

# GUARANTEES IN THE CONTEXT OF EXAMINERSHIPS

The Companies (Amendment) Act 1990 (the **1990 Act**) provides the statutory framework for petitioning the High Court for the appointment of an examiner to a company and providing the company concerned with a certain level of protection from its creditors. In practice, a significant issue which often arises is the enforceability of the provisions of a guarantee in the context of an examinership. The purpose of this article is briefly to look at the enforceability of a guarantee both during the period of protection and once it ends.

## **DURING THE EXAMINERSHIP**

During the period of protection provided by the examinership, a guarantee provided in respect of the liabilities of a company in examinership is unenforceable. Section 5(2)(f) of the 1990 Act provides that during the period of protection of the examinership, the following is to apply in relation to the liability of any person in respect of the debt of a company in examinership whether under a guarantee or otherwise (for convenience below I refer to guarantees only):

- (i) No attachment, sequestration, distress or execution shall be put into force against the property or effects of such person in respect of the debts of the company, and
- (ii) No proceedings of any sort may be commenced against such person in respect of the debts of the company.

## **CESSATION OF EXAMINERSHIP**

With regard to the enforcement of a guarantee in circumstances where the examinership ends, there are certain requirements that the creditor needs to have met before the creditor can enforce the provisions of the guarantee which can be summarised as follows:

- 2.1 The creditor must have served a notice on the guarantor containing an offer in writing by the creditor to transfer to the guarantor any voting rights (in so far as they relate to the debt) in relation to the meeting of the creditors/members to approve or reject the scheme of arrangement;

2.2 The above notice must have been served at least 14 days before the day on which the meeting of creditors/members is convened to approve or reject the scheme if 14 days or more notice is given in relation to the meeting and if less than 14 days notice is given of the meeting, the creditor must have served his notice in writing not more than 48 hours after he has received notice of the meeting.

If the guarantor accepts the offer and furnishes it to the examiner at the meeting of creditors/members to approve or reject the proposals and the guarantor informs the examiner that the offer has been accepted, the transfer of voting rights at the meeting of creditors/members takes effect without the need for any assignment or the execution of any other instrument.

If the creditor fails to make the above offer, the creditor cannot enforce by legal proceedings or otherwise the terms of the guarantee unless the following conditions are met:

- (a) the scheme of arrangement is not entered into or does not take effect; and
- (b) the creditor has obtained the leave of the court to enforce the guarantee.

A guarantee cannot be enforced against a company which itself is in examinership.

If a guarantee is enforceable and a scheme of arrangement is put in place involving a write down of creditors, the liability of the guarantor is not reduced despite the write down unless the creditor and the guarantor agree otherwise.



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