



INSOLVENCY AND CORPORATE RESTRUCTURING

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# Debts Subject to Personal Guarantees in Examinership

by **Jill Callanan, Clare Dowling**

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The existence of a personal guarantee over a debt may affect the enforceability of that debt after a company has gone through an examinership process.

A creditor's ability to enforce a debt subject to a guarantee after a period of examinership is dependent upon that guarantor having been granted a right to vote at the creditors' meeting approving the scheme of arrangement.

In a recent decision, the High Court confirmed the operation of the legislative position underpinning this rule, section 549 of the Companies Act 2014. The decision will be welcomed by insolvency practitioners and serves as a practical reminder of the procedures to be followed in examinerships in relation to debts subject to a guarantee.

## The procedural requirement in section 549 of the Companies Act 2014

The scheme of arrangement formulated by the examiner during examinership is subject to a vote at a creditors' meeting. Under Section 549 of the Companies Act 2014 two criteria must be satisfied in order for a debtor to be subsequently permitted to enforce that guarantee post examinership:

1. The creditor must offer the guarantor the creditor's right to vote at the meeting of creditors; and
2. Either two weeks' notice of the creditors meeting must be provided to the guarantor or notice must be served within 48 hours in advance of the creditors' meeting, depending on when the notice of the creditors' meeting was received by the creditor.

If a scheme is approved, a creditor will only be able to enforce the debt against the guarantor if this opportunity to attend and vote at the creditors' meeting has been offered to the guarantor. If this procedural requirement is not followed the creditor will be unable to enforce the guarantee against the guarantor post examinership. The importance of this cannot be overstated as the failure to comply with this procedural requirement could lead to a loss of opportunity to the creditor who would otherwise have been permitted to enforce the full debt owed against the guarantor (irrespective of whether those debts were crammed down in the scheme of arrangement in the examinership). Where this procedural requirement is not complied with a creditor is obliged to seek the leave of Court prior to an attempt to enforce a debt against a guarantor.

**Leonard & Woods Developments Limited v Brian Pagni [2021] IEHC 724**

## The examinership and the guarantee of debts

The Defendant was a director of a company that had previously gone through a process of examinership in which a scheme of arrangement was approved. The Plaintiff was a creditor of the company, being owed money for unpaid rent and service charges. Under the scheme of arrangement, the Plaintiff received 5% of its debt which the company had owed to it. Under the lease between the parties, the Defendant as a former director, had provided guarantees to the effect that he would discharge rent and service charge debts in accordance with the various leases in the event that these were not paid by the company.

## **Application for judgment by the Plaintiff against the Defendant in his capacity as guarantor**

Subsequent to the examinership, the Plaintiff commenced separate proceedings for the entirety of the debt owed to it against the Defendant in his personal capacity on foot of the guarantees he had provided. Judgment was sought in the amount of €388,906.74 (by way of summary proceedings which is special type of High Court proceedings for the enforcement of debt).

The Defendant sought to defend the proceedings for judgment for the full amount against him on arguing that section 549 of Companies Act 2014 provided him with two stateable defences:

1. The Plaintiff did not provide the requisite notice of the creditors' meeting as outlined in s.549 (1); and
2. The Plaintiff had acted in such a manner as to revoke notice to the Defendant by executing a proxy and sending a proxy to vote at the creditors meeting.

## **Was sufficient notice provided to the guarantor?**

The argument on notice rested on whether the Plaintiff was obliged to provide 14 days' notice or 48 hours' notice of the creditors' meeting and the guarantor's right to vote in the place of the creditor at that meeting. A creditor is obliged to provide 14 days' notice to the guarantor of the creditors' meeting if the creditor has been provided with 14 days or more notice of the meeting. However in this notice period is reduced to 48 hours' notice to the guarantor where the creditor is given less than 14 days' notice of the creditors' meeting.

The letter from the examiner's office giving notice to the creditor here was dated 31 October 2018. It was date stamped as received by the creditor on 5 November and accordingly on the evidence the Court held that it was received on 5 November 2018. The Plaintiff creditor served notice the next day, 6 November, which was within 48 hours of receiving notice of the creditors' meeting and therefore complying with section 549 (1)(b) of the Companies Act 2014. The Court applied previous case law in this respect, *Padraic Tuffey Limited v O'Neill* [2013] IEHC 231, where it was held that 48 hours runs from the time of actual receipt of the meeting notice.

## **Guarantor did not attend the creditors' meeting**

The Defendant argued that the Plaintiff had acted in such a manner as to revoke the offer to attend and vote at the creditors' meeting ("**offer notice**") by executing a proxy form and delivering a proxy to vote at the creditors' meeting. The Plaintiff creditor's position was that the Defendant had not provided any indication of his intention to accept the offer notice. At the creditors' meeting the examiner confirmed that the guarantor did not provide any indication he would attend the meeting. Accordingly, the examiner accepted the validity of the proxy sent by the Plaintiff creditor at the beginning of the creditors' meeting.

Under section 549(3), in order to vote at the creditors' meeting, the guarantor must furnish to the examiner a copy of the offer notice and inform the examiner of his or her having accepted it. The Defendant guarantor in this instance did not indicate he would attend the creditors' meeting, did not attend and did not inform the examiner that he accepted the offer to vote in the place of the creditor at the creditors' meeting.

Because the Defendant guarantor did not communicate his intention to accept the offer notice and did not attend the creditor's meeting, the Court held that the conduct of the Plaintiff creditor in appointing a proxy did not amount to a revocation of the offer.

## Implications

In rejecting the guarantor's arguments, the Court has provided some useful guidance to insolvency practitioners regarding the treatment of guarantors at creditors' meetings in examinerships.

There was some ambiguity concerning the legal effect of a creditor (or its proxy) attending a creditors' meeting in circumstances where a guarantor did not attend, despite being provided with sufficient notice. The decision is to be welcomed as it confirms that a creditor (or its proxy) is entitled to vote at a creditors' meeting in circumstances where a guarantor does not attend the meeting and in situations where the guarantor does not notify the examiner of their attendance, in accordance with section 549(3) of the Companies Act 2014.

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