International Corporate Rescue

Published by:
Chase Cambria Company (Publishing) Ltd
4 Winifred Close
Barnet, Arkley
Hertfordshire EN5 3LR
United Kingdom

www.chasecambria.com

Annual Subscriptions:
Subscription prices 2017 (6 issues)
Print or electronic access:
EUR 730.00 / USD 890.00 / GBP 520.00
VAT will be charged on online subscriptions.
For 'electronic and print' prices or prices for single issues, please contact our sales department at:
+ 44 (0) 207 014 3061 / +44 (0) 7977 003627 or sales@chasecambria.com

International Corporate Rescue is published bimonthly.

ISSN: 1572-4638

ARTICLE

Welcome Irish High Court Ruling in Corporate Rescue Case: Clarification on Import and Effect of Undertakings to Discharge Current Revenue Liabilities During Period of Protection Afforded by Examinership

Gavin Smith, Partner, and **Greg Cooney**, Associate, Walkers, Dublin, Ireland

Overview

It has become a frequent feature for Irish companies seeking court protection through examinership to provide a written undertaking at the petition stage that it will discharge in full post-petition taxes to the Irish Revenue Commissioners (the 'Revenue') that accrue and fall due during the period of protection. A recent written judgment of the Irish High Court (Ms Justice Baker) in *Harley Mechanical Services Ltd & the Companies Act 2014*[1] (the 'Proceedings') has provided welcome clarity on the import and effect of such undertakings.

Walkers' Dublin office acted on behalf of the examiner/liquidator in the Proceedings and was successful in challenging an order which had the effect of deeming unpaid Revenue liabilities as costs in the examinership and thus given special status such that these monies would be unavailable to the liquidator to discharge his own fees and the claims of other creditors.

Examinership

Ireland boasts a powerful, flexible, corporate restructuring process, which international corporates will recognise as similar to the Chapter 11 of the US Bankruptcy Code. Examinership is a court supervised statutory process[2] available to an insolvent company which has a reasonable prospect of survival as a going concern. The procedure is commenced by way of presentation of a petition to the Irish High Court (the 'Court') seeking the appointment of an independent office holder called an examiner (invariably an insolvency practitioner) to the company and, if appropriate, related companies.[3] Upon the presentation of the petition, the company is placed under the protection of the Court which affords it extensive protection from enforcement or execution action by its creditors. Usually the petitioner is the company itself. However, other stakeholders, such as directors, creditors and shareholders holding at least 10% of the issued share capital of the company, also have standing to present an examinership petition.

From an EU law perspective, examinership, is recognised as a main insolvency proceeding for the purposes of the Recast European Insolvency Regulation ('EIR Recast'). The company which is the primary subject of the petition must have its centre of main interests[4] ('COMI') in Ireland. Companies which are incorporated or registered elsewhere in the EU but have their COMI in Ireland can be the subject of the petition. It is also possible to apply for the appointment of an examiner to a foreign (i.e. non-EU) company, as a related company, if that company may be wound up by the courts of Ireland.[5]

Like Chapter 11, examinership is a debtor-in-possession process whereby (save in exceptional circumstances) the directors retain control and executive power of the company. The Examiner sits along side the directors and management of the company. He or

Notes

1 [2018] IEHC 80.

2 The legislative code for examinership is set out in Part 10 of the Irish Companies Act 2014 ('the Act').

3 Under section 2 of the Act, a related company is broadly defined and includes but is not limited to a holding company or subsidiary; a company or companies entitled to exercise control the exercise of more than one half of the voting power at any general meeting of the first company; where the businesses of the companies have been so carried on that the separate business of each company is not readily identified; or where there is another body corporate to which both companies are related.

4 As per the EIR Recast, a debtor company's COMI is generally the place where it conducts the administration of its interests of a regular basis as ascertainable by third parties. In most cases there is a rebuttable presumption that a corporate debtor's COMI is the location of its registered office.

5 Under the Act, a foreign company may be wound up by the Irish High Court if it has a sufficient connection to the State and there is a reasonable possible that if a winding up order is made, it will be of benefit to those applying for the winding up order. For example, both BVI and Jersey companies have been considered as being liable to be wound up in Ireland in previous cases.

she has a brief period of time (up to 100 days from the date the petition is presented) to put together a restructuring plan to save the company, that is, the scheme of arrangement. This will usually involve sourcing fresh investment and agreeing write-downs with the company's creditors.

The scheme of arrangement is presented to the company's creditors and members at duly convened meetings and voted upon. A striking feature of examinership is that only one class of impaired creditors needs to vote in favour of the proposals, by way of simple majority in number and value, before the Court has jurisdiction to consider whether or not to approve the scheme of arrangement.

The threshold for court approval is that the Court must be satisfied that the proposals will, if implemented, have a reasonable prospect of facilitating the survival of the company as a going concern and that the proposals are not unfairly prejudicial to any interested party. Generally speaking, proposals will not be considered unfairly prejudicial if the dividend/outcome for creditors under the scheme of arrangement is more favourable than it would be in a receivership or liquidation.

The Proceedings

In the Proceedings, Walkers were initially instructed to represent and advise the proposed examiner, Mr Aengus Burns of Grant Thornton. Mr Burns was appointed as examiner (the 'Examiner') on an interim basis on 28 June 2017 and his appointment as Examiner was later confirmed by the Court on 11 July 2017. The petition for Mr Burns to be appointed as Examiner was supported by an affidavit of a director of the company sworn 27 June 2017. The affidavit contained an undertaking on behalf of the company to discharge its Revenue liabilities as they fell due during the period of protection afforded by the examinership process. On 5 September 2017, the Examiner made an application to have the protection of the Court lifted and have the company put into liquidation in circumstances where investment could not ultimately be secured, which investment was needed for the company to have a reasonable prospect of survival. On foot of Mr Burns' application, the company was wound up by the Court and Mr Burns was appointed as Liquidator to the company (the 'Liquidator').

Later in the afternoon of 5 September 2017, after the end of the normal Court day, Counsel on behalf of the Revenue appeared before Ms Justice Baker on an *ex parte* basis and advised the Court that contrary to the company's undertaking to discharge its Revenue liabilities as they fell due during the protection period, the company had failed to discharge its tax liabilities for the period 1 July to 31 July 2017, which were due to be discharged on or before 23 August 2017. Counsel for the Revenue sought and was granted an order that the sum due for the said period be treated as a priority expense in the examinership (the 'Order'), with the result that these monies would not be available to the Liquidator to discharge his own fees and the claims of other creditors. The Liquidator applied to have the Order set aside.

Liquidator's application

An exchange of affidavits ensued between the Liquidator and the Revenue in which both sides alleged a lack of candour or good faith on the part of the other. The Liquidator took issue with the fact that the Revenue did not make the application earlier in the day on 5 September 2017 and the fact that the application was made *ex parte*. Counsel for the Revenue argued that the Examiner should have alerted the Court immediately once he became aware that the Revenue liability had not been discharged sometime after 23 August 2017. The Court assessed both parties' allegations and concluded that there was no lack of candour or good faith on the part of either party and proceeded to address the substance of the Liquidator's application i.e. what was the appropriate result arising from the breach of the undertaking.

It was noted by the Court that undertakings in a form similar to that given by the company in the Proceedings are commonly given by companies seeking to have an examiner appointed. The Court noted that a practice has evolved whereby the Revenue, who can frequently be a significant creditor and thus on notice of a petition to appoint an examiner to a company, will consider taking a neutral position when such an undertaking is given and that the giving of such an undertaking is a factor that will be taken into account in the exercise by the Court of its discretionary power to appoint an examiner. The Court then considered the purpose of the undertaking, to whom the undertaking is given and the effect of a breach of the undertaking.

The Court noted that notwithstanding the import and solemnity of the undertaking, the effect of a breach of the same is not to alter or improve the priority status of the Revenue's debt. The Court rejected the argument made by the Revenue that the Examiner had breached the undertaking, which was given by and on behalf of the Company. The Court found that the undertaking to discharge the Revenue liabilities was not an undertaking given to the Revenue; but was an undertaking given to the Court and was to be treated for most purposes as being equivalent to a Court order in identical terms. The Court then proceeded to consider the effect of a breach of such an undertaking.

Counsel for the Revenue argued that the Order did no more than give effect to the situation that would have transpired had the company complied with the terms of the undertaking. It was also argued that the Order was an appropriate sanction to the Examiner/Liquidator for his failure to advise the Court immediately upon becoming aware of the breach of the undertaking by the company. The Liquidator argued that the Court

did not have jurisdiction to make the Order as only the Examiner could certify liabilities as being costs of the examinership, albeit subject to Court supervision.

Ultimately, after a careful analysis of the relevant legislation and case law, the Court accepted the argument advanced by the Examiner/Liquidator and set aside the Order.

Case significance

The Proceedings provide welcome clarity to the law on examinership, providing important guidance on the nature and effect of undertakings to discharge Revenue liabilities that arise during the protection period, the potential effect of a breach of the same and clarification on the role of the Court in certifying liabilities as costs in the examinership process.

While examinership did not save the company in this instance, it can often provide a means of survival for certain companies in financial difficulties or those facing insolvency. Directors of such companies would do well to seek professional advice at the earliest available opportunity in order to explore this as a restructuring or rescue option.

Examinership as a cross border restructuring tool

Examinership has been a feature of the Irish corporate restructuring landscape since its inception in 1990 and therefore, as an English speaking common law jurisdiction, it benefits considerably from being administered by a dedicated division of the Irish High Court that has nearly three decades of accumulated knowledge and specialist expertise. Furthermore, in recent years, there have been a number of significant international / cross border restructurings which have utilised examinership successfully, namely the telecommunications group Eircom [6] and the oil and gas group Petroceltic[7] and so complex multi-jurisdictional issues are well-known to the Irish Courts.[8]

In light of the legal uncertainty which Brexit has created, it is possible that Ireland will become a more popular legal jurisdiction for directors of international corporates in difficulties and their advisors to consider. With a legal system closely analogous to the highly respected English system, it benefits from the fact that examinership will be recognised as a main insolvency proceeding in the remaining EU member states and that judgments of the Irish Courts are and will continue to be recognised under Brussels Recast.[9]

Brexit also comes at a time when Europe is embracing Chapter 11 which is the inspiration behind the EU Commission's proposal for a directive on Insolvency, Restructuring and Second Chance.[10] In this regard, the vast majority of the terms of the proposals envisaged by the EU Commission, as far as corporates are concerned, are already a tried and tested feature of the Irish corporate restructuring legal system through the examinership process. As explained in greater detail earlier in this article, examinership is available to any companies that have their COMI in Ireland.

Notes

6 Eircom Limited & Ors & the Companies (Amendment) Act 1990 Record Number 2012/175COS.
7 Petroceltic International plc & the Companies Act 2014 Record Number 2016/75COS.
8 Walkers acted for and advised key stakeholders in both of these examinerships.
9 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
10 Published in November 2016 and currently undergoing the EU legislative procedure.

International Corporate Rescue

International Corporate Rescue addresses the most relevant issues in the topical area of insolvency and corporate rescue law and practice. The journal encompasses within its scope banking and financial services, company and insolvency law from an international perspective. It is broad enough to cover industry perspectives, yet specialized enough to provide in-depth analysis to practitioners facing these issues on a day-to-day basis. The coverage and analysis published in the journal is truly international and reaches the key jurisdictions where there is corporate rescue activity within core regions of North and South America, UK, Europe Austral Asia and Asia.

Alongside its regular features – Editorial, US Corner, Economists' Outlook and Case Review Section – each issue of *International Corporate Rescue* brings superbly authoritative articles on the most pertinent international business issues written by the leading experts in the field.

International Corporate Rescue has been relied on by practitioners and lawyers throughout the world and is designed to help:

- Better understanding of the practical implications of insolvency and business failure – and the risk of operating in certain markets.
- Keeping the reader up to date with relevant developments in international business and trade, legislation, regulation and litigation.
- Identify and assess potential problems and avoid costly mistakes.

For more information about *International Corporate Rescue*, please visit www.chasecambria.com