

Clark Hill's experienced Restructuring and Insolvency Team are acutely aware that COVID-19 poses a great deal of financial uncertainty and distress for many businesses.

Experience has told us that the key to survival, for any business, is to act early—seek professional advice early and communicate with creditors and stakeholders early.

While we are all hopeful that this crisis will pass and that our economy will recover, hope itself is not a strategy. What follows here are some key suggestions on what actions to consider.

Negotiated Arrangements/Settlements

It is entirely possible to negotiate voluntary yet legally binding arrangements with creditors and to renegotiate the current terms of contracts and lease arrangements. Indeed, in the current climate many creditors may be more willing than ever to negotiate reasonably as the alternative—the liquidation or bankruptcy of its debtor—is a much worse outcome for them. We can advise on such negotiated arrangements and settlements and, indeed, we can negotiate with creditors on your behalf.

However, the difficulty in endeavouring to reach binding agreements with differing types of creditors—who will each have different expectations and requirements—cannot be underestimated. Directors of companies that are insolvent—or potentially insolvent—must be mindful of their statutory obligations not to trade whilst insolvent and, importantly, not to prefer one creditor over another. Our team can provide clear and concise advice to directors of companies who are considering, as a first step, embarking upon a voluntary negotiated strategy. We can advise on all aspects of their statutory obligations and duties particularly in times of insolvency or potential insolvency.

Given the tricky landscape, however, it may be worthwhile seeking advice from us in relation to entering a more formal process of negotiation/restructuring. In particular, we have hands-on experience advising in relation to two Statutory mechanisms enacted to ensure the survival and/or return to solvency of companies.

Examinership

Examinership is a Court-based process which gives an insolvent company (or group of companies) protection from creditors (banks, leasing companies, suppliers, revenue, landlords, etc.) for a period of up to 100 days. During that time, the Examiner (normally an accountant appointed by the company) will review the affairs of the company, engage with creditors, source and secure investment, and put together a rescue plan. The rescue plan will normally involve a write-off of debt and can include the disclaimer or repudiation of onerous leases and contracts. The aim of Examinership is to ensure the survival of the company as a going concern, to protect jobs, and return the company to solvency. The Court will approve the rescue plan or scheme provided one class of creditor, whose interests will be adversely affected by the proposed scheme, has voted in favour of it and provided the Court is satisfied that the company can exit the process as a going concern with a reasonable prospect of survival. Once the Court approves the Examiner's rescue plan, it will be binding on all creditors—even those who did not vote in favour of it.

While Examinership is a highly successful rescue/restructuring tool, it can be costly and, as the Examiner will openly seek investment, there is a risk of change to the current board and ownership of the company.

Schemes of Arrangement

An alternative to Examinership is the legislative-based Scheme of Arrangement. A company need not be insolvent to avail of this form of rescue. It can be utilised to reorganise solvent companies, or it can be used to assist insolvent companies that wish to reach a binding settlement with creditors in a structured manner and without the risks associated with a piecemeal negotiated approach.

This is not a Court-based process (although ultimately a Court will be asked to approve a Scheme) and so it is less costly and will attract less publicity than an Examinership. In addition, the directors do not necessarily have to accede control of the business in order to conclude a binding Scheme or Compromise

A Scheme of Arrangement—in order to become legally binding on all creditors—must secure the support of at least 75% of the creditors, or class of creditors present and voting on the proposed Scheme. This is in contrast to an Examinership where only one class of creditor must vote in favour of the rescue package for it to become legally binding on all other creditors (once approved by the Court). The threshold for a successful Scheme of Arrangement is thus much higher than an Examinership.

How Can We Assist?

We would welcome the opportunity to meet with you, your clients and contacts to give a more in-depth analysis of the various rescue and restructuring options available and to answer any questions they may have.

Some examples of the work we have carried out in this area include:

- **Retail**—we acted for the Board of Carl Scarpa in securing the appointment of an Examiner which resulted in the survival of this well-established shoe retailer. We also acted for the Examiner appointed to Apparel Supply Solutions, one of the largest sports clothing manufacturers in Ireland, and T & P Kavanagh, the Irish franchisee of the United Colours of Benetton.
- **Leisure**—we acted for the Board of Mapdance Limited in securing the appointment of an Examiner to the gyms operated by Jackie Skelly Fitness.
- **Motor**—we advised the Board of Murray’s Rent-a-Car throughout its Examinership.
- **Media**—we acted for the Examiner of Buy and Sell Limited and Buy and Sell (NI) Limited.
- **Hotels**—we acted for the Examiner appointed to the Rolestown House Hotel, a family-run business, which, ultimately, restructured its debts and secured the required investment but remained in the ownership of the family. We also acted for the Examiner appointed to Ebonwood Limited, the owner of the Waterside House Hotel in Donabate, North County Dublin and the Station House Hotel in Meath. We also represented the Board in the successful appointment of an Examiner to Cox’s Bar and Tavern in Castlebar, County Mayo.
- **Construction**—we acted for the Examiner appointed to the Hanly Group. We also acted for the Board of Phoenix Industrial Pipeline Equipment in securing the appointment of an Examiner to that company.
- **Medical**—we advised the Board of Advanced Balloon Technologies in its application to appoint an alternative Examiner to the company. A novel, and successful, application. We also advised the Board of Ely Medica Group in relation to the successful appointment of an Examiner to its company.

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