


# Zombie Litigation

How to survive the court cases  
that just won't die.




Malcolm Niekirk  
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# Zombie litigation – the topics

- What is it?
  - The statutory stays on litigation in insolvency.
  - How, and why, it breaks the stays.
  - Third Parties (Rights Against Insurers) Act 2010
  - *Atlantic Computers*
  - CPR 31
  - How to deal with the Zombie Apocalypse
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# Zombie Litigation – what is it


- Claims brought against BustCo.
- Arising from something that's pre-appointment.
- That are not stayed in the insolvency proceedings.



# Zombie Litigation – what it is not

- Claims brought against you.
    - Those – if legitimate – are outside the statutory stay.
  - Arising from something that's post-appointment.
    - Those – if legitimate (and against BustCo) – may rank as expenses.
  - That are stayed in the insolvency proceedings.
    - Legitimate claims against the office holder are not stayed.
    - Legitimate claims for expenses are not stayed.
      - (They are claims within the insolvency proceedings.)
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# Insolvency stays litigation

- Why?
  - Preservation of the *pari passu* (equality) rule.
  - Allows the liquidator to do their job.
  - Maximises realisations for all creditors.
- How?
  - Different rules for different procedures.
    - Administration
    - Compulsory liquidation
    - Voluntary liquidation
    - Bankruptcy

# Insolvency stays litigation

- Bankruptcy
  - Proceedings can be stayed between petition and order (s285).
  - Enforcement is ineffective ('void') after the petition (s285).
  - The bankruptcy order stays all proceedings (s285).
    - The court can lift that stay (s285), conditionally, or unconditionally.
    - Special rules for:
      - Incomplete execution (s346); and
      - Bailiffs collecting rent arrears.

# Insolvency stays litigation

- Compulsory liquidation
  - Proceedings can be stayed between petition and order (s126).
  - Enforcement is ineffective ('void') after the petition (s128).
  - The winding up order stays all proceedings (s130).
    - The court can lift that stay (s130(3)), conditionally, or unconditionally.

# Insolvency stays litigation

- Voluntary liquidation
  - No automatic stay.
    - Use s112 to activate the court's powers, as if it were a compulsory liquidation.
    - And then ask the court to impose a stay (as if s130 applied)
    - The court can lift that stay (s130(3)), conditionally, or unconditionally.
  - This is more likely to work for a CVL than an MVL.


# Insolvency stays litigation

- Administration
  - Automatic stay (para 43(6) of schedule B1)
    - Applies from the start of the appointment process
  - Can be lifted:
    - If the administrator allows.
    - By a court order.
    - *Atlantic Computer* principles apply.


(More on that later!)



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# Stay-breaking litigation

- Reasons for solicitors to litigate against an insolvent company include:
  - They don't understand insolvency
  - They want possession of something
  - They want to enforce rights against a third party
    - Such as an insurance company
    - Under the Third Parties (Rights Against Insurers) Act 2010

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# Third Parties (Rights Against Insurers) Act 2010

- (Replaced the Third Parties (Rights Against Insurers) Act 1930, in 2016)
- The previous Act,
- and this,
- take some insurance policies out of the insolvency.

# Third Parties (Rights Against Insurers) Act 2010

Liquidator



Assets

# Third Parties (Rights Against Insurers) Act 2010

Creditors

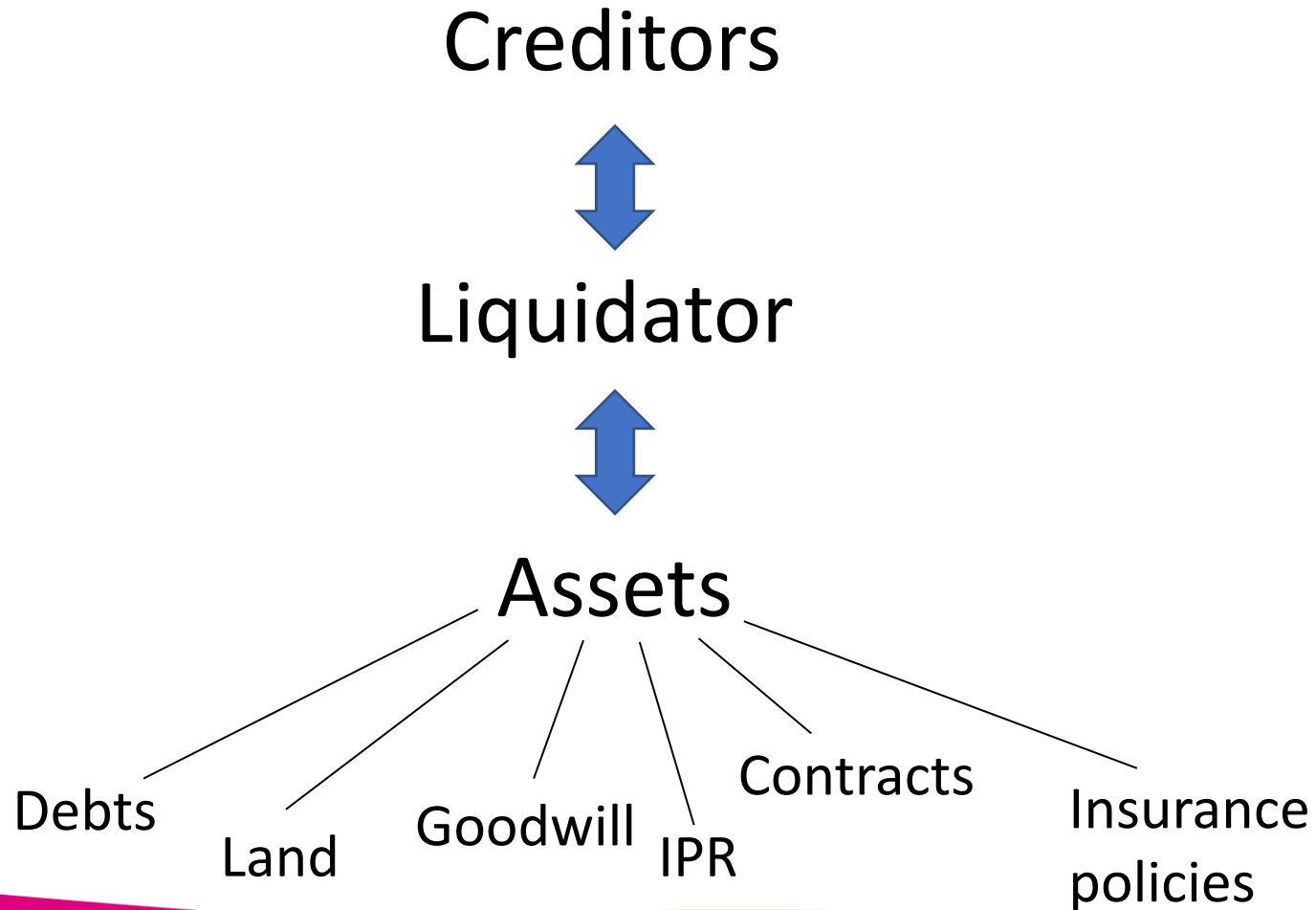


Liquidator

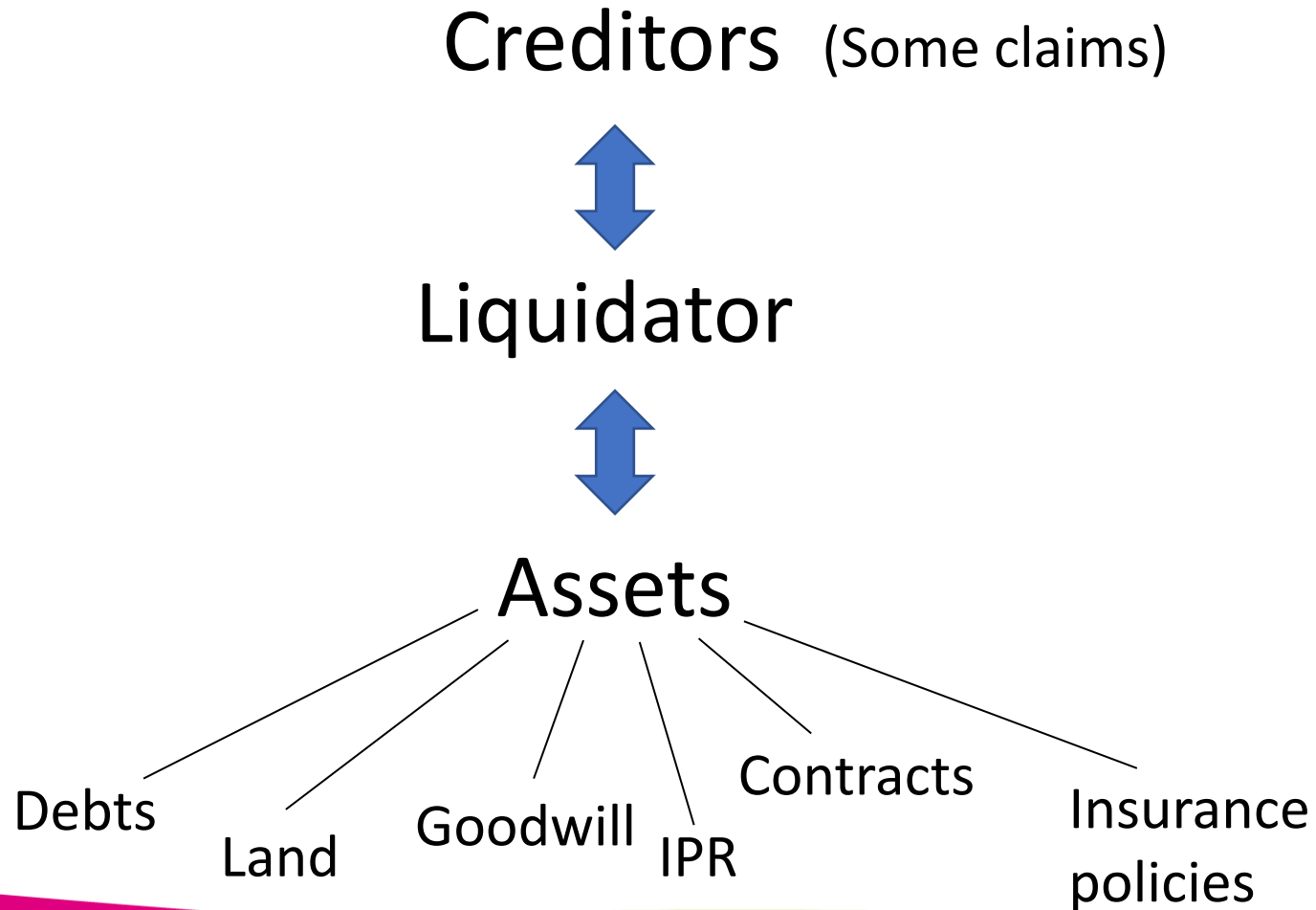


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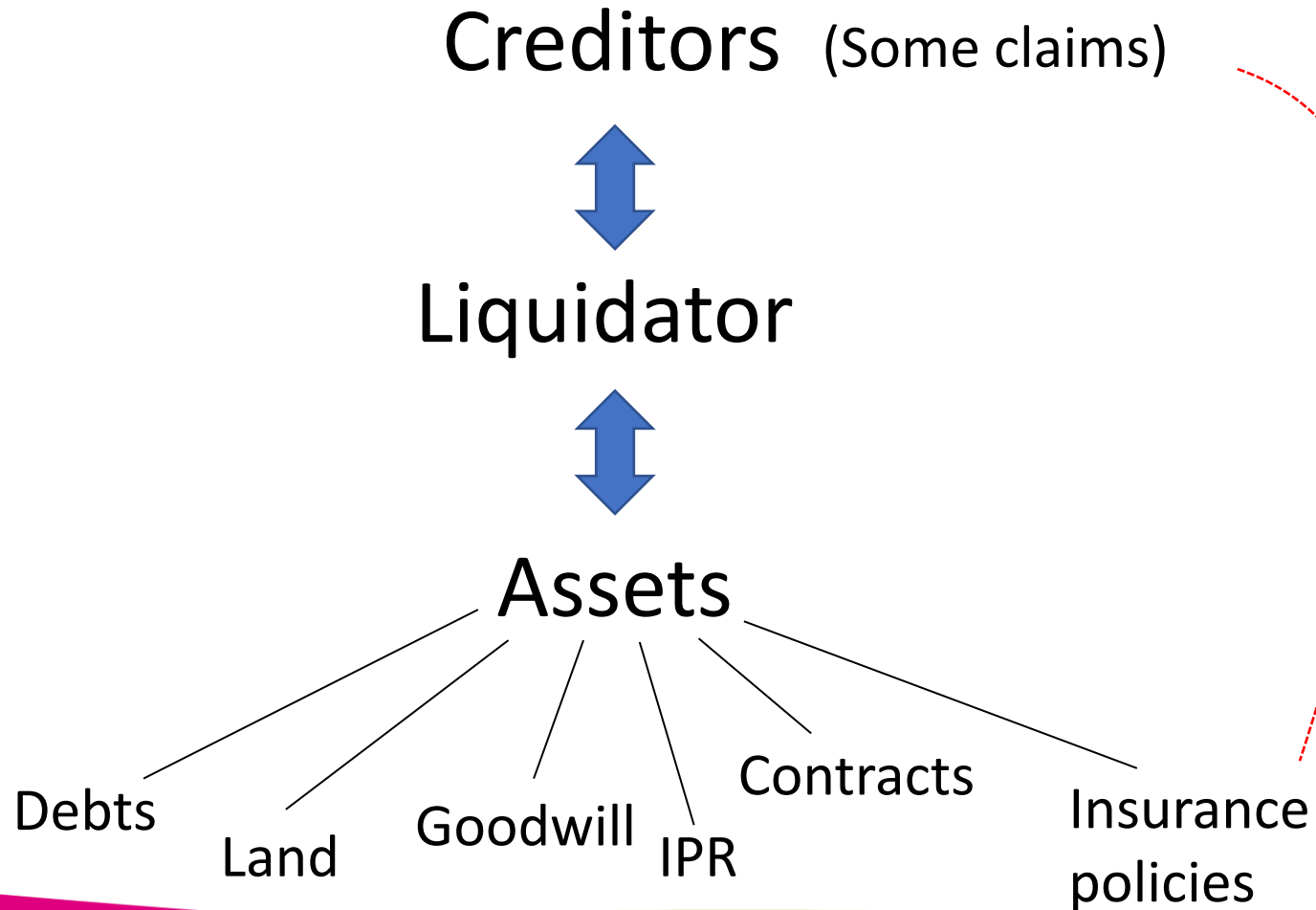
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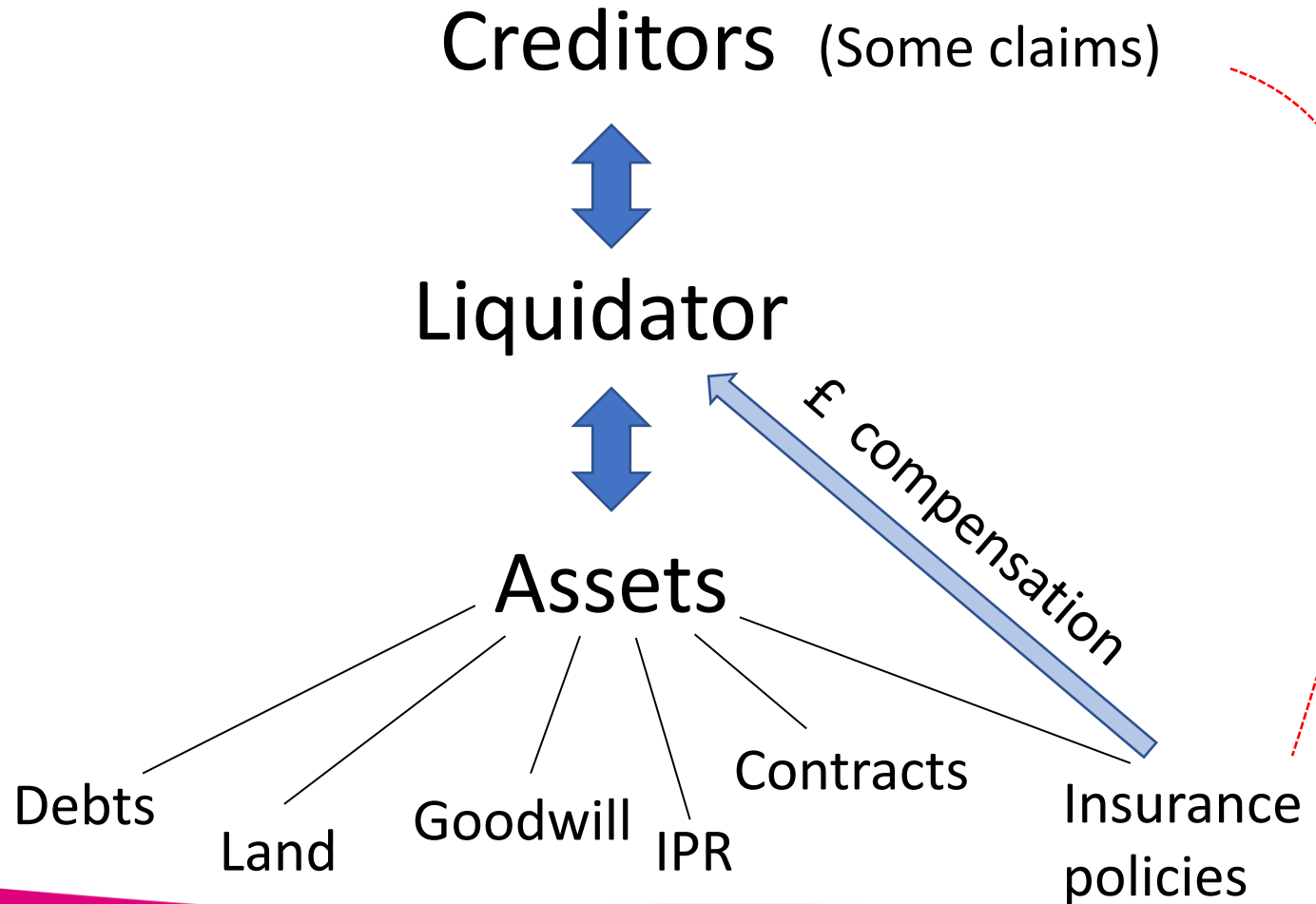
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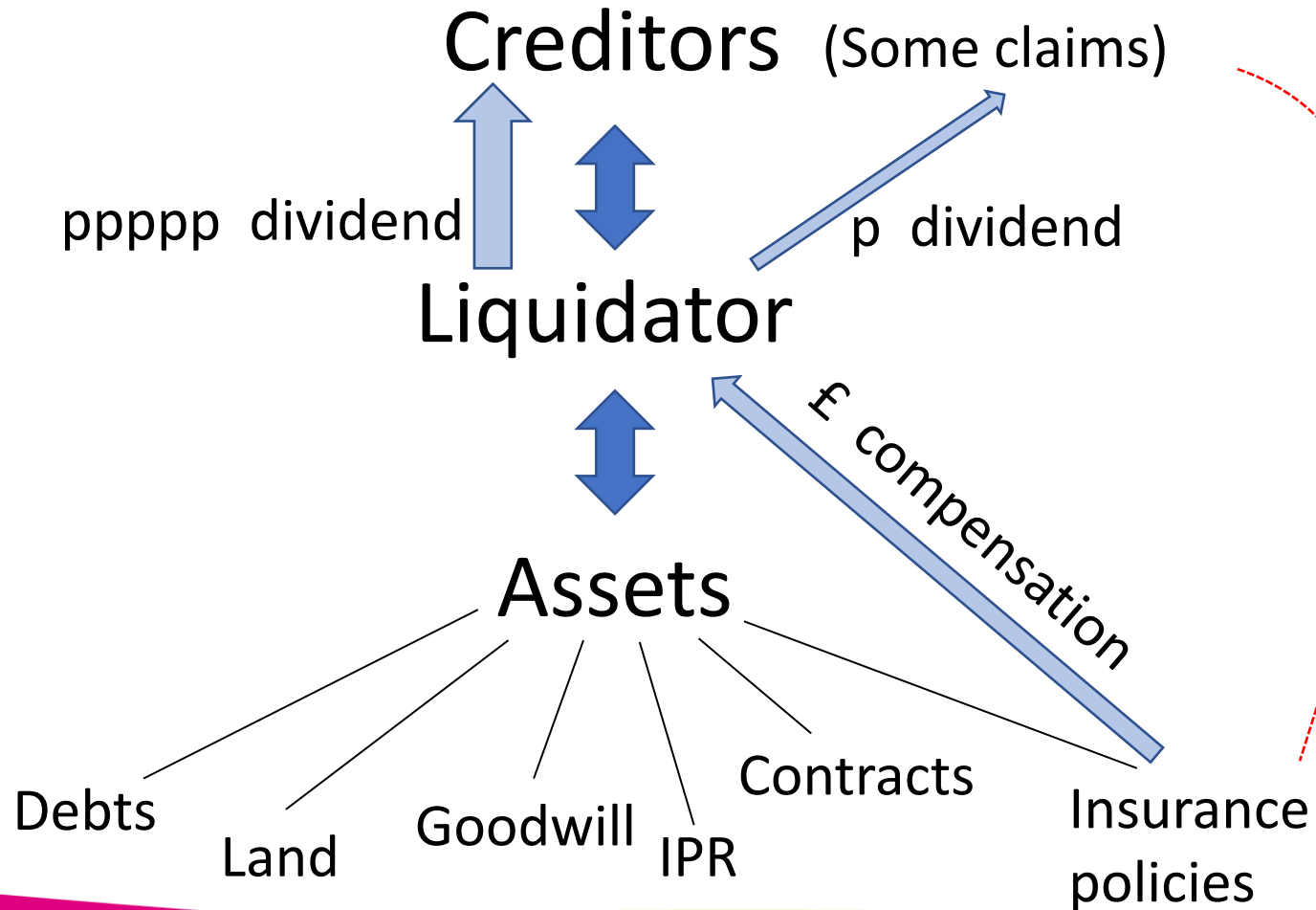


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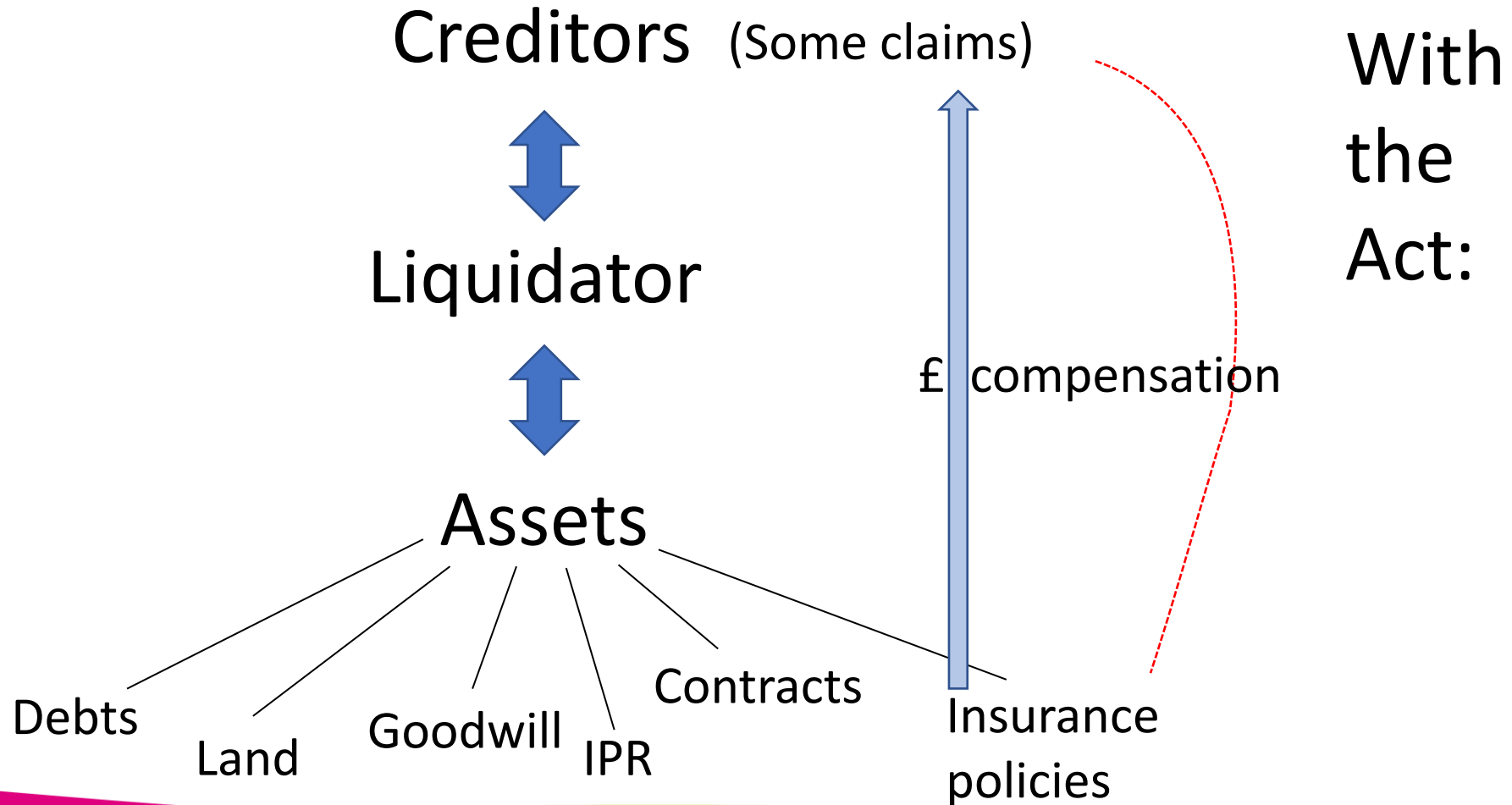
Without  
the Act:

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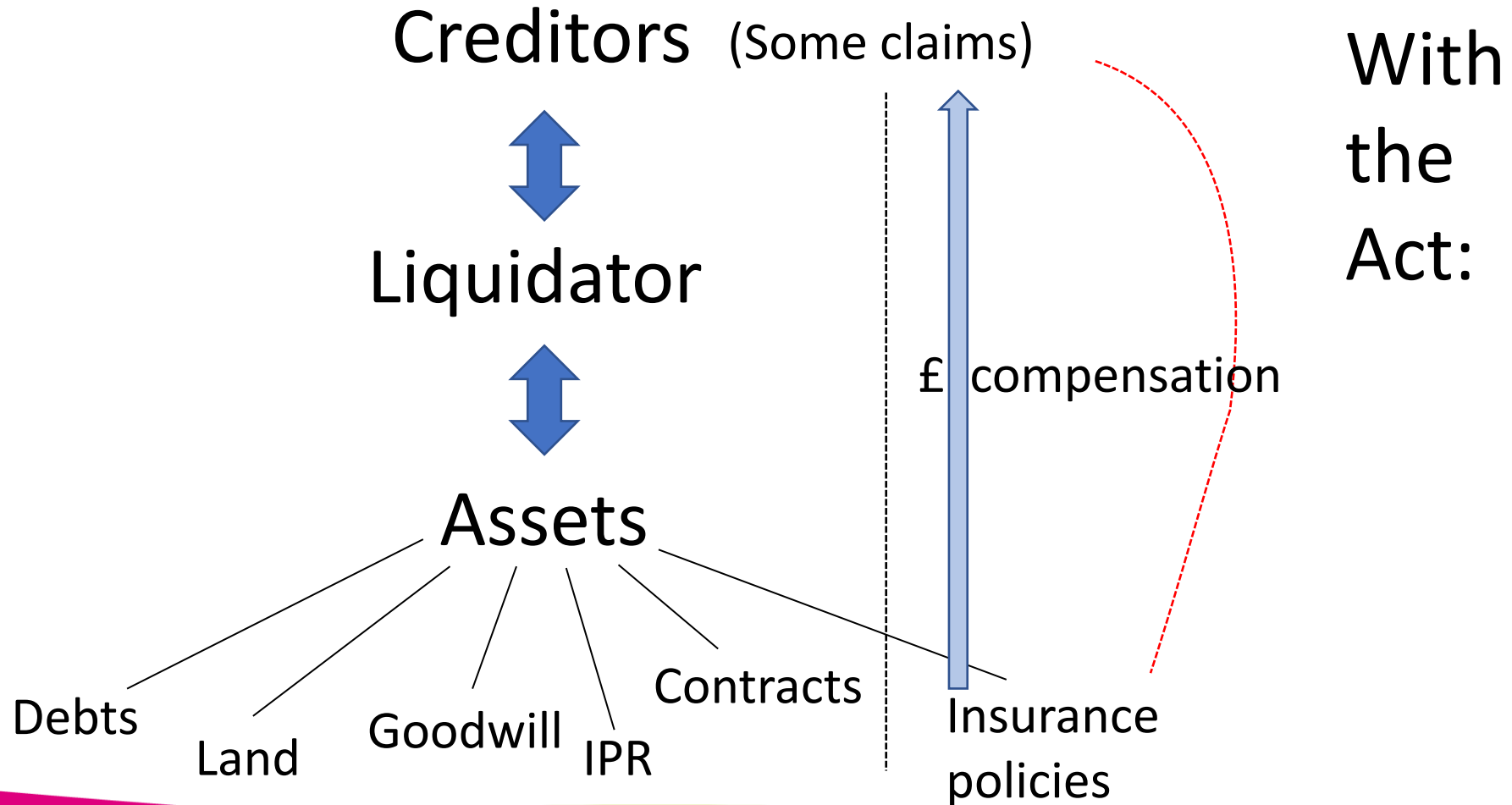


Without  
the Act:


# Third Parties (Rights Against Insurers) Act 2010



# Third Parties (Rights Against Insurers) Act 2010



# Third Parties (Rights Against Insurers) Act 2010

- The Act is triggered by any common insolvency procedure.
    - Bankruptcy, liquidation, administration, VA, and others.
  - Under the 1930 Act, the third party had to establish liability against the insured (BustCo) before claiming against its insurer.
  - Under the 2010 Act, the third party can claim only against BustCo's insurer.
    - (Some solicitors don't know that)
    - Or, if they do, they may not know who the insurer is.
  - The legislation tries not to affect the rights of the third party, or the insurer.
- 


# Third Parties (Rights Against Insurers) Act 2010

- The third party has a limited right to information.
- They can ask for it from:
  - The insured (BustCo); or
  - Anyone else who might have it:
    - Insurers
    - Brokers
    - Directors of BustCo
    - You.


# Third Parties (Rights Against Insurers) Act 2010

- This is the information they're entitled to (within 28 days):
  - Is there an insurance policy to cover their claim?
  - If so:
    - Who is the insurer?
    - What are the terms?
    - Has the insurer denied liability?
    - Has BustCo sued the insurer?
    - If there's a cap on cover, how much is left?
  - If you can't answer those questions, why?


# Third Parties (Rights Against Insurers) Act 2010

- Don't ignore a request like that.
  - They may get a court order to compel compliance.
  - And, they will probably get a costs order against you.
  
  - By all means, pass the duty on to someone better able to answer:
    - Broker
    - Director
    - Insurer
- 


# Third Parties (Rights Against Insurers) Act 2010

- Incoming letter from a claimant's solicitor?
  - Requesting:
    - Permission to bring the proceedings (lift the stay).
    - Information about BustCo's insurance.
- 

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# Atlantic Computers

- Mostly about when leasing companies can repossess their goods
- Deals with administrations
- Sets out principles to balance competing interests


# The *Atlantic Computers* principles

- The person asking for permission has to make their case.
  - Grant permission if it won't damage the administration.
    - Look at:
      - the purpose of the administration;
      - how successful it's likely to be;
      - what stage it's at.
  - Balance the interests, if it will.
    - Look at which party will be more damaged.
    - Mitigate the damage by paying rent for continuing use?
  - Conditions may apply (if permission is granted or refused).
- 


# *Atlantic Computers* and IP's conduct

- Administrators are officers of the court (so act judicially).
  - Be decisive – act quickly.
  - Perhaps make an interim decision?
  - Be responsible – don't negotiate for partisan advantage.
  - Give reasons for your decision.
- 


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# Civil Procedure Rules (CPR) 31

- CPR = the court rules (High Court, County Court and appeal courts)
  - CPR 31 is about disclosure.
  - Disclosure is the duty that litigants have to make information available to each other.
  - The person bringing the claim against BustCo (the applicant) is entitled to information:
    - From you (the liquidator).
    - From the company (the respondent).
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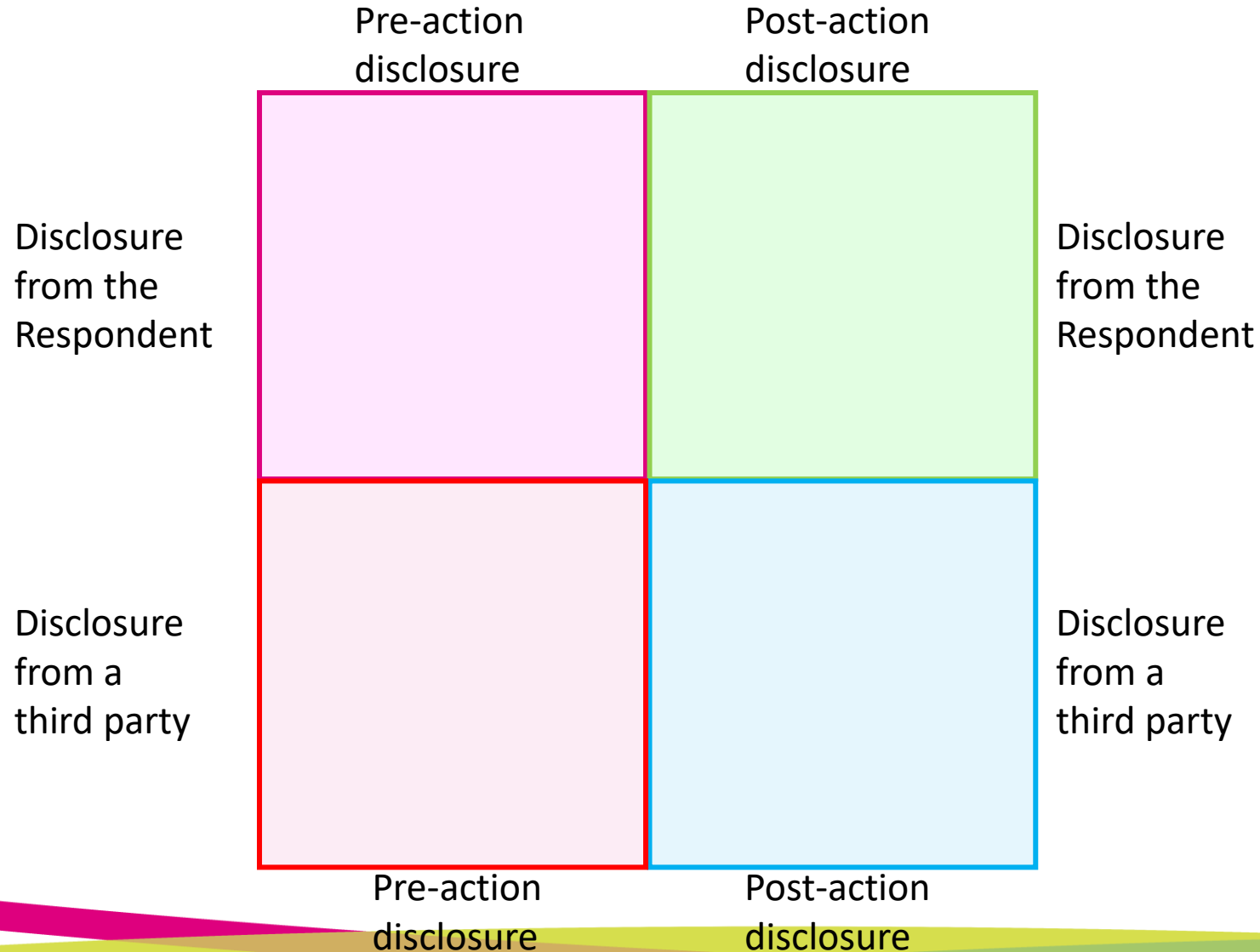
# Third Parties (Rights Against Insurers) Act 2010

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  - Is there an insurance policy to cover their claim?
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    - Who is the insurer?
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  - If you can't answer those questions, why?
  - (Perhaps someone else can? Broker, director, insurer ... ?)

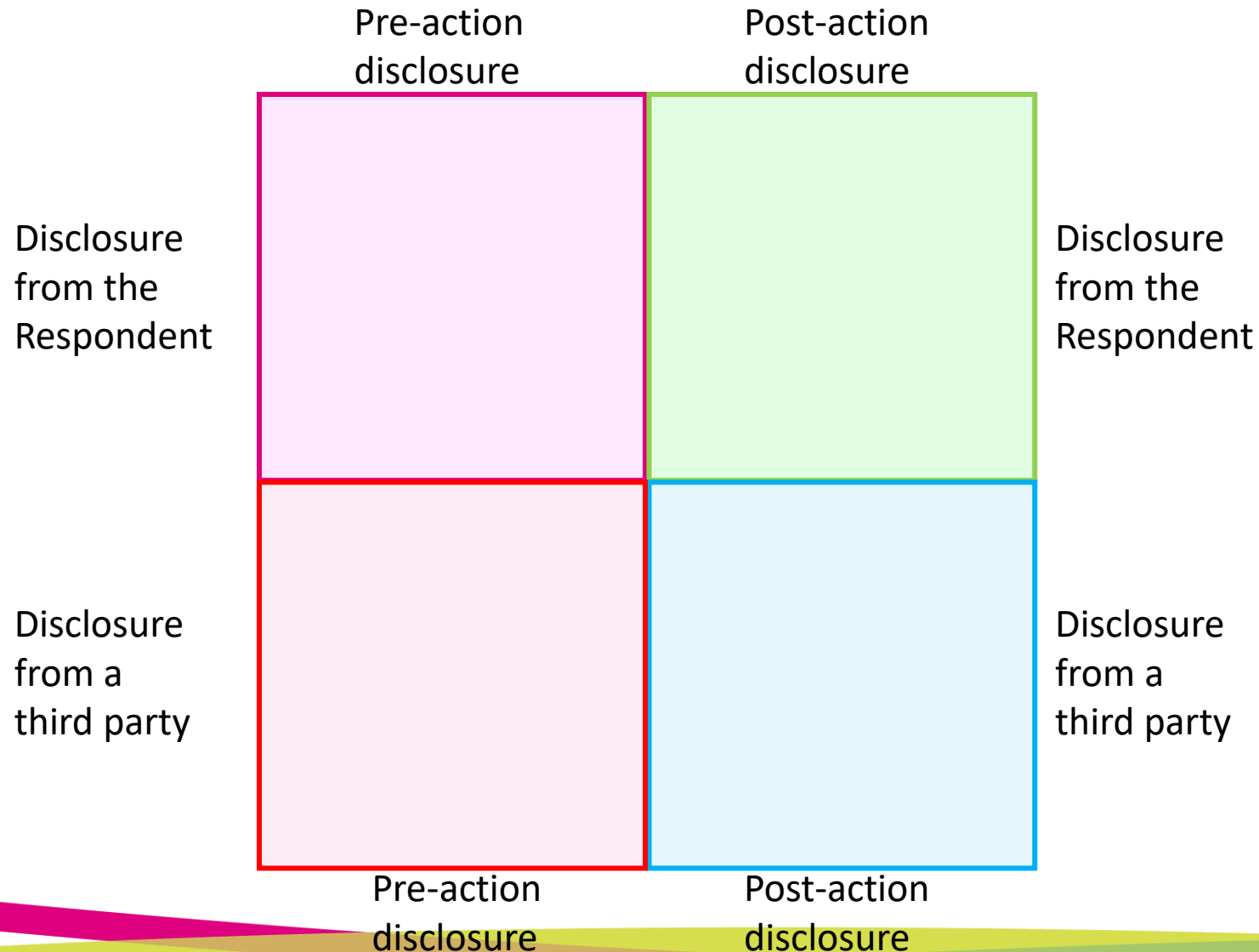
# Disclosure

- The applicant may want information from BustCo, such as:
    - Client or customer files
    - Contracts and invoices
    - Board minutes
    - Procedural manuals and instructions
    - Emails and correspondence
    - Web content
    - Etc.
  - CPR 31 applies to that.
- 

# Civil Procedure Rules (CPR) 31



# Civil Procedure Rules (CPR) 31



NB: BustCo is the Respondent. The claim is against it.

NB: You, the liquidator, are a 'third party'. The claim is not against you.

# Civil Procedure Rules (CPR) 31

	Pre-action disclosure	Post-action disclosure	
Disclosure from the Respondent		This is normal. Respondent normally has to pay the Applicant's costs.	Disclosure from the Respondent
Disclosure from a third party			Disclosure from a third party
	Pre-action disclosure	Post-action disclosure	

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# Civil Procedure Rules (CPR) 31

	Pre-action disclosure	Post-action disclosure	
Disclosure from the Respondent	This is unusual. The Applicant normally has to pay the Respondent's costs.		Disclosure from the Respondent
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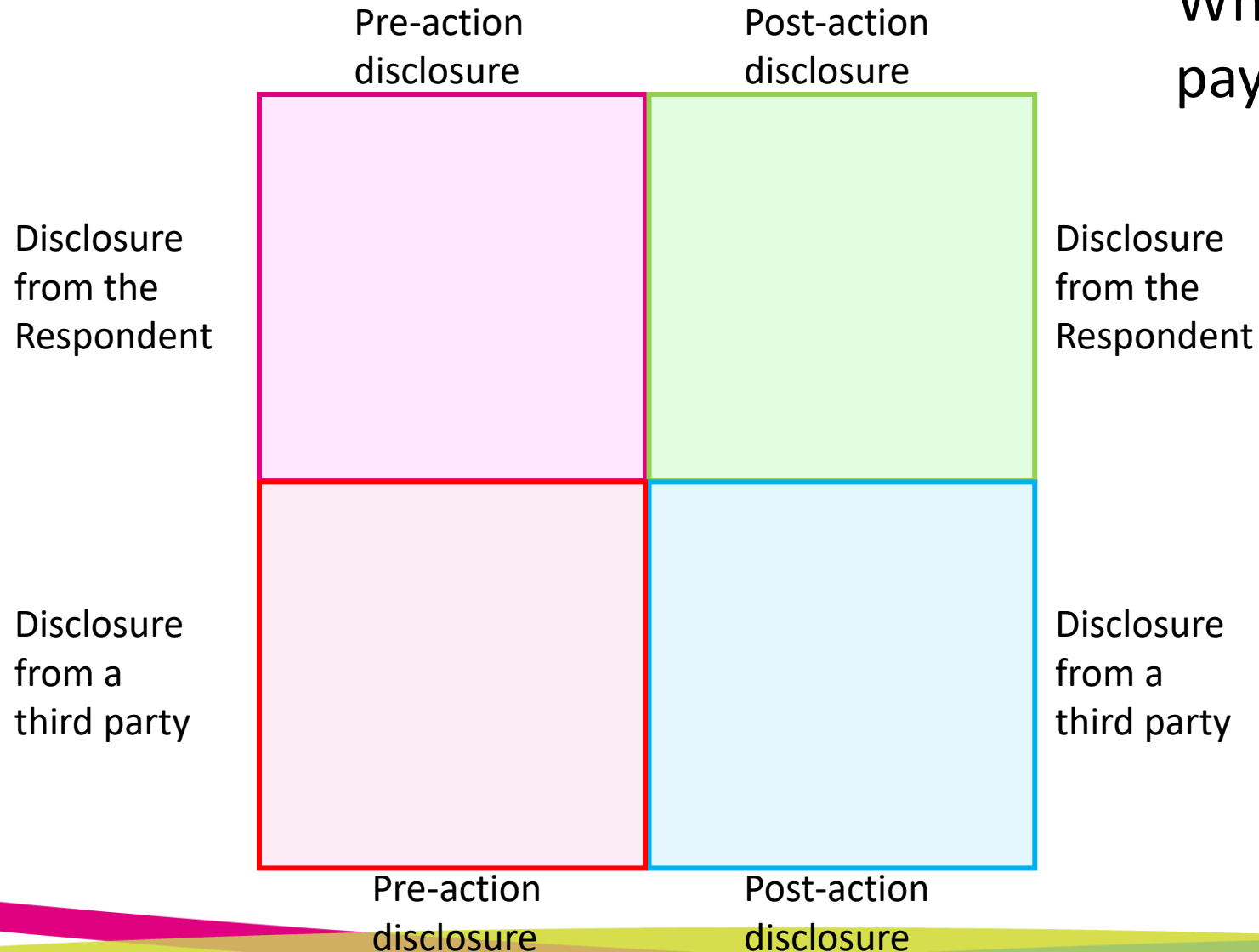
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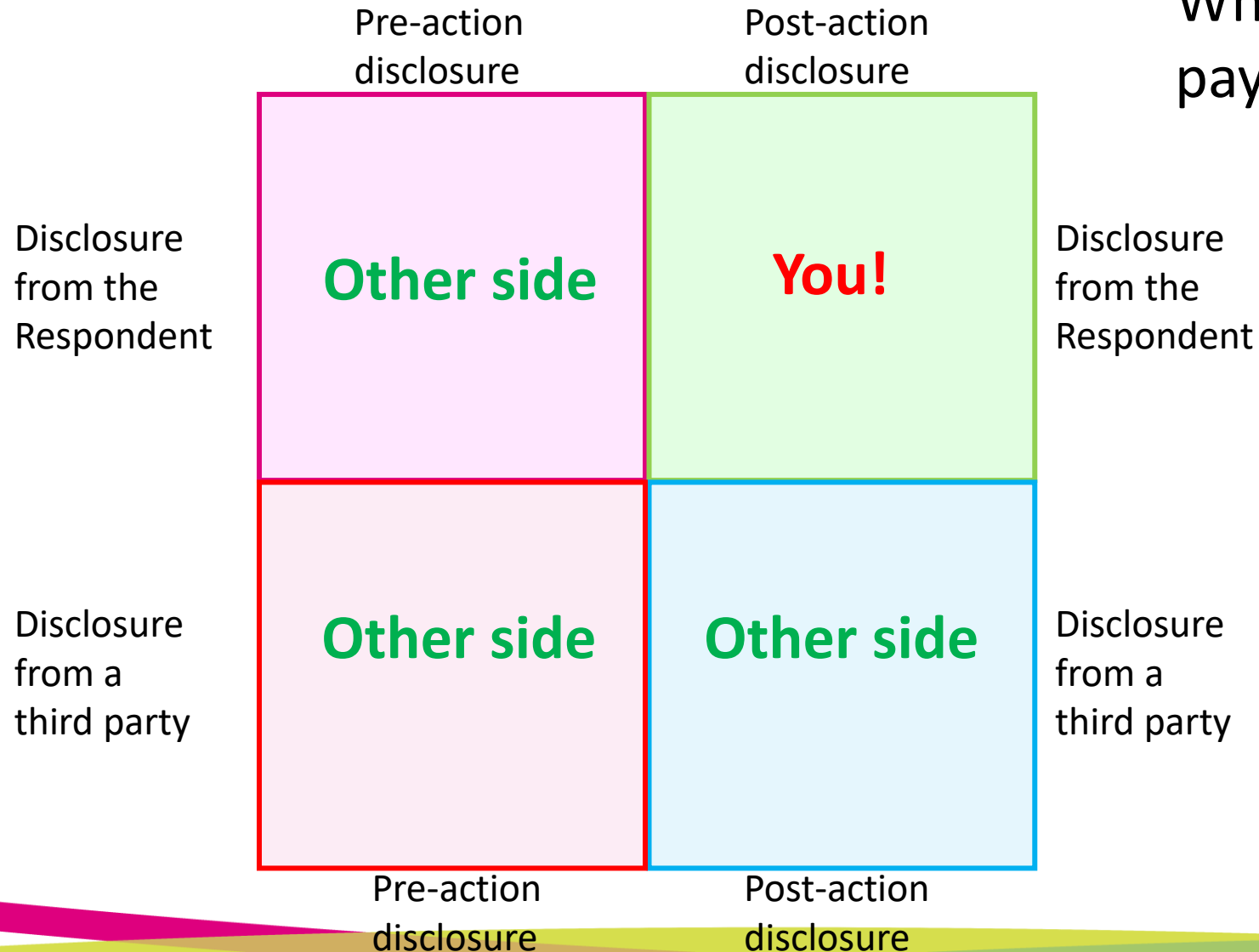
Who is likely to have to pay both side's costs?



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# Practical tips – how to deal with zombies

- Remember the *Atlantic Computers* principles
  - Be neutral
  - Be open
  - Be fair



# Practical tips – how to deal with zombies

- Remember the other side are entitled to specific, limited information
  - Give it to them quickly if you can
  - And, if you can't (easily):
    - Explain why (remember *Atlantic Computers*); and
    - Pass them on to someone who can.




# Practical tips – how to deal with zombies

- Remember the other side are entitled to specific, limited information.
- But they are not entitled to more than that from you.
- If they seek it from the company:
  - They may not be entitled to it from you (and giving it may harm other parties' interests – remember *Atlantic Computers*).

# Practical tips – how to deal with zombies

- If they seek it from the company:
- And you can give it to them:
  - Don't harm other parties' interests – remember *Atlantic Computers*.
    - Agree terms of disclosure.
  - It is probably 'third party disclosure' – they should pay for:
    - Your legal costs
    - Your time.
  - It may be 'pre action disclosure' – they should pay then too.
  - They may be seeking a *Norwich Pharmacal* order – they should pay then too.

# Practical tips – how to deal with zombies

- Expect demands with menaces – it's litigators you're dealing with.
  - But, you've got decent protection for your role.
  - The litigators demanding disclosure may, or may not, realise that.
  - Remember the *Atlantic Computers* principles.
    - Be fair
    - Be open
    - Be careful
    - Be neutral
    - Be reasonable
- 



# If you'd like to contact us...

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