

Many firms still unaware of the benefits of examinership

Companies are unwilling to use examinership as they don't realise how straightforward and beneficial the process can be

By David Boland

Given their unusually high success rate, it is something of a surprise that more companies do not elect to go down the examinership route when faced with the prospect of insolvency.

It is true that more businesses opted for examinership between 1990 and 1999, when it was easier to get the process started and before amendments to legislation were introduced.

Making entry requirements more stringent should not preclude companies with trading difficulties seeking the protection of the court in a bid to turn things around.

The fact that 93 per cent of examinerships since 2004 have been successful should be an incentive.

But a telling statistic can be seen in the difference between the US and the Irish markets.

In the US, some 22 per cent of insolvent companies enter the Chapter 11 process, while in Ireland, only 2 per cent of insolvent companies become involved in this process, even though it was largely modelled on Chapter 11.

Perhaps a significant factor in the reluctance of certain directors to undergo the process comes from a basic lack of understanding of what is meant by examinership.

Before 1999, the process would start with an examiner who examined whether the company had a reasonable chance of survival.

But since the Companies Amendment Act 1999, a company has to demonstrate its chances of survival before a court will allow the examinership to go ahead – by employing an independent accountant – to prepare a report on its possibilities.

"This made sense, and we have probably got the balance about right now," said Neil Hughes of Hughes Blake, an independent accountancy firm with specific expertise in corporate recovery and examinerships.

"An independent report is not an expensive procedure to go through. An examinership



Neil Hughes of Hughes Blake

move forward, a legal team petitions the High Court on behalf of the client.

Creditors are given the opportunity to speak at the petition hearing.

If the judge is satisfied that the company has a reasonable prospect of survival and if the company demonstrates that it has sufficient cashflow to trade through the initial 70-day period of the examinership (this can be extended by a further 30 days), the judge will generally allow the examinership to take place.

Of course, all of this is dependent on acceptance from the shareholders and creditors,

but faced with the alternative of liquidation, most creditors will give examination a chance.

And once it is in place, the protection of the court then descends on the company.

"The examiner is trying to balance the competing claims of all the creditors in the company," said Hughes.

"The reality is that nobody is going to be happy, but if everybody is equally unhappy, then you have probably struck the right balance.

"You have to put it to the creditors that this is a bleak day, but that the alternative is that you will lose all your money.

"And one of the most important parts of it is that the examiner can tell the creditors that if the company goes into liquidation, they will also lose a very important customer."

Despite the fact that examinership gives respite from the demands of creditors, as well as protection from the appointment of a receiver or liquidator, from the sheriff and from landlords for the period of the examinership, there have been fewer than 20 examinerships in Ireland in the past three years.

Hughes believes that many people are simply not aware of the process.

"We have a long way to go before professionals in Ireland realise what examinations are really about when it comes to insolvency," he said.

"I think that there is a tendency to think in terms of 'wind the damn thing up'.

"A company that is not terminally insolvent, then there is no reason why an examinership should not be successful.

"The High Court is favourably disposed, particularly because a successful examination would normally result in the majority of jobs at a company being saved."

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