

Examinership: The Irish Rescue Process 30 years later

Professor Irene Lynch Fannon reports on the successful history of the process in Ireland which contains all of the key features in the new Directive



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In 1990, Ireland introduced a rescue process¹ which reflects all of the main components of the Preventive Restructuring Directive (1023/2019) (“Directive”).

This procedure was originally contained in a larger scheme of corporate law reform and consolidation designed in the late 1980s,² but the rescue process was extracted and passed hurriedly in September 1990 to respond to a crisis in the Irish beef industry. This first outing of what was called the Examinership process³ was a spectacular success leading to the rescue of the Goodman Group.⁴ The remainder of the original legislation was passed later in 1990.⁵

The Examinership process contains all of the key features in the Directive. It provides for a stay of 70 days with the possibility of extension. There is a threshold test where the court⁶ must be satisfied that the company is insolvent or likely to be insolvent, that there is a ‘reasonable prospect of survival’⁷ and that no petition for the winding up of the company persists.⁸ There is also a provision for intra- and cross-class cram down and a final confirmation of the plans by a judicial authority, namely the High Court. The legislation also provides for a test of fairness under the rubric of ‘unfair prejudice’ as also described in Article 11 of the Directive.

The three phases of the history of Examinership

A radical departure

Over the 30 years since its introduction, the use of the

Examinership process can be divided into three periods. In the initial phase, the process represented quite a radical departure from the existing insolvency framework, which had been dominated in the 1980s by significant liquidations and the ever present possibility of receiverships – a significant right granted to secured creditors, which continues to be a feature of insolvency proceedings in most common law countries.⁹ In this phase, a number of decisions of the Irish High Court and Supreme Court underlined the radical nature of the process, particularly when it provided for the compromise of existing creditor rights to facilitate new investment. Commentators on the Directive would do well to understand that the intent of a rescue process is to disrupt with a view to rescue and so, it is argued here, that some compromise of existing rights is absolutely necessary for rescue to work effectively.

Decisions in *Re Atlantic Magnetics Ltd.* and *Re Holidair*¹⁰ underlined the important changes to the insolvency landscape introduced by examinerships. In *Atlantic Magnetics Ltd.*, McCarthy J. in the Supreme Court noted that examinership was introduced to provide for the protection of the company and its creditors as a whole, stating that the ‘fate of the company and those who depend upon it’ should not lie solely in the hands of secured creditors ‘to the inevitable disadvantage of those less protected’.¹¹ In this phase, the courts supported a significant rearrangement of creditors’ expectations, including a quite

controversial ability of the examiner to disclaim pre-existing contractual agreements, which was subsequently amended in later legislation.¹² In addition, the use of the provisions allowing the examiner to borrow new funds, together with a certification of expenses, was used in a controversial manner to give additional priority to new financiers.¹³ Now, however, a distinction is expressly made in the Companies Act 2014 between the certification of liabilities and expenses necessary to secure the survival of the company during the protection period and the question of new financing during the compromise period.

Settling down

In a second phase, following some amendments to the process in 1999,¹⁴ in response to concerns from lenders, the examinership process settled down. That said, the period from 1999 to 2004 was a period of boom, sometimes referred to as the ‘Celtic Tiger’ years where there was not much need for formal corporate rescue.

Ongoing supervision and the Court’s role

In the third phase, following the financial crisis, the importance of examinership again became apparent. A key feature of the process is the ongoing role of the courts which provides the benefits of ongoing supervision. This has become very important in terms of bringing the negotiation of a compromise to successful completion. Nevertheless, this characteristic adds to the cost of the process. In 2013, legislation was introduced to allow for the conduct of examinerships through



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a lower court with a view to reducing costs and making the process more attractive to the SME sector. This legislation is now consolidated in the Companies Act 2014. As a strategy its success has been limited.

Also in the third phase, decisions such as *Re Vantive Holdings* and *McInerney*¹⁵, have underlined the role of the court in ensuring that the examinership process is operated fairly. This observation sounds a note of caution regarding the options available in the Directive to adopt a rescue process, which does not include the supervision of a court or administrative authority. That said, the Directive does not envisage that this option is available where cram-down provisions are operated and as described, the examinership process includes cross-class and intra class cram-down provisions.

In *Vantive Holdings*, objecting creditors based their arguments on the threshold test which includes an assessment of whether there is a ‘reasonable prospect of survival’ of the entity. The court’s refusal to allow the appointment of an examiner was extremely significant, not only in relation to the fate of that large construction enterprise, but also in relation to the recognition of the fact that the economy was in crisis and that the Irish property market had collapsed. Kelly J., in refusing to allow the appointment of the examiner, stated that the supporting projections for the company’s recovery appeared “*to be lacking in reality, given the extraordinary collapse that has occurred and the lack of any indication of the revival of fortunes in the property market*”.¹⁶

The later decision in *McInerney* similarly underlines the role of the court in approving a final compromise. The tests included in the legislation designed to ensure fairness between all creditors have been further developed.¹⁷

Going forward

The recognition that corporate rescue is not for all enterprises,

nor indeed all situations, has led to a measured response to the ebullient early days of examinership and corporate rescue. A cautionary note to sound, following the 30-year period of examinership, is that, although rescue is an important part of the insolvency framework, it must not be overrated.¹⁸ The policy objectives of rescue are reiterated but tempered with experience. In *Traffic Group*,¹⁹ Clarke J. stated the original aims of examinership as facilitating the continuation of the enterprise “*for the benefit of the economy as a whole and, of equal, or indeed greater, importance to enable as many as possible of the jobs which may be at stake in such enterprise to be maintained*”.

However, it was also stated that examinership was “*not designed to help shareholders whose investment has proved to be unsuccessful. It is to seek to save the enterprise and jobs.*”

A similar observation was also made by the same judge, who is now the Chief Justice, in *Re Vantive Holdings*. And similarly, in the later case of *McInerney*, it was observed by the Supreme Court²⁰ that the legislation is aimed at rescuing “*fundamentally sound businesses... in a manner that is not unfair to any party*”. In that later case, the principles of unfair prejudice were used to ground a refusal to accept a compromise.

In conclusion, the Irish experience as expressed through legislative amendments, but more importantly through an important range of cases and court decisions, provides a rich vein of study for those considering implementation of the Directive and its implications. ■

Footnotes:

- 1 Companies (Amendment) Act 1990. See generally Lynch, Marshall and O’Ferrall: *Corporate Insolvency and Rescue* (Butterworths, 1996) and Lynch Fannon and Murphy: *Corporate Insolvency and Rescue* (2nd Edition) (Bloomsbury Professional, 2012), Chapters 12 - 14. O’Donnell and Nicholas: *Examinerships* (Londsdale Law Publishing, 2016).
- 2 Companies Bill 1987.
- 3 The examinership process is modelled on Chapter 11 of the US Federal Bankruptcy Code, but differs in some important respects. Interestingly, Chapter 11 includes the possibility of appointing a trustee or an examiner and it is from this that the unusual (and somewhat misleading) title of the Irish process is derived.

- 4 *Re Goodman International* (28 January 1991), HC, Hamilton P (1963–1993) Irish Company Law Reports 623.
- 5 Companies Act 1990. Both pieces of legislation are now consolidated in the Companies Act 2014. The Examinership process is contained in Part 10 of that Act.
- 6 All references to ‘the court’ in the Irish context means the Irish High Court.
- 7 The original legislation provided for a prospect of survival. The requirement that this should be a ‘reasonable prospect of survival’ was added in the Companies (Amendment) Act 1999.
- 8 Section 509, Companies Act 2014.
- 9 See generally Companies Act 2014, Part 8 dealing with Receivers and Part 11 dealing with Liquidations. See supra n. 1 Chapters 4-7. See also Pcarda: *The Law of Receivers, Managers and Administrators* (4th Edition) (Bloomsbury, 2006).
- 10 *Re Atlantic Magnetics Ltd* [1993] 2 IR 561; *Re Holiday Ltd* [1994] 1 IR 416.
- 11 *Re Atlantic Magnetics Ltd*, p. 578. This observation is cited with approval by Finlay CJ in the Supreme Court in *Re Holiday Ltd*, p. 439.
- 12 Companies (Amendment) Act 1999. All of these provisions are now included in the Companies Act 2014, Part 10. Sections 524 and 525 allow the examiner to exercise a power to repudiate certain kinds of contracts and terms of contracts. Before 1999, the examiner could repudiate contracts entered into by the company where the performance of the contract would be detrimental to the survival of the company. After 1999, the express power to repudiate was confined to contracts entered into during the period of the examinership. However, the examiner still has the power to repudiate particular types of contracts which might prohibit the exercise of the right to borrow or create additional charges.
- 13 *Idem*. A practice had emerged whereby borrowing to fund the rescue was certified as expenses, but this practise stopped, after changes made in the 1999 Act regarding priority of costs and following cases such as *Re UMP Dairies Ltd*, [2009] IEHC 34. See further Lynch Marshall and O’Ferrall, supra n. 1.
- 14 Companies (Amendment) Act 1999.
- 15 *Re Vantive Holdings* [2009] IEHC 384; [2009] IESC 66. *Re McInerney Homes Ltd* [2011] IESC 31.
- 16 *Supra* n. 15 in the High Court judgement.
- 17 Under s. 541 of the Companies Act 2014 which effectively re-enacts previous legislation, the court shall not confirm any proposals unless—
“(a) at least one class of creditors whose interests or claims would be impaired by implementation of the proposals has accepted the proposals, and
(b) the court is satisfied that—
(i) the proposals are fair and equitable in relation to any class of members or creditors that has not accepted the proposals and whose interests or claims would be impaired by implementation, and
(ii) the proposals are not unfairly prejudicial to the interests of any interested party, and in any case shall not confirm any proposals if the sole or primary purpose of them is the avoidance of payment of tax due.”
- 18 Indeed, this is borne out by figures comparing the utilisation of insolvency processes in recent years. Deloitte monitors the use of the various insolvency processes. In recent years the number of examinerships is around 3% of all insolvencies as compared with figures for CVLs being over around 70% each year between 2017-2019. See: <www2.deloitte.com>.
- 19 *Re Traffic Group Ltd* [2007] IEHC 445, [2008] 3 IR 253, para 5.5.
- 20 *Re McInerney Homes Ltd* [2011] IESC 31.



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