



JW ACCOUNTANTS – SPECIALIST ADVISORY PRACTICE

CORPORATE RESTRUCTURING

AN ASSESSMENT OF PART 9 vs PART 10 of the COMPANIES ACT, 2014

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Debt Restructuring Options

Debt Restructuring Options - *where can companies look for protection, an assessment of Part 9 versus Part 10 of the Companies Act 2014.*

Over the past number of weeks there has been unprecedented disruption to business throughout the world presenting challenging times for most companies operating in Ireland. In this post **Joe Walsh** of **JW Accountants Ireland** considers the restructuring options currently available to companies in Ireland under Part 9 and Part 10 of the Companies Act 2014.



INTRODUCTION

As talk turns to how the economy can be reopened, businesses face a number of challenges and with the level of uncertainty that exists the new norm is working capital management and assessment of business plans on an almost daily basis.

The key considerations for businesses at this time will include:

- a) The health and well-being of employees and customers
- b) New business model and how to start back up
- c) Legacy debt
- d) Debtor Collections and the impact on cashflow



Part 9 of the Companies Act, 2014

A scheme of arrangement, pursuant to Part 9 of the Companies Act 2014, deals with reorganisations, acquisitions, mergers and divisions, and it provides a mechanism for a company to enter into a scheme of arrangement with its members and / or its creditors.

In assessing this section of the legislation, I have focused on the option of a scheme of arrangement under Part 9 (“**Part 9 Scheme**”) for an insolvent company to address legacy debt. A Part 9 Scheme must be approved by each class of creditor by special majority ($\geq 75\%$) and is also subject to approval by the High Court. Examples of typical classes of creditors that form part of a scheme of arrangement are included in **Table 2** below.



EXAMINERSHIP – Part 10 of the Companies Act, 2014

A scheme of arrangement, pursuant to Part 10 of the Companies Act 2014, is an arrangement formulated by an Examiner in respect of a company that has been granted protection of the Court (“**Examinership Scheme**”). In order for a company to be granted the protection of the Court an Independent Expert must provide an expert opinion confirming the company is insolvent (or likely to become insolvent) and that the Company has a reasonable prospect of survival subject to certain conditions being met. The Examinership Scheme is subject to Court (High Court or Circuit Court) approval and for the scheme to be considered by the Court at least one class of compromised creditor must vote in favour of the Examinership Scheme, with a vote deemed to be in favour where a majority, in number and value, of creditors in that particular class vote in favour.



RESTRUCTURING OPTIONS

The following Panels make up **TABLE 1** which compares the various aspects of the two restructuring options:

Independent Expert's Report

Part 9 Scheme

There is no requirement for an IER in order to make an application for Court protection.

Examinership Scheme

Prior to Court protection being granted the company must engage an independent expert to prepare a report and this report will include an opinion on whether the company has a reasonable prospect of survival.

Comment

The examinership option is only available to companies that can provide evidence of a reasonable prospect of survival.

In circumstances where a Part 9 Scheme is being formulated for the purpose of dealing with legacy debt, with a view to the company being in a position to continue to trade, the ability of the company to trade into the future will be an essential consideration for the stakeholders including the directors, members and creditors.



Court Applications

Part 9 Scheme

Applications to the High Court to stay proceedings against the Company (if required) and to approve any Part 9 Scheme.

Creditors are entitled to be heard at the hearing to approve a Part 9 Scheme and where a creditor is objecting this will likely lead to an additional Court appearance.

Examinership Scheme

Applications to the Court include:

- Directions application following presentation of petition for Court protection (an interim examiner can also be appointed at this stage).
- Application for appointment of examiner.
- Application for extension of time at day 35 of the protection period.
- Application for extension of time at day 70 of the protection period (if required).
- Application seeking the approval of the Examinership Scheme.

Comment

The examinership process is likely to involve significantly more Court time.



Protection



Part 9 Scheme

Where a meeting to consider a Part 9 Scheme has been convened the court may, on application, on such terms as seem just, stay all proceedings, or restrain further proceedings against the company for such period as the court sees fit.

Examinership Scheme

Once a petition is filed the Company is immediately under the protection of the Court and this protection includes the following:

- No proceedings for a winding up may commence.
- No receiver can be appointed.
- No attachment, sequestration, distress or execution shall be put into force against the property or effects of the company, except with the consent of the examiner (this would include retention of title claims).
- Lease / Hire purchase assets cannot be repossessed.
- Any company or individual who has provided a guarantee for debts of the company cannot be pursued during the protection of the Court.

Comment

The examinership legislation provides significantly more protection to a company, particularly where the issues faced by a company are across a number of different classes of creditor such as secured creditors, unsecured creditors, and leasing creditors.

Length of Time

Part 9 Scheme

No time restrictions set out in the legislation.

Examinership Scheme

The protection period commences on the day the petition is filed and can continue for a period of up to 100 days. During this time, the Examiner must formulate a scheme of arrangement, hold meetings of the members and creditors and return to Court.

Comment

There has often been a debate on whether 100 days is sufficient for an examinership process and while there may be some merit to an extension of this time period this must be considered in the context of the infringement of the rights of certain creditors and in particular secured creditors. A secured creditor cannot enforce its security while a company is under the protection of the Court. Extending the period further could lead to a drawn-out process and where it does not prove possible to formulate a scheme of arrangement the security held by a secured creditor could be unfairly compromised over this extended period of time.

While Part 9 does not include any time limits it would be my view the process would need to be concluded within a relatively short period of time in circumstances where a company is insolvent and has significant legacy debt issues. For such a company protection of the Court will be required and an application can only be made where meetings to consider the Part 9 Scheme have been convened.



Ability to deal with Legacy Creditors

Part 9 Scheme

SEE TABLE 2 BELOW

Examinership Scheme

SEE TABLE 2 BELOW

Comment

The main advantage of the Examinership Scheme compared to a Part 9 Scheme is the statutory requirements for approval of the terms of a scheme of arrangement, as referred to in the introduction section above.

Dealing with Onerous Contracts

Part 9 Scheme

Not provided for, would only be possible by consent

Examinership Scheme

Onerous contracts can be repudiated where necessary for the survival of the company.

Comment

For a company with an onerous contract the examinership legislation provides a clear mechanism for dealing with these contracts.



Shareholders

Part 9 Scheme

The Part 9 Scheme can compromise the position of Members.

Examinership Scheme

The Examinership Scheme can compromise the position of Members and the support of the Members is not required for approval of the scheme.

Comment

The purpose of the examinership legislation is not to protect the investment made by shareholders rather it is to protect the enterprise of viable businesses.

Part 9 Scheme

With less Court applications the costs are likely to be significantly less.

Examinership Scheme

The Company must be in a position to pay the initial costs (Independent Expert's Report and legal costs for petition) in order to make an application for Court protection.

In the case of a successful examinership the Examiner's costs are paid out of the investment and in the case of an unsuccessful examinership the Examiner must apply to court for costs and these costs would be paid in priority in any receivership / liquidation.

Comment

The professional fees for the implementation of a Part 9 Scheme should be significantly less, however in circumstances where a company needs to raise finance or investment to fund a Part 9 Scheme the professional fee costs of this will also need to be taken into account in any comparison.

Costs



In preparing a Part 9 Scheme or Examinership Scheme the legal priorities in a winding up or receivership scenario must be considered when classifying creditors. The secured creditor would be a creditor holding fixed and / or floating security and this class of creditor would have priority in respect of the assets over which it holds its security.

Section 621 of the Companies Act 2014 sets out the creditors with preferential status on a winding up and this would include certain debts owed to the Revenue Commissioners, rates department and to employees.

The following panels make up **TABLE 2 – Part 9 versus Examinership – THE ABILITY TO DEAL WITH DEBT**

BANK DEBT

Secured Creditor(s)

Part 9 Scheme

As most companies will have one secured creditor the consent of this creditor will be required under this restructuring option due to the requirement for a 75%+ acceptance under each class of creditor.

Examinership Scheme

Secured debt can be addressed in the following ways under an Examinership Scheme:

- The debt is repaid in full in accordance with the terms currently in place.
- The debt is reduced and repaid over time - this requires the consent of the secured creditor.
- The debt is compromised and repaid by way of a dividend equivalent to a minimum of the value of the underlying assets on a receivership – this does not require the consent of the secured creditor and can be imposed by the scheme of arrangement.

An Examinership Scheme can be approved by the Court even where the secured creditor votes against the proposal put forward.

Comment

Engagement with the secured creditor to agree a consensual restructuring of debt will always be the first option, however where agreement cannot be reached the Examinership Scheme provides the only option to deal with legacy unsustainable secured debt in circumstances where a secured creditor accounts for 75%+ of the total secured debt.





TRADING DEBT Unsecured Creditors

Part 9 Scheme

The Part 9 Scheme can propose a write down or restructuring of the unsecured debt and can be binding on the creditors where a special majority ($\geq 75\%$) of unsecured creditors vote in favour of the Part 9 Scheme.

Examinership Scheme

The Examinership Scheme can propose a write down or restructuring of the unsecured debt and this class is deemed to have voted in favour if a majority ($\geq 50\%$) in number and value of creditors, that participate in the voting process, vote in favour of the Examinership Scheme.

Comment

For an Examinership Scheme to be considered for approval only one class of creditor is required to vote in favour, accordingly the debts owed to unsecured creditors can be compromised regardless of the voting at this particular meeting.

Part 9 Scheme

The legislation specifically provides that State bodies can accept a write down in debt under a Part 9 Scheme.

Examinership Scheme

An Examinership Scheme will often include a compromise of preferential debt and the scheme can be approved in absence of support from this class of creditor.

Comment

State bodies will take a pragmatic approach to either form of scheme of arrangement, however based on experience the Revenue Commissioner will only vote in favour of a scheme of arrangement where its debt is paid in full.

DEBTS OWED TO STATE BODIES

Preferential in respect of certain Revenue debt and amounts owed to County Council for rates



LANDLORD DEBT

Part 9 Scheme

Arrears of rent are typically considered an unsecured debt and a Part 9 Scheme can provide for a reduction in this debt.

A landlord cannot be compelled to accept a lower rent into the future and the legislation **does not** provide for a repudiation of a lease with a landlord.

Examinership Scheme

Arrears of rent can be compromised as part of an Examinership Scheme.

A landlord cannot be compelled to accept a lower rent into the future, but the legislation **does** provide for the repudiation of an onerous lease.

Comment

In the case of a multi-unit operating company there may be a requirement to repudiate certain onerous leases and the examinership legislation specifically addresses this.

LEASE & HIRE PURCHASE DEBT

Part 9 Scheme

Lease and hire purchase providers can repossess assets.

Examinership Scheme

The company is protected from these assets being repossessed while under the protection of the Court.

Comment

The examinership legislation would be more beneficial where pressure exists from lease and hire purchase providers.



EMPLOYEES

Part 9 Scheme

In circumstances where employees are made redundant, an application can be made to the Department for the redundancy to be paid directly to the employees and the amount owed by the company to the Department would fall under the heading of preferential creditors.

Examinership Scheme

The position is similar in the context of an examinership.

Comment

As this debt would fall under the heading of preferential creditor, in order for this debt to be compromised (or restructured) under a Part 9 Scheme this class, which would include the Revenue Commissioners, would need to support the scheme by special majority (75%+).

The above would not be a requirement under an Examinership Scheme.

CONTINGENT

Part 9 Scheme

The Part 9 Scheme deals with specific identifiable classes of creditors.

Examinership Scheme

The Examinership Scheme deals with all liabilities known, unknown, contingent or otherwise.

Comment

In circumstances where new funding is needed as part of a restructuring the investor will likely require certainty that unknown liabilities are addressed as warranties are typically of no value in an insolvency process.

CONCLUSIONS

In the current unprecedented environment, it is more likely companies will be able to reach a consensual arrangement with their creditors and this should always be the first option considered. However, the consensual agreement may prove difficult as it may not be possible even where there is a single dissenting creditor and this creditor is a threat to the survival of the business.

The Part 9 Scheme would be most suited to a company with legacy debt issues in a single class of creditor, for example unsecured creditors where the majority of the creditors are likely to support a restructuring, but it is not possible to secure consensus. It is important to note the Part 9 Scheme can be formulated for a single class of creditor. The process may not be suitable where a company is faced with a myriad of debt issues such as a combination of secured debt, preferential debt and unsecured debt. The bar for approval of a Part 9 Scheme is significantly higher compared to an Examinership Scheme with each class required to approve the scheme by way of a special majority.

The examinership legislation provides comprehensive protection to a company and provides an opportunity for a company to deal with debt issues and onerous contracts. The Examinership Scheme also provides comprehensive protection for any new investor as it deals with liabilities known or unknown.

JWA is a specialist restructuring firm and in 2019 were directly involved in over 70% of the examinership cases which took place in Ireland.