

The harsh reality of the economic storm in which we find ourselves, is that many business, large and small, will struggle to stay afloat. Businesses already facing a steep decline in revenue have been placed in an induced coma as a result of the restrictions implemented during lockdown, many of which will continue long after the lockdown has come to an end.

The statistics show that Creditors Voluntary Liquidations account for 84% of corporate insolvencies in Ireland in the first three months of 2020.¹ However, insolvency for many businesses does not have to mean the end of the road and it should not be viewed as a death sentence.

Ireland has a strong corporate rescue culture. While this article primarily focusses on Examinership, Ireland's premier vehicle for corporate rescue, numerous survival mechanisms and restructuring options are available to businesses and should be explored without delay, all of which provide an alternative to liquidation.

Some Options to Consider

A business may seek to enter Negotiated Arrangements/Settlements with its creditors. The threat of liquidation and loss to creditors may make them more amenable to negotiating on the terms of their contracts.

Mediation could be utilised to provide for a fast, structured, and binding restructuring of debts and other obligations without the costs associated with Examinerships and Schemes of Arrangement.

A Scheme of Arrangement allows a solvent or insolvent company to restructure its liabilities with significantly reduced Court involvement. The Companies Act 2014 made Schemes of Arrangement more accessible to struggling small or medium-sized enterprises (SMEs), allowing for the chance to restructure relatively quickly and as a cheaper alternative to Examinership. On the flip side, a 75% voting majority of creditors is required for the Court to sanction it.

Examinership allows an insolvent business to secure investment and recalibrate. This option is explored at greater length below.

Group reorganisations may be effected by way of Merger that allows them to consolidate and to simplify their corporate structure with a reduction in costs.

Others may look to Hive Down, a process that enables the separation of a profitable section of a business or its assets from those which are struggling, by transferring those profitable assets to a 'Newco' subsidiary.

The above restructuring options are to mention a few. Knowledge of the business and the sector, as well as obtaining valuations, play a vital role in the restructuring of any business. Taking early action and seeking advice will often prove the most fundamental step of the process.

False Hope?

Currently, the Government has in place a range of emergency financial support measures, which—along with the support from Revenue and the Central Bank of Ireland—have afforded some temporary reprieve for businesses.

¹ Insolvency Statistics published by Deloitte

Financial providers are offering a moratorium on loans and leasing repayments, payment breaks are being afforded for a number of months, credit lines are being extended, and flexible repayment arrangements negotiated. Revenue are also working proactively with businesses as are many commercial landlords.

The crisis requires the banks, revenue, businesses, commercial landlords, and tenants to collaborate together in a cohesive and effective way. It is hoped that by adopting such a strategy, structures will be put in place to allow for businesses to remain solvent and to return to such operating levels that will enable them to discharge their liabilities and all the while ensuring an economic bounce back.

This ideology is based upon businesses regaining their financial strength relatively quickly and smoothly. The commercial reality, however, is that many businesses will not enjoy such a rapid and seamless recovery. One thing is for certain, irrespective of how long the virus or restrictions on businesses last, the collaboration and extended forbearance currently in place will end. For some, it may have already, as each industry elevates its self-interest over that of others with concerns over its own associated risks and income return.

The real financial impact for some will only become apparent as they begin to reopen. Cash flow problems. A flawed revenue model. A lack of cash reserves. Couple this with increasing debt and rent obligations and, inevitably, pressures will mount for many businesses. And as pressure mounts and time passes, the options available to a struggling company dwindle. Legal proceedings will issue, winding up petitions will be served, and charge holders will seek the appointment of Receivers thus suspending the company's power over those secured assets. The stark reality is that as time passes, decisions will be made for the directors as opposed to by the directors.

This highlights the importance of seeking early advice and considering all options, whilst they are all still on the table.

Examinership – A Company's Ventilator

Examinership is a survival mechanism that ought to be considered by almost all businesses facing insolvency. It provides for immediate breathing space. Whilst the uptake of this process has been relatively low over the years in this jurisdiction, its success rate has proved that it should not be discounted. In 2019, Examinerships accounted for just 3.6% of all corporate insolvencies.²

Some of the primary reasons for the low uptake boil down to a lack of knowledge of the process amongst businesses, the failure to seek timely advice, the attitude of companies to go it alone, or the general unwillingness to contribute to accounting and legal fees.

Strategic missteps can lead from one failing intervention to another. Notwithstanding the urgency of action required across the board, vulnerability is often also a by-product of poor decision making. Instead of seeking professional advice, businesses often opt for a quick injection of capital whilst leaving the underlying problems dormant, only to re-emerge down the line. A stop gap solution that frequently fails in the long run.

Where there exists a reasonable prospect of survival for an insolvent company, the above short sightedness ought to be parked and professional advice sought as to the suitability of the process for the business concerned.

² Insolvency Statistics published by Deloitte

A market analysis of the sector should be considered to examine the outlook. Is there evidence to show that with the benefit of restructuring and refinancing the business can be a viable and relevant entity? What are the opportunities for potential investors? These are just some of the key questions to which a business ought to have regard from the outset.

Defined Timeline

Day	
	The Examinership process can be initiated by a company, its directors, by members holding not less than one tenth of the paid-up capital, or by a creditor of the company.
	If a Receiver is appointed to a company which desires to present a Petition for Examinership, the Petition must be presented in the Central Office of the High Court <u>within 3 days</u> of the Receiver's appointment.
1	A Petition for the appointment of an Examiner is presented in the Central Office. The company will immediately be placed under the protection of the Court.
	The Court's role in the process is primarily supervisory and to decide upon legal issues.
	An Independent Expert's Report (IER) must be presented alongside the Petition (save for the allowance of a late filing of same within 10 days in exceptional circumstances). The specific content of the IER is provided for under Section 511 of the Companies Act 2014. It is imperative that the IER states that the company has a reasonable prospect of survival if investment is secured.
	An ex-parte application to the High Court is often made on the same day that the Petition is presented in the Central Office. The Court may place the company in interim examinership and set a return date for the confirmation hearing to confirm the Examiner's appointment.
	Within 3 days of the Examiner's appointment, Notice of the Examiner's appointment must be placed in two daily newspapers and the Court Order of appointment lodged with the Companies Registration Office. Notice of appointment must be placed also in Iris Oifigiúil within 21 days. The website of the company and emails sent to third parties should state that the company is in Examinership.
	As soon as practicable after his/her appointment, the Examiner shall secure investment and formulate proposals for a Scheme of Arrangement.
	Potential investors are provided with information on the company. Commercially sensitive information can be properly protected as was decided by the Court in the Examinership of Ladbroke's in 2015.
	Following receipt of investment and the formulation of a Scheme of Arrangement, the Examiner must call and chair the creditor and member meetings at which a vote on the proposal takes place.
	One class of creditor is required to vote in favour of the proposal and no class can be unfairly prejudiced.

Day	
35	The Examiner must present to the Court by this date at the latest, unless otherwise specified by the Court, a Report on the proposals for a compromise or Scheme of Arrangement. The contents on the Examiner's report are provided for under Section 536 of the Companies Act 2014. An ex-parte application can be made to the Court seeking an extension of time with which to present the report.
70	The Court's protection of the company ends at close of business on this date unless the Examiner has applied to the Court for a further extension of time, up to a maximum of 30 days.
100	The Court's protection ends at close of business on this date and the Examiner must have lodged his report in advance.
	After receipt by the Court of the Examiner's report, a confirmation hearing date is set. The Court considers the proposals set out in the Examiner's Report and will hear from any notice parties. The Court approves or rejects proposals. If the Scheme is approved, it becomes binding on the company, its members, and creditors. The Court will normally fix an effective date from which the proposals will take effect. If the Court rejects the Scheme, the company will most likely be placed into liquidation.

Benefits of Examinership

There are a multitude of benefits to the process, particularly in troubled times, and not just as an effective restructuring tool for the business drifting towards the brink. Although creditors will be crammed down on Examinership, they are all but guaranteed to fare better than if the company meets its demise through liquidation. Investors are getting a clean slate with reduced risks. Directors retain autonomy, employees retain jobs, and the economy profits as the fabric of an established enterprise continues to exist.

Examinership offers a restructuring solution as opposed to dissolution. It provides for fresh investment. It allows for business assets and contracts to remain intact. It affords the opportunity of renegotiating and terminating a lease that may be overburdening a business. Whilst under the protection of the Court, creditors are prevented from appointing a Liquidator or Receiver. They are also restricted from initiating legal proceedings against a company or its directors.

Many high-profile businesses have successfully opted for Examinership in the past, from Eircom to B&Q, O'Briens Sandwich Bar to Ladbrokes. In recent weeks, CityJet has sought the interim protection of the Court as its financial circumstances exacerbated.

Similarly, in the United States, household retailer names such as JCPenney and J.Crew have filed for Chapter 11 Bankruptcy protection in recent weeks, the U.S. equivalent of the pro-active self-help Examinership model. Avianca in the airline industry has also followed suit, while Hertz, the 102-year-old car rental company, is the latest high-profile casualty. Sadly, for many others, a similar reckoning awaits.

Like the virus itself, no distinction is made as to whom is susceptible. From retail to energy, hospitality to manufacturing, almost no industry will be immune from the financial distress caused by the greatest pandemic that any of us have ever witnessed.

Unfortunately for some businesses, who may have already been vulnerable prior to this pandemic, the crisis will only accelerate their demise. The ramifications will be more significant than *'business as usual'* and an increased wave of filings is almost inevitable in the coming months.

Examinership for Smaller Businesses

There is little doubt that the major disruptions encountered to date make smaller companies inherently more exposed. The Examinership process should not be viewed as only being an option available to larger businesses. Where there's a will, there's a way; and where there's a reasonable prospect of survival, there's Examinership, no matter the size of the balance sheet.

The Circuit Court now has the ability to oversee the Examinership process, where, prior to 2014, the only access to the process was via the High Court. This allows for more affordable access to the process for smaller businesses. To come within the remit of the Circuit Court, a company must meet two of the following criteria for a given financial year and the year preceding it:

- Turnover must not exceed €8.8 million;
- Balance Sheet Total for the Year must not exceed €4.4 million; and
- Average number of employees for the year must not exceed 50.

Takeaway

When a company is insolvent, or close to insolvent, its directors owe fiduciary duties to the creditors of the company. These duties include, but are not limited to, the duty to act honestly and responsibly and in good faith in the best interests of the company. Directors of an insolvent company need to be aware of the personal sanctions that can be imposed upon them where they are recklessly incurring credit or engaging in fraudulent trading. Taking early professional guidance can safeguard against these risks.

In these unpredictable times, it is fundamental for a business to grasp the severity of what may lie ahead, to have knowledge of the restructuring options available to it, and the processes and strategies presented by each avenue.

Where businesses feel that they may be facing financial distress in the coming months, they should seek immediate advice before they become another COVID-19 statistic. Insolvency need not be the enemy, but timing and a failure to act just might be.

The content of this article is provided for information purposes only and should not be regarded as a substitute for legal or other advice.

For more information and expert guidance on restructuring and insolvency options available to a business, please contact the author, Ray Kelliher, or any member of Clark Hill Dublin's experienced Restructuring & Insolvency team.