1. Introduction and Theory

Company law is all about conflicts of interest. Examinership is no exception. There is an obvious public interest in successful commerce. Good commerce pays good wages, imports varied goods, and makes good contribution to the Revenue. At the same time, there is no desire to let the short term conditions of a market economy reign supreme. Company law is used to achieve those ends that commerce of itself cannot. The law occasionally displaces the effect of short term market conditions by intruding into the interests and rights of other actors in the economic drama.

Alternatively, market failure may be seen of as a product of imperfect information. So, a company may remain viable and be rescuable, but individual stakeholders may proceed to insist on their legal right claims in ignorance of this possibility. Hence the tool of court protection operates to inform creditors about possibly maximising the utility of their investments or expenditure in relation to the ailing company.

The key can be seen to be balance - the correct balance between the interests of the relevant actors. This article attempts to provide an overview of the process and law regarding examinership and offer a general evaluation of the regime as well as present some of the problems inherent in the law.

2. Legislative History

1 Company Law Review Group, First Report, Chapter 2, (Stationery Office, 1994) at 2. (Hereafter cited as “the Review Group”.
2 Traces of this kind of thinking can also be found in the law and economics school of jurisprudence, particularly in the concept of collective value determination in the work of Calabresi and Melamed “Property Rules, Liability Rules and Alienability: One View of the Cathedral” (1972) 85 Harvard Law Review 1089.
3 Parkin & King, Economics, (2nd Ed., Addison-Wesley, 1995), at 510.
Examinership is the process by which a company is placed under the protection of the court for a period of time during which claims and debts against it are for the most part, frozen. It is loosely analogous to administration or the Chapter 11 procedure. It was first introduced into Ireland in 1990 by the Companies (Amendment) Act 1990 to temper the strength of the wind of ill-fortune blown over the Goodman Group by the gulf crisis. The Companies Act 1990 made some amendments to the general provisions, but it was in 1999, in the form of the Companies (Amendment No.2) Act that the area was revisited. References to sections in this essay are to the sections of the Companies (Amendment) Act 1990, as amended or inserted by the successive statutes.

3. The Appointment of an Examiner.

An examiner is appointed by the court on application to it by the company itself, its directors, a creditor (including a prospective creditor) or members holding not less than 10% of shares with voting rights. The applicants must nominate an examiner and the petitioner must be in a position to offer such security for costs as the court thinks reasonable. A person who would not be qualified to act as a liquidator is not qualified to act as an examiner. In Re Wogans (Drogheda) Limited (No.3) Costello J evidenced a reluctance to appoint as an examiner an accountant that had previously been associated with the company in question. Such, in the mind of Costello J would leave a question of impartiality hanging over the proceedings. Thus in Re Tuskar Resources the contention was made that a person who had acted as an independent accountant, for the purposes of the preliminary report could not be appointed as an examiner. In rejecting this McCracken J emphasised that considerable expense may be involved in two separate investigations into the companies prospects, obviously

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4 For a brief overview of the differences in the quasi-philosophy of these modes of protection with examinership see Keane, Company Law, (3rd Ed., Butterworths, 2000), at 535.
5 The Review Group, at 3.
6 The Goodman Group was a large exporter of meat products to, among others, Iraq. Obviously the conflict had a serious effect on its operations.
7 Section 13(4) states that the acts of the examiner shall be valid despite any defects in his appointment or qualification that may later be discovered. If a receiver has been in situ appointed to the company for 14 days or more no petition can be presented. See Section 3C(6).
8 Section 3(1). An insurance company can only be brought under court protection by application of the Minister. In the case of certain other companies, that can loosely be called financial institutions, only the Central Bank can present a petition. See Section 3(2). The schedule of the Companies (Amendment No.2) Act 1999 contains a list of companies, again connected with finance in various ways, in relation to whom the persons listed in section 3(1) can present a petition as well as the Central Bank or a combination of either. See Section 3(2)(c). If the Central Bank does not bring a petition, notice of the petition must be served on it. See Section 3(2)(c)(ii). The Central Bank must also be furnished with an unaltered copy of the Independent Accountants Report. See Section 3(3C)(4) Finally, the Central Bank is entitled to be heard at the hearing. See Section 3(2)(c)(ii)(I).
9 Section 3(3)(a).
10 Section 3C(5).
11 Therefore the person would be disqualified. If one acts as an examiner while disqualified one is guilty of an offence and is subject to a fine of up to £1000 on summary conviction or £10000 on conviction on indictment.
12 High Court, unreported, 9th February 1993 (Costello J).
13 [2001] IEHC 27; High Court, Unreported, 26 February, 2001 (McCracken J).
14 As to the Independent Accountants Report See below at 6.
considering that the "new" examiner would be desirous of conducting a fresh investigation of his own. Noting that there was no restriction in the legislation on such an appointment McCracken J held that it was indeed possible, although there may be cases in which it would be undesirable.

In order to appoint an Examiner it must appear to the court that the company is unable to pay its debts as they fall due\(^\text{15}\), or that the value of its assets is less than all its liabilities.\(^\text{16}\) In this regard the court may also consider the extent to which creditors have afforded extensions on payments, to the extent that it may be reasonable to infer an inability to pay its debts as they fall due.\(^\text{17}\)

Prior to the 1999 amendments Section 2 of the Companies (Amendment) Act 1990 stated that the court may appoint an examiner, where in particular it considered that such order would be likely to facilitate the survival of the company, and the whole or any part of its undertaking, as a going concern. The Supreme Court in *Re Atlantic Magnetics*\(^\text{18}\) took this to mean that the guiding principle was to be whether the company had "some prospect of survival". Finlay CJ thus rejected the standard applicable in England of a "real prospect" of survival. McCarthy J explained the adoption of such a standard:

> I reject the real prospect test: I would adopt the test applied by Lardner J omitting the words "there being some reasonable prospect of survival". It is not that I consider such may not enter the equation but it appears to me to be difficult to come to any firm conclusion on such a matter until the Examiner has carried out his preliminary task within the first statutory period, that of three weeks.

Although approved of in *Re Holidair Limited*\(^\text{19}\), Keane J revisited the issue in *Re Butlers Engineering Ltd.*\(^\text{20}\) Arguing that the simple omission of the words 'there being some reasonable prospect of survival' would go further than the majority decision he doubted whether McCarthy J's approach was consistent therewith. He went on to clarify the judgment of Finlay CJ to avoid any possible interpretation of *Atlantic Magnetics* that could lead to the appointment of an examiner where there was no possibility of the company surviving.\(^\text{21}\) He concluded that the real ratio of the case was that there must be at least an identifiable possibility that the company will survive as a going concern if an Examiner is appointed. This was later approved of in *Re Westport Property Construction Company Ltd.*\(^\text{22}\) by Budd J.

It is probably true to say that the conclusions reached in these decisions were inseparable from implied considerations relating to the amount and quality of evidence that the court would have before it upon a petition. Under the old regime it was the function of the examiner to determine and report on whether a reasonable prospect for survival existed, which would be completed within the first statutory period of three weeks. Now that function has been passed to the Independent

\(^{15}\text{Section 2(1), Section 3(a).}\)
\(^{16}\text{Section 3(b).}\)
\(^{17}\text{Section 2(4).}\)
\(^{18}\text{[1993] 2 IR 561.}\)
\(^{19}\text{[1994] 1 IR 416.}\)
\(^{20}\text{High Court, Unreported, 1st March, 1996. (Keane J).}\)
\(^{21}\text{The Chief Justice in that case had spoke of the "extreme hesitation with which a court should appoint an Examiner where there is no identifiable possibility of the survival of the company".}\)
\(^{22}\text{[1996] IEHC 13, Unreported, High Court, 13th September, 1996 (Budd J).}\)
Accountant’s report, which is to be presented upon petition. Therefore, it is far more plausible for a court to be able to insist on a reasonable prospect standard.

The "some prospect" standard was heavily criticised by the Company Law Review Group as unduly lenient. Arguing that the purpose of examinership is to facilitate a viable company in overcoming temporary difficulties the Group considered that the old standard was more likely to postpone "at the expense of others", the inevitable failure of some businesses. In its opinion, the reasonable prospect test would tilt the focus on the more viable company. Similar arguments were made in extra judicial comments by Ronan Keane.

These criticisms found form in the 1999 Amendments. Now the court must be satisfied that there is a reasonable prospect of the survival of the company or any part of its undertaking as a going concern. It has been held that this wording necessarily excludes a holding company *simpliciter* from availing of court protection. However, section 4 of the Act gives the Court power to appoint the Examiner to be Examiner of a related company. Hence, both the holding company and its subsidiary would come under scrutiny of the same examiner provided, of course, that the same proofs as regards a reasonable prospect of survival were made out.

Although there is no restriction on the size of the company that can avail of court protection, where the liabilities of the company concerned do not exceed £250,000, the matter may be remitted to the jurisdiction of the Circuit Court.

### 4. The Petition

The Petition must be accompanied by a signed consent of the nominated examiner. If a scheme of arrangement has already been prepared for submission to interested parties, then a copy must accompany the petition.

Given that the standard of proof was increased to the "reasonable prospect" threshold, it was foreseeable that a greater quality of evidence would be required at the petition.

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25 *Keane, Company Law*, 2nd Ed., at 510..
26 Section 2(2). Although unnecessary, this was confirmed by McCracken J in *Re Circle Network (Europe) Limited*, Unreported, High Court, 15th February, 2001.
27 *Re Tuskar Resources* [2001] IEHC 27; High Court, Unreported, 26 February, 2001: It seems to me that the wording of the Act precludes the Court from making an order appointing an Examiner to a holding company *simpliciter*, and that indeed to do so, particularly in the circumstances of this case, would be totally contrary to the objects of the Act. The Act is intended to give a breathing space to try to get the affairs of an insolvent company put in order. This is frequently to the detriment of some creditors, particularly secured creditors, but the Legislature has considered that their interest may sometimes have to suffer if there would be a general benefit to other creditors, to the shareholders, and to the employees of the company. However, these considerations are unlikely to apply to a pure holding company. *Per* McCracken J.
28 Section 4(1), Section 4(2). *See also Re Tuskar Resources* [2001] IEHC 27; High Court, Unreported, 26 February, 2001.
29 Section 3C(9).
30 Section 3(4).
stage. Thus, in accordance with recommendations of the Review Group, to enable the court to conclude on whether such a prospect exists, an Independent Accountants Report must also accompany the Petition.\(^{31}\) However, if the court is satisfied that such report is not available due to exceptional circumstances\(^{32}\) outside the control of the petitioner, which could not reasonably be anticipated by the petitioner and accordingly the court cannot consider the petition, it may nevertheless order the company under the courts protection for a period of no more than ten days\(^{33}\) to allow the reports completion and submission.\(^{34}\)

This 10-day "emergency" provision clearly makes it more difficult to obtain the protection of the court. Obviously it will availed in cases where no work at all has begun on a report and the ten days is all the time they will have. Under the old statutory regime, the examiners first report contained much the same material as the independent accountant's report and yet he had three weeks to deliver it. The difference is stark and within the policy of the amendments - to restrict the availability of examinership. However, one could argue that a company proficient in book-keeping should be easily able to prepare the report within the worst case scenario of ten days. Conversely, it must be borne in mind that the expectations of optimal efficiency are probably misplaced in the majority of cases, where the company is \textit{prima facie} suffering from difficulties in some form or another. Similarly, as will be argued later, the preparation of the report may necessitate consultation with the creditors, so heavy emphasis on the "accounting" aspects of the report may be to obscure the reality of the situation.\(^{35}\) Comments of Gerry McGovern, chief executive of Nua Ltd, a company that was contemplating a section 2(2) application are worth reflection:

\begin{quote}
Our advice was that while it was once relatively easy, the law has been changed and we would have needed an independent accountants report to show that we could have remained viable. We just did not have time to do that.\(^ {36}\)
\end{quote}

One aspect of the theory behind the introduction of this requirement was that it would only be required in very rare circumstances. In other words, the Review Group assumed that it would not be needed in many cases. Thus it was simply not the case that the Review Group took a somewhat hard-line approach arguing that although many companies would be surprised by the need for court protection, (as was the case with Nua Ltd), that that was simply tough luck. Rather the provision is based on the assumption that such "surprises" are not a widespread occurrence. If this is the theory it may require some re-thinking if statistics as to the speed of events in company failure become available to disprove this assumption.\(^ {37}\)

\begin{footnotesize}
\begin{itemize}
\item[31] Section 3A.
\item[32] These would not include the fact that a receiver stands appointed to the company: Section 3A(3).
\item[33] Note the specific terms of Section 3A(2): That period shall be a period that expires not later than the 10th day after the date of making of the order concerned or, if the 10th day after that date would fall on a Saturday, Sunday or public holiday, the first following day that is not a Saturday, Sunday or public holiday.
\item[34] Section 3A(1).
\item[35] See below, at 26
\item[37] It may be argued that such statistics are unlikely to be forthcoming from any source. It would probably be the case that the data necessary would be private and closely guarded by companies and entrepreneurs.
\end{itemize}
\end{footnotesize}
If the petition is made by creditors or members of the company, and an order is made for extra time to present the report, section 3A(4) compels the directors of the company to co-operate with its preparation. If the directors fail in this regard, they may become the subject of a mandatory court order directing them to so behave.\textsuperscript{38}

Importantly, any liabilities that are incurred during this discretionary period may not be the subject of a section 10(2) certificate. The company is therefore only protected during this time from existing creditors "knocking on the door".\textsuperscript{39}

A petition cannot be dismissed by the court without first hearing those creditors who have expressed a desire to the court to be heard.\textsuperscript{40} It seems from \textit{Re Tuskar Resources}\textsuperscript{41} that a creditor is perfectly entitled to oppose a petition on the grounds that they may see advantage in the winding up of the company as opposed to its continued existence. Here opposition to the petition was allegedly made in order to ensure that upon the winding up of the company certain lease arrangements with the Nigerian government would then most likely fall to the opponents of the petition. McCracken J could see:

\begin{quote}
[N]othing wrong or illegal in them taking the view that, in their own commercial interest, they would be better off exercising such lien as they may have in the winding up and leaving themselves with a chance to obtain the lease themselves, rather then facing the uncertainties of an examinership.
\end{quote}

Despite the right to be heard it is clear that the court has wide discretionary power as to the making of interim orders, and so an interim examiner can be appointed where the application is made \textit{ex parte}.\textsuperscript{42}

\section*{5. Particulars of the Independent Accountants Report}

Section 3B states that the report must comprise

(a) the names and permanent addresses of the officers of the company and, in so far as the independent accountant can establish, any person in accordance with whose directions or instructions the directors of the company are accustomed to act,

(b) the names of any other bodies corporate of which the directors of the company are also directors,

(c) a statement as to the affairs of the company, showing in so far as it is reasonably possible to do so, particulars of the company's assets and liabilities (including contingent and prospective liabilities) as at the latest practicable date, the names and addresses of its creditors, the securities held by them respectively and the dates when the securities were respectively given,

(d) whether in the opinion of the independent accountant any deficiency between the assets and liabilities of the company has been satisfactorily accounted for or, if not, whether there is evidence of a substantial disappearance of property that is not adequately accounted for,

\textsuperscript{38} Section 3A(5).

\textsuperscript{39} Section 3A(8).

\textsuperscript{40} Section 3B(1). It appears that despite the lack of such a right under the old regime, the attendance of creditors was usual at the petition stage. Review Group, p 8.

\textsuperscript{41} [2001] IEHC 27; High Court, Unreported, 26 February, 2001 (McCracken J).

\textsuperscript{42} Section 3C(7) Such interim orders can be, in particular, directed at restricting the powers of directors. \textit{See} Section 3C(8).
(e) his opinion as to whether the company, and the whole or any part of its undertaking, would have a reasonable prospect of survival as a going concern and a statement of the conditions which he considers are essential to ensure such survival, whether as regards the internal management and controls of the company or otherwise,

(f) his opinion as to whether the formulation, acceptance and confirmation of proposals for a compromise or scheme of arrangement would offer a reasonable prospect of the survival of the company, and the whole or any part of its undertaking, as a going concern,

(g) his opinion as to whether an attempt to continue the whole or any part of the undertaking would be likely to be more advantageous to the members as a whole and the creditors as a whole than a winding-up of the company,

(h) recommendations as to the course he thinks should be taken in relation to the company including, if warranted, draft proposals for a compromise or scheme of arrangement,

(i) his opinion as to whether the facts disclosed would warrant further inquiries with a view to proceedings under section 297 or 297A of the Principal Act,

(j) details of the extent of the funding required to enable the company to continue trading during the period of protection and the sources of that funding,

(k) his recommendations as to which liabilities incurred before the presentation of the petition should be paid,

(l) his opinion as to whether the work of the examiner would be assisted by a direction of the court in relation to the role or membership of any creditor's committee referred to in section 21, and

(m) such other matters as he thinks relevant.

In the Re Tuskar Resources\(^43\) case it was contended that in addition to the opinions referred to in parts (e) and (f) that the report must show that the company has a reasonable prospect of survival based on evidence, and that the report must set out the evidence as to how the necessary conditions for survival can be achieved. McCracken J noted the absence of such requirement in the legislation and went on to point out that the opinions delivered in the report are only preliminary to the far more detailed investigation of the examiner. Curiously though, the judge found the report here satisfactory as if "[gave] a full account of his views and the reasons for them." So while, evidence \textit{stricto senso} is not required, some degree of reasoning may be.\(^44\)

This report must be made available to the company and any interested party.\(^45\) However the court may direct that certain aspects of the report may be omitted upon supply to these parties.\(^46\) In particular, this can include a situation where the court feels that inclusion of certain materials would be likely to prejudice he survival of the company or any part of its undertaking as a going concern.\(^47\) Such omissions may not be made in relation to a copy furnished to the Central Bank.\(^48\)

The Petition may be dismissed if it appears to the court that in the preparation of either the report of the petition itself, either the independent accountant or the petitioner as acted otherwise than in good faith or failed to disclose material information.\(^49\) In Re Tuskar Resources\(^50\) one of the submissions made in a petition for

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\(^{43}\) [2001] IEHC 27; High Court, Unreported, 26 February, 2001 (McCracken J).

\(^{44}\) Note however that this holding may be effected by the fact that the Independent Examiner in this case had been appointed interim examiner, and had given a consequent report which contained a more detailed submission in relation to the prospects of the company.

\(^{45}\) Section 3C(1).

\(^{46}\) Section 3C(2).

\(^{47}\) Section 3C(3).

\(^{48}\) Section 3C(4).

\(^{49}\) Section 4A. This makes clear what was held in Re Wogans (Drogheda) Ltd. (No.2) Unreported, High Court, 7th May 1992. (Costello J).
an interim examiner under section 2(2) was that a reasonable prospect of survival as a going concern existed, subject to a number of conditions, which included the resolution of certain claims and difficulties with the companies partner company in Nigeria. In the grounding affidavit the company expressed the view that such resolutions were forthcoming. This was debated by the Nigerian company. The affidavit of the managing director of the Nigerian company, stated:

At the meeting, I made it entirely clear to Tuskar and the DPR that Cavendish has no interest in dealing with Tuskar and that there is no prospect of any agreement being reached with Tuskar or for any form of ongoing business relationship to be established between our respective companies.

Further, it was alleged that the availability of a certain storage facility, crucial to the companies operation of an oil well was disguised in the affidavit. Such facility was not in fact available. McCracken J held that although both the independent auditors report were "overly optimistic as to the future of the company, and in particular as to the future of its operations in Nigeria." He felt he could not hold that such enthusiasm was sufficient to show bad faith and was guided in this conclusion by the use of the discretionary term "may" in the legislation, indicating that even if bad faith was shown the petition may still be entertained. It must be queried why the Judge decided to go so far. If no bad faith was shown then that is enough. There was arguably no need to resort in this case, to the discretion of the court. It is submitted however, that where bad faith occurs, there must be an almost irresistible presumption in favour of dismissal.


The petitioner must deliver, within 3 days of the presentation of that petition to court, notice of the petition to the Registrar of Companies. Within 21 days of his appointment the examiner must publish notice of such in Iris Oifigiúil and within 3 days such must be published in at least two daily newspapers circulating in the locale of the companies place of business. McCracken J held that although both the independent auditors report were "overly optimistic as to the future of the company, and in particular as to the future of its operations in Nigeria." He felt he could not hold that such enthusiasm was sufficient to show bad faith and was guided in this conclusion by the use of the discretionary term "may" in the legislation, indicating that even if bad faith was shown the petition may still be entertained. It must be queried why the Judge decided to go so far. If no bad faith was shown then that is enough. There was arguably no need to resort in this case, to the discretion of the court. It is submitted however, that where bad faith occurs, there must be an almost irresistible presumption in favour of dismissal.

The examiner must deliver a copy of the appointment order to the Registrar within 3 days of his appointment.

When a company is under the protection of the court all official correspondence, including invoices, must contain the words 'in examination (under the Companies (Amendment) Act, 1990) after the companies name.'

7. The Effects of Examinership Upon Creditors

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50 [2001] IEHC 27; High Court, Unreported, 26 February, 2001 (McCracken J).
51 Section 12(2), Sub-sections (a) and (b).
52 Section 12(5). Failure to comply with the requirements of section 12 results in an offence carrying a summary fine of up to £1000 and an indictable fine of up to £10,000.
From the date of the presentation of the petition the company is deemed to be under court protection. The period is to last 70 days which may be extended by a further 30 days. This means no winding up proceedings can be initiated, no receiver may be appointed and no remedy can be sought against the property of the company without the consent of the examiner. No attempt at re-possession may be made. No action may be take to realise security granted under a mortgage, charge, lien or other charge or encumbrance.

Similarly, where any other person is liable to pay the debts of the company no remedies for payment or proceedings in respect of such debts can be brought against that person. Basically, the debts of the company are frozen. Indeed, the legislation goes further. Under section 5(3) no other proceedings in relation to the company can be commenced without leave of the court. Similarly, the examiner may apply to the court for a stay on proceedings already in motion.

The legislation however, works both ways. A company cannot make payment to satisfy a liability incurred before the date of the presentation unless the independent accountants report contained a recommendation to discharge such debt. This was to address the concern that the management of a company may selectively chose which debts to pay. Although the legislation made it impossible for creditors to insist on payment, nothing prohibited the payment of debts of the companies own volition. Both the Review Group and a leading commentator had expressed dissatisfaction with this position. An exception is made where on the application to court of the examiner or any interested party, such a discharge may be authorised on the grounds that failure to do so would considerably reduce the prospects of the company or its undertaking.

8. The Position of the Receiver and Provisional Liquidator

Where a receiver has been appointed to the company and a petition is then presented the court has discretion to make such order as it sees fit. Section 6(1) instances some orders that may be made:

(a) that the receiver shall cease to act as such from a date specified by the court,
(b) that the receiver shall, from a date specified by the court, act as such only in respect of certain asset specified by the court,
(c) directing the receiver to deliver all books, papers and other records, which relate to the property or undertaking of the company (or any part thereof) and are in his possession or control, to the examiner within a period to be specified by the court,
(d) directing the receiver to give the examiner full particulars of all his dealings with the property or undertaking of the company.

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53 Section 5(1).
54 Section 5(1).
55 Section 18(3).
56 Section 5(2).
57 Section 5(2).
58 Section 5A(1).
60 Section 5A(2).
It is arguable that the tenor or tone of the sample orders is distinctly weighted in favour of the examiner being given a sort of priority over the role of the receiver. It is submitted that despite the apparently wide jurisdiction conferred by section 6(1) to make orders beyond the examples provided, a court may find itself limited in its power by the overall atmosphere of the section.

The argument that there is some limits on this jurisdiction is strengthened on a consideration of the provisions relating to the Provisional Liquidator. Again, the jurisdiction to make orders where a provision liquidator stands appointed to the company is at the court's discretion. Yet in section 6(2)(a) one such order may related to "the provisional liquidator being appointed as examiner of the company". A similar example order is striking in its absence from section 6(1) perhaps indicating that the jurisdiction is indeed limited in that section. However, this may simply refer to the restrictions inherent in the office of receiver that would possibly make it inappropriate in many cases to appoint that person as examiner.

In neither case can the receiver or provisional liquidator be ordered to cease to act, or in the case of the receiver, have his role restricted to certain assets unless the court is satisfied that a reasonable prospect of survival exists.

The 1999 Act introduced a new section 6A. Under its terms the court can make an order providing that section 98 of the Companies Act 1963 shall not apply as regards payments made by the receiver out of assets coming into his hands if either an examiner has been appointed, or in the opinion of the court such an appointment may yet be made, and that such order would facilitate the survival of the company or part of its undertaking. However, such an order cannot be made without first affording creditors of debts relating to prioritised preferential payments an opportunity to be heard. It will be interesting to see how the court interprets the phrase "yet to be made". Does it refer to the interim period after a petition or may preferential creditors find their interests overridden by a forward looking court influenced by evidence that indicates an intention to make a section 2(2) petition?

9. The Office of Examiner

9.1. Powers of the Examiner

The examiner enjoys at least the same rights and powers as an auditor as regards the supply of information and general co-operation and may apply to court to resolve any question in relation to his office. The examiner also has power to convene, set the agenda for, and preside at meetings of the board of directors and general meetings of the company and to propose motions or resolutions and to give reports to such creditors.

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61 It should be noted that under Section 3B(1) creditors, in order to be afforded an opportunity to be heard must expressed a desire to be so heard. There is apparently no need for creditors of preferential payments to express such a desire under section 6A. Rather they must simply be afforded an opportunity to be heard.

62 Section 7(1).

63 Section 7(6). Conversely, under Section 13(7) the company can apply to court to determine any question arising out of the performance by the examiner of his functions.
meetings. Logically then, he is entitled to reasonable notice of such meetings and is entitled to attend such.

An examiner has discretion, unless directed by the court to appoint a committee of creditors, consisting of not more than 5 members and including the holders of the three largest unsecured claims (who are willing to serve) to assist him in his functions. It is notable that no amendment was made in respect of a potential right of a secured creditor to serve on such a committee. The Review Group seemed to feel that given the general improvement of the position of secured creditors under the 1999 amendments, that such a development was unnecessary to protect their interests. The committee must be furnished with copies of any proposed compromise and they may express an opinion thereon, on their behalf or on behalf of classes of creditors.

The examiner must be sure to provide in all contracts that he enters on behalf of the company that he is not to be personally liable. However, his general rights to indemnity are not effected.

Where an examiner becomes aware of any actual or proposed act, omission, course of conduct, decision or contract, by or on behalf of the company, which, in his opinion, is or is likely to be to the detriment of that company, or any interested party, he shall, subject to the rights of parties acquiring an interest in good faith and for value in such income, assets or liabilities, have full power to take whatever steps are necessary to halt, prevent or rectify the effects of such act, omission, course of conduct, decision or contract. It has been held in Re Holidair Limited that this provision includes debenture contracts. In that case it was specifically used to allow the examiner to override the terms of such a contract that required the company to apply to the debenture holders for consent to certain borrowings.

If the company enters into, or has entered into before coming under court protection, an agreement a provision of which entails borrowing money, receiving credit or creating a mortgage or like encumbrance the examiner may serve notice on the other parties to the agreement indicating his opinion that enforcement would prejudice the survival of the company. Such provision is consequently not binding on the company during court protection.

Apart from this situation an examiner does not have general right of repudiation on behalf of the company in respect of contracts entered into prior the period of protection. This is an important change from the previous regime where this limitation was not present and the examiner could repudiate contracts entered into prior to his appointment where he believed them to be detrimental to the companies

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64 Section 7(2).
65 Section 7(3) Reasonable notice is deemed to include a description of the business to be carried out.
66 Section 21(1).
67 Section 21(3).
68 Section 13(6).
69 Or of its officers, employees, members or creditors or by any other person in relation to the income, assets or liabilities of that company; Section 7(5).
70 Section 7(5). This paragraph is the actual text of the section.
71 [1994] 1 IR 416 per Finlay CJ.
72 Section 7(5C).
73 Section 7(5B).
interests. This situation met with the stern disapproval of the Review Group. It is probable that the new regime will afford more certainty to those contracting with companies, especially when one considers that difficulties can indeed "come out of the blue".

An examiner may apply to court to have the powers of the directors made exercisable only by him. The court will make such an order if it thinks it just and equitable having regard to the matters contained in section 9(2):

(a) that the affairs of the company are being conducted, or are likely to be conducted, in a manner which is calculated or likely to prejudice the interests of the company or of its employees or of its creditors as a whole, or

(b) that it is expedient, for the purpose of preserving the assets of the company or of safeguarding the interests of the company or of its employees or of its creditors as a whole, that the carrying on of the business of the company by, or the exercise of the powers of, its directors or management should be curtailed or regulated in any particular respect, or

(c) that the company, or its directors, have resolved that such an order should be sought, or

(d) any other matter in relation to the company the court thinks relevant.

Such an order may provide that an examiner have the powers that he would have if he were a court appointed liquidator. There is an apparent inconsistency between this provision and the terms of section 9(1) which provides for the vesting of all or any of the functions or powers which are vested in or exercisable by the directors in the examiner, given that the powers of a liquidator may be more extensive. In Re Holidair Limited Finlay CJ resolved this inconsistency by holding that correct construction of the Act is to interpret section 9(4) as giving the court an additional authority to vest in the examiner powers over and above those exercisable by the directors.

The examiner may certify liabilities to be incurred during the period of court protection. These are liabilities that in the opinion of the examiner are required to avoid prejudice to the survival of the company as a going concern. These liabilities are then treated as expenses of the examiner and fall to be considered under section 29, which is considered below. Under the old statutory regime this would mean that such liabilities would have priority over all creditors, secured and unsecured. However, as will be seen, in line with the recommendations of the Review Group, the 1999 amendments have restricted this priority to unsecured creditors only. These provisions were considered in Re Don Bluth Entertainment where Murphy J clarified that this section only refers to liabilities incurred during the protection period which may be certified. So, in this case various legal expenses incurred in the

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75 Review Group, op. cit. at 12-13.
76 Section 9(4).
77 The legislation does not specifically require such to be in writing. However in Re Don Bluth Entertainment [1994] 3 IR 141 Murphy J held such as an "obvious and inescapable administrative necessity". For an authoritative approval of this position see Keane, Company Law, (3rd Ed., Butterworths, 2000), at 545.
78 Section 10.
79 See below at 15.
80 Review Group, op. cit. at 9.
81 [1994] 3 IR 141.
presentation of the petition could not be certified by the examiner. Murphy J also pointed out that when issuing certificates "great care and professional expertise" must be taken by the examiner in reaching his decision to so do so.

As we have seen, court protection may be extended to cover the 10 day 'emergency' period during which the independent accountants report is prepared, when exceptional circumstances rendered its presentation with the petition unavailable. It would be more than slightly invidious and arbitrary to allow such the costs of such to be certified, as incurred under court protection, yet not those incurred in other pre-petition preparation. The Review Group was unequivocal in its recommendation that no certificate could be issued by an interim examiner in relation to expenses incurred during the ten day period and section 3A(8), as inserted by the 1999 amendments, adopts this approach.

The examiner may apply to the court to dispose of property secured by a floating charge.\(^{82}\) The court must be satisfied that such disposal would be likely to facilitate the survival of the whole or any part of the company as a going concern. The examiner may also be authorised to deal with the property as if it were not subject to such security.\(^{83}\) However, the security holder will retain his rights of priority in respect of any property directly or indirectly representing the property disposed off.\(^{84}\) Likewise any other property subject to a security other than an original floating charge or goods in possession of the company under a hire purchase agreement may be disposed of if the court is similarly satisfied.\(^{85}\) The proceeds of such disposal must be used in order to discharge the sums secured by the security or payable under the hire purchase agreement.\(^{86}\) In either case, a copy of the order must be delivered by the examiner to the Registrar of Companies.\(^{87}\)

Section 8 allows an examiner to compel all officers and agents of a company or its related companies to produce all books or documents relating to the company in their custody or power. This refers to past as well as present officers and agents and includes also bankers and solicitors of the company and auditors.\(^{88}\) Such persons can be compelled to attend before the examiner when so required and must in general give all reasonable assistance. The examiner may question such persons on oath by oral or written evidence. He may cause oral evidence to be written down and require the signature of the person on such writing.\(^{89}\)

Further, if an examiner maintains a reasonable belief that a director or a company or related company has any bank account into which there has been paid money resulting from a transaction not disclosed in the companies accounts as would be otherwise required by law or resulting from misconduct as a director the examiner may require all documents so relating that are in the possession of that director.\(^{90}\)

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\(^{82}\) The charge must have been a floating charge from the outset.
\(^{83}\) Section 11(1).
\(^{84}\) Section 11(3).
\(^{85}\) Section 11(2).
\(^{86}\) Section 11(4).
\(^{87}\) Section 11(6). If the examiner fails to comply with this requirement he is liable to a fine not exceeding £1000. See Section 11(7).
\(^{88}\) Section 8(6).
\(^{89}\) Section 8(4).
\(^{90}\) Section 8(3).
If there is a refusal to co-operate in any of the above matters, the examiner may certify such refusal to the court. The court may hear the matter fully and take such action as it sees fit. The constitutional aspects of these provisions are considered later.

9.2. Repudiation of Certain Contracts

According to section 20(1):

Where proposals for a compromise or scheme of arrangement are to be formulated in relation to a company, the company may, subject to the approval of the court, affirm or repudiate any contract under which some element of performance other than payment remains to be rendered both by the company and the other contracting party or parties.

It should be queried what is meant by 'to be formulated'. What point in time does this refer to exactly? The question gets its heat from the critical significance of this section as regards the rights of those who lie in reasonable expectation of performance. Could this power be exercised as soon as the examiner takes office? Or must he first reach some conclusion as to whether a scheme can indeed be formulated? Can the power be exercised during the interim period? As yet, the courts have not had to consider these difficult questions.

Where such action is approved of the court it has power to make orders as it sees fit to give effect to the order. The potentially destructive power of this provision is somewhat offset by section 20(2). Under that provision a person who suffers loss because of such repudiation stands as an unsecured creditor for amount lost. Such loss can be determined by a court hearing, at which the examiner is entitled to be heard, and the amount due will be owed in the form of a judgement debt.

9.3. Costs and Remuneration of Examiners

The court can order payment (from the revenue of the business or the realisation of the assets) for remuneration and costs properly incurred by the examiner. The remuneration, costs and expenses are to be paid before any other claim under a compromise. Those liabilities incurred under section 10(1) are treated as expenses properly incurred and so enjoy priority subject only to claims secured by mortgage.

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91 Section 8(5). See Section 8(5A): Without prejudice to the generality of subsection (5), the court may, after a hearing under that subsection, make a direction—
(a) to the person concerned to attend or re-attend before the examiner or produce particular books or documents or answer particular questions put to him by the examiner, or
(b) that the person concerned need not produce a particular book or document or answer a particular question put to him by the examiner.

92 See below at 22
93 Section 20(5).
94 Section 20(4).
95 Section 20(3).
96 Section 29(1).
97 Section 29(3).
charge, or other encumbrance of a fixed nature\textsuperscript{98} under a scheme or in any receivership or winding-up.\textsuperscript{99}

It is clear then that priority is afforded over floating charges.\textsuperscript{100} However, a floating charge crystallises into a fixed charge upon appointment of a receiver. We have already seen that a receiver can stand prior to the appointment of an examiner - so what is the position of such a security? Is it still a fixed charge that will enjoy priority under section 29(3A)? In \textit{Re Holidair Limited}\textsuperscript{101} the Supreme Court \textit{per} Blayney J held that such a charge decrystallised upon the appointment of an examiner. It is submitted that this is a logical conclusion when one bears in mind section 5(2)(d) as it then was

\begin{quote}
Where any claim against the company is secured by a charge on the whole or any part of the property, effects, or income of the company, no action may be taken to realise the whole or any part of such security, except with the consent of the examiner.
\end{quote}

It is also submitted that nothing in the amendment of this section by the 1999 Act alters this position.\textsuperscript{102}

The High Court decision in \textit{Re Springline Ltd}\textsuperscript{103} illustrated a potentially lethal obstacle to the efficacy of the office of examiner. There Murphy J held that:

\begin{quote}
[T]here is no way, without doing violence to the subsection, whereby subsection (3) can be construed in such a manner as to allow for the payment to Mr O’Ferrall of his remuneration ahead of that of the Liquidator.
\end{quote}

So in that case the examiner found himself in a position whereby he could not receive any remuneration other than that he could by recover in the course of winding up. However, the Supreme Court reversed the decision on this point.\textsuperscript{104} And in what must have resulted in a sigh of relief for examiners the point has been put beyond question by section 29(3A) as inserted by the 1999 Act.

The costs of the examiner can include the wages of people employed by the examiner to assist him, but he must make as much use as is reasonably possible of the services and staff of the company.\textsuperscript{105} In fact, this end proviso is a consideration to be born in mind when considering any claim for remuneration and expenses.\textsuperscript{106}

\begin{itemize}
\item \textsuperscript{98}Therefore, they enjoy priority over floating charges.
\item \textsuperscript{99}Section 29(3A).
\item \textsuperscript{100}Distinguishing a floating charge from a fixed charge can itself be a tricky business as demonstrated in \textit{Re Holidair Limited} [1994] 1 IR 416. As regards the floating charge/fixed charge problem, this decision reflects the recent decision in \textit{Agnew v IRC} [2001] 2 BCLC 188.
\item \textsuperscript{101} [1994] 1 IR 416.
\item \textsuperscript{102}The new section 5(2)(d) states: where any claim against the company is secured by a mortgage, charge, lien or other encumbrance or a pledge of, on or affecting the whole or any part of the property, effects or income of the company, no action may be taken to realise the whole or any part of that security, except with the consent of the examiner.
\item \textsuperscript{104} [1997] 1 IR 467.
\item \textsuperscript{105}Section 29(4).
\item \textsuperscript{106}Section 29(5).
\end{itemize}
9.4. Examiners Report

As soon as possible after his appointment the examiner must formulate proposals for a compromise or scheme of arrangement. Within 35 days, or such period as the court allows under section 19, he must report on these proposals to the court. The court may conclude upon application by the examiner that he would be unable to report within the 70 day period and extend the period of protection by not more than 30 days. Where the report has been submitted the court can extend the protection period by such time as it sees fit to allow a decision to be made under section 24.

The report must include

(a) the proposals placed before the required meetings,
(b) any modification of those proposals adopted at any of those meetings,
(c) the outcome of each of the required meetings,
(d) the recommendation of the committee of creditors, if any,
(e) a statement of the assets and liabilities (including contingent and prospective liabilities) of the company as at the date of his report,
(f) a list of the creditors of the company, the amount owing to each such creditor, the nature and value of any security held by any such creditor, and the priority status of any such creditor under section 285 of the Principal Act or any other statutory provision or rule of law,
(g) a list of the officers of the company,
(h) his recommendations,
(i) such other matters as the examiner deems appropriate or the court directs.

This report must be submitted to the company on the same day as submitted to the court and to any person mentioned in it and those interested parties who have requested it in writing. The court may direct certain omissions to be made in relation to copies circulated interested parties.

If he cannot enter into such a compromise or agreement the examiner can apply to court for directions. At this point the order may make an order for the winding up of the company.

10. The Scheme of Arrangement

107 Section 18(1).
108 This has been reduced from 42 days.
109 Section 18(3).
110 Section 19.
111 Section 18(5).
112 Section 18(7). The basis for omitting information is contained in Section 18(8) as is the same as is described below at footnote 153. In the case of certain companies, i.e. those mentioned in Section 3(2)(a) a copy must be submitted as soon as it is prepared to the Minister. A copy must be sent to Central Bank in respect of companies mentioned in section 3(2)(b) and 3(2)(c). It is not clear, in the context of this section whether omissions can be ordered in these copies to be sent to the Minister and Central Bank. It is submitted that *expressio unius et exclusio alterius* applies and that such omissions cannot be ordered.
113 Section 18(9).
The proposals must specify each class\textsuperscript{114} of members and creditors of the company, and any class thereof whose interests will not be impaired by the proposals, and any class whose interests will be impaired.\textsuperscript{115}

The interest of a party is said to be impaired if

\begin{itemize}
\item[(a)] the nominal value of his shareholding in the company is reduced,
\item[(b)] where he is entitled to a fixed dividend in respect of his shareholding in the company, the amount of that dividend is reduced,
\item[(c)] he is deprived of all or any part of the rights accruing to him by virtue of his shareholding in the company,
\item[(d)] his percentage interest in the total issued share capital of the company is reduced, or
\item[(e)] he is deprived of his shareholding in the company.\textsuperscript{116}
\end{itemize}

The proposals must ensure equal treatment for each claim of a particular class unless one holder has agreed to less favourable treatment.\textsuperscript{117} If he thinks it either necessary or desirable to facilitate the survival of the company, the examiner may specify changes in relation to the management and direction of company\textsuperscript{118}, or changes to the articles or memorandum.\textsuperscript{119} It must include any such matters he deems appropriate and must provide for the implementation of the proposals.\textsuperscript{120} Attached to each copy to be submitted to the creditors and members will be a statement of the companies assets and liabilities\textsuperscript{121} and a description of the financial outcome of a winding up for each class of members and creditors.

The notice of the meeting of creditors etc. must also include an explanation of the scheme of arrangement and state the interests of the directors, and the effect of the scheme of such insofar as they differ from the effects on the like interest of other persons.\textsuperscript{122}

Modified proposals may be put to the meeting, but may only be accepted with the consent of the examiner.\textsuperscript{123} Indeed, it is clear from the decision in \textit{Re Goodman International}\textsuperscript{124} that where intended modifications are of a fundamental nature, they must be put before a meeting of the creditors and members. The proposals are deemed to have been accepted by a meeting of creditors or class of creditors when a majority of the value of the claims represented at that meeting vote in favour of it.\textsuperscript{125} This is in contrast to the old position whereby all that was required was that one class

\textsuperscript{114} There is no definition of "class" contained in the legislation. The Review Group saw no merit in including such a definition.
\textsuperscript{115} Section 22(1).
\textsuperscript{116} Section 22(6).
\textsuperscript{117} Section 22(1)(d)
\textsuperscript{118} Section 22(1)(f)
\textsuperscript{119} Section 22(1)(g)
\textsuperscript{120} Section 22(1)(e)
\textsuperscript{121} Section 22(2).
\textsuperscript{122} Section 23(8).
\textsuperscript{123} Section 23(2).
\textsuperscript{124} Unreported, High Court, 28th January 1991. (Hamilton P). In that case the learned President found it unnecessary to adjourn the matter to enable further consideration by creditors given that the modifications were not of a sufficiently fundamental nature.
\textsuperscript{125} Section 23(4).
of creditors accept the proposals which the Review Group felt did not give enough recognition to the general interests of creditors. An abstention or non-vote is not a vote against the proposals. Specific provision is made for the acceptance by State authorities of compromises amounting to less than the amount owed.

The court must hold a hearing to consider the report of the examiner and as it thinks proper to confirm it, confirm it subject to modifications, or refuse to confirm it. At such a hearing the company, the examiner, any creditor or member whose interest is potentially impaired, and in certain cases, the Central Bank, are entitled to be heard. Under section 25(1) "impaired" creditors or members can object to court confirmation if there was some material irregularity at the meeting at which the creditors considered the proposals, or that acceptance was obtained by improper means. Objections may also allege that the proposals were put forward for an improper purpose or that they unfairly prejudice the interests of the objector. But if one voted to accept the proposals one cannot allege an improper purpose that one became aware of afterwards nor can one allege that acceptance was obtained by improper means. The court can uphold such objection and make such order as it sees fit including an order for reconvention of the meeting.

The court is not permitted to confirm proposals unless at least one class of impaired interest creditors has accepted the proposals, or if the primary purpose of the proposals is to avoid tax or unless the court is satisfied that the proposals are fair and equitable in relation to those who did not accept and that they are not unfairly prejudicial to the interests of any interested party. Neither can the court confirm the proposals if the effect would be to impair the interests of the creditors of the company in such a manner as to favour the interests of creditors of a company to which it is related, and to which that examiner has been appointed.

Acceptance by the court means that the proposals are binding on all members and the company, and all creditors, and any person liable for the debts of the company and the court may make orders for its implementation as it sees fit. Copies of such orders must be given to the Registrar by either the examiner or a person who the court directs.

126 Review Group, op. cit. at 11.
127 Section 23(4A).
128 Section 23(5). State Authority is defined to mean, the State, a Minister, a Local Authority, or the Revenue Commissioners.
129 Section 24(1).
130 Section 24(3).
131 In the case that the company referred to in paragraph (b) or (c) of section 3(2).
132 Section 24(2).
133 Section 25(1).
134 Section 25(2) It should be queried whether these provisions exclude the operation of the doctrine of duress.
135 Section 25(3).
136 Section 24(4).
137 Section 24(4A).
138 Section 24(5).
139 Section 24(6).
140 Section 24(8).
141 Section 24(8).
142 Section 24(10).
court within 180 days after confirmation for a revocation on the grounds that the confirmation was procured by fraud.\textsuperscript{143}

Where the court refuses the proposal, or where the examiner finds it impossible to propose a scheme or compromise the court can order the winding up of the company.\textsuperscript{144}

The decision of Costello J in \textit{Re Wogans (Drogheda) Ltd. (No.2)}\textsuperscript{145} provides an instructive insight into some of the reasons for which the court may refuse to confirm the proposals of the examiner. Here the proposals had been accepted by several classes of creditors but was objected to by \textit{inter alia} the Revenue Commissioners on the basis that a large amount of money owed to them would be lost. Generally speaking, the proposals offered a 10\% compromise. Costello J, in a decision quite prophetic of the good faith clause inserted by the 1999 Act, held that the one of the directors knew the extent of the sums owed to the Revenue, however these debts were deliberately misstated in the balance sheet presented on the section 2(2) petition. Thus the petition constituted an abuse of process as in bad faith. Secondly the entire proposals were contingent upon the granting of tax clearance certificates which were refused, not unreasonably, by the Revenue. Thirdly, Costello J noticed several practical problems in the scheme. It was also contingent upon the continued support of a certain investor, who was entitled to withdraw at any time. Hence, it could not be said with certainty that the scheme could in fact take effect.

Specific provision is made for the liability of persons under a guarantee or otherwise in respect of a debt of a protected company. Such liability will not be affected despite the fact that such debt has been the subject of a compromise that has taken effect.\textsuperscript{146} If a creditor seeks to enforce the obligation in respect of the debt serve notice 14 days before a section 23 meeting of creditors, or if less than 14 days notice has been given of the meeting, not more than 48 hours after received notice of such a meeting. Such a notice must contain an offer to transfer the rights relating to the debt that he may have to vote in respect of the proposals.\textsuperscript{147} Acceptance becomes operative without need for assignment or execution upon furnishing a copy of the offer to the examiner and informing him of his acceptance.\textsuperscript{148} If such an offer is not made, then the creditor cannot enforce the liability\textsuperscript{149} unless the scheme or arrangement does not take effect and he has obtained the leave of the court to enforce it.\textsuperscript{150}

\textsuperscript{143} Section 27(1). As soon as practical after such a revocation copies must be delivered to in accordance with section 27(2):
   (a) the registrar of companies,
   (b) in case the company to which the order relates is a company referred to in paragraph (a) of section 3 (2), the Minister, and
   (c) in case the company to which the order relates is a company referred to in paragraph (b) or (c) of section 3(2), the Central Bank, by such person as the court may direct.

\textsuperscript{144} Section 24(11).


\textsuperscript{146} Section 25A(1)(a) This will not apply where the person giving the guarantee, the 'third person' is a company to which an examiner has been appointed.

\textsuperscript{147} Section 25A(1)(c)(i)(I), Section 25A(1)(c)(i)(II).

\textsuperscript{148} Section 25A(1)(c)(ii).

\textsuperscript{149} Section 25A(1)(c)(iii).

\textsuperscript{150} Section 25A(1)(c)(iv).
It has been argued that this provision is quite onerous on the creditor.\textsuperscript{151} The 1990 Act allows the holding of creditors meetings with as little as 3 days notice, and in this case the 48 hour provision would operate. The hardships on the creditor are obvious.

It was felt by the Review Group that it would be unreasonable to expect a lessor of an interest to accept a reduced level of payments that could theoretically be enforced upon him under a compromise. Therefore, according to provisions inserted by the 1999 Act proposals are not permitted to contain a reduction in any rent or like payments or the extinguishments of the rights of a lessor to such payments or restrictions on the right of the lessor to exercise possession upon default.\textsuperscript{152} Neither will a proposal be considered not to be unfairly prejudicial to the interests of an interested party under section 24(4)(c)(ii) if proposals contain a provision relating to a lease or hiring agreement in relation to property where the value of such property is substantial unless the lessor consents to such inclusion.\textsuperscript{153} Obviously there will be heated dispute as to what constitutes substantial value.

\section*{11. Hearing on Irregularities}

If on hearing the report of the Independent Accountant, or otherwise, the court considers that there is evidence of a substantial disappearance of property that is not properly accounted for, or other serious irregularities have occurred in relation to the affairs of the company the court shall hold a hearing to consider that evidence.\textsuperscript{154} The court may direct the examiner to prepare a report setting out such matters as he thinks will assist. This report must be submitted to the company on the same day as submitted to the court and to any person mentioned in it and those interested parties who have requested it in writing.\textsuperscript{155} The court may direct certain omissions to be made in relation to copies circulated to persons mentioned in report or interested parties.\textsuperscript{156} The following are entitled to appear at such a hearing:

(a) the examiner,  
(b) if the court decided to hold a hearing under this section because of matters contained in the report of the independent accountant, the independent accountant,  
(c) the company concerned,  
(d) any interested party,  
(e) any person who is referred to in the report of the independent accountant or the report prepared under subsection (2),  
(f) if the company concerned is a company referred to in paragraph (a) of section 3 (2), the Minister.

\textsuperscript{152} Section 25B(1)(a) and Section 25B(1)(b).  
\textsuperscript{153} Section 25B(2)(a).  
\textsuperscript{154} Section 13A(1).  
\textsuperscript{155} Section 13A(4) Query whether the written request applies to those mentioned in it.  
\textsuperscript{156} Section 13A(5). The basis for omitting information is contained in Section 13A(6) as is the same as Section 3C(2). In the case of certain companies, i.e. those mentioned in Section 3(2)(a) a copy must be submitted as soon as it is prepared to the Minister. A copy must be sent to Central Bank in respect of companies mentioned in section 3(2)(b) and 3(2)(c). No omissions may be made in these cases. See Section 13A(7). The court may direct that a copy be sent to the Registrar of Companies by virtue of Section 13A(10).
(g) if the company concerned is a company referred to in paragraph (b) or (c) of section 3(2), the Central Bank.\textsuperscript{157}

On conclusion of such a hearing the court may make such order as it sees fit and this includes and order for trial of any issue relating to the matter concerned.\textsuperscript{158}

### 12. Hearing In Camera

The whole or part of proceedings under the legislation can take place otherwise than in public if, the court considers that, in the interests of justice, the interests of the company or its creditors as whole so require.\textsuperscript{159}

### 13. Returns of Property

Where the examiner demonstrates to the court that a disposal or property was to effect a fraud on the company, its creditors or its members, the court may, if it deems it just and equitable order a return of the property or a sum of money to the examiner.\textsuperscript{160} The court must have regard to the rights of bona fide purchasers for value.\textsuperscript{161}

### 14. Criminal and Civil Liability

Personal liability may be imposed by the court, upon application made by the examiner, a creditor or a contributory of the company, if it concludes that a person while an officer of the company knowingly was a party to reckless trading or was knowingly a party to fraud.\textsuperscript{162} For the purposes of the legislation an officer is deemed to have been knowingly a party to reckless trading if:

\begin{itemize}
  \item [(a)] he was a party to the carrying on of such business and, having regard to the general knowledge, skill and experience that may reasonably be expected of a person in his position, he ought to have known that his actions or those of the company would cause loss to the creditors of the company, or any of them, or
  \item [(b)] he was a party to the contracting of a debt by the company and did not honestly believe on reasonable grounds that the company would be able to pay the debt when it fell due for payment as well as all its other debts (taking into account the contingent and prospective liabilities).\textsuperscript{163}
\end{itemize}

As regards part (b) the court should have regard to whether the creditor in question was aware of the companies financial state of affairs and nevertheless agreed to the

\textsuperscript{157} Section 13A(8).
\textsuperscript{158} Section 13A(9).
\textsuperscript{159} Section 31.
\textsuperscript{160} Section 35(1).
\textsuperscript{161} Section 35(3).
\textsuperscript{162} Section 33(1). Reckless trading is primarily situated in section 297A of the Companies Act 1963. It language is similar to that quoted above. The jurisprudence surrounding the term “reckless” and “knowingly” is well treated in Ellis, Modern Irish Company Law, (2001, Jordans), at 347 and in Forde, Company Law (3rd Edn, Round Hall Sweet & Maxwell, 1999) at 729 et seq.
\textsuperscript{163} Section 33(2).
incurring of the debt. \footnote{Section 33(4).} If the claim is under part (a) and the court finds the person has acted honestly and reasonably the court may relieve him in whole or in part from personal liability. \footnote{Section 33(7)(a).} Also, part (a) is not to apply when a company is under the protection of the court. \footnote{Section 33(9).} It should be noted that the requirement of honesty and responsibility is the same as required as a requisite to escape a \textit{restriction order} being made under section 150 of the Companies Act 1963. A common thread of the decisions seems to be that undue leniency towards the keeping of records or in some cases, trading while insolvent will prohibit a finding of responsibility. \footnote{In this respect see \textit{Business Communications v Baxter}, Unreported, High Court, 21 July, 1995; \textit{Re Costello Doors}, Unreported, High Court, 21 July 1995 (Murphy J holds compliance with book-keeping rules would go a long way to establishing responsibility); \textit{Re Outdoor Advertising}, Unreported, High Court, 27 January, 1997 (Dishonest payments to non-creditors); \textit{La Mouselle Clothing Ltd v Soulahi} \footnote{[1998] 2 ILRM 345} (Disposed of books, and traded while insolvent); \textit{Re CB Readymix Ltd.}, Unreported, High Court, 20 July 2001 (Liquidator dumping books of company irresponsible); \textit{Re Newcastle Timber Ltd.}, Unreported, High Court, 16 October, 2001. (Insolvent trading and preferring trade creditors labelled as irresponsible.)} However, in \textit{La Moselle Clothing v Soulahi} \footnote{[1998] 2 ILRM 345} Shanley J offered a wider understanding of responsibility as not only covering the above mentioned areas, but requiring the court to enquire into general compliance with the Companies Acts, and referred to the general standard of “commercial probity” and proper standards, thus echoing \textit{Re Lo-Line Electric Motors} \footnote{[1988] BCLC 83} and \textit{Re Bath Glass} \footnote{[1988] BCLC 568} respectively.

Criminal liability may be imposed if a person is knowingly a party to fraud. On summary conviction such a person may face a fine of up to £1000 and up to 12 months in prison. If conviction proceeds by indictment, the maximum custodial sentence is 7 years, and the fine may be anything up to £50,000. \footnote{Section 35.}
15. Examinership and The Constitution

15.1. Privilege Against Self Incrimination

The Review Group reserved its position on whether any constitutional issues arise out of what would now be sections 8(5) and 8(5A). It did however note the similarity of the sections as they then were with section 10(5) and 10(6) of the companies act 1990 which had been the successful target of constitutional challenge.

In Desmond v Glackin O'Hanlon J, and on appeal, the Supreme Court, held that the part of section 10(5) of the 1990 Act, that stated "the court may ...punish the offender in like manner as if he had been guilty of contempt of court" was unconstitutional on the basis of In re Haughey. Both the High and Supreme Court understood that case to mean, inter alia that Article 38.2 operated to provide protection against the imposition of penalties for those offences that can only properly be described as serious otherwise than in the case of a trial by jury. Hence, the summary trial upon certification by the inspector, for an offence that could not be seen as minor, was unconstitutional.

It must be noted that the new section 8(5A) does not provide for the punishment of the offender in like manner as if he had been guilty of contempt of court. Rather it states that upon certification of refusal by the examiner to the court, the court may make any order or direction it thinks fit. Therefore, the inexorable conclusion that led from the section 3(4) of the impugned legislation in Haughey, and section 10(5) of the 1990 Act, of a criminal sanction in the form of a non-minor offence is missing. So, in accordance with the presumption of constitutionality laid down in the East Donegal Co-Operative Case, there is clear limit to the orders that the court can make. Orders made must avoid the spectre of summary conviction for a serious offence. It may be possible therefore to order a jury trial of the person.

The powers of an inspector in equivalent English legislation to section 10 was challenged before the European Court of Human Rights in Saunders v UK. It was alleged that a breach of Article 6(1), the "fair trial" provision, had occurred where notes made by an inspector of testimony given during an misconduct investigation were handed over to the prosecution service and used in the criminal trial of Saunders. Citing Fayed v UK the court reasoned that the functions of an inspector were investigative as opposed to adjudicative in nature and fulfilled a vital public interest role in the regulation of commerce. Therefore, rigorous application of Article 6(1) at such a stage would be inappropriate.

172 [1993] IR 67 for both High Court and Supreme Court decisions.
174 In fact O'Hanlon J rested his conclusion on a "floating choice" (excuse the pun) over three possible rations deducible from Haughey.
177 Sections 434 and 436 of the Companies Act 1985.
179 (1994) 18 EHRR 393
However, the court went on to hold that the use of compulsorily obtained evidence obtained by a non-judicial investigation at the trial of the person concerned constituted a breach of the convention.

So, while the public interest may operate to allow the inspector to compel attendance and answers, such compelled testimony cannot be used at a criminal trial. This then leaves potential for punishment only at the pre-criminal stage where the offence tried would not be the substantive one, such as fraud, but rather the procedural offence of non-compliance.

This position has been considered by the Supreme Court in the *National Irish Bank*\(^{180}\) case. Barrington J offered a considered synthesis of two conflicting principles - those of the requirement of volition in confessions and of the public interest. *Saunders* was followed insofar as that no question of constitutionality arises in relation to the investigation stage of an inspection. An inspector is entitled to compel answers to questions. However, given the requirement that a confession must be voluntary, it is up to the trial judge in each case, in deciding on the admissibility of the statements to inspectors, to determine whether in fact such are the product of volition. Barrington J noted that it would only be in very rare cases that a confession in the context of section 10 of the 1990 Act could properly be seen as voluntary.

Therefore it would seem that the power vested in the court upon application of the examiner in sections 8(5) and 8(5A) are constitutionally sound.

Under the statutory scheme of examinership it is entirely possible that criminal proceedings may be taken under section 34, and potentially as a result of a trial ordered after a hearing on irregularities disclosed by the investigation under the new section 13A. It seems reasonable to suggest that the principles outlined in *National Irish Bank* would apply here and that where information is obtained by compulsion it cannot be later used at a criminal trial. An interesting question would be whether similar considerations apply to civil liability under section 33 given that the financial consequences of personal liability may be drastic.\(^{181}\)

### 15.2. Property Rights

It is clear that court protection has very serious consequences for the creditors of a company. They are prohibited from calling in money owed to them, and may be forced, as a dissenting minority, to make do with a scheme of arrangement that drastically affects their position. It must be asked whether any potential infringement of a persons property rights exists.

Oliver Wendell Holmes once said; "The prophecies of that the courts will do in fact, and nothing more pretentious, are what I mean by the law".\(^{182}\) Although the strict

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\(^{180}\) [1999] 1 ILRM 321.

\(^{181}\) It would be wise to bear in mind the conclusions of the Supreme Court in *Goodman International v Hamilton* [1992] 2 IR 542 relating to proceedings that are in not criminal in nature. See also the recent decision of the Supreme Court in *Murphy v Mitchell*, unreported, October 2001 which consolidates the approach taken in *Gilligan v Criminal Assets Bureau* [1998] 3 IR 185.

\(^{182}\) Holmes, "The Path of Law" (1897) 10 Harv. L.Rev. 457.
merits of this can be, and have been, debated\textsuperscript{183} Holmes enjoinder remains a valuable methodological approach for practical study.

Although the following must necessarily be left undeveloped in this essay, it is arguable that rights jurisprudence in the Irish legal system is more about the separation of powers, than the intrinsic worth of rights. To explain briefly, recent landmark decisions on rights have been characterised by widespread deference to the governmental arms of state. This is true in the spheres of equality\textsuperscript{184}, freedom of speech\textsuperscript{185} and in the "new-rights" or socio-economic rights arena recently decried in \textit{TD v Minister for Education}.\textsuperscript{186} The common tie in these and other decisions is that at a pre-interpretative or pre-theoretical level certain decisions are entrusted to the elected legislature. Hence, there are no suspect classes.\textsuperscript{187} There is no strict scrutiny. There is only rationality.\textsuperscript{188} That is to say, that once the Oireachtas can be seen to have acted rationally, no question of constitutionality will arise. The Oireachtas is entrusted to decide certain questions, and those decisions cannot be called into question when they seem plausible.

What does this mean for examinership? Well, previous to the 1999 amendments there may have been a case for a constitutional challenge based on property rights, particularly by a secured creditor. It is arguable that the legislation was highly unbalanced, and failed to strike a proper apportionment of loss-bearing in the case of difficulty. However, the 1999 Act is a clear attempt to alter this balance. Hence the criticisms of the Review Group are taken on board. The position of the secured creditor is strengthened, as is the position of creditors generally given the increased threshold of proof needed to obtain court protection.

Added to this is that this area is by definition one of balance. As was noted above, the only method that one can evaluate the legislation is by an ultimate appeal to an ideal standard of balance between competing interests. There is no clear cut evaluative answer. Hence, as has been consistently held in the courts, where a balance has to be struck, it is generally the prerogative of the Oireachtas to do so,\textsuperscript{189} and something seriously wrong must be shown to exist before a constitutional challenge must be successful.

\textsuperscript{183} See Hart's treatise of this position as a general sociological description of law throughout \textit{The Concept of Law} (Oxford University Press, 1961).
\textsuperscript{184} \textit{Lowth v Minister for Social Welfare}, [1999] 1 ILRM 5
\textsuperscript{185} \textit{Murphy v IRTC} [1998] 2 ILRM 360
\textsuperscript{186} Unreported, Supreme Court, 17th December, 2001. The judgment is available at <http://www.ucc.ie/law/irlii_cases/203-00_g.htm>
\textsuperscript{187} \textit{cf} An Blasach Mor Teo v Commissioners of Public Works (No.3) [2000] 4 IR 537.
\textsuperscript{188} One could argue that the emergence of the doctrine of proportionality may cast doubt over this conclusion. See for example its application in \textit{Tuohy v Courtney} [1994] 3 IR 1, Heaney v Ireland [1994] 3 IR 593 (High Court); [1996] 1 IR 580 (Supreme Court) and \textit{Rock v Ireland}, Unreported, High Court, 10 November 1995. (Murphy J) and Unreported, Supreme Court, 19 November 1997. However, it is equally arguable that the \textit{Lowth} case is a clear indicator of the manifest reluctance to use this doctrine as a tool in a higher intensity standard of review.
\textsuperscript{189} For example see the conclusions of Murphy J in \textit{F v F} [1994] 2 ILRM 401 in the context of the Judicial Separation and Family Law Reform Act 1989. Here it was alleged that section 2(1)(f) failed to protect the institution of marriage in accordance with the states obligations under Article 41 of the Constitution. It was held that the act constituted a reasonable attempt to balance the needs of the relevant interests. It was not a perfect balance, but one that was nevertheless acceptable.
As regards examinership, it may be true to say that in discrete areas fail to protect as well they might the interests of the secured, or indeed unsecured creditor. It is submitted that given the general approach to rights in this jurisdiction that the legislation is just not so constitutionally offensive as to yield a successful challenge.

16. Evaluation and Concluding Observations

The key to a satisfactory evaluation of the legislation is an understanding of the balance required as between the interests of the creditors and the public interest in the protection of ailing but viable companies. As has been stated above it is probable that such understanding cannot be achieved with precision. Even the Review Group admitted to difficulty in formulating the public interest justification of court protection. However, it is clear that the 1999 amendments ameliorate the concerns expressed by the review group. Hence, if they had the correct balance in their report, the amendments and the new regime of examinership is also correctly balanced.

The concerns expressed by the Review Group were the product of several years experience of the old regime. There has been little consideration of the new regime to date, and it would be foolish to predict confidently that all will invariably be well. Certain problems have been sketched in this essay that may require court attention, but all these problems could not really be said to go to the issue of balance. It is clear that the position of creditors has been improved greatly under the new regime to the extent that the equilibrium as envisaged by the Review Group has been attained. For the time being, it is submitted that that is enough evidence on which to declare the amendments a general success. The fact remains that some creditors will be disappointed, but that is the fact of court protection.

In this respect it should also be noted that there is probably an increased prospect of creditor involvement in the petition and the entire process. It has been suggested that and Independent Accountant will be unlikely to be able to produce his report without first consulting the creditors. Obviously this is more inclusive of the creditor but yet still may present a tricky problem for judge who is called to affirm the later compromise. In the context of Chapter 11 proceedings it has been remarked that "the judge looks down and sees everyone in agreement, so he approves the plan". Therefore it is arguable that such consensus may hide some of the more problematic aspects of the plan. In this context however, one should remember that in the Wogan case Costello J evidenced a great willingness to carefully scrutinise the compromise, and to suggest that Irish judges are cast in the blinkers of the acquiescence of parties would be at best naive.

The Review Group did not see any reason to restrict the amount of times a company can have recourse to court protection and neither does the legislation. The opinion of the Review Group was that the relevance of recurring application should be taken into account by the court at petition. Therefore, a three time over petitioner may be less likely to be able to persuade the course that the company has a reasonable prospect of survival. It is submitted that where the independent accountant or the examiner has

190 Review Group, op. cit. at 3.
made recommendations about changes in the companies management structure in previous proceedings, the court should be very slow to allow this company to come under the protection. If a firm is restructured and yet still enters serious difficulties there must surely be "trouble at mill" and the policy of the Act of protecting viable companies should require caution in a decision regarding a section 2(2) petition. This analysis has been borne out in US where continued recourses to chapter 11 have led to calls for its re-writing to be more strict on so called chapter 22s and 33s.

Indeed, it is arguable that given the focus on the viability of the company, a court should be required to specifically address the examiners recommendations or lack thereof as to management changes. If the company is genuinely suffering a down period due to circumstances outside its control then there is no real problem, however it is always possible that such problems may result from mismanagement. It is arguable that the Legislation is not directive enough in this regard. It is further submitted that the law on restriction and disqualification of directors should be altered to allow evidence of a directors continued role in a company with recurring section 2(2) petitions to be considered as a specific ground for disqualification or restriction of that person.

One issue has not been touched throughout this essay - that of the compatibility of a the regime of court protection with the competition law of the European Union. Although no attempt will be made here to probe the intricacies of the area it seems somewhat unusual that if court protection was to be extended to a large Irish firm, that had competitors based in member states, that those competitors would have no remedy in competition law. It would be an interesting development, to say the least, if the European Commission is called on to decide on this issue in the future.

To conclude, it is also in the interest of commerce generally that access to court protection has been restricted. It is most likely the case that financial institutions would be less willing to lend to companies in a jurisdiction where recourse to examinership was a matter of course, given the drastic effect upon creditors rights. It can only be a confidence boost to banks, especially foreign banks, that investment in Irish commerce is a far more stable venture under the new regime.