

## Is Examinership the answer to the impending economic downturn?

While a sense of normality has been restored as a result of a number of businesses returning to work, many others continue to be significantly affected by cash-flow and other financial issues which have arisen due to these unprecedented times. Although temporary cost-cutting measures such as pay reductions, short time working arrangements and bonus deferrals have provided welcomed short-term relief, unfortunately for industries such as tourism, hospitality and transport that have been directly impacted by safety controls introduced to reduce the spread of COVID-19, it is unlikely that these short-term measures will be sufficient to secure the future survival of the business.

As discussed in our previous article ([available here](#)), employers are considering how they can restructure their business on a long-term basis in order to increase efficiencies and reduce costs. In addition to considering potential redundancies, examinership presents an alternative option for businesses which are currently struggling to discharge debtors, but with some reprieve, could have a reasonable prospect of survival.

### Examinership Basics

The examinership process allows the business to enter a period of protection from its creditors provided that the Court is satisfied that there is reasonable prospect of survival of the whole or part of its undertaking, as a going concern.

In recent months, quite an amount of opinion has been published on the process of entering examinership, as such, the below highlights four essential points that a business must take into account when considering examinership:

- (1) the longer a business delays making its decision to enter examinership, the less likely the prospect for survival and the opportunity will be gone forever;
- (2) following from that, get the Independent Expert Report (the “IER”) prepared now - it is the cornerstone of the application for court protection and once the business has it, it can either be used or not - if it is not used and as a result, the company must be liquidated, the very act of preparing the IER will further insulate the directors from potential liability in a liquidation;
- (3) ensure a funder is arranged **before** the process begins- beginning the search afterwards is a dangerous strategy;
- (4) timing is everything. The business owners need to understand what the commercial ecosystem will look like 100 days from the date examinership is sought, because the business must be capable of being a going concern in that ecosystem.

While those points apply to any business, a further specific consideration applies to retail or restaurant businesses with multiple units. The process of examinership is by far the cleanest way a business can repudiate an onerous or otherwise uncommercial lease. Indeed, some would argue that it is the only way.

Examinership offers a number of unique advantages for businesses both from the perspective of the employer and the employee:

### Advantages for employers

- **Breathing space:** The first and most obvious advantage of examinership is the protection afforded by a Court to assist in the restructuring and ultimately, the survival of the business. For example, during examinership, no creditor can take any steps or act to wind up the company or have a receiver appointed over its assets for the duration of the examinership. In addition, goods cannot be seized, claimed or repossessed by any creditor through the Sheriff without the consent of the examiner. This provides the employer the necessary breathing space to regain control of business finances. These might include challenges such as VAT or PAYE/PRSI arrears, redundancy costs, judgement creditors amongst other issues.
- **No change to employment status:** If the employer is in examinership, technically there is no impact on the employment status of its staff and the process enables the company to continue to trade. This allows many employers to maintain those employees’ integral to the business.
- **Redundancy:** Where the examiner decides to introduce redundancies as part of the Scheme of Arrangement, the employer may rely on the examiner’s rationale for implementing the redundancies. Notwithstanding this,

it is important to note that the examiner will be required to engage in a genuine and meaningful consultation process with the employees as part of the redundancy process, irrespective of whether the circumstances are considered futile. It would also be hopeful that examinership could result in a lower number of redundancies being required, or potentially done away with entirely.

### Advantages for employees

- **Job Security:** It is important to note that unlike the liquidation process, the appointment of an examiner does not automatically terminate existing contracts of employment. In fact, one of the fundamental aims of any examinership process will be to rescue the company as a going concern and, with that, preserve employment where possible.
- **Preferential Creditors:** During the examinership process, employees remain on the company's payroll and are generally treated as preferential creditors. Accordingly, it is usually the case that they will be the first to receive their money, or at the very least, a proportion of it.
- **Inclusive:** The examinership process is inclusive of all key stakeholders, including customers, creditors, suppliers and staff. The examiner will liaise with all these stakeholders to attain what is deemed a fair and equitable Scheme of Arrangement.

### Conclusion

When implemented successfully, examinership can offer a much-needed opportunity for businesses to re-establish and restructure themselves, in addition to reducing the number of redundancies required. This ultimately creates a level of certainty during a time when businesses need it the most.

However, it is by no means a silver bullet for all companies experiencing financial issues. For example, where companies are not deemed to have a reasonable prospect of survival, examinership will not be appropriate. As such, when deciding on the appropriate course of action, getting early advice will help ascertain whether examinership offers an effective solution for the company. Doing so will also afford directors further protection from liability in a liquidation.

*Your key contacts are [Ronan McGoldrick](#), Head of Insolvency and Restructuring and [Bláthnaid Evans](#), Head of the Employment & Corporate Immigration team at Leman Solicitors.*

*For further information, please contact Ronan or Bláthnaid on +353 1 639 3000 or visit [www.leman.ie](http://www.leman.ie).*