EXAMINERSHIP A PRACTITIONER'S PERSPECTIVE

Based on his recent experience of acting as examiner for two Limerick-based companies **Peter Russell** has some practical insights to share with practitioners. The cases were dealt with in the High Court by Judge Peter Kelly.

In its original form the Companies Act 1990 allowed for the appointment of an examiner where the court "considered" that such an order might enable the company to survive in whole or in part as a going concern.

However, the 1999 amendments have imposed more exacting standards. The court "shall not" appoint an examiner unless it is satisfied that there is a reasonable prospect of survival. The petitioner does not, however, have to establish a probability of survival.

The following criteria should be noted:

- The company must be insolvent and unable to pay its debts as they arise;
- It must be able to demonstrate that it has a reasonable prospect of survival;
- Examinership cannot be used by the directors/proprietors to protect their own position;
- The company must be able to demonstrate that there is a reasonable prospect of saving the jobs of the employees;
- Examinership cannot be used by a company as a device to avoid its obligations to the State, i.e. the Revenue Commissioners.

RECENT CASE

In 2010, I was asked by the directors, to give my views on the current business status of two companies. On examination, I concluded that the companies were, in fact, one entity in that they were owned by the same family and operated from the same place of business.

When taken together, the companies were insolvent with large debts owed to the Revenue Commissioners and to a landlord for arrears of rent and service charges.

Debts due to other creditors were mostly within reasonable limits.

The directors' main concern was the protection of the jobs of a loyal, local workforce.

Decisions

At this point, there were two possible options – liquidation or examinership. The preferred option was to apply to the court for protection under examinership.

Debts owed to Revenue Commissioners

The Revenue Commissioners had served notice on the company that an application to have the company wound up would be made to the High Court if their final demand for payment (section 214, Companies Act 1963) was not paid. The cash flow capability of the business was reviewed to work out how much could be paid to the Revenue Commissioners on a monthly instalment plan. Agreement with them would be the cornerstone of any survival plan.

A report was prepared outlining exactly what the business could afford and, after a number of meetings, a conditional agreement was reached which involved payment of a substantial sum on account with monthly instalments thereafter to ensure that all current tax liabilities would be cleared as they arose.

Cost savings in the business

On foot of the above agreement, wage cuts were negotiated with the company's employees and an agreement was reached with the landlord that rents would be substantially cut to match current market rents.

When these cuts had been achieved, however, the Revenue Commissioners sought to revisit their agreement. Following a period of discussion and correspondence, they decided to proceed with their petition to wind up.

Petition for Examinership & The Independent Accountant's Report

At this point the company applied to the court for protection by presenting a petition for examinership. This petition included an independent accountant's report as required by law. While this report was, in fact, prepared by myself, it should be noted that the court may decide that anyone with a previous professional involvement with the company should not act as the independent accountant.

The independent accountant's report which I prepared for inclusion in the petition was laid out in a manner which showed everything, warts and all. In this type of assignment it should be borne in mind that one owes a full duty of candour to the court. There are no short cuts. If this is not done the court may refuse to hear the petition.

The petition for examinership was heard by Judge Peter Kelly in the High Court. It was expected that the Revenue would oppose the petition because of their previous objection, but in the event they took a neutral stance.

Examinership Process

Judge Kelly granted the court's protection and appointed me as examiner to both companies. The period of protection is 70 days but this dates back to when the petition was presented to court.

Judge Kelly noted that I had stated in the independent accountant's report that the directors may have acted recklessy. He requested that I prepare a report for him in which this matter be fully investigated and my opinion given.

The unwary should keep in mind that when one takes on an appointment as examiner, one is an "officer of the court" for the duration of the protection period .

I was given 21 days to carry out this task.

I prepared a lengthy report stating my opinion that although the directors may have behaved foolishly, they did not trade recklessly. In effect, they always had the retention of the jobs of their employees as their goal.

At the hearing of this report, the Revenue opposed the continuation of the examinership and stated that the examinership was being used as a vehicle for the companies to avoid paying their liabilities to the State. This argument was not accepted by Judge Kelly.

At this stage a considerable amount of the allotted time had elapsed. While the cost reduction programme had been completed prior to examinership, some further time had to be spent in dealing with landlords.

From the commencement of the examinership, information had been gathered regarding each creditor's claim.

With this completed, I could set out various schemes of arrangement.

Continuing to Trade

It was my view on examination of past trading history and investigation of the future cash flow projections that the business could survive into the future, but as an added precaution, an outside investor was obtained.

Scheme of Arrangement

In formulating his proposals for a scheme of arrangement the examiner must take care to ensure that the affected parties are segregated into their correct class. Each class must be confined to "those persons whose rights are not so dissimilar as to make it impossible for them to consult with a view to their common interest". If incorrect, the mistake may be fatal and the scheme may not be sanctioned by the court. Practitioners should ensure that their legal representative is very well versed in this area as it is fraught with danger.

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Case under Review

Creditors' meetings at which I acted as chairman were held for each class of member and creditor.

Prior to these meetings all the relevant parties were given statutory notice of same together with the value of their claims and what the proposed dividend was for each category. The only creditor to vote against any proposal was the Revenue Commissioners. The scheme of arrangement was approved by the creditors once it had been made clear to them that they would secure a more advantageous outcome by endorsing the examiner's proposals than they would if the business were to be wound up.

A report was prepared for Judge Kelly under section 18 of the Companies (Amendment) Act 1990 in which minutes of all meetings were exhibited together with the results of each vote. Any suggested modifications to the examiner's original proposals must be included at this point. In this case there was only one modification in relation to the omission of one creditor in error.

On receipt of this section 18 report, Judge Kelly set down a date for hearing under section 24 of the Companies (Amendment) Act 1990.

The section 24 report again set out the whole statable case and included full details of all work done and also the examiner's opinion as to whether the scheme of arrangement should be accepted and his reasons for forming that opinion.

In this case, the reasons given for the company being allowed out of examinership were:

- the saving of jobs;
- the benefits to the local rural economy;
- the benefits to the State in savings on redundancy and weekly social welfare;
- the creditors, as a whole, receiving a greater dividend than they would have received if the company had gone into liquidation.

The Revenue Commissioners, as was their right, strenuously objected to the confirmation of the scheme of arrangement and the objection was noted by Judge Kelly. The scheme of arrangement was approved, with certain conditions, and the companies successfully exited examinership.

CONCLUSION

While examinership is not suitable in every case, it is always worth exploring the option. A properly implemented restructuring programme can be equivalent to the pre-examinership process and, in the event of a company subsequently going into examinership, will help the company to comply with the strict time limits of the process.

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