

# Examinership, receivership and liquidation in ireland

[Business](#), [Company](#)



The collapse of the Irish economy has triggered a substantial increase in the number of companies in Ireland which are being deemed insolvent and which are no longer in a position to continue operating as viable entities. This has caused the companies directors, creditors and shareholders to seek remedies available under Irish law. The law in Ireland regarding companies in financial difficulties was originally set out by the Companies Act 1963, which was amended in 1990, and then again in 1999.

All cooperate entities must adhere to the legislation set out under the Act and their individual memorandum of association and articles of association, which together constitute the constitution of a company. The principal remedies for dealing with insolvent companies are: 1. Examinership; 2. Receivership; 3. Liquidation. 1. The concept of examinership was introduced into Irish law by the Companies (Amendment) Act 1990.

This legislation was enacted in order to provide companies which were in financial difficulties with the chance of recovering and thereby avoiding liquidation. An examinership is where the court places a company under its protection to enable a court appointed examiner to assess the affairs of a company and consider whether it is capable of survival, and if so, puts forward proposals that will facilitate that continuation of business.

The motivation behind the creation of this legislation was the prevention of the collapse of the Goodman Group. The aim of this legislation was to avoid liquidation of companies with a chance of recovering from financial difficulties. Forde and Kennedy opine that the immediate objective and consequence of the protection created by this legislation is to provide the

company or companies in question with extensive immunity against its creditors and against claims being made against it. McCormack in his article "Control and Corporate Rescue" believes that this role was created as a response to changing political and business dynamics in the 1990s. The receivership model was seen as being too creditor centred and as not being sufficiently responsive to the concerns of other stakeholders.

The feeling at the time, McCormack opined, was that "banks had pushed companies unnecessarily into insolvency by being unduly precipitate in the appointment of receivers." The original legislation has been criticised in numerous respects, and so has been amended significantly by the CA 1999. Finlay CJ in the Supreme Court in *Re Holidair Ltd*, acknowledged the shortcomings of the legislation and held that it is appropriate to approach the construction of any sections in CA 1990 on the basis that the two objectives of the legislature were to provide a period of protection for a company and that a company should be continued as a going concern. The legislation was being used as a last attempt to save companies which were incapable of salvation. As John O'Donnell put it in his article 'Nursing the Corporate Patient - Examinership and Certification under the Companies Act, 1990', "for many, it has been a painful experience to learn that the Act is designed to help cure the sick but cannot raise the dead." Keane notes that the granting of the examiner is discretionary. A court may appoint an examiner where it appears that: a) A company is or is likely to be unable to pay its debts; (b) No resolution subsists for the winding-up of the company; (c) No order has been made for the winding-up of the company.

Because of the effects of an examiner on a company, one should not be appointed without a real prospect of survival. Lardner J in *Re Atlantic Magnetics Ltd* advocated a strict test for “reasonable prospect of survival”. He was overruled by the Supreme Court, in favour of a requirement of “some prospect of survival”. Prior to the revision of CA 1990, the leading authority on the test for the appointment of an examiner was that SC decision in *Re Atlantic Magnetics Ltd*. The statutory revision of Section 2. 2 has effectively reversed that decision. The foregoing views are supported by the decision of the High Court in *Re Tuskar Resources plc*, which was the first written decision on the appointment of an examiner since the changes effected by CA 1999 were commenced.

McCracken J began by analysing the changes effected to the test for the appointment. He said the new test was more in keeping with the decision of Lardner J in the High Court than with the decision in the Supreme Court - “In *re Atlantic Magnetic...* Finlay CJ also stated that there cannot be an onus of proof on a petitioner to establish as matter of probability that the company is capable of surviving as a going concern. It seems to me that this is no longer the position under the Act of 1999 by reason of the wording of the new sub-s 2(2).” He refused to appoint an examiner as the petitioner had failed to discharge the onus of proof that there was a reasonable prospect of the survival of the company. Although all petitions to have an Examiner appointed must be presented to the High Court, the HC may remit the matter to the Circuit Court under CA1990 Section 3. 9 where it appears that the total liabilities of the company, do not exceed €317, 434. For the petition

to be approved, the CA 1990 required a petition to have evidence of possibility of salvation but no detailed analysis of the company's situation was required.

This is another criticism of that Act. The petition to have an examiner appointed and the grounding affidavit must be made *uberrimae fides*, that is, in the utmost of good faith. What was first decided by Costello J in *Re Wogans (Drogheda) Ltd* has now been given statutory force by Section 4a CA 1990. Where it is discovered that the court has been misled, the entire application will be tainted. If this is discovered early in the proceedings, the examiner will be discharged where the lack of good faith is sufficiently serious. However, a lack of candour and good faith will not always result in a refusal to confirm an examiner's proposals, as seen in *Re Selukwe Ltd*. There are no particular qualification requirements for an examiner.

They can't have been an officer of the company within the last 12 months. McCracken J held in *Re Tuskar Resources plc* that there was no bar on the person who provides the independent person's report from acting as examiner. The person appointed is entitled to court-fixed remuneration and to costs. He can employ staff to assist or may use company staff. Section 10 CA 1990 provides that any liabilities incurred during the protection period are deemed to be legit examiner expenses. These liabilities would include new borrowing. Forde and Kennedy explain that the reason why the examiner may certify liabilities is that there may otherwise be a danger that the company's survival as a going concern may be prejudiced.

Section 29 CA 1990 gave these liabilities and expenses priority over creditors where a scheme of arrangement was drawn up or a winding up ensued. This provision was one of the most criticised. It was deemed to subvert the whole lending process, as secured creditors lost priority. This had the potential to severely prejudice these creditors should examinership fail. Prior to the enactment of the 1999 Act, the duty of the examiner was to conduct an examination of the affairs of the company and report the results to the court within a specified period and to later present proposals and schemes of arrangement. Since the 1999 Act, that report is effectively replaced by the report of the independent accountant which must now accompany the petition. Accordingly, the duty of the examiner now is: (a) To formulate proposals for a compromise or scheme of arrangement; (b) To carry out such other duties as the court may direct him to carry out.

The examiner must report to the court within 35 days informing them of any schemes formulated. If the court is then not satisfied, it can order the company be wound up as per Section 22 CA 1999. The examiner must meet with creditors and members to devise schemes of arrangement. The members and creditors are classed for the purpose of voting on schemes and these schemes are deemed to be accepted if the majority vote in favour from each class. Various classes can vote on the proposals, including the Revenue, etc. When these proposals go to the court, any creditor or member whose interests are impaired may be heard. If a party who was completely unaware of the proposed scheme can show that the examiner knew of his existence but failed to take reasonable steps to appraise him of the

situation, he may possibly have a right of action against the examiner for damages.

The court will not approve the proposals unless at least one class of creditors impaired by the proposals vote in their favour. As to the actual content of the proposals, the only requirement regarding the proposals' intrinsic merits are that of equality within classes. Proposals must be fair and equitable and not unfairly prejudicial. The court may propose modifications to schemes and these must be voted on if significant. 2. Receivership arises in the context of secured debenture holders and provides a framework in which they may act so as to enforce their security interest. Forde and Kennedy observe that at times receivership is used not simply as a means of reimbursing creditors but more as a device for reorganising insolvent companies, so as to salvage their viable parts for the benefit of those involved.

Courtney notes that the term derives from the Latin *recipere* "to take". The receiver will go to the company and take control of those assets subject to the charge. They can then dispose of those assets and pay off the principal and interest due to the debenture holder. Receiverships involve two distinct relationships as per Barr J in *Bula Ltd v Crowley* - "First, that between the appointing mortgagee and the receiver which relates to the fundamental objective of the receivership...The second relationship is that between the receiver and third parties arising out of the receivership..." The receiver is usually appointed by virtue of the debenture. The validity of the appointment of a receiver is dependent upon compliance with the terms contained in the debenture and the capacity of the company and authority of its officers to

create the deb ab initio, that is, from the beginning. Courtney states that a creditor owes no special duty to a company in deciding whether or not to appoint a receiver. The fundamental issue for the debenture holder is whether or not the appointment will further their interests.

However, where the appointment will not advance these interests, the appointment may be said to have been made in bad faith. The only qualifications that the law requires of receivers are negative, i. e. certain persons are barred from becoming receivers, such as undischarged bankrupts and persons connected to or related to persons within the company, as per Section 170 CA 1990. In *WiseFinanceCo Ltd* the court held that a company's secretary was ineligible to act as that company's receiver. A receiver appointed by debenture can resign with notice. The court also possesses an inherent power to appoint a receiver on application by a debenture holder.

This occurs in instances where the debenture doesn't provide for an appointment in a particular situation which has arisen. A receiver appointed by the court has the status of an officer of the court and can only resign with the authority of the court. Ellis noted that receivers, irrespective of the method of their appointment, are regarded as being in a 'fiduciary' relationship with those who appointed them. A receiver is normally deemed to be the agent of the company by virtue of his appointment; however, the receiver's primary duty is to the debenture holder. The receiver owes a fiduciary duty to the debenture holder and must conduct his receivership in good faith. The receiver is liable to the debenture holder in damages if he is



negligent. The receiver is liable to the company where he is negligent in the sale of any of the company's assets.

Section 172 CA 1990 states that " a receiver, in selling property of a company, shall exercise all reasonable care to obtain the best price reasonably obtainable for the property at the time of the sale". This gave statutory effect to the law in Ireland that a receiver should be required to ensure that he got the best price for an asset, even if a much smaller sum would realise his security, as accepted in Ireland in *Lambert v Donnelly* and *McGowan v Gannon*. It was observed by McCracken J in *Ruby Property Company Ltd* that this is simply a statutory acknowledgement of the position at common law. A receiver can't be appointed after appointment of an examiner. If appointed in the 3 days prior to examiner appointment, he may be ordered to cease acting. 3. Liquidation terminates a company's existence and distributes its assets in a preordained way.

Carrie Jane Canniffe " Restraining a Creditor's Winding up Petition - The position since *Truck and Machinery Sales Ltd v Marubeni Komatsu Ltd.* , proffers the winding up process can be said to mark the formalised beginning of a company's end. There are two main forms of winding up; (a) By court order; (b) Voluntary. A voluntary winding up can be either a members' winding up or a creditors winding up. Ussher observes that the only grounds upon which a company may be wound up by the court are stated in Section 213 of the Companies Act 1963. Two different types of grounds exist for the winding up of a company by the courts, procedural and substantive. Three

different procedural grounds exist: (a) The company has resolved by special resolution to wind up the company.

It was held in the case of *Re Galway and Salthill Tramway Co.*, that the board of directors may not cause it to do so without the benefit of an authorising or ratifying resolution in general meeting, or specific authority in the articles. (b) The company does not commence its business within a year from its incorporation or suspends its business for a whole year. Courtney notes this ground is rarely relied upon since only contributories, the Co itself and creditors may rely on it. c) The number of members is reduced, in the case of a private company, below two, or, in the case of any other company below seven. The most important grounds however, are those of the substantive grounds. Where; (a) The Company is unable to pay its debts.

The CA 1990 provides that a company shall be deemed to be unable to pay its debts in certain circumstances: (a. 1) A creditor has not been paid a debt of €1000 or more within three weeks after demanding it in writing; (a. 2) A judgment is unsatisfied; or (a. 3) It is proved to the satisfaction of the court that the company is unable to pay its debts. Keane comments that in deciding whether it has been proved that the company is unable to pay its debts, the court will generally act on evidence that a creditor has repeatedly applied for a payment without success. If, however, the company can show that there is a bona fide dispute as to the particular debt claimed, the order will not be made. Alison Keirse 'Winding up petitions - Practical application of the Stonegate test' observed that the decision in *Re Pageboy Couriers Ltd*

adopted the decision of *Stonegate Securities Limited v Gregory* establishing this method of defeating a creditor's petition to wind up a company.

However, as Courtney notes it is one thing to successfully dispute the bona fides of a debt at the hearing of a petition; even where successful, the company is exposed to a glare of adverse publicity wherein its solvency is questioned. The first Irish case to consider an application for injunction relief against the advertisement of a petition was *Clandown Ltd v Davis*. Morris J held that the precise amount of the debt had to be declared before the court could order a winding up. Thus Morris J granted the injunction to restrain the publication of the petition. One result of this decision is to reinforce the principle that the courts will not permit themselves to be used as a method of debt collection. Howard Linnane 'Oppression of Members: Section 205 Companies Act, 1963' proffers that under the CA 1963 the court has jurisdiction to order the winding up of a company where it is 'just and equitable' to do so. Ussher proffers that in many cases such grounds are invoked where there is a complete deadlock between the shareholders and the company's activities to the detriment both of the member and the creditors.

The leading case is *Re Yenidje Tobacco Co*, the principle of which was applied in *Re Irish Tourist Promotions*. Kenny J wound up a company in which the two directors could not meet without the risk of unruly scenes, and the business of the company could not be conducted. In conclusion, while a company's inability to pay its debts is the most common reason for the winding up of a company, it is not determinative. A court will only wind up a

company where it is just an equitable to do so. Ultimately the appropriate remedy to be employed will be dependent upon the extent of difficulty the company finds itself. " There is of course some comfort for both companies and creditors alike that the Irish statutory framework at least contemplates solutions which draw back from the finality of ultimate dissolution of a company and facilitates interested parties a way forward through these recessionary times perhaps even to the benefit of all parties concerned. "