'America's Views on President Obama' *The New York Times* (New York, 25 September 2013)

<<http://www.nytimes.com/interactive/2013/09/25/us/politics/nyt-poll-obama.html>>

WEBSITES, BLOGS, ONLINE SURVEYS, ONLINE PETITIONS

Angelides P, Ritholtz B, 'America is a "Failed State" with a "Dual Justice System"

<<http://www.washingtonsblog.com/2011/04/america-is-a-failed-state-with-a-dual-justice-system-one-for-ordinary-people-and-then-one-for-people-with-money-and-enormous-wealth-and-power.html>>

Harper B, 'Online Etymology Dictionary' (Reckless)

<http://www.etymonline.com/index.php?allowed_in_frame=0&search=reckless>

Kettenring B, 'ACTION: Tell Obama to end too big to jail' MoveOn.org Petition

Merriam-Webster, 'Definition of Fraud', online legal dictionary

<<http://www.merriam-webster.com/dictionary/fraud>

Oxford dictionaries online< <http://www.oxforddictionaries.com/definition/english/fraud>>

Woodcock M and Cronolly J, 'High Court considers reckless trading for the first time in years' (2015) Mc Dowell Purcell

<http://www.mcdowellpurcell.ie/news/high-court-considers-reckless-trading-first-time-years/>

YouGov, Avaaz Survey conducted in the United Kingdom, France and Germany. See survey results

<https://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/8uw8rxn930/AVAAZ%20Results%20121004%20Banking%20UK.pdf>

https://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/utqoah9zai/AVAAZ%20Results%20121004%20Banking%20Germany.pdf

https://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/d1pdi6kffn/AVAAZ%20Results%20121004%20Banking%20France.pdf

Other Sources

Don McLean Trinity College Dublin, Lecturer in EU Financial Services Law, permission obtained 21/06/16

ACKNOWLEDGEMENTS

I sincerely wish to thank the Law School at Trinity College, Dublin for having provided me with what has been a wonderful academic endeavour this year. My esteemed lecturers, namely; Eoin O'Dell, William Binchy, Donald MacLean, Ewa Komorek, Giuseppe Mazziotti and Shelley Horan, have all truly expanded my knowledge and understanding in their respective fields of expertise. I do not doubt that the many insights in which I have gained will be invaluable in respect of my career pursuits, God willing. I am also entirely indebted to Kelley McCabe; with whom I have been in contact with for over three years now, from the first point at which I decided to pursue further study in the University of Dublin. Kelley is incredibly kind, caring, approachable and helpful and is always the first point of contact for any kind of matter that may arise. My supervisor, Dr. Deirdre Ahern, has undoubtedly been a wonderful mentor throughout the year and I am most thankful to her for having kept me on the straight and narrow with regard to my thesis, as well as for providing me with many insights into corporate governance.

Furthermore, I am truly blessed to have such a wonderful employer in Galway who facilitated, in more ways than one, the attainment of this masters. I must particularly thank Tom, Dónal, Susan, Margaret, Patricia, Sinéad, Catherine and Aisling for the understanding, advice and guidance in which you each have provided me with throughout the year.

Of course, I must thank the lovely Kathleen, Paraic and Hazel for having cared for Jack every Tuesday or Thursday evening during the Michaelmas and Hilary Terms, as well during those times in which I needed to do some additional study.

Most significantly, I must thank my amazing family for their incredible support throughout the year. Mum and Dad, for your persistent encouragement and having cared for Jack from five months old (indeed, from when I first commenced my studies in September), I cannot possibly imagine how I would have seen this through were it not for you both. Fiona, Caroline and Katie; my wonderful sisters, you are all so young and yet so mature – thank you ladies so much for all of your help and reassurance.

And last but not least, I must thank my newly formulated little family; Daniel and Jack, whom I know will continue to inspire, drive and motivate me as we grow and progress.

