

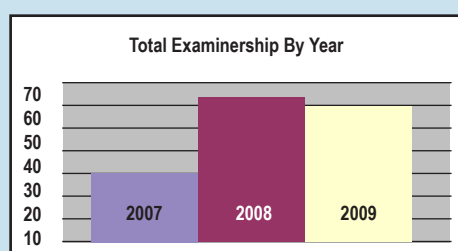
The Examinership Process

By BrianMcEnergy

2009 has certainly been a year of the Examiner. For those unfamiliar with the Examinership process the 1990 Companies Act, as amended, allows companies to seek Court protection from their creditors to allow them devise and launch a rescue plan. A company is awarded High Court protection from the moment the Examinership petition is presented in the Central Office of the High Court. Once protection is granted the examiner has up to 70 days (this can be extended to 100 days) to present a plan to service the company and deal with creditors. This leads invariably to a substantial write down of creditor balances. New capital, and frequently additional management resources, are introduced to strengthen the company.

At least one class of creditors must approve the scheme of arrangement. The High Court Justice can then - if they so wish - make it binding on the creditors. The company is lifted out of Examinership and resumes normal trading.

There were 60 Examinerships for the period to the 1st December this year. This compares to 62 for the full 12 months of 2008 and 30 for 2007.



While, by definition, there are no records kept of the number of informal schemes of arrangement, I have seen a number of these being completed, particularly for smaller companies that cannot afford the Examinership process. Informal Schemes of Arrangement are undertaken without protection of the Court and are more suitable to smaller companies unable to sustain the cost of seeking formal Court protection. A relatively unknown and unutilized section of the Companies Act 1963 is Section 279 which deals with informal schemes of arrangement and I believe this is a provision which will be

utilised more into the future. It allows for a minority of creditors (25%) to be crammed down if the ¾ majority of creditors approve a scheme of arrangement. This can avoid the necessity of going for Court protection.

Informal schemes of arrangement, share much of their methodology with Court-approved Examinerships.

One of the most high profile cases in 2009 was the Liam Carroll group of companies and their failure to secure Court protection in the form of Examinership. On reflection this was a little surprising but not completely so. The scale of the group was such that it seemed implausible that it would collapse however the Carroll Group is now crumbling and a number of companies have receivers appointed. There are a few important lessons to be learned from the Carroll Group's demise, as follows:

1. It's the old Joseph Kennedy phrase – "it's time to get out of the market when you are receiving tips from the shoeshine boy." Not easily done when it appears so easy to make money, but there is a ring of truth in it. Property development was rampant and it drove land prices to ridiculous levels.
2. Don't use your auditor to prepare the Independent Accountants Report (IAR). The Court places a lot of weight on the IAR and it appears it would prefer if it came from somebody other than the auditor.
3. Do ensure the Independent Accountant expresses his own opinion about the prospects of survival and ensure he does not rely on the opinion of other experts e.g. estate agents. It is similar to ISA 620 "Using the work of an Auditor's Expert" this ISA states that although you may retain the services of an expert, it ultimately is the responsibility of the auditor to express their opinion.
4. Despite the pressure of time, do ensure the Independent Accountant is convinced of the commercial viability of the business if reasonable obstacles can be overcome. He should include details of any conditions that need to be overcome as part of the Examinership process in his report. These need to be plausible.

5. Ensure the IAR is thorough and well thought out. Our High Court Judiciary are experienced enough to spot ill-prepared reports and will reject them where appropriate.

6. Where possible try to have fixed chargeholder approval and support in advance of the presentation of the petition.

7. Finally, it is vital to be able to show adequate working capital for the period of the Examinership and indeed strong evidence of the ability to secure recapitalisation capital when the company exits from Court protection.

The status of Examinership is jealously protected by the High Court and it is appropriate that it should not be abused. Hence it is vital that business owners - and their advisors - understand how to make the best use of the Examinership process.

In conclusion the Examinership process is one which offers viable companies a real opportunity to address trading issues and carefully implement a restructuring strategy. However the High Court is not to be fooled and will not grant protection lightly so any petitions placed before it need to be rigorous with detailed cash flow projections, an executable strategy and submitted by a reputable independent professional. For smaller companies, informal schemes of arrangement are the way to go.



BrianMcEnergy