



JW ACCOUNTANTS – SPECIALIST ADVISORY PRACTICE

Pre-Pack + Examinership = ?

A consideration of whether a restructuring through examinership can be implemented on a pre-pack basis

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Is a Pre-Pack Examinership Permitted?

In the UK the “*pre pack administration*” process is a commonly used insolvency procedure (examples *Debenhams and Karen Millen*) involving a company structuring a deal to dispose of its assets and business in advance of appointing an insolvency practitioner, as an administrator, to effect the sale immediately following the commencement of the administration.

In considering whether a pre-pack examinership is possible I believe it is important to note an examinership, unlike an administration in the UK, involves the rescuing of the company itself as opposed to the sale of its business and assets. It is possible, in an examinership process, to sell non-core assets as part of the overall restructuring however for an examinership to be successfully concluded the company must exit the process on a sound financial footing having entered into proposals for a compromise and scheme of arrangement (“Proposals”) with its members and creditors.



The Stages

The **stages** involved in an **examinership** process can be summarised as follows:

- Stage 1** Preparing the examinership application
- Stage 2** First Court hearing (usually also Day 1 of Protection Period)
- Stage 3** *Hearing to consider appointment of an examiner
(typically before Day 14 of the Protection Period)*
- Stage 4** The Examiner's first report to the Court
(typically between day 35 and 49 of the Protection Period)
- Stage 5** The Examiner's further report to the Court
(on or before day 70 of the Protection Period)
- Stage 6** Application to approve a Scheme of Arrangement
(on or before day 100 of the Protection Period)



Stage 1 – Preparing the examinership application

A company must be *insolvent* or *likely to become insolvent* in order for examinership to be considered.

An **Independent Expert Report** (“IER”) is prepared in accordance with Section 511 of the Companies Act, 2014. The IER includes an opinion on whether a company has a reasonable prospect of survival, being one of the statutory tests for the appointment of an examiner to a company.

The IER will then form part of the **Petition** which will typically also include:

- (i) an affidavit from a company director / shareholder
- (ii) the consent from an examiner to act
- (iii) a copy of the company's constitution and
- (iv) a resolution of the board.

As an application for Court protection is made on an *ex parte* basis it is also essential the Petition includes all materially relevant information in respect of the company regardless of whether this information would be in favour of the company's application.

Once the Petition is filed with the relevant Court office the company is immediately under the protection of the Court (**Day 1 of the Protection Period**).

Stage 2 - First Court Hearing

As soon as practically possible, following the filing of the petition, the application is heard before the Court and at this ex parte hearing the Court will give directions for advertising and will also set down a date for the full hearing to consider the appointment of an examiner. It is also possible for the Court to confirm the appointment of an examiner on an interim basis at this stage of the process.

Stage 3 – Hearing to Consider appointment of Examiner

Creditors may be heard at this hearing and the Court must be satisfied the company is insolvent (or likely to become insolvent) and has a reasonable prospect of survival in order for the appointment of an examiner to be confirmed.



Stage 4 – The Examiner’s first report to the Court

The Examiner, who is an officer of the Court, reports back to the Court within 35 days following his or her appointment.

Stage 5 – The Examiner’s further report to the Court

At this stage of the process the Court will only confirm a further extension of time where significant progress has been made and where an extension to the Protection Period will facilitate the formulation of Proposals.

Stage 6 – Application to approve a Scheme of Arrangement

The Examiner, having formulated the Proposals and held meetings of members and creditors, is required to report back to Court on the outcome of the meetings and set out an opinion on whether the Court should confirm the Proposals. The Examiner must report back to the Court and make this application on or before day 100 of the Protection Period and the Court will generally set a date at this time for the confirmation hearing to approve the Proposals or otherwise. The Court will extend the protection period beyond day 100 in the event that the Examiner makes the application to the Court on or before day 100.

*See also – [Joe Walsh](#), Managing Director's [Information Leaflet](#) on Part 10 Examinership v. Part 9 Restructuring



Protection Period

By way of example, I have included a table of the **ten most recent** examinership cases undertaken by JWA to include the length of the Protection Period.

As can be seen from this table, the Proposals were *successfully implemented*, and the average Protection Period was **77 days**.

Company	Sector	Protection Period	
		Duration (in days)	Successful
Examinership A	Tourism	48	Yes
Examinership B	Education	59	Yes
Examinership C	Education	59	Yes
Examinership D	Hospitality	106	Yes
Examinership E	Construction	40	Yes
Examinership F	Construction	40	Yes
Examinership G	Construction	87	Yes
Examinership H	Motor Salvage	120	Yes
Examinership I	Hospitality	105	Yes
Examinership J	Information Technology	110	Yes
Total Days			774
Average Days			77

Pre-Pack Examinership

When the various stages, set out above, are considered...is it permitted or indeed possible to plan a pre-pack examinership?

Interestingly, Section 511 (3) (h) of the Companies Act 2014 sets out the following in relation to an IER (Stage 1 of the process):

“Recommendations as to the course he or she thinks should be taken in relation to the company including, if warranted, draft proposals for a compromise or scheme of arrangement.”

The above section, within the IER, clearly leaves open the option to go to Court with the plan to exit examinership at a very advanced stage. In circumstances where this is the case it is also clear there are a number of stages remaining in the process and unlike the UK administration process the restructuring plan cannot simply be implemented following the appointment of an examiner.



The following would still need to be completed as part of an examinership process:

Finalise Proposals to include all debts owed up to the date the Petition was presented.

Call meetings of the members and creditors (giving not less than three days' notice).

Holding of meetings of the members and creditors.

Report back to Court on the outcome of the meetings. In order for the Court to consider approving the Proposals a minimum of one class of compromised creditors must have voted in favour of the Proposals and the Court must be satisfied the Proposals are fair, equitable and not unfairly prejudicial to the interests of any interested party.

Therefore, while it is possible to formulate draft Proposals prior to making an application for the appointment of an examiner there will remain a number of steps within the Court process to allow for any Proposals to be approved by the Court. It is exceptionally rare for an application for the appointment of an Examiner to be accompanied by draft Proposals and I believe the reasons for this are as follows

Investment Process - The Examiner will typically conduct an investment process as part of securing funds for the Proposals. The investment process will usually involve advertising the investment opportunity to seek expressions of interest. This stage of the process can be an important factor to assist the Court in considering whether to approve Proposals. As mentioned above, the Court cannot confirm Proposals deemed to be unfairly prejudicial to a creditor and the test applied is the comparative position for a creditor in a liquidation or receivership. Where an investment process has been undertaken this would provide very strong evidence for the Court, as the outcome of the process is evidence of the market value of the company and assists in assessing the comparative outcome on a winding up.

Creditor Reaction - The Proposals require creditor approval (at a minimum one class of compromised creditor) in order for the Court to consider approving the Proposals. Based on experience, creditors are generally less favourable to supporting a company at the commencement of an examinership and usually become more supportive of the process over time, particularly where the company continues to trade and pay for its supplies on an ongoing basis during the Protection Period.

Function of Examiner - As part of an examinership process an Examiner is required to examine the affairs of the company to assist with forming an opinion on the company's future prospects and to assess the options for formulating appropriate Proposals.

The inclusion of draft Proposals in the IER followed by a swift examinership process may be suitable in certain cases where the following applies:

Return to Creditors - The draft Proposals provide for a significant payment for creditors and there is very clear evidence this outcome would represent a better outcome compared to a receivership or liquidation.

Company sector - The type of business carried out by the company necessitates a short period of restructuring. An example of this may be a company involved in long term contracts such as a construction company. This type of company is unlikely to secure new business while going through an insolvency process and a prolonged process could be a significant threat to existing contracts.

The company has the general support of its creditors and it is highly likely there would be significant support for the restructuring plan.

CONCLUSION

Examinership in Ireland is very different to administration in the UK and it is not possible to implement a pre-pack examinership, however in certain cases it may be possible to undertake a swift restructuring process through examinership with the IER specifically allowing for draft Proposals to form part of a Petition.



JW ACCOUNTANTS

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

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