

Introduction to Examinership

1. The statutory framework for placing a company in examinership is set out in the Companies (Amendment) Act 1990 (the '1990 Act'). The process is designed to provide a mechanism for a company facing financial difficulty to benefit from a certain period of protection and to enable its rescue.
2. **APPOINTMENT OF AN EXAMINER AND THE INDEPENDENT ACCOUNTANT'S REPORT**
 - 2.1 An application for the appointment of an examiner is made by the presentation of a petition to the High Court and can be presented by the following persons:
 - 2.1.1 The company;
 - 2.1.2 The directors of the company;
 - 2.1.3 A creditor, including a contingent or prospective creditor; and/or
 - 2.1.4 Members of the company holding not less than one-tenth of the paid up capital of the company having voting rights.
 - 2.2 In presenting a petition, it is necessary to establish each of the following:
 - 2.2.1 The company, is or is likely to be, unable to pay its debts; and
 - 2.2.2 No resolution subsists for the winding up of the company; and
 - 2.2.3 No order has been made for the winding up of the company.
 - 2.3 A petition is required to be accompanied by a report of an independent accountant which will include:
 - 2.3.1 A statement as to the affairs of the company, showing in so far as it is reasonably possible to do so, particulars of the company's assets and liabilities (including contingent and prospective liabilities) as at the latest practicable date, the names and addresses of its creditors, the securities held by them respectively and the dates when the securities were respectively given;
 - 2.3.2 Statement of opinion as to whether the formulation, acceptance and confirmation of proposals for a compromise or scheme of arrangement would offer a reasonable prospect of the survival of the company and the whole, or any part of its undertaking, as a going concern;

- 2.3.3 Statement of opinion as to whether an attempt to continue the whole, or part, of the undertaking would be likely to be more advantageous to the members as a whole and the creditors as a whole than a winding up of the company;
 - 2.3.4 Details of the extent of the proposed funding required to enable the company to continue trading during the period of protection and the sources of that funding; and
 - 2.3.5 Recommendations as to which liabilities incurred before the presentation of the petition should be paid.
- 2.4 Pending the hearing of the petition, the court is usually prepared to appoint an examiner on an interim basis. The interim examiner is deemed to have the same powers and duties in relation to the company as if he were appointed examiner.
- 2.5 All creditors who have indicated an intention to appear at the hearing of the petition are entitled to attend and be heard on the petition.
- 2.6 The court is not permitted to make an order for the appointment of an examiner unless it is satisfied that there is reasonable prospect of the survival of the company and the whole or any part of its undertaking as a going concern. The 'reasonable prospect of survival' criterion is the principal test that must be satisfied for an examiner to be appointed.
- 3. THE ORDER OF APPOINTMENT / PREPARATION OF SCHEME**
- The order will provide for the appointment of an examiner and that he should prepare proposals for the compromise or scheme of arrangement.
- 4. MANAGEMENT OF COMPANY**
- The day to day management and control of the company, including its business activities, remains with the board of directors of the company. The examiner may apply to the High Court to have all or any of the functions or powers of the directors vested in him.
- 5. THE PROTECTION**
- The company is under the protection of the court for a period of 70 days from the date of presentation of the petition. The 70 day period may be extended by a further 30 days with the sanction of the court. During the period of protection the following apply:
- 5.1 No proceedings for the winding up of the company may be commenced or resolution for winding up passed in relation to that company and any resolution so passed shall be of no effect;
 - 5.2 No receiver over any part of the property or undertaking of the company shall be appointed;

- 5.3 No attachment, sequestration, distress or execution shall be put into force against the property or effects of the company, except with the consent of the examiner;
- 5.4 Where any claim against the company is secured by a mortgage, charge, lien or other encumbrance or a pledge of, on or affecting the whole or any part of the property, effects or income of the company, no action may be taken to realise the whole or any part of that security, except with the consent of the examiner;
- 5.5 No steps may be taken to repossess goods in the company's possession under any hire purchase agreement except with the consent of the examiner;
- 5.6 Where, under any enactment, rule of law or otherwise, any person other than the company is liable to pay all or any part of the debts of the company (this would cover a guarantee of the debts of the company in examinership):
 - 5.6.1 No attachment, sequestration, distress or execution shall be put into force against the property or effects or such person in respect of the debts of the company; and
 - 5.6.2 No proceedings of any sort may be commenced against such person in respect of the debts of the company.

6. RECEIVERS

- 6.1 The 1990 Act stipulates that the High Court cannot hear a petition to appoint an examiner if a receiver stands appointed to the company for a continuous period of at least 3 days prior to the presentation of the petition.
- 6.2 As pointed out in section 5.2, once the company is under the protection of the court, no receiver may be appointed over any part of the property or undertaking of the company.

7. POWERS OF AN EXAMINER

- 7.1 The examiner has the same rights as an auditor relating to the supply of information and has power to convene, set the agenda for and attend meetings of the board of directors and general meetings of the company and to propose motions or resolutions at such meetings. In addition, the examiner has an important power of veto in that he may halt, prevent or rectify acts taken by the company, its officers, employees, members or creditors affecting the income, assets and liabilities of the company which in his opinion are likely to be to the detriment of the company.

7.2 This power of veto does not enable an examiner to repudiate a contract which has been entered into by the company prior to the period during which the company is under the protection of the court except where the provision in the relevant contract contains a covenant not to borrow monies or obtain credit from any person or a negative pledge on the granting of security.

8. SECTION 18 REPORT

The examiner is obliged to furnish to the court a report of the meetings of creditors and shareholders, which considered the proposals, within 35 days of the date of his appointment or such further period as the court may allow. The report is to include:

- 8.1 Details of the proposals placed before the meetings of creditors and members, the outcome of each of the meetings of the members and creditors the recommendation of the committee of creditors if any;
- 8.2 A statement of the assets and liabilities of the company as at the date of the report;
- 8.3 A detailed list of the creditors of the company, the amounts owing to them and the nature, value and priority of their claims; and
- 8.4 The examiner's recommendations.

9. PROPOSALS IN THE SCHEME OF ARRANGEMENT

- 9.1 The 1990 Act contemplates that members and creditors be furnished with information relating to the proposals for a compromise or scheme of arrangements, prior to the meetings.
- 9.2 The 1990 Act further provides for separate class meetings of creditors and member at which each class votes on the proposals.
- 9.3 Proposals are deemed to have been accepted by a class of creditors when a majority in number representing a majority in value of the claims present at the meeting by person or proxy vote in favour of the resolution for the proposals.
- 9.4 The examiner's report on such meetings is then considered by the court which may decide to refuse or to confirm the proposals.
- 9.5 It is not necessary for each class of creditor to have approved the proposals. As can be seen in section 10 below, before the court can confirm the proposals, at least one class of creditor whose claim would be impaired by the implementation of the proposals (a creditors claim is impaired where it receives less than 100 cent in the €1) must have accepted the proposals and the court must be satisfied that certain other conditions summarised in section 10 below have been met.

10. ORDER CONFIRMING THE PROPOSALS

- 10.1 The court shall not confirm any proposals:
- 10.1.1 Unless at least one class of creditor whose interest or claims would be impaired by implementation of the proposals has accepted the proposals; or
 - 10.1.2 If the sole or primary purpose of the proposals is the avoidance of payment of tax due; or
 - 10.1.3 Unless the court is satisfied that:
 - (a) The proposals are fair and equitable in relation to any class of members or creditors that has not accepted the proposals and whose interests or claims would be impaired by implementation; and
 - (b) The proposals are not unfairly prejudicial to the interests of any interested party.
- 10.2 If the court confirms the proposals at the confirmation hearing (known as the Section 24 hearing) the court must also fix the date for the coming into effect of such compromise or scheme of arrangement (the "**Effective Date**"). The Effective Date must be a date not later than 21 days from the date of the court's confirmation.
- 10.3 Where the proposals are confirmed by the court, the protection granted to the company ceases on the commencement of the compromise or scheme of arrangement or such earlier date as the court directs, whereupon the appointment of the examiner is terminated.

11 LK SHIELDS SOLICITORS AND EXAMINERSHIPS

LK Shields Solicitors has extensive experience in the area of Examinerships and has been involved in some of the most high profile Examinerships to date including the following:

- **Smart Telecom:** Acting for secured lender to Smart Telecom which is in examinership.
- **Fate Park Limited and related companies:** Acted for the group of companies which petitioned the High Court for protection. A scheme of arrangement was approved by the High Court which included an investment by a trade buyer. The group is active in the distribution and retail sale of oil and related products.
- **Modern Kitchens Limited and E. Van Investments Limited:** Acted for an investor in the kitchen and bedroom furniture business which trades under the name Modern Kitchens. The above companies had been granted protection by the High Court under the Examinership regime. The scheme of arrangement was approved by the Court.

- **Ire-Tex Group:** Acted for Ire-Tex Group Limited and related companies that successfully petitioned the High Court for Examinership. The companies were involved in the specialist packaging business.
- **Fitzgerald Packaging Limited:** Acted for the Examiner and subsequently for the Liquidator when the Examinership concluded.
- **Nomura International Plc:** Acted on behalf of Nomura International Plc during the Examinership of Structured Credit Company (SCC) a provider of credit risk protection with liabilities of approximately US\$438m.
- **International Securities Trading Corporation Plc (ISTC):** Acted on behalf of creditors including Citibank N.A, Mitsubishi UFJ Securities International Plc and Principal Life Assurance in relation to the Examinership of ISTC with debts in excess of €600m.
- **Swissco:** Acted on behalf of creditors in relation to the Examinership and subsequent liquidation of the Cork based ready meals producer.

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About LK Shields Solicitors

LK Shields Solicitors is one of the leading law firms in Ireland. Founded in 1988, today we number some 23 Partners, 70+ fee earners and upwards of 130 staff. Our principal areas of practice include corporate, litigation and dispute resolution, commercial property, intellectual property, financial services, employment, pensions and employee benefits.

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