

An investigation into the appointment,
role and success of Examinership in
Ireland

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Declaration

Disclaimer 1

“I hereby certify that this material, submitted in partial fulfilment of the Master of Arts in Accounting programme is entirely my own work, unless cited and acknowledged within the text as the work of another.”

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“I hereby agree that this dissertation may be used by the Letterkenny Institute of Technology for teaching future Masters programmes.”

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ABSTRACT

Overview

Legislation governing the process of Examinership was introduced by the Companies (Amendment) Act, 1990. The current economic climate has left many companies facing extreme difficulties meeting financial obligations and has led to the doubling of the number of companies applying for Examinership. Grant

Examinership assists the survival of a company by making arrangements to reduce creditor balances and protecting the intangible assets of the company. It explores all opportunities to provide for a company's survival, while control is retained by the Directors. Brain Foley has described Examinership "as 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".

Purpose

Previous research presented the topic of successful Examinerships solely on a quantitative basis, the current research aims to view Examinership in entirety and provide qualitative explanations on the process with particular focus on the appointment, role and success of Examinerships in Ireland. This will close the gap in the literature which exists at present.

Findings

There are no definite steps to success as each company in difficulty is different in many ways and therefore should be addressed in a manner suitable to their needs. The success of the process should not be viewed on overall statistics alone but on the merits of each case which has survived to confirm the success of the process in Ireland.

Importance

The process of Examinership is a very powerful restructuring tool, the outcome of the process offered is undoubtedly better than the outcome offered by Liquidation or Receivership. If the results of this research are used in an educational manner then there will be more awareness of this corporate rescue plan.

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 - Joseph Walsh
 - Brian Mc Enery
 - Michael Mc Ateer

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- ❖ Finally, Michael.

LIST OF ABBREVIATIONS

ACT	Companies Act, 1990 and Companies (Amendment) (No.2), Act, 1999
CLRG	Company Law Review Group
CSO	Central Statistics office
HC	High Court
IAR	Independent Accountant Report
SCHEME	The Scheme of Arrangement
SME	Small and medium enterprises

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(All practitioners that were interviewed signed a document granting the researcher permission to use the information obtained during the interview. The original signed documents are included after the references.)

Chapter 1

Introduction

1. Introduction

The process of Examinership has been in existence since its introduction to legislation in 1990. In the last few years the number of ailing companies availing of this process in order to restructure and save their companies has dramatically increased.

(Appendix G-Increase in Examinerships)

There are certain conditions which must be satisfied before a company can avail of the process but once these pre- requisites have been met then the ailing company is given the protection of the High Court (hereafter referred to as HC) for a period of 100 days. In this protection period an Examiner is appointed and the successful outcome of a company's survival is reliant on the role of the Examiner and the compilation of a scheme of arrangement (hereafter referred to as "the scheme") agreed upon by at least one class of creditors.

There is evidence that the process of Examinership is successful but statistics of late are expressing a decrease in the success. The researcher therefore aimed to investigate "the appointment, role and success of Examinership in Ireland" in qualitative terms to fully understand the success of the process and the reasons behind these fluctuations.

1.2 Research aims and objectives

The dissertation aimed to address the following issues:

1. Identify how an examiner is appointed and what criteria must be met?
2. What is the role of an examiner?
3. The success of Examinership in Ireland.

The research objectives were to:

- Establish the criteria for appointing an examiner
- Establish who can petition for the appointment of an examiner
- Explain the significance of the Independent Accountant Report

- Establish the role of the examiner in the period of protection
- Investigate the powers granted to the examiner to complete their duties.
- Explain the relevance of the examiner's report
- The success of Examinership
- Describe how success can be achieved
- Provide evidence of the success in the form of examples.

1.3 Merit and justification of the Research

The research can be justified due to the increase in the use of the Examinership process; this is represented by the graph in Appendix G. The area of Examinership has not previously been researched except in a statistical format. With a rising increase in the use of the process, the researcher believed that creating an understanding of the process, highlighting the benefits and its possible successful outcome would be invaluable to companies, creditors, shareholders and employees. As all of these individuals are affected by the failure of a company and in most cases the effect is negative

The researcher will use the objectives to create a clear picture of how a company can use the process of Examinership, and steps the company can take to increase their chance of success. The researcher will also provide mini case studies as supportive evidence that the process does work and that it can save jobs and ensure that revenue continues to be created which ultimately benefits the economy.

The study will also be valuable to shareholders who are aware that their company is facing difficulties but are not sure what can be done. The research will provide shareholders with the knowledge they need and will enable them to take action which they are entitled to take and appoint an Examiner. The study will give employees information on the process that they might find themselves involved in.

The process of Examinership is a very powerful restructuring tool, the outcome of the process offered is undoubtedly better than the outcome offered by Liquidation or Receivership. If the results of this research are used in an educational manner then there will be more awareness of this corporate rescue plan. This may lead to the

appointment of examiners at an earlier stage and therefore reduce compulsory liquidations where there is no hope of survival and the only outcome is the demise of a company, and the loss of many jobs.

Chapter 2

LITERATURE REVIEW

Appointment, Role and Success of Examinerships

“Properly managed, an Examinership could result in the survival of a company and the protection of jobs that would have possibly been lost”

(Tom Murray Dec 07)

2.1. Introduction

The current economic climate has left many companies facing extreme difficulties meeting financial obligations and has led to the doubling of the number of companies applying for Examinership. Grant Thornton’s analysts reiterate this point stating that there was more than double the number of companies seeking protection of the HC in the latter part of the year (2008), compared to the first six months. Paul Mc Cann said “these companies face a greater risk of being wound up due to the harsh economic circumstances they are operating in”, but added that “companies will have a better chance of survival once credit becomes more freely available”.

Previous research presented the topic of successful Examinerships solely on a quantitative basis, the current research aims to view Examinership in entirety and provide qualitative explanations on the process with particular focus on the appointment, role and success of Examinerships in Ireland. This will close the gap in the literature which exists at present. The research will offer an understanding of the process which has become a rescue tool for many companies, preventing the loss of jobs; this is of immense importance in a country already struggling economically.

A view shared by many who practise in the specialised area, is that the under-use of the process is caused by a lack of understanding of how the process works in practice, and a lack of appreciation of both how little it can cost to implement and the very high success rates in Ireland in recent years. Neil Hughes stated in an article in the Irish

Times that "Not enough people are aware of it and it's not even the company directors and promoters, it's that their advisers are not aware of it, their accountants and solicitors simply don't know that it exists or they think it is only for big companies,"

2.2 What is Examinership?

“Examinership is intended to address the situation of companies already in difficulty, but is not designed to prolong the existence of the hopeless case.”

(The Sunday Business Post)

Examinership assists the survival of a company by making arrangements to reduce creditor balances and protecting the intangible assets of the company. It explores all opportunities to provide for a company’s survival, while control is retained by the Directors. Brain Foley has described Examinership “as 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”.

The protection is granted by the HC after a petition is presented. Neil Hughes believes that Examinership gives insolvent companies a 100-day period of “breathing space” from its creditors to facilitate the company and an Examiner in attracting investment and aiding it’s restructuring.

On application to the court, the period of protection can be extended if adequate progress had been made during the initial period. This was seen recently in the case of First Equity, who were granted an extended period of protection so their Examiner could formulate a survival plan. Mr. Justice Peter Kelly granted the extension as “considerable progress had been made” and because the Examiner was in continuing discussions with potential investors and had also made good progress with bank creditors on refinancing existing loans. The Examinership option allows directors “one last throw of the dice” and in many cases this has saved the company.

2.2.1 The introduction of Examinership Legislation

Legislation governing the process of Examinership was introduced by the Companies (Amendment) Act, 1990. The Act was rushed into legislation to prevent the collapse of the Goodman Group of Companies. The Goodman group was centre of the beef industry in Ireland and its collapse would have had disastrous consequences for the Irish economy.

The Act was fraught with difficulties and was perceived by lending institutions as anti-creditor in its approach, as Examinership placed creditors in an inferior position to those creditors in a receivership or liquidation scenarios. Hence it was argued that the focus was on the “survival of the debtor rather than on the rights of the creditor”. A Report of the CLRG highlighted a further criticism as the Act did not offer sufficient focus to viable companies. The 1990 Act was amended in 1999 to deal with the perceived weaknesses of Examinership. It ensured that companies met specific criteria before offering them court protection to ensure that they had the best possible chances of survival and that the process would be successful.

The most vital inclusion in the amended Act was the requirement to produce an Independent Accountants Report (hereafter referred to as IAR), this offers a high degree of transparency when aiming to attract investment as two independent professionals (the independent accountant on whose report the Examiner is appointed, and the Examiner) are standing over the figures used. Such reliance is placed on this report that companies are now getting IAR’s prepared in anticipation of their use.

The process has been used by approximately 2% of companies in Ireland each year since the Goodman case. The significance of the process was heightened as the Celtic Tiger seen the emergence of a substantial number of companies with assets of a sufficient value to justify the use of Examinership.

Amongst the successful Examinerships there have been some high profile cases across different sectors. Many of these have attracted media comment, resulting in an increased awareness of the process. This corresponds with the aim of the research to aid awareness and highlight the success of the process. (Appendix E- case studies)

2.2.2 Who can avail of this process?

A company must be considered insolvent before it can avail of Examinership. Mc Lean Chartered Accountants have highlighted several reasons why a company may encounter financial difficulties. They include:

- Poor decision making, especially in expansion and growth areas.
- An inappropriate finance structure of the business which puts serious pressure on cash flow
- Management’s failure to deal decisively with loss-making or permanently declining areas of the business.

It is not only large companies that can avail of this process. Small and Medium sized companies can also apply for court protection although it can be more challenging due to the costs associated with the process and also the criteria, which outlines that companies must be able to attract investment.

Investment can be obtained easier for larger companies because of the vast amount of audited financial information available and investors can adequately assess the investment potential of the company. However, Business Finance Magazine (Oct 2008) has reported an increase in the trend of SME’s entering court protection as the asset value of these companies are rising to counter the costs involved. James Stafford, however believes it is “more appropriate” for small companies to enter into an informal scheme of arrangements rather than Examinership.

2.3. How is an examiner appointed?

In practise, companies of all sizes and in different industries can avail of Examinership. “In these uncertain times, more and more companies are likely to face financial difficulty and risk becoming insolvent. Knowing this fact may help businesses build up the courage to face the economic crisis in the cold face and acknowledge the real impact it has on their businesses” (Cecilia Zwahlen).

In order for a company to have an Examiner appointed certain criteria must be met. The criterion consists of both statutory and commercial considerations that have to be adhered to.

Statutory Provisions are outlined in the Companies (Amendment) Act, 1990, as amended by the Companies (Amendment) (No.2) Act, 1999 under sections 2 and 3.

2.3.1 Statutory Requirements

In order for an Examiner to be appointed a company must be insolvent and unable to pay its debts under sec 2 (3). In addition, a company must have a “reasonable prospect of survival”, in whole or in part as a going concern (sec 2 (2)). The company must then commission an IAR (Appendix A) with the following relevant information

- The successful outcome of the process would be more advantageous to creditors than a winding up
- The requirement that the company must secure sufficient investment
- The company must have sufficient funds to trade throughout the period of protection.
- Cash flow projections and statement of affairs must be included to support the conclusions of the report

Alan Mc Lean, an Independent Accountant has outlined that “the report must be an impartial review and assessment of the company’s activities and where necessary be critical of the role of the directors and management in the company finding itself in the current position, including a critique of management styles and decision making processes” The final report must indicate a roadmap for the recovery of the company and this must be achievable within the protection period.

Companies must address the above points in order for an Examiner to be appointed. Failure to adequately address these points will have devastating consequences as shown in the case of the Thomas Read Group of pubs, sufficient funds had been generated to aid the survival of the group but the investor has since backed out and a receiver has been appointed.

This highlights a limitation in the Act whereby proposed investment is not on a contract basis and that single investors hold the future of an entire company in their hands. This is not the first time a supposed white knight in a high-profile Examinership has failed to come up with the goods, such was the case at Antigen and DCP when Thomas O Keefe failed to pay up and turned out to be an undischarged bankrupt

2.3.2 Commercial Considerations

Neil Hughes and Barry Lyons outline the key commercial requirement to avail of the Examinership process; the likelihood of attracting investment. A company must critically evaluate whether it will attract new investment as this along with an accepted Scheme can save a company from its ultimate demise. Questions need to be asked to establish whether it is a suitable candidate for attracting investment and meeting the criteria for appointing an examiner. Examples of questions companies must raise include the following:

- Are the company assets of the company sufficiently large to justify the costs of Examinership?
- What are the assets of the company and are they easily sold?
- What are the liabilities of the company and how are they secured?
- What is the level of outside investment required to put together the Scheme to be put to the creditors?

Having met the statutory and commercial considerations a company will be able to apply for court protection. Michael Mc Ateer has said that he believes the wrong types of companies are now applying for court protection. Therefore careful decisions need to be made as to whether the company can afford the costs of Examinership which for a SME can be up to €100,000 before applying for the process. Once a company is a suitable candidate for Examinership a petition must be presented on behalf of the company. Michael Quinn, head of Corporate Recovery & Insolvency at William Fry, has stated that “there has been a dramatic increase in the number of petitions for Examinership, 106% from 2007 to 2008, but not all petitions are being granted.”

In the case of an application for Examinership the courts are applying a very stringent examination of the accounts in order to ensure that the business has a ‘reasonable prospect of survival’. Successfully demonstrating to the courts that the company has a reasonable prospect of survival and that it can attract investment is paramount in successfully emerging from Examinership.

2.4. Presenting a Petition

Under the Companies (Amendment) (No.2) Act, 1999, presentation of a petition must be accompanied by an IAR. This offers the court the required information before the benefits of Examinership are granted as Examinership “is simply not a solution for the financial ills of every company”. Petitions are now being scrutinised to ensure that the industry becomes more selective in how it is used. “It can be an appropriate tool for certain cases but, if it becomes abused, the Examinership process will become tarnished.” (Mc Cann)

The process of applying for court protection commences with the petition. The petition is presented to the HC and Sec 3 (1) of the Companies (Amendment) (No.2) Act, 1999 outlines the persons who may petition the court. They include;

2.4.1 Directors

Directors can petition the court to be placed under court protection provided the majority of directors agree. A formal board resolution to appoint an examiner must be passed. If a meeting has not been formally convened and the resolution has not been formerly passed the petition of the directors could be dismissed. (This occurred in the case of Aston Colour Print Ltd, Feb 21, 1997)

2.4.2 The Company

In order for the company to petition the courts an ordinary resolution must be passed by its members. In certain cases, directors applying for a petition may also be viewed as acting on behalf of the company even if the petition is presented in the names of the directors. Such was the ruling of Murphy J in the case of Don Bluth Entertainment Ltd August 27, 1992.

2.4.3 The Creditors

Creditors include both contingent and prospective creditors as well as employees. However an application under these three categories requires security to be put up for the costs until a case for the appointment of an examiner has been established to the satisfaction of the court. These costs may mount to €25,000 between legal costs and the costs of an independent accountants report. Until recently it was virtually unheard of for creditors to petition for a company to be put into examinership, but that changed when Sony Music Company, a large creditor of Golden Discs, petitioned for an examiner to be appointed to Golden Discs.

2.4.4 Members/Shareholders

In order for members to present a petition they must hold at least one-tenth of the fully paid up voting capital

2.4.5 Content of the petition

The Petition must be verified by affidavit and must show that:

- The company is or is likely to be unable to pay its debts;
- No resolution subsists for the winding up of the company;
- No order has been made for the winding up of the company

Having recognised the need to present a petition to the HC, the company must prepare the petition to include specific contents. The contents of the petition are set out under sec 3 Companies (Amendment) (No.2) Act, 1999. (Appendix A) The Act states that a petition presented under section 2 shall-

- Nominate a person to be appointed as examiner, and
- Be supported by such evidence as the court may require for the purpose of showing that the petitioner has good reason for requiring the appointment of an examiner, and
- Where the petition is presented by any person or persons referred to in subsection (1) (a) or (b) {The Company or Directors}, include a statement of the assets and liabilities of the company (in so far as they are known to them) as they stand on a date not earlier than 7 days before the presentation of the petition.

2.4.5.1 Independent Accountant Report

Section 3 also outlines the requirements of the IAR which must accompany the petition. It must be prepared by a person who is either the auditor of the company or a person who is qualified to be appointed as an Examiner. (Appendix A-The requirements of the IAR under the Act)

The application for the petition must be signed by the person nominated to be Examiner and include a copy of the Scheme proposed. The petition must be presented in utmost good faith. The court may decline to hear a petition if it appears that the practitioner or the independent accountant has failed to disclose information material to the court in exercising its powers or has in any other way failed to exercise utmost good faith.

The period of court protection begins from the date the petition is presented which is a major advantage as a company will be protected from its creditors even before an Examiner is officially appointed. For example, no winding up proceedings may be commenced, no receiver may be appointed or no judgment may be enforced. Sec 5 of the Companies (Amendment) (No.2) Act 1999 provides narrative on the effects of court protection.

2.5. The Role of the Examiner

During the period of protection the appointed Examiner takes on the role of examining the affairs of the company. At the earliest possible date, the Examiner must formulate a proposal for the Scheme which must be presented at meetings of the company's shareholders and creditors, and ultimately approved by the Court.

The Examiner works closely with the management of the company as they have an in depth knowledge of the ailing company which may help when formulating a rescue plan. Neil Hughes believes the Examiners role includes "restoring confidence in the company and its trade where it has been lost". An Examiner may also appoint a committee of creditors to assist in the performance of their duties.

A key power of the Examiner is to ‘certify’ ongoing expenses of suppliers, with the effect that should these suppliers continue to supply the company on credit during the protection period, their post-petition certified accounts will enjoy priority over all other creditors except a fixed charge holder, should the Examinership process prove unsuccessful and the company be wound up.

The Examiner must carefully monitor the cash flow of the company throughout the protection period to ensure the company trades in accordance with the projections furnished to the Court at the petition stage.

2.5.1 Statutory Powers

There are statutory powers granted to an Examiner under sections 7, 8 and 9 of the Companies (Amendment) Act 1990, Grainne Callanan has summarised some of these as follows:

- All the powers and rights of an auditor
- The powers to convene, set the agenda for and preside over meetings of the board of directors and general meetings
- The right to be given reasonable notice of, to attend and be heard at, all board meetings and general meetings.
- To apply to the court to determine any question arising in the course of his office.

There is a statutory duty (sec 8) imposed on officers and agents of the company to produce, on the Examiner’s request, such books and documents including those relating to bank accounts held by directors or officers of the company.

The Act further enhances the role of the Examiner by providing legislation granting further specific powers which are subject to court approval under section 9 of the Act. The powers cumulatively can have serious effect on secured creditors.

2.6 Examiner's Report

The primary obligation of the Examiner according to the Small Firms Association is to report to the court, this must occur within 35 days of appointment, the contents of which are outlined under sec 19. A copy of the report must be submitted to the court and the company on the same day. The court approval of the Examiner's report has the effect of binding the parties affected by them. The contents of the proposals for a compromise or the Scheme are set out in section 22(1) of the Act and are required to be included in the Examiners report.

2.6.1 Scheme of Arrangements

The main benefit of appointing an Examiner and the role of the Examiner can both be linked to the Scheme. The Scheme is the ultimate rescue plan for the company and is a way of reducing current debt. In order for the Scheme to be successful the Examiner must persuade at least one class of creditors to accept the Scheme before it can be brought before the HC for approval. The examiner must also ensure that all creditors within a class are treated the same way; however, the formulation of the Scheme usually causes some degree of discontent.

The typical Scheme will involve a secured creditor receiving all of the funds owing to them, but sometimes by way of instalments and at times will involve some writing off of interest. The preferential creditors will usually receive a substantial dividend on foot of their liabilities whereas the unsecured creditors will generally receive much less. The Scheme should be presented in such a way that it is clear that creditors will secure a more advantageous outcome for themselves by endorsing the examiners proposals, than would be the case in liquidation. Proposals are accepted by members through a majority vote in favour of the resolution during a members meeting. Proposals are accepted by creditors when a majority of the large creditors have voted in favour of the resolution.

Once confirmed by the courts the Scheme becomes binding. The Scheme can result in the difference between successful or unsuccessful emergence from Examinership.

2.7. Success of Examinership

Business Finance Magazine has stated that successfully emerging from financial difficulties and Examinership can be achieved but “as with most problems in the business world, only the vigilant will survive. Those who detect problems from the off will be better placed to work their way through them and come out stronger on the other end. As hard as it may be to admit, when a director notices that his or her company is not performing well, he or she needs to address the situation without delay” This may suggest that the success is ultimately in the hands of directors and whether or not they can detect problems early.

On cessation of the year 2006 the success of Examinership was recorded by Hughes Blake as 93%, however the success of the process of Examinership in Ireland has begun to fluctuate of late; this is heavily due to the economic crisis, the lack of access to finance and also a scarcity of potential investors. One judge has commented that potential investors are now as “scarce as hen’s teeth”. Without the intervention of the above obstacles the Examinership process remains successful. “Companies and creditors can take comfort that the Examinership regime affords an opportunity to save a business that otherwise would go into liquidation with little or no prospect of any dividend to creditors” (Mark Traynor).

The importance of this research is that it investigates Examinership success both in qualitative and quantitative measures which outweighs the significance of quantitative research alone, as it does not evaluate factors which can help explain fluctuations and the reasons why they have occurred. The research results will aim to determine whether it is in fact the success of the process which is in decline or whether the decrease is caused by external factors that impact upon the process.

The researcher believes that Examinership can still be deemed a successful process, as saving one company provides the economy with a great deal more than a liquidation or receivership process, by saving jobs, maintaining the tax revenue and reducing unemployment rates. Therefore should be highlighted and encouraged. As expressed by Neil Hughes “sometimes, Examinership can be the only way to get out of difficulties”.

2.8 Conclusion

This chapter has considered the legislation and the literature on the appointment, role and success of Examinership in Ireland. It has outlined the success of the process, the criteria for appointing an Examiner and the role which the Examiner must adopt once appointed. Other than statistical analysis on the success of the process there exists little or no research in this area. The researcher aims to fill this gap by conducting the current research, the findings of which are presented in chapter four.

Chapter 3

Research Methodology

3.1 Introduction

The purpose of this chapter is to identify and explain the research methodology adopted. The research focus and the data collection methods adopted are also discussed in sections 3.4 and 3.5 of this chapter respectively.

Goddard and Melville (1996, pg: 1) state that research is:

“Not just the process of gathering information but rather it is about answering an unanswered question or creating that which does not currently exist.” They further added that research “can be seen as a process of expanding the boundaries of our ignorance”

3.2 Research Design

“A research design is a procedural plan that is adopted by the researcher to answer questions validly, objectively, accurately and economically” (Kumar, 2005, p83) A design is used to structure the research, it provides a plan outlining how information is to be gathered for evaluation and identifies the data gathering methods.

3.2.1 Research Philosophy (The logic of the research)

The first step the researcher must take in designing their research strategy is to identify the most suitable philosophy to pursue. Saunders et al (2007) believe that the researcher’s values can have an important impact on the research that they pursue and the way in which they pursue it. In general, the research paradigm is the predominant approach to the research. “A paradigm refers to a pattern or framework that forms our thinking before we even begin our research”, this concept was defined by Thomas Kuhn in 1962.

Two research paradigms dominate the literature: these are referred to as positivism and interpretivism. The two philosophies are different but cannot be described as mutually exclusive as it is not uncommon for many areas of research to be based on elements of both philosophies. Positivism is a structured approach to gathering data,

whereby only one truth exists which is analyzed and interpreted in a factual and statistical manner. However Interpretivism, also referred to as phenomenology, can have many truths and is a more flexible method of collecting data and enables the researcher to focus on the meanings behind the research.

3.2.1.1 Positivism / Interpretivism (Phenomenology)

Positivistic approaches to research are based on research methodologies commonly used in science. They are characterised by a detached approach to research that seeks out the facts or causes of any social phenomena in a systematic way.

“Positivistic approaches are founded on a belief that the study of human behaviour should be conducted in the same way as studies conducted in the natural sciences” (Collis & Hussey, 2003, p.52).

A key distinction of this method is the fact that “the researcher is independent of and neither effects or is affected by the subject of the research” (Remenji et al, 1998, p33) However some researchers are critical of positivism and according to Saunders et al (2003), those researchers argue that the rich insights into this complex world are lost if such complexities are reduced entirely to a series of law-like generalisations. Interpretivism was developed due to the criticisms of positivism.

Interpretive approaches however, approach research from the perspective that human behaviour is not as easily measured as phenomena in the natural sciences. Human motivation is shaped by factors that are not always observable, so it can become hard to generalise on. Furthermore, people place their own meanings on events; meanings that do not always coincide with the way others have interpreted them. “Interpretive research seeks to understand the subjective reality of those being studied, making sense of their motives, actions, and intentions in a way that is meaningful to the research participants” (Saunders et al, 2003; Walliman 2001)

There is an evident contrast between positivism, which places emphasis on law-like generalisations and interpretivism which places emphasis on understanding and appreciating different meanings. This contrast is illustrated in the table 3.1 below as it summarises the main features and highlights the differences between the two paradigms.

Table 3.1

Positivism	Interpretivism (Phenomenology)
Tends to produce quantitative data	Tends to produce qualitative data
Uses large samples	Uses small samples
Concerned with hypothesis testing	Concerned with generating theories
Data is highly specific and precise	Data is rich and subjective
The location is artificial	The location is natural
Reliability is high	Reliability is low
Validity is low	Validity is high
Generalises from sample to population	Generalises from one setting to another

(Collis and Hussey, 2003, p55)

3.2.2 Research Philosophy adopted

The philosophy which the researcher adopted had to be linked to the aims and objectives of the research and the manner in which the researcher could collect and analyse the information needed in order to answer the research question. (The researcher's aims and objectives are presented in chapter one) The researcher's aims and objectives could only partially be answered by the relevant literature and so questions would have to be asked to professionals in the applicable domain to obtain a greater insight into the area of research.

The researcher decided that some of the objectives could be answered by means of a questionnaire but other objectives would require further explanations and so the use of interviews and mini case studies would be necessary and this highlighted the data collection methods which were appropriate. These are discussed in more detail in sections 3.5 of this chapter.

Hence the researcher would adopt the use of both paradigms- positivism and interpretivism. Questionnaires are quantifiable with the use of yes/no answers or one definite truth emerging and so are positivistic in nature with the researcher assuming the role of an objective analyst. Interviews, however involve the researcher interpreting the opinions of the interviewee and so are interpretive in nature, as are

case studies which allow the researcher an opportunity to study a particular subject in depth.

3.3 Research Approach

There are two possible approaches to research, namely inductive and deductive research. Deductive research moves from general ideas/theories to specific particular and situations: the particular is deduced from the general, e.g. broad theories.

Inductive research, in contrast, moves from particular situations to make or infer broad general ideas/theories. As the researcher will develop a conclusion from the data collected on the research area via questionnaires, interviews and mini case studies, the research is therefore inductive.

3.4 Research Focus (The purpose of the research)

The objective of the research has four main classifications. (Saunders et al, 2003; Kumar, 1999)

3.4.1 Exploratory research

Exploratory research is a valuable means of finding out “what is happening: to seek new insights; to ask questions and to assess phenomena in a new light” (Robson, 2002, p59) Exploratory research is used principally to gain a deeper understanding of something.

3.4.2 Explanatory research

Explanatory research attempts to identify how and why there is a relationship between two aspects of a situation or phenomenon. (Kumar, 1999) The Focus is on the reason a situation or behaviour occurs.

3.4.3 Descriptive Research

The object of descriptive research is:

“To portray an accurate profile of persons, events or situations”

(Robson, 2002, p59)

3.4.4 Correlation Research

Correlation research attempts to discover a relationship, association or interdependence between two or more aspects of a situation. (Kumar, 1999)

3.4.5 Research Focus Adopted

The research of this topic begins as exploratory research as the researcher finds out what is happening concerning the appointment, role and success of examinership in Ireland. The research then takes on a descriptive nature as the success of examinerships in Ireland is described. Explanations are sought as to how success is achieved.

3.5 Data Collection Methods

There are many data collection methods available for use by the researcher but the methods used are dependant on the researcher and the area of research. The main primary methods of collecting data include; questionnaires, interviews, focus groups, observation and case studies. However this section will only focus on the methodologies used by the researcher which comprise of questionnaires, interviews and case studies.

3.5.1 Questionnaires

A questionnaire was used to gain a brief understanding of the area of Examinership. The questionnaire contained questions about the appointment of Examiners and their main role. It also contained yes/no answers about law reform and the benefit of Examinership to the economy; this provided a starting base for the interview as questions could then be opened up and explanations sought as to the reason why a particular answer was chosen in preference to another.

The researcher had to then decide who the questionnaires would be distributed to. A list was compiled, based on accountancy firms that advertised practising in the area of Examinership, which amounted to twenty two practises. The questionnaires were posted to the accountancy practises or to the relevant individual practitioner where their identity was known. Each practitioner received a cover letter, a questionnaire and a stamped addressed return envelope.

Given the time and financial constraints of the research, the researcher thought that questionnaires would provide reliable, general information on the topic from an appropriate number of professionals in the relevant area. There are some limitations attached to questionnaires, namely the possibility of low response rates or the incorrect individual receiving the questionnaire and having a poor knowledge of the research area.

However, the researcher aimed to overcome these limitations by providing the stamped addressed return envelope to encourage a high response rate. The researcher also spent considerable time identifying the relevant individual in each practise to ensure that the respondent had knowledge and expertise on the topic.

Collis and Hussey describe a questionnaire as being a list of carefully structured questions with a view to eliciting reliable responses from the chosen sample and this was a description the researcher kept in mind whilst constructing the questionnaires. There can be different types of questionnaires and these are represented in Table 3.2, the table is based on information contained in the diagram on p282 Saunders et al, 2003.

Table 3.2 Types of Questionnaires

Questionnaire	
Self –Administered	Interviewer-administered
On-line	Telephone
Postal	Structured Interview
Delivery and Collection	

The choice of the questionnaire will be influenced by the factors related to the researcher's aims and objectives, these include; characteristics of the respondent; the importance of reaching a particular person as a respondent; the types and numbers of questions you need to ask and the sample size (Saunders et al, 2003) Questionnaires

are descriptive in nature and so are corresponding to the research philosophy and focus adopted by the researcher. Questionnaires are a widely used research tool as they are easy to analyse

3.5.2 Interviews

In order to gain an in depth understanding into the appointment, role and success of Examinerships in Ireland interviews had to be conducted to obtain the views of those who specialised in the area of Examinership. The process ultimately requires the work of two professionals- an Independent Accountant and an Examiner.

Therefore the researcher conducted four semi- structured interviews, one with an Independent Accountant and three with Examiners. The researcher chose the interviewees based on each professionals experience in the research area, so that the best possible knowledge and expertise could be obtained and used to answer the research question. The interviews enabled the researcher to add to the information obtained by the questionnaires and so both methods were extremely relevant.

An interview is a purposeful discussion between two people (Kahn and Cannell, 1957). Interviews can be very effective in obtaining valid and reliable data that is relevant to the researcher's questions and objectives. Interviews are a widely used tool to access people's experiences and their inner perceptions, attitudes, and feelings of reality. There are three types of interviews:

3.5.2.1 Unstructured interview

Unstructured interviews are frequently conducted on a one to one basis, and rely entirely on the spontaneous generation of questions in the natural flow of an interaction. The intent of the interviewer is to circumvent short answers from the interviewee and to establish the genuine influences on the individual's opinion. Interpretations of the findings can be difficult as there is no standard on which to base them.

3.5.2.2 Semi Structured Interview

A semi structured interview involves the interviewer having a pre-prepared list of general topics or questions before the interview. Questions can vary from interview to interview depending on the responses given; some questions may be omitted or added during the

course of the interview. The semi-structured interview uses open-ended questions to explore broad issues in a non-directive, non-threatening manner. Interpretation of the findings in a semi structured interview can be simpler than an unstructured interview as there is a partial standard on which to base the findings.

3.5.2.3 Structured Interview

The structured interview is designed to elicit specific responses to specific questions. Responses to a structured interview will normally be easier to quantify and interpret since uniform questions tend to yield a narrower range of responses.

Due to time and financial constraints only four interviews were conducted, as previously stated the interviewees were chosen based on experience. The way in which this was done was by viewing the Iris Oifigúil and selecting the Examiners that were appointed in the HC to Examinerships over the past number of years and the Independent Accountant chosen was one that dealt with over one third of Irish cases. The interviews took place between May and June in locations in both Dublin and Limerick. The interviews were conducted face to face and were all tape recorded with the kind permission of the interviewees (Appendix I)

According to Saunders et al, 2003 there is a need to record an interview, in order to control bias and to produce reliable data for analysis. A frequently used and possibly the most effective method, is using a tape recorder. There are both advantages and disadvantages of using the tape recorder however and these are illustrated in Table 3.3.

Table 3.3 Advantages and Disadvantages of tape recording interviews

Advantages	Disadvantages
Allows the interviewer to concentrate on questioning and listening	May adversely affect the relationship between interviewee and interviewer
Allows questions formulated in interview to be accurately recorded for use in later interviews	May inhibit some interviewee responses and reduce reliability

Can re-listen to the interview	Possibility of a technical problem
Provides an accurate and unbiased record	Disruption of discussion when changing tapes
Allows for direct quoting	Time required to transcribe the tape
It is a permanent record that can be used by others	

3.5.3 Case Studies

As the research was based on the appointment, role and success of Examinership in Ireland, the researcher would also have to use the data collection method of case studies. This was not the main collection method but was merely used to draw attention to how success was achieved in practice by focusing on particular companies that had been through the Examinership process and emerged successful. A few companies were chosen that had gone through the process to highlight how the process benefited them and also to highlight that a successful Examinership benefits the economy, thus fulfilling one of the remaining research objectives.

The case study method has four main steps;

1. Determine the present situation
2. Gather background information about the past and key variables
3. Test this information- what action was taken to remedy the problem
4. Take remedial action- determine how it worked out in practise

Case studies can enable the researcher to explore, unravel and understand problems, issues and relationships, however one limitation is that the results cannot be generalised. According to Green et al (2006), case study research enables the researcher to investigate important topics not easily covered by other methods. The case study method is pertinent when the research addresses either a descriptive question or an explanatory question. The researcher therefore felt that the case study method was suitable in answering the research objective of how success could be achieved and highlighting examples to support this claim.

3.6 Data Analysis

The results from the questionnaire will be analysed in a statistical format. The questions asked allowed the respondent to choose only one answer and so the results will highlight the percentage of respondents that chose each answer or that agreed or disagreed with a statement. These results will be presented in the data analysis chapter.

The interview was tape recorded and then the transcript to each interview was typed and can be located in Appendix D. As the transcript was produced it enabled the researcher to quote the interviewee in the text of the data analysis chapter.

Finally, the mini case studies will be used as examples of the success of the process, the relevant case studies will be provided in Appendix E.

3.7 Secondary Research

The researcher referred to Legislation, practitioner's websites and case studies, journals and also newspaper articles that were relevant to this research. Although some academics are sceptical about the use of newspapers, the researcher believed that newspapers were paramount to this research as the research area was extremely topical and new revelations about the benefits and limitations of the Examinership process continually came to light throughout the development of this thesis. This information would not be found in an academic journal for at least a period of twelve months.

3.8 Conclusion

To conclude, this research was undertaken to investigate the appointment, role and success of Examinerships in Ireland. It involved the use of both the positivistic and interpretive philosophies to sufficiently address the research area. The research was a combination of descriptive, exploratory and explanatory elements which allowed the researcher to investigate the research question and to provide description and explanation to the research. The research process involved the circulation of 22 questionnaires and four semi- structured interviews, the findings of which will be discussed in Chapter four.

Chapter 4

Research Findings and Analysis

4.1 Introduction

The purpose of this chapter is to analyze the results of the research methods adopted by the researcher. The methods adopted, as outlined in chapter three; were questionnaires and interviews with examples provided in a mini case study format. The findings presented are based on the fourteen questionnaires returned which represents 63.63% of the surveyed population. (Table C.1-Appendix C) It also involves reviewing the transcripts from the four interviews conducted in order to ascertain the interviewee's views on the study.

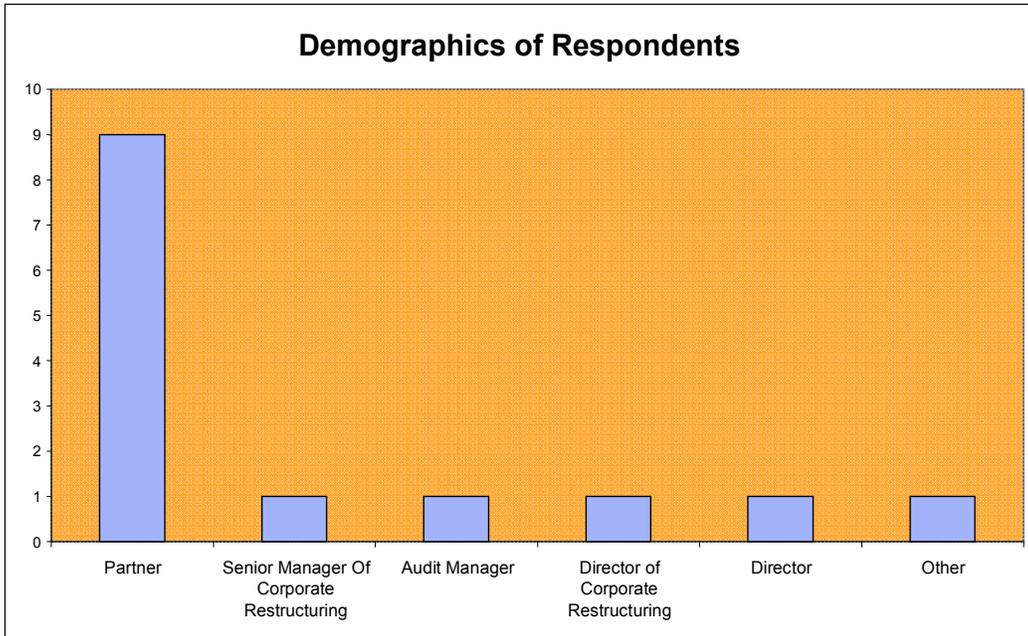
The researcher has included the questionnaire used to conduct the research in Appendix B, the results of which are presented in Appendix C. The four interview transcripts can also be viewed in Appendix D. As the findings presented in this chapter are based on the information collected via questionnaires and interviews, readers are advised to refer to the appropriate Appendices when reading this chapter. Where findings are presented throughout the chapter, the researcher will highlight the appendix to which it relates.

Time was spent to ensure that the questionnaires were sent to the "appropriate individual", so that the researcher could really benefit from the response. In hindsight, this was time well spent as the responses provided the researcher with a wealth of relevant information due to the experience and knowledge of the respondents. This is illustrated by figure 4.1- the demographics of the respondent.

A semi structured interview was conducted with one Independent Accountant and three Examiners. As stated in chapter three, the Examiners were chosen based on direct experience with the area of study, as per their appointments to Examinership cases published in the Iris Oifigiuil. (Appendix F) The purpose of the interviews was

to gain a more in depth knowledge into the research area as the literature on the area is not extensive.

Figure 4.1



Ultimately, as the researchers aim was to highlight the appointment, role and success of Examinership in Ireland, examples have been provided in a case study format to illustrate this objective. The companies discussed in the case studies (Appendix E) all successfully came through the process of Examinership and are still successfully and profitably trading at present.

4.2 Findings and Analysis

4.2.1 The criteria for appointing an Examiner

The initial objective of the research was to establish exactly how an Examiner could be appointed and also who could petition for the appointment of an Examiner. This objective can be answered through legislation alone, however the researcher add the practitioners view's on this by highlighting what occurs in practise.

How is an Examiner appointed?

The Companies Act, 1990 introduced the Examinership legislation and was further amended in the Companies (Amendment) (No.2) Act, 1999. Section 2 of the Companies Act, 1990, as amended by the Companies (Amendment) (No.2 Act), 1999 outlined that an Examiner could be appointed, only if three conditions were met by the company in question.

“Subject to subsection (2), where it appears to the court that-

- a) A company is or is likely to be unable to pay its debts, and*
- b) No resolution subsists for the winding-up of the company, and*
- c) No order has been made for the winding up of the company,*

It may, on application by petition presented, appoint an examiner to the company for the purpose of examining the state of the company’s affairs and performing such duties in relation to the company as may be imposed by or under this Act”

The above conditions also come with the pre requisite that the company must be able to demonstrate a “reasonable prospect of survival”. The IAR presented with the petition must highlight the basis on which this has been concluded. In practise, companies hoping to avail of the process must concentrate their efforts on demonstrating a reasonable prospect of survival; some suggestions on how to demonstrate this were voiced by practitioners during the interviews.

Brian Mc Enery, has suggested that companies should prove they have orders into the future, [Q.41 Appendix D-Interview Transcript 3] that any cost or turnover estimates are reasonable and examples should be provided based on robust financial modelling and perhaps downsizing the company is the only way to move forward. This is an opinion shared by Michael McAteer, who also believes that slimming down a component and showing that some part of the business is profitable can ensure that the company successfully demonstrates a reasonable prospect of survival. [Q.33 Appendix D-Interview Transcript 4]

4.2.2 Who can petition to appoint an Examiner?

Who petitions for an Examiner in practise?

Companies must meet the requirements of the Act, before they can petition to have an Examiner appointed. Persons whom may petition for an Examiner in legislation and in practise offers one minor difference- Chapter two outlined that The Directors, The Company, The Creditors or The Members may petition to appoint an Examiner. However in practise there is one further inclusion, that of the Minister for Finance. Michael McAteer stated that the Minister would “only appoint an Examiner if it was deemed to be in the national interest”, he further added that there are no such cases where the Minister has petitioned for an Examiner, although it was considered in respect of Waterford Glass. [Q.1 Appendix D-Interview Transcript 4]

The results from the questionnaires highlighted that 64.28 percent of practitioners felt that Directors usually petitioned to put the company into Examinerships. However other practitioners experience was that it was either the company (28.57 %) or the shareholders (7.14%) that petitioned to appoint an Examiner. [Q.6-Appendix C] Creditors do not usually petition for the appointment of an Examiner but it may increase in the future. It did occur recently, when Sony, a major creditor petitioned for an Examiner to be appointed to Golden Discs. Joseph Walsh said that [Q.1 Appendix D-Interview Transcript 2] creditors face difficulties appointing an Examiner as they do not have the company's books and records and therefore cannot compile an IAR to accompany the petition. In extenuating circumstances interim Examinership is granted to allow a creditor access to the information and prepare an IAR.

The Petition for Examinership

Once a petition has been presented to the HC and lodged in the central office the company is automatically put into Examinership (interim Examinership). A full hearing of the petition occurs a few days later, allowing “notice parties”, such as the revenue commissioners and major creditors, the opportunity to be heard as to whether they would be supportive of the company being given the status of full Examinership. Every item of correspondence which is given to the court must be circulated in advance to the notice party, so that they can be heard on any matter that comes up in front of the court.

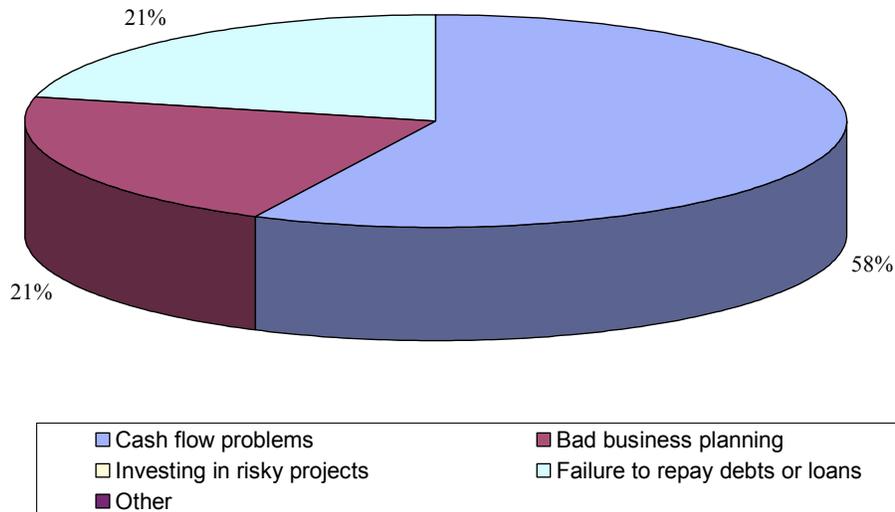
Although petitions are rarely rejected, they are being subjected to more scrutiny now than previously by the Judges in the HC. The questionnaire concluded that where a petition was rejected it was either the Court rejecting the petition (50%) or the Creditors (50%) [Q.7-Appendix C]. With regards the creditors rejecting the petition; it is commonly either the revenue or the bank that oppose. Joseph Walsh, Hughes Blake stated that as Examiner he highlights what savings the state would make by allowing the company to continue because the revenue make the decision whether to vote in favour or against the Examinership.

As the researcher addressed how an Examiner can be appointed and by whom they can be appointed, they encountered several characteristics that exist in companies applying for Examinership.

What characteristics exist in companies seeking Examinership?

The questionnaire results indicated that the examinership process was the most suitable process for companies experiencing financial difficulties (78.57%) The balancing 21.43% chose the option “other” but cited that they either felt that all the processes were applicable but it depended on each company’s circumstances or that an informal scheme of arrangement should be used, as it was less costly and more suitable for small businesses. [Q.1- Appendix C]. The results highlighted that it is paramount that companies appoint an Examiner early as 85.71% of practitioners believed that this increases the companies’ chance of survival. [Q.5-Appendix C]

Figure 4.1 highlights the most common characteristics that exist in companies applying for Examinership. It is companies experiencing these problems that must then satisfy the required conditions outlined by the Act.

Figure 4.2- Common characteristics in companies applying for examinership

Joseph Walsh has encountered cash flow problems and failure to repay debts or loans in previous Examinership cases. Banks are insisting that capital repayments are made and “often the capital repayments are far too much for the group or the company” and therefore the company applies for Examinership.[Q.24 Appendix D- Interview Transcript 2] He also stated that often Directors don’t have the “required capabilities” resulting in bad business planning [Q.26 Appendix D-Interview Transcript 2]; this was supported by Brian McEnery who stated that “bad business planning and bad financial management generally result in companies not making the right decisions at the right time”. [Q.38 Appendix D-Interview Transcript 3] However he added that even good, well run businesses fail because turnover and demand has collapsed. Early decision making is the key and only companies that act quickly will survive.

Michael McAteer, however, believes that sometimes Examinerships are caused because “management went into a new area and the area didn’t prove successful” [Q.30 Appendix D-Interview Transcript 4] or due to outside factors such as changes in the market or in legislation. This occurred in Iqon technologies, a computer manufacturing company, supplying computers to Tesco. As the company was restructuring, Dell announced that they were also supplying computers to Tesco and

this ended the company's reasonable prospect of survival. The examiner determined that a price difference of €100 between the computers would not be enough to entice customers to buy an unknown computer in preference to a Dell computer. The market changed and demand was lost, this unfortunately resulted in Iqon technologies being liquidated. [Q.15 Appendix D-Interview Transcript 4]

4.2.3 The significance of the IAR

Importance of the report to the application for an Examiner

As stated previously, petitions are being more scrutinised in the HC, a specific component of the petition which has particularly been scrutinised is the IAR. Justice Kelly stated that some of the reports were becoming almost “formulaic” in presentation. Michael McAteer however, is supportive of the inclusion of the IAR as it gives a “snap shot of where the company is at, it identifies key risks and issues that should be addressed by the Examiner” [Q.9 Appendix D-Interview Transcript 4], this opinion is collaborated by Joseph Walsh who believes that the IAR is “great” and provides the background information of the company allowing an Examiner “a good briefing” before they begin. [Q.9 Appendix D-Interview Transcript 2]

The criticism of the IAR by Justice Kelly is not without substance as Brian McEnery informed the researcher, a report recently “had the name of the wrong company on it because they cut and pasted it”. Brian McEnery is of the opinion that “some practitioners are willing to sign an IAR without giving them enough care and attention”. [Q.11 Appendix D-Interview Transcript 3] However he added that it is extremely difficult due to the intense time pressures put on the practitioner. This intense pressure was confirmed by Alan Mc Lean, an Independent Accountant who stated that a report from start to finish can be “25-80 hours of time” and often the report is required within days, especially if creditors are trying to put forward a winding up order or appoint a receiver. [Q.4 Appendix D-Interview Transcript 1]

Although Brian Mc Enery did voice limitations of the report he did highlight that the report can be “very helpful to an Examiner”, provided it really answered “the questions required in an IAR”. [Q.11 Appendix D-Interview Transcript 3] The questionnaire result's supports the significance of the IAR to the application of the

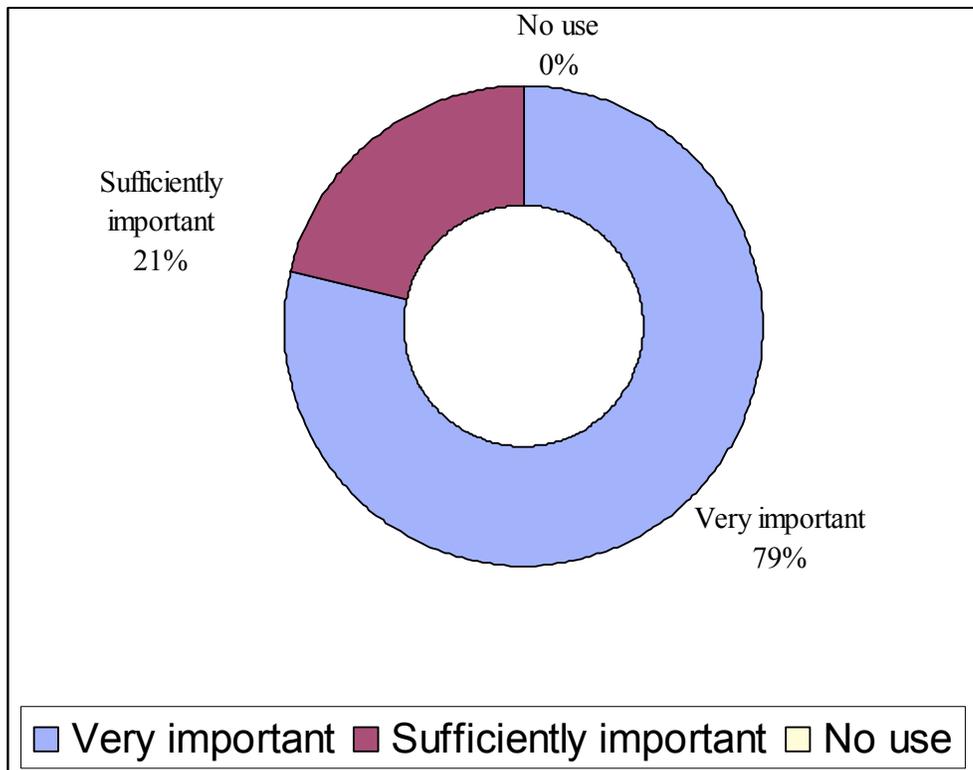
petition, as 78.57% of practitioners believed that the IAR was very important, the remaining 21.43% felt that it had sufficient importance, not one practitioner said that it had no use, this is illustrated in Figure 4.3.[Q.9-Appendix C].

As such a large majority of the practitioners felt that the report was very important the researcher aimed to find out the significance of the report from an Independent Accountant; Alan McLean explained the three basic steps in compiling a report.

1. “To maintain an overview of what a company does over time
2. Discover what the current financial position of the company is
3. Recommend whether you believe the company has a future, if certain conditions can be met and also try to determine what those conditions are”.

[Q.2 Appendix D-Interview Transcript 1]

Figure 4.3- The significance of the IAR to the application of the petition.



The significance of the report is that it is presented to a judge that ten seconds beforehand had no idea about the company. It allows the judge an insight into the company and what it does. In addition, it offers a more nuts and bolts view of the

company. Alan McLean believes that the 1999 Amendment to the Act, for the inclusion of the IAR to accompany a petition was a good idea. [Q.8 Appendix D-Interview Transcript 1] Joseph Walsh believes that the IAR is significant because it contains “the information required by the judge in order to assess their decision as to whether to put the company into Examinership and allow an Examiner to be appointed” [Q.9 Appendix D-Interview Transcript 2]

The researcher also quizzed the Independent Accountant on whether or not he believed the report should be more scrutinised, his response was “I think there probably should be a certain amount of scrutiny” [Q.9 Appendix D-Interview Transcript 1] but added that it may not be practical as every time a case comes along, either an observation is made by a Judge or an opposing barrister and that must be worked into the next report and so it is still developing. Alan Mc Lean added that the reports should be much longer and more detailed. Every report “is individual” and the report are not something “that can ever be standardised” [Q.18 Appendix D-Interview Transcript 1]

Using the contents of the report during the Examinership process

As it was demonstrated that the report is significant to the application of the petition, the researcher’s next aim was to discover whether or not the Examiner used the contents of the IAR throughout the Examinership. The questionnaire results indicated that a large majority (85.71%) of practitioner’s did use the contents of the IAR. However, 16.66% of the practitioners used the report only as a point of reference. [Q.11-Appendix C]. Michael McAteer agreed that the report “from a day one perspective is a very important document”, but added that “it loses its importance as time goes on because the Examiner starts to add their information”. [Q.9 Appendix D-Interview Transcript 4]

In contrast, Joseph Walsh believes that the report is useful in the initial stages and throughout the process due to the fact that the report contains a cash flow statement and the Examiner needs to constantly “monitor the cash flow” and to compare the actual with the expected within the cash flow. Monitoring cash flow is an important part of Examinership as the company is required to have enough cash flow for the period of protection. [Q.10 Appendix D-Interview Transcript 2]

Brian McEnery shares the opinion that the report is used throughout the process as it “contains good accurate information relating to the opening balance sheet of the examinership period”, but if the report is not accurate then it is of little use to an examiner. He added that in one Examinership he was involved in, the statement of affairs attached to the IAR was radically different to what he encountered and the report therefore of little use. [Q.12 Appendix D-Interview Transcript 3] In order for the Examiner to fully benefit from the information provided within the report, it is fundamental that the information is accurate.

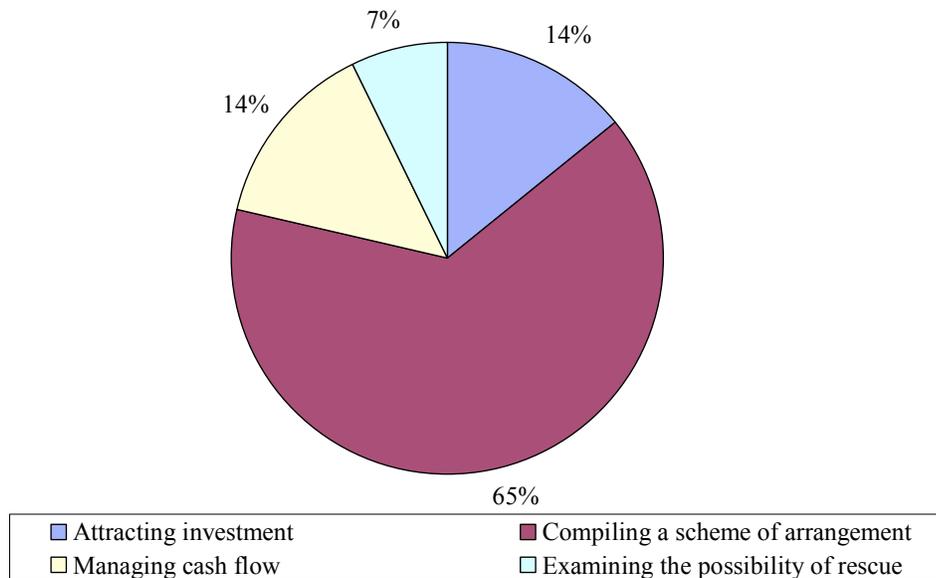
4.2.4 The role of the Examiner

The role of the Examiner is outlined in the Companies Act, 1990, as amended by the Companies (Amendment) (No.2) Act, 1999. The legislative requirements imposed on the Examiner as an officer of the court have been outlined in chapter two. The role of the Examiner presented in this chapter is based on the researcher’s findings.

The aim of the researcher was to consider the most important role of the Examiner, legislation highlighted several duties but the researcher wanted to identify the most important role of the Examiner in practice. This is illustrated below in Figure 4.4.

The main role of the Examiner in practise

The results indicate that the majority of practitioners (65%) felt that the most important role as an Examiner was to compile the Scheme. [Q.10-Appendix C] The Scheme is essentially a compromise with the creditors to assist the survival of the company

Figure 4.4 The most important role of the Examiner

- **Compiling the Scheme**

In many Schemes creditors receive only a small dividend and so the Scheme often faces opposition. One case of late which has come under fierce opposition is Laragon Developments as hundreds of home buyers were set to lose over 95% of their deposits, fuelling the argument that Examinership is anti-creditor. Ultimately Laragon Developments was put into liquidation as a result of the unfair treatment of the home buyers and creditors and it is hoped the company will be investigated. Mr. Justice Frank Clarke said “Laragon was not a company the Examinership process was designed to protect” [Q.18 and Q.19 Appendix D-Interview Transcript 3]

However, unsecured creditors rejecting the Scheme should know that if liquidation occurs they are likely to receive nothing and therefore should be encouraged to support the scheme and recoup some of their money. The home buyers in the case of Laragon Developments are now to receive nothing.

The scheme is presented for approval to the HC when at least one class of creditors have voted in favour of the Scheme. Opposition to the Scheme often comes from the

banks as their loans are usually secured and would benefit immediately in a liquidation scenario. The revenue are also likely to oppose the Scheme, Joseph Walsh believes that an Examiner should highlight the benefits of the company continuing as a going concern and the “costs to the state” if it does not, to entice the revenue to vote in favour of the Scheme. [Q.13 Appendix D-Interview Transcript 2] Any company which has successfully come through Examinership continues to pay taxes, hence the benefit of supporting Examinership. This is illustrated in the case study of Shamrock Rovers presented in Appendix E.

- Attracting Investment

Attracting investment represented 14% of the population, a role which is even more imperative in the current economic climate. As stated in chapter two, the ability to attract investment is considered before an Examinership is granted.[Q.10-Appendix C] Michael McAteer believes the Examiners should be meeting with potential investors and from an independent view point “look at what is best for the company not necessarily what is best for the shareholder”. [Q.7 Appendix D-Interview Transcript 4] Companies in Examinership need capital to survive and if the company is unable to attract investment then this will prove fatal to the company.

Brian McEnergy believes that now it is crucial to identify possible investor’s pre Examinership, as very often it is somebody known to the company that invests in it, as solely external capital is extremely difficult to attract. An Examiner should “take a hands on role and try to cut a deal”. He added that company’s should “use that time period pre examinership to go out and get some ducks lined up in a row”. [Q.30 Appendix D-Interview Transcript 3]

- Managing the company’s cash flow

Equally important to attracting investment, is managing the company’s cash flow, this was voiced by 14% of the population, as the duty is on the Examiner to report to the HC if the reasonable prospect of survival has been eliminated. [Q.10-Appendix C] The company needs to have the required cash to keep the company trading during the 100 day protection period. The protection is offered so that the management of the company can focus on managing the company and the Examiner deals with all the

historical debts. Keeping cash flow in line with the predicted cash flow presented in the IAR is vital to ensure that the company does not accumulate any further debt.

- Examining the possibility of rescue

Examining the possibility of rescue represents 7% of the population and the view of Brian Mc Enery. [Q.10-Appendix C] He believes that some of this examination occurs in the IAR when a “reasonable prospect of survival” is demonstrated. The Examiner continues this examination to decide if the company can survive, this is done by corroborating the information presented in the IAR and investigating whether or not the company has a good core business. If it is found that the company has a “good core business” or even part of the company then the possibility of survival is increased.

The Examiner must investigate what caused the crisis strengthen that. Brian Mc Enery said that there are a number of hurdles to jump in an Examinership, the first is to examine the possibility of rescue or the reasonable prospect of survival, then the other hurdles include “new capital, new management, and getting approval from the creditors”. There is a lot of work to be done. [Q.9 Appendix D-Interview Transcript 3]

While the results of the questionnaire indicated the most important roles of the Examiner, the researcher also identified a number of secondary roles during the interviews; these are listed in Table 4.1.

Table 4.1 Other roles of the Examiner

Communicate with the creditors, directors and shareholders about the examinership [Q.8 Appendix D-Interview Transcript 2]
Restructure the company [Q.8 Appendix D-Interview Transcript 2]
Introduce new management or additional management personnel [Q.20 Appendix D-Interview Transcript 3]
Report to the High Court [Q.7 Appendix D-Interview Transcript 4]
Restore confidence in the company [Q.10 Appendix D-Interview Transcript 3]

4.2.5 Investigative powers of the Examiner

Has an Examiner investigative powers?

The Examiner may, only if requested by the HC, investigate certain affairs of the company such as any claims made against the company with reference to reckless trading or specific transactions. The Examiner only has to report something if something becomes obvious to the Examiner, however, as practitioner Michael McAteer stated an Examiner “does not have the right or the duty to actually go looking for something”. There is a mismatch with what creditors think the Examiner’s job is and what an examiner’s job actually is. [Q.35 Appendix D-Interview Transcript 4]

4.2.6 The importance of the examiner’s report

What is the importance of the Examiner’s report?

The role of communication is fulfilled by reporting to the HC at intervals throughout the Examinership. The main report produced by the Examiner is a legally required document known as a section 18 report. (the contents are outlined in Appendix A.) It is essentially the results of “all the meetings with the creditors and the proposals and what would happen if the company went into liquidation versus what would happen under Examinership” according to Brian McEnergy. [Q.44-Q.47 Appendix D-Interview Transcript 3] The report leads to the granting of Examinership, provided one class of creditors have agreed to the proposals. Therefore the results of the report will ultimately decide whether the company will be offered protection of the court and the chance to restructure the company and continue as a going concern. After the section 18 report has been heard there will be one final hearing so that the court can either “confirm or deny the cramming down of debt”.

4.2.7 The success of Examinership

How successful is the Examinership process?

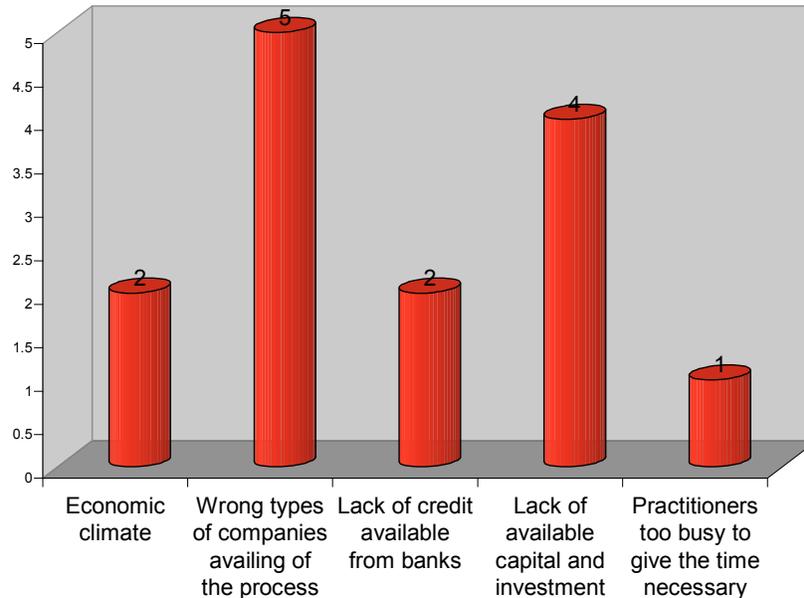
The final objective of the researcher was to investigate the success of Examinership. As highlighted in chapter 2, previous research only offers statistical information on the success of the process and the researcher wanted to add to this by exploring why fluctuations occurred in the success rate. The researcher wished to highlight whether

the process itself was at fault for any decreases in success or was any decline due to external factors which could neither be controlled nor prevented. Statistical research on the success of Examinership in Ireland has highlighted a sharp decline in the success rate, the success of the process peaked in the period 2004-2006 at 93%, however the success rate for the last quarter of 2008 was at an all time low of 18% according to Grant Thornton.

If companies were to view these statistics alone they would come to the conclusion that the process no longer works. Granted, the success rate is not as high as it was but the survival of only one company benefits the economy dramatically as opposed to liquidating it. Michael McAteer has stated that this quarter (Jan-April) Examinership success is rising again to between 50% and 60% approximately. [Q.39 Appendix D- Interview Transcript 4] Brian McEnery, on the other hand, believes that the annual successful emergence is “of the order of about 30% or less and that’s for companies that are getting through the process and out the other side” but added that companies still in existence a year or two after the Examinership may be less. [Q.48 Appendix D- Interview Transcript 3]

Why has the success rate of Examinership decreased recently?

The questionnaire results showed that practitioners in the area of Examinership firmly believed that the success rate of Examinership was in decline due to the following factors represented in Figure 4.5; supporting the conclusion that it is not the process of Examinership which is at fault but external factors negatively impacting upon it. [Q.12-Appendix C]

Figure 4.5 Reasons for the decrease in the success of Examinership

- Wrong types of companies availing of the process

Five out of fourteen practitioners surveyed argued that the success rate fluctuation was due to the wrong types of companies availing of the process. Michael McAteer is one of the practitioners supporting this opinion; he stated recently “that the wrong sorts of companies” are now seeking the protection of the HC through Examinership specifically in the Construction sector. [Q.16 Appendix D-Interview Transcript 4] To take advantage of the breathing space that Examinership allows, companies should retain a steady flow of new business – no longer the case with construction firms, hence the decrease in success. He added that the construction and building companies are no longer suited to the process even though they were a year previous because there is no banking available and projects can not be “re-floated”. It can be assumed that once banking becomes available again construction companies availing of the process may experience more success than they are currently.

- Lack of investment

Certain companies can no longer avail of the process because of a lack of available capital and investment. Companies which are experiencing financial difficulties need an injection of capital in order to successfully restructure their business. However as Justice Kelly highlighted investors are “as scarce as hen’s teeth” and 28.57 percent of practitioners believe this is proving detrimental to the success Examinership. [Q.12- Appendix C] Brian McEnery emphasized that it is easier for companies that are not considered terminal to attract investment. [Q.31 Appendix D-Interview Transcript 3] In addition, he is of the opinion that investment can be attracted depending on the way the Examiner presents the company to potential investors. Sometimes the finance needed to rescue a company can be raised within the community. This occurred in several cases and was particularly successful in the case of Shamrock Rovers.

- Lack of credit (available from banks)

The results highlighted that the lack of credit available from banks both during the Examinership process and after successful emergence is proving detrimental. During Examinership banks often do not feel that it is in their interests to support the Examinership and so it is difficult to get the bank to write down any debt. Michael McAteer said that the banking system is so unworkable at the moment and “it’s impossible to get cash out of a bank even from invoice”. [Q.27 Appendix D-Interview Transcript 4] Companies emerging from the examinership process face similar situations with their suppliers. The role of the Examiner in restoring confidence in the company is vital to resolving these difficulties.

Michael McAteer added that “there is a very, very difficult process of getting new finance from a bank for a company that’s been in Examinership”. [Q.28 and Q.29 Appendix D-Interview Transcript 4] Joseph Walsh believes that the banks add an extra “risk factor” when dealing with companies that have come through Examinership. [Q.25 Appendix D-Interview Transcript] Brian McEnery supported this, very often if banks have written off some of their debt “it generally tends to try and not trade with the company then subsequently in respect of new facilities”. In

contrast, he had seen cases where banks have worked with the company subsequently. [Q.34 and Q.35 Appendix D-Interview Transcript 4]

- Economic Climate

The economic climate also represented a reason for the decrease in success. [Q.12-Appendix C] This can be seen through the reduction in demand. If, for example a company in the retail sector went into Examinership, the restructuring of the company would only be a success if the company continued to trade throughout the period of protection and with the Central Statistics office citing a reduction in spending in the retail sector of 17% the prospect of survival for companies in the retail sector are decreasing. This is a problem across all sectors of the economy with car sales reduced by 60% and even the grocery sector experiencing a 7% decrease in spending.

- Practitioners are too busy to give the time necessary

The economic climate has ensured that the volume of companies seeking the advice and expertise of Insolvency Practitioners is increasing and they are now dealing with a larger volume of companies within the same time constraints. The questionnaire found that practitioners were seen to be too busy to give the appropriate time to companies and this was causing a decrease in success. [Q.12-Appendix C] Examinership has been described as an extremely intense process and if a practitioner is dealing with several Examinerships simultaneously, giving each company the time and commitment needed can prove extremely difficult. [Q23 Appendix D-Interview Transcript 3]

Brian McEnery said he knew one practitioner who had five examinerships ongoing concurrently and none of those were successful. That outcome was no surprise because of the intensity of the process. His thoughts on this was that “it’s better to turn one company around in a hundred days, rather than take on five and put the five of them into liquidation”. Hence he advised that “it’s important for companies not to automatically go for the busiest” Examiner because they might not be able to give the company the required attention. [Q.24 Appendix D-Interview Transcript 3]

- Inexperienced Examiners

A further reason expressed for the decrease in success of Examinerships was a belief that some Examiners did not have the appropriate experience to conduct an Examinership. Brian McEnery thought that some Examinerships have collapsed because Examiners were “not experienced enough”. In his opinion some examiners are “very hands off” believing that they are only a conduit whereas they should be really in the cold face of it and trying to cut a deal. He concluded with the thought that “more Examinerships would succeed if Examiners were more energetic about the process”. [Q.25 Appendix D-Interview Transcript 3] This opinion was supported by Michael McAteer.

As the researcher explored reasons for the decrease in the success of Examinership not one practitioner was of the opinion that the ultimate fault was with the process. In fact, the Independent Accountant, Alan McLean firmly believed that the “process works perfectly” and that the decrease in the success rate was due to cases failing which should never have gone to court. [Q.15 Appendix D-Interview Transcript 1] Hence the reason petitions are now being scrutinised because judges are also recognising this. Therefore the process can still be described as a success in Ireland as the fluctuations in the success rate have been explained by external factors. Perhaps increasing awareness of the process would enable companies to act quicker when they are in financial difficulties, as they are made aware of options early.

Increasing awareness of the Examinership process

The surveyed population agreed (71.42 percent) that increasing awareness could increase the success of the process [Q.13-Appendix C], albeit that this would still depend on external factors such as the availability of investors. Increasing awareness of the process in companies would be a good step according to Joseph Walsh so that “companies are not at a terminal stage before they are aware of the process” but added that it should be actual accountants that are “aware of the criteria of Examinership and what fits into an Examinership” and “they could advise their clients correctly”. [Q.10 and Q.11 Appendix D-Interview Transcript 2] Brian McEnery supports this opinion stating that there is some ignorance as to what Examinership is about and “what examinerships can do and in what circumstances it is plausible” and companies need to be made aware of this. [Q.14 Appendix D-Interview Transcript 3]

In contrast, Michael McAteer does not believe that increasing awareness of the process would increase its success rate. As there is a huge expense to put a company into Examinership and only the top 5%- 7% companies in the country meet that financial commitment. Larger companies would “tend to have Independent Accountants, quite good law firms who in turn would know of the processes available to them, so if a company of that size needs to go into examinership, I would believe in general that they would know of the process” [Q.11 Appendix D-Interview Transcript 4]

4.2.8 How success can be achieved

Achieving success through Examinership

Through investigation, the researcher identified a number of factors which practitioners believed could lead to a successful Examinership, provided legal requirements are first met. These success factors are represented in Table 4.2 The researcher also identified a number of companies that successfully emerged from Examinership (Appendix E). The success of the process should not be viewed on overall statistics alone but on the merits of each case which has survived to confirm the success of the process in Ireland.

Table 4.2 How to achieve success

Identify and tackle financial problems as soon as they are apparent
Seek advice from an insolvency practitioner early to increase available options
Do not inject capital without first identifying the problem
Be honest and communicate with creditors about financial difficulties to maintain confidence in the company
Identify any potential investors pre examinership
Ensure the company has a good “core business” or some part which is profitable
Make any necessary changes or additions to Management, Directors and Shareholders

4.2.9 Examples of successful cases of Examinership

As outlined previously, examples are provided to represent the success of the process in Ireland. These success stories are presented as case studies in Appendix E.

4.3 Conclusion

The chapter analysed and discussed the main findings of both the questionnaire and interviews, which were conducted by the researcher. From this, it is evident that there are various opinions on the appointment, role and success of Examinership in Ireland.

It is important to note that there are limitations of the actual process- it can be very expensive and it is more suitable for medium or large companies. In addition the Examinership legislation needs to undergo some reforms, as indicated by 85.71 percent of the surveyed population. [Q.14-Appendix C]

However the benefit of a successful Examinership has several folds and 100% of the surveyed population believed that the process does ultimately benefit the economy. [Q.15-Appendix C] To conclude, the findings have answered the research question and met the research objectives.

Chapter 5

Conclusions and Recommendations

5.1 Introduction

The purpose of this chapter is to summarise the main findings of the research, to draw conclusions, and to make recommendations and suggestions for further areas of research based on the findings of the study.

In order to investigate the “appointment, role and success of Examinership in Ireland”, the following aims were derived:

- Identify how an Examiner is appointed and what criteria must be met?
- What is the role of an Examiner?
- The success of Examinership in Ireland.

5.2 Overview of the main findings

The conclusions of this research are broken down under the headings of each research objective identified in chapter one and based on the findings outlined in chapter four.

5.2.1 The criteria for appointing an Examiner

As outlined in chapter four, the criterion for appointing an Examiner is set out under legislation. A thorough presentation on the criteria is also offered in chapter two (paragraph 2.3.1 and 2.3.2). The researcher concluded that the most important part of that criterion is proving that the company in question has a reasonable prospect of survival. This is based on the grounds that without a company being able to demonstrate a reasonable prospect of survival an Examiner will not be appointed.

The findings highlighted ways in which a company may demonstrate the reasonable prospect of survival. To conclude, the researcher believes appointing an Examiner to a viable but ailing company is their best chance of restructuring and saving the company as an Examiner offers their expertise at turnaround and aids the cramming down of historical debt. In addition, the HC offers a much needed period of

protection. So, for companies meeting the criteria; it is advisable to seek the appointment of an Examiner.

5.2.2 Who can petition to appoint an Examiner?

As stated in chapter four, there are numerous individuals that can petition to appoint an Examiner, these findings are consistent with legislation which is addressed in chapter two (paragraph 2.4). Therefore, it is paramount that the process is understood so that an Examiner can be appointed early and the full benefits of the process can be reaped. As highlighted by the findings, Directors are commonly the individuals that will appoint an Examiner.

However the researcher believes that the shareholders should not always rely on the Directors due to the possibility of agency theory existing .In a company where the Directors are paid based on performance it can be difficult for a Director to admit that the company is in fact not performing well. This opens the possibility that Directors may bury their heads in the sand rather than face the problems as they appear.

Creditors are acting quickly to ensure that their debts are honoured. Banks are becoming more aggressive in ensuring that they do not lose out and are quick to appoint a receiver or petition to wind up a company so that they can be paid what they are owed earlier. Shareholders wishing to protect their company from a winding up order or a receivership should keep close tabs on the company and ensure that if the company is in difficulty that they know how to react and in what circumstances to appoint an Examiner.

The researcher presented common characteristics that existed in companies applying for Examinership (chapter four, Figure 4.2); these characteristics should be noted by shareholders, Companies and Directors as a siren that help is needed. As stated in chapter one, this thesis could be educational to all of the above and making those individuals aware of these characteristics is one way in which this thesis could benefit them.

5.2.3 The significance of the Independent Accountant's Report

Chapter four presented reasons why the IAR is significant. As the report was promoted to a legal requirement in the 1999 Act the researcher was immediately aware that the report was now more significant than it had been when Examinership legislation was initially introduced.

The literature suggests that the IAR and the process of Examinership are transparent and independent of the company; however in practice Directors usually aid the preparation of the report and the Examiner in their duties. Hence some scrutiny is needed, particularly with the report as it leads to the appointment of an Examiner. The report was considered a very important part of the application of the petition (as presented in chapter four, Figure 4.3) by 79% of practitioners.

The findings of the research noted some limitations. Time was found to be a major constraint as often Examinership is a reactionary process whereby a petition to wind up the company has been sought and the company reacts by applying for Examinership.

However, with strict deadlines to meet and a company's survival on their hands, perhaps some of the reports being prepared offer evidence that Independent Accountants should be given adequate time to prepare a document which could save a company or lead to its liquidation.

The researcher concluded that the report was crucial, as a reasonable prospect of survival is a significant part of the criteria to appoint an Examiner and the report offers evidence that this exists. However in order for the examiner to fully benefit from the information provided within the report, it is fundamental that the information is accurate.

5.2.4 The role of the Examiner

Chapter four's analysis was based on the findings of the primary research, which expressed several practitioners' views and expertise on what the role of the Examiner

consisted of. Chapter two had previously outlined any statutory roles of the Examiner (paragraph 2.5.1).

The researcher concluded that the Examiner's role was multi fold. Legislation outlines the powers that an Examiner has when appointed such as all the powers and rights of an auditor. The primary research identified several of the most important roles of the Examiner in practise (chapter four, Figure 4.4) and this also enabled the researcher to establish secondary roles of the Examiner (chapter four, Table 4.1).

Results of the questionnaire indicated that the majority of practitioners believed that the Scheme was the most important role of the Examiner. The Scheme offers a compromise between the company and the creditors and is the ultimate survival plan for the ailing company.

The Scheme needs to ensure that creditors are not being treated unfairly and that they would benefit more from an Examinership rather than liquidation. Often, creditors think that they'd most benefit by recouping their money immediately in liquidation as opposed to a dividend in an Examinership. However they should note that a liquidation spells the end for a company whereas Examinership offers the chance of survival and creditors can continue to trade with the business in the future .A company which has survived Examinership is undoubtedly a better company than it was before Examinership as its problems have been identified and solution have been obtained. Creditors should bare this in mind before opposing the Scheme.

Other practitioners felt that the main role of the Examiner was attracting investment, managing cash flow or examining the possibility of rescue. These roles too are important, especially in the current climate as it becomes crucial for companies to properly manage their cash flow and ensure that they can meet their current liabilities. It was found that the most common characteristic in companies applying for Examinership was cash flow problems which corroborates why an Examiner's main role would consist of managing cash flow.

Without attracting investment a company in Examinership can not survive. Investment in the economic climate is hard to attract as the recession has hit even the

wealthiest. Each case of insolvency has an element of personal insolvency and investors which have lost out before are slow to take chances as a bankruptcy claim will remain with them for years and any subsequent profits they make will have to be offset and as such offers no encouragement for investors to take a chance.

The final role of importance was examining the possibility of rescue. This role will lead the Examiner to determine whether in fact the company can survive. The groundwork of this role is completed by the Independent Accountant and added to by the Examiner once the Examinership begins.

As the researcher previously stated the role of the Examiner is multi fold. The period of protection is intense and numerous hurdles have to be overcome. The successful emergence of a company from an Examinership can therefore be considered a thoroughly rewarding experience for an Examiner as they aid the rescuing, restructuring and retention of a company. This provides local and national communities with employment. As recent unemployment figures have reached a record high (10.83% average for Jan-June 2009 according to CSO), a process which can preserve jobs should be given every opportunity to succeed.

5.2.5 Investigative powers of the Examiner

The findings stated that the Examiner does not have any investigative powers in relation to the company which is in Examinership, unless something specifically comes to their attention or the HC orders them to investigate a claim. If the HC has ordered the Examiner to investigate an allegation of, for example, reckless trading then the authority to investigate is granted to them.

The results led the researcher to conclude that a gap exists in expectations similar to the audit expectations gap, whereby Examiner's and creditors have different views on what the job of an Examiner is. It is hoped that this thesis will close this gap as it highlights the main and secondary roles of an examiner and also clearly states that they do not investigate the company unless ordered to by the HC.

Directors must take extra care to meet all their legal requirements because if an accusation is made by creditors against them, then there is a duty on the HC to ensure that it is investigated.

5.2.6 The importance of the Examiners Report

The report compiled by the Examiner, the findings of which are presented to the HC is an extremely important document. The results in chapter four emphasised that the Examiners section 18 report contained all the results of the meetings with creditors and the proposals and “what would happen if the company went into liquidation versus what would happen under examinership”. Based on this the researcher concluded that the contents of the Examiners report could be the difference in the survival or failure of Examinership.

The conclusion is based on the fact that a qualified accountant acting as an Examiner has gone into a company, identified the problems which led to the difficulties and then developed appropriate solutions to these problems. Throughout the process of conducting this work, the Examiner communicated with the creditors to gain their support for each suggested proposal. The report contains details of the steps the Examiner took, the proposal that he has put forward and the reactions of the creditors to the proposals. The support of creditors would also be documented.

The importance of this report on reaching the HC is that the judge will not grant approval of the Scheme if any one class of creditors argues that the proposals are prejudice towards them. Therefore the Examiner must ensure that the contents of the report show that there has been no prejudice and that the survival of the company was the only concern.

5.2.7 The success of Examinership

The results in chapter four aimed to expand on the statistical success of the process. The researcher having viewed the implications of only one company successfully emerging from Examinership in terms of employment, tax revenue and value to the community concludes that the survival of one company can still be described as a

success. There is no complex operation or surgery that has a 100% success rate, each individual surgery which succeeds with a positive outcome is defined as a success, the researcher has interpreted the success of the Examinership process in the same way.

Percentage rates of success show that the success of the process is in decline, however as the results have clearly presented external reasons for this decrease in success, the process itself should not be considered unsuccessful. The researcher considers that the many companies still seeking the protection of the court, such as O'Brien's and the Lynch Hotel Group are too of the opinion, that a process which offers the chance of survival in the current economic climate must be worthy of a try.

The results of chapter four discussed that external factors leading to a decrease in the success rate namely, the economic climate, lack of credit and investment, wrong types of companies seeking protection and practitioners are too busy to give the company the necessary time and attention. These factors are having a detrimental effect on the process and perhaps the government should offer some funding to a process such as Examinership that has already proven its success.

5.2.8 How success can be achieved

There are no definite steps to success as each company in difficulty is different in many ways and therefore should be addressed in a manner suitable to their needs. As the researcher conducted the primary research the information suggested that there may be ways in which a company can increase its chance of survival. The information was interpreted by the researcher and the steps to success which emerged are represented in chapter four, Table 4.2.

Companies willing to make any necessary changes to management; identify their problems before injecting capital and tackling financial problems as soon as they appear will undoubtedly have increased their chance of survival. In any company contemplating seeking an Examiner, they should be aware of the findings in chapter four and try to overcome the external factors which decrease the success of the process, perhaps by cutting costs to free up internal investment and attracting investors before the company is considered terminal.

The success stories presented in Appendix E are inspiring and offer support to the argument that the process is a success, although in need of some minor reforms.

5.3 Overall Conclusion

In conclusion, the process of Examinership benefits the economy through job preservation and tax revenue. The appointment, role and success of Examinership in Ireland are evident. (Appendix E) The process offers companies which are viable but currently experiencing difficulties the chance to trade through these problems and emerge as a restructured and more grounded business entity.

Companies which appoint an Examiner early are more likely to survive. In the current climate the process has been negatively impacted by the reduction of investment and credit so the message to companies is to act early.

5.4 Recommendations

The researcher recommends that this study be expanded and the expectations gap should be more thoroughly addressed. It is important for creditors to be aware what an Examiner actually does rather than what they think an Examiner should do. One practitioner suggested that an Examiner and the Examiner's duties should be defined with more clarity in the Companies Act.

The researcher also highlighted that limitations existed with the process of Examinership namely that it was too expensive and that law reform was needed. The researcher suggested that a way of reducing the costs of the process was by moving the process to a circuit court, thus reducing the legal bills dramatically.

The practitioners which were interviewed were in agreement with suggestion of law reform but added that such a change in the process would have to be conducted through legislation and with the current problems facing the government it is not likely that they would consider this change as their ultimate objective.

5.5 Further areas of study

As the process had limitations the researcher has identified a few future areas of study.

Insolvency Payment Scheme

The researcher felt that there was a minor problem with the Examinership process. In order for an Examiner to be appointed a company must be unable to pay its debts and be considered insolvent. (Refer to chapter two, paragraph 2.3.1) However under the Insolvency payment scheme which legislative basis is the “Protection of Employees (Employers Insolvency) Acts 1984-2004, a company under Examinership is not considered an insolvent company and therefore means that employees that are suffering arrears in their wages during or previous to the period of Examinership are not covered by the scheme like employees in a liquidation or receivership.

The employees in an Examinership are covered under the Redundancy Payment Scheme, which legislative basis is the “Redundancy Payments Act 1967” but that is if they are made redundant. This ensures that there needs to be reforms to the protection of employees Act to consider wages of continuing employees during Examinership.

The researcher did question various practitioners on this area of law during the interviews and the practitioners argued that if an Examiner can prove that the company can not pay the employees the wages owed then the insolvency payment scheme will pay these arrears from the social fund. Thus showing a leniency in the law, which perhaps strengthens the argument that it should be reformed to include employees that are owed wages in an Examinership scenario? The area has merit to warrant further study

The researcher, due to constraints on the word count, could not include all the potential areas that warrant future research. However the extended suggestions on future research are presented in Appendix H. These include:

- Personal Insolvency
- New Companies Consolidation Bill part A10-Examinership
- Time Extension
- Subsequent appointment as liquidator
- Informal/ Voluntary Scheme of Arrangement

APPENDICES

Appendix A- Contents of the IAR

Contents of the Independent Accountant Report

The Independent Accountant Report was brought into legislation by amendment to section three of the Companies Act, 1990. The information to be contained in the Independent Accountant Report includes the following:

- 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,
- 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 survival of the company, and the whole or any part of its undertaking, as a going concern,

Appendix A-Contents of the Independent Accountant's Report

- 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.

Appendix A- Contents of the Examiner's section 18 Report

The contents required by the Examiner's Section 18 Report are prescribed by the Companies Act, 1990.

Contents of the Examiner's report under section 18

An Examiner's report under section 18 shall 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 recommendations 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 the 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 officers of the company,
- h) His recommendations
- i) Such other matters as the Examiner deems appropriate or the court directs.

Appendix B- Questionnaire Distributed

Name: _____

Job Title: _____

Company: _____

What is the most suitable process for a company experiencing financial difficulties?

Examinership Liquidation

Receivership Other

Why?

What are the most common characteristics that exist in companies applying for Examinership? (Please rank in order)

Cash Flow Problems

Bad business planning/ management

Investing in risky projects

Failure to repay debts or loans

Other (specify)

What is the most frequent company size availing of Examinership?

Large Medium Small

Are the majority of the company's?

Private Public

What is the main benefit of appointing an examiner at the earliest stage possible?

- Increased chance of survival
- Greater ability to attract investment
(due to reduced risk at early stages of financial difficulties)
- Creditors are less likely to oppose the petition
- Scheme of arrangement easier to compile
- Other (specify)

Petitions for examinership are usually requested by;

- Directors
- Creditors
- Shareholders
- Company

Petitions are most likely to be rejected by;

- | | | | | | |
|--------------|--------------------------|-----------|--------------------------|---------|--------------------------|
| Court | <input type="checkbox"/> | Creditors | <input type="checkbox"/> | Company | <input type="checkbox"/> |
| Shareholders | <input type="checkbox"/> | Directors | <input type="checkbox"/> | Other | <input type="checkbox"/> |

Petitions for appointing an examiner have increased recently. In your opinion this is due to;

- | | | | |
|------------------|--------------------------|------------------------------------|--------------------------|
| Economic Climate | <input type="checkbox"/> | Increased awareness of the process | <input type="checkbox"/> |
| Other | <input type="checkbox"/> | | |

How important is the content of the Independent Accountants report to the application of the petition?

- | | | | | | |
|-----------|--------------------------|----------------------|--------------------------|----------------|--------------------------|
| No effect | <input type="checkbox"/> | Sufficient influence | <input type="checkbox"/> | Very important | <input type="checkbox"/> |
|-----------|--------------------------|----------------------|--------------------------|----------------|--------------------------|

What is the main (most important) role of the examiner?

- Attracting investment
- Compiling a Scheme of arrangement
- Managing cash flow
- Other

Does the examiner use the contents of the Independent Accountants Report?

Yes No

The success rate of examinership has decreased recently. In your opinion is this due to;

- Economic Climate
- Wrong types of companies availing of the process
- Lack of credit (available from the banks)
- Lack of investment
- Other

Do you think increased awareness and education of the process would increase its success rate?

Yes No

Are there any areas of the law governing examinership that need to be reformed?

Yes No

Does the use of the examinership process ultimately benefit the economy?

Yes No

Appendix C-Summary of results from the Questionnaire

The questionnaire was sent to twenty two Accountant Firms which also specialised in the area of Examinership. The response rate is indicated in the table below.

Table C.1-Response Rates

		Percentage of total
Responses received	14	63.63
Responses not received	8	36.37
Total sent	22	100

Enquiries were made into the reason behind questionnaires not being returned. The main reason was due to some respondents having a lack of experience in practise with the examinership process, although qualified to do so.

Table C.2- Position/ Demographics of Respondents (as illustrated by Figure 4.1- Chapter four)

	Responses Received	Percentage of total
Partner	9	64.28
Senior Manager of Corporate Restructuring	1	7.14
Audit Manager	1	7.14
Director of Corporate Restructuring	1	7.14
Director	1	7.15
Other	1	7.15
Total	14	100

Table C.3 The most suitable process

Source Q.1- What is the most suitable process for a company experiencing financial difficulties?

	Responses received	Percentage of total
Examinership	11	78.57
Receivership	0	0
Liquidation	0	0
Other	3	21.23
Total	14	100

The results indicated that the majority (78.57 percent) of practitioners felt that the Examinership process was the most suitable process for a company experiencing financial difficulties. The remaining population voted in favour of the option “other” but commented that this represented either using an informal scheme of arrangement or that all the above processes could be applicable but it depended on the exact difficulties of the company in question

Table C.4 Characteristics that exist in companies applying for Examinership (as illustrated in Figure 4.2)

Source Q.2- What are the most common characteristics that exist in companies applying for Examinerships?

	Responses received	Percentage of total
Cash flow problems	8	57.14
Bad business planning/management	3	21.43
Investing in risky projects	0	0

Failure to repay debts or loans	3	21.43
Other	0	0
Total	14	100

Table C.5 The most frequent size of companies applying for Examinership

Source Q.3- What is the most frequent size of companies availing of Examinership?

	Responses received	Percentage of total
Large	6	42.85
Medium	8	57.15
Small	0	0
Total	14	100

Table C.6 Private and Public Companies

Source Q.4 – Are the majority of companies availing of Examinership public or private?

	Responses received	Percentage of total
Private	13	92.85
Public	1	1.15
Total	14	100

Table C.7 Benefit of appointing an examiner early

Source Q.5- What is the main benefit of appointing an examiner at the earliest stage possible?

	Responses received	Percentage of total
Increased chance of survival	10	85.71
Greater ability to attract investment	1	7.14
Creditors are less likely to oppose the petition	0	0
Scheme of arrangement easier to compile	0	0
Other	1	7.15
Total	14	100

The one respondent that chose the option “other” expressed that they chose this option because they believed that the main benefit was that the company would be placed under court protection as early as possible, thus ensuring that the opportunity to appoint a receiver or liquidator is reduced.

Table C.8 Petition requests

Source Q.6- Petitions for Examinership are usually requested by?

	Responses received	Percentage of total
Directors	9	64.28
Creditors	0	0
Shareholders	1	7.15
Company	4	28.57
Total	14	100

Note: the question specifically asks who usually petitions for an examinership, therefore although no respondent chose the option creditors; it is not because creditors do not petition for examinership, just that it is not a frequent occurrence.

Table C.9 Petitions rejected

Source Q.7- Petitions for Examinership are most likely to be rejected by?

	Responses received	Percentage of total
Creditors	7	50
Court	7	50
Company	0	0
Shareholders	0	0
Directors	0	0
Others	0	0
Total	14	100

Table C.10 Petitions have increased for several reasons

Source Q.8- Petitions to appoint an examiner have increased recently. In your opinion this is due to?

	Responses received	Percentage of total
Economic climate	12	85.71
Increased awareness of the process	2	14.29
Other	0	0
Total	14	100

Table C.11 The importance of the Independent Account Report (as illustrated in Figure 4.3)

Source Q.9-How important is the contents of the Independent Accountants report to the application of the petition?

	Responses received	Percentage of total
Very important	11	78.57
Sufficiently important	3	21.43
No effect	0	0
Total	14	100

The Independent Accountant's report is now legally required to accompany the petition for Examinership as a result of the 1999 Act.

Table C.12 The main role of the Examiner (as illustrated in Figure 4.4)

Source Q.10- What is the main (most important) role of the Examiner?

	Responses received	Percentage of total
Attracting Investment	2	14
Compiling a scheme of arrangement	9	65
Managing cash flow	2	14
Other	1	7
Total	14	100

The respondent that chose the option "other" specified that he believed the main role of the examiner was examining the possibility of rescue. For the purposes of Figure 4.4, the option of "other" was then replaced with that response.

Table C.13 The use of the contents of the Independent Accountants Report

Source Q.11- Does the examiner use the contents of the Independent Accountants Report?

	Responses received	Percentage of total
Yes	12	85.71
No	2	14.29
Total	14	100

Table C.14 The decrease in the success of the process (as illustrated in Figure 4.5)

Source Q.12- The success rate of Examinership has decreased recently. In your opinion this is due to?

	Responses received	Percentage of total
Economic climate	2	14.28
Wrong types of companies availing of the process	5	35.71
Lack of credit (available from banks)	2	14.28
Lack of investment	4	28.57
Other	1	7.16
Total	14	100

The respondent that chose the option “other” provided an alternative reason for the decrease in the success of the process. The reason presented was, that practitioners were now too busy to give the time necessary, this suggestion replaced the option “other” in Figure 4.5.

Table C.15 Increasing awareness of the process

Source Q.13- Do you think increased awareness and education of the process would increase its success rate?

	Responses received	Percentage of total
Yes	10	71.42
No	4	28.58
Total	14	100

Table C.16 Law Reform

Source Q.14- Are there any areas of the law governing Examinership that need to be reformed?

	Responses received	Percentage of total
Yes	12	85.71
No	2	14.29
Total	14	100

Table C.17 Benefit to the Economy

Source Q15- Does the use of the Examinership process ultimately benefit the Economy?

	Responses Received	Percentage of total
Yes	1	100
No	0	0
Total	14	100

Appendix D- Interview Transcript One

Alan McLean, Independent Accountant

Q.1 How exactly is an Independent Accountant appointed, is it by the Company in difficulties or the courts?

We are normally appointed by the Directors of the company, what they would normally do is they would make contact with an insolvency practitioner or with one of the solicitors that specialise in this area and I would have a relationship with a number of those and they would recommend me to prepare the report. Anyone can prepare the report, their auditor could do it or even their internal accountant in theory could do it, but not so much the internal accountant but somebody outside the company so the auditor could do it but I suppose there is a certain kind of expertise that gets built up over time and that's what they are buying into with me as I have now been involved in so many, but the exact statistics of it move around all the time.

Q.2 What do you do when you go into a company, do you just start off and go through all their books or how do you actually compile the report?

The report is much more of an overview so it's not like an audit or something else that their regular external accountants would do. Really what it's trying to do is, it has three parts basically 1. to get an overview of what a company does and how the company has developed over time, 2. to get a handle on where their current financial position is and the third part is to make a recommendation as to whether you believe that the company has a future, in some way if certain conditions can be met and you are also trying to determine what those conditions are. While you don't set them in stone, you have to know what's going to be the result of examinership.

Q.3 Is there any areas in particular in a company that you would focus in on whenever you're compiling your report?

No, it's really a case of looking at their historical data and what the current information looks like, the better company's will have future projections as well and what you're trying to do is, you're trying to see how realistic they are given what you

know about different industries or their own business from what they've done. So, if somebody tells you they are going to grow, in the current climate for instance, well that proves they know nothing about what they're doing. So that's what you're looking at, your looking at future prospects.

Q.4 How long would you usually spend doing the report?

A report from start to finish can be anything from 25- 80 hours of time. There would be an initial interview with the directors, that could be two or three hours, a bit of time would also be spent with the accountant on board, a lot of it depends on how good the information is that they have, how synced it is and how easy it is to follow through.

Q.5 Do you get much information from the Directors?

Well the interview is really to develop what has happened to date and what's caused the crisis that they're in now, sometimes it's obvious for example if I'm in a property market, the world and its mother knows what's happened.

Q.6 Whenever the report goes to court, do you actually present your findings in court, or is that done by the solicitor?

It's done by the barrister, it's a high court application so nobody speaks in court other than the barristers. While my report, for instance might take 20 hours to produce and then there's another 10 or 12 hours were your liaising with the barrister and briefing them and liaising with the solicitors and the report goes to a draft stage and then it evolves in the last 24 or 48 hours as things come to light because the barrister will take a different perspective and ask different questions and they get worked into the report as well.

Q.7 So, you are working along with the barrister?

Exactly, yeah so my report would start the barrister of and then he takes up the running and the two matted together then, the petition and the accountants report.

Q.8 Do you think the inclusion of the report to accompany the appointment was a good idea, now that it has been made compulsory?

I think so yeah, the reality is that the petition is made in front of a judge whom 10 seconds earlier knew nothing about the company and while the petition itself and all

the affidavits and all those documents that come to court are very legal, the accountants report is a much more nuts and bolts view of the company and during the examinership process were there's effectively 2 court hearings involved in the process. The first one is where you present the petition to the high court to get protection and then they set a date for the full hearing, so in advance of the full hearing the judge will have read the full report and they effectively understand what the business does because while you might say two companies are alike if they are in the same industry, there's a huge amount of difference between them and that's what the report does it sets out what's going on and what the company looks like. The key thing really is to be able to describe the company in lay mans terms but also enough so you can get a picture over 10 pages of what's happening in the company.

Q.9 Do you think the report should be more scrutinised before an examiner is appointed or do you think it is sufficient the way that the court examines it now?

In an ideal world I think the report would be longer, it'd be much more detailed but the reality is that companies who have arrived at the position where they are going into examinership, they are usually really at the end of the run, they are about to be wound up by a creditor or a receiver is about to be appointed by a bank. In some cases, and actually in a lot of cases examinership process is a reactionary situation. So, yes I think there probably should be a certain amount of scrutiny but I don't think it's practical. What has happened is that the reports have evolved over the last three years or since I started doing them whereby new things come up in each case. I've probably been involved in forty odd cases at this stage, so every time a case comes along, either an observation is made by a judge or an opposing barrister, we work it into the next so that we are developing the skill as the time goes along.

Q.10 So do new recommendations come from cases?

Yeah, so for instance 12 months ago we would make no comment about how we thought the examinership would ultimately end up whereas now we are actually putting paragraphs in the report about what we think might happen and that's not because the law says it's that way, it's because judges have said I'm giving this examinership, I'm giving the protection to the company but I don't really see how it's going to end up. So I think what they want because there has been so many, unfortunately, companies who have failed in the last 12 months, the judges are kind of

second guessing themselves and saying should we have given protection in the first place, but they're equally going, based on the information we had we didn't do anything wrong, we didn't make the wrong decision.

Q.11 If there was a negative opinion given in the report that perhaps the company wouldn't come out of examinership, does that ultimately affect the judges decision?

No, effectively it wouldn't go into court. So you know I have worked on cases in the past where I have said, even after spending 10 or 12 hours we'd have said no this is the wrong thing to do. Its not a runner because no barrister, no solicitor, no one wants to go into court with something that may fail, so I'm the first line of defence against that and then the barrister might be the second line where legal issues that I wouldn't have dealt with might be an issue later on.

Q.12 When the examiner receives your report, do they use it throughout the process?

Yes, normally it's with my permission it's distributed to potential investors, to creditors and to other interested parties. But they do need to get my permission in most cases to distribute it.

Q.13 And would the examiners use it as a point of reference?

Effectively because there is no point in them reinventing the wheels, so if they're trying to get somebody to invest in the company this is the starting point, its what the company did, the history of it. So that's why it is used quite extensively and also for creditors who are made an offer of a reduced payment, it's also to give them comfort that an accountant has said that the company is in dire straits and if you don't take this 10 or 15 percent full and final settlement you get nothing in an alternative insolvency scenario.

Q.14 Does the examiner ever consult with you during the examinership process?

Yes, there would e a fair bit of contact n the initial stages and then I would obviously keep in contact with the case because I like to know how things end up as well.

Q.15 Do you think there's any area of the process that needs to be reformed or even with the report that you compile do you think there is need for reform?

No I think the process works perfectly, I think that in the last 12 months there have been cases that went to court that shouldn't have been there in the first place, the judges are now recognising that some of those should never have got through the initial process, but the process itself works. It's quite new in Ireland but it's effectively a copy of chapter 11 in the U.S and that's been running for years and years and if you look at how many companies that would use that process as opposed to in Ireland. In Ireland over the past three years I think maybe 140 companies have used the process and considering there's probably 200,000 live companies on the registrar it's a very small percentage, even if you took that 90,000 of those companies were operating it's still a very small percentage, whereas in the U.S I think it's as many as 2% a year that would use the chapter 11 process, which would imply that there should be 2,000 examinerships a year in Ireland.

Q.16 Earlier you talked about expressing an opinion on the likely outcome of the process in your report, do you think that perhaps that should be made compulsory and shown to the judge?

No, because the principle is that the examiner is trying to get the best possible outcome for the creditors, he's not working for the directors, he's not working for the company, he's working for the creditors even though he's appointed and approached by the directors. So for me to predetermine the course of the examinership might be negative from every perspective because it's not until the thing happens, because nobody knows about an examinership before it comes along as opposed to say a liquidation. It's amazing what actually does come out in the wash and there would be approaches from third parties wanting to buy businesses and whatever, whereas my predetermined view of the thing might have been completely different.

Q.17 What do you think is the most sufficient part of the report or is there anything in particular that you think is very important?

Well I suppose the key part is the recommendation that the company is or isn't a suitable candidate, and so if it isn't it doesn't end up there in the first place. I suppose because I've been involved in these you would get the impression that the judge is taking your word for it. Some of it is reputation because it is a very sterile

environment in the court you don't ever get that recognition although judges do look at you and they know who you are in the room, I think it is the case that they are taking you on your word and the reputation that goes with that.

Q.18 Any other information you want to add about the report?

The thing about the reports are every one is individual they all start with a blank canvas so its not something that can ever be standardised and it probably will require people with expertise to do them going forward.

Q.19 So while there is a format for the report it's very individual for each company?

Well its individual based on the experiences of every other case that you've worked on in the past and that's the reality of it.

Appendix D-Interview Transcript Two

Joseph Walsh, Hughes Blake

Q.1 How is an examiner appointed and how is a decision reached as to what examiner gets assigned to each case?

The examiner can actually be appointed by the creditors of the company but this is quite rare, now recently that did happen in the case of Golden Discs, their main creditor Sony came in and appointed an examiner. The difficulty with a creditor appointing an examiner is that they obviously won't have the company's books and records and they can't put together an Independent Accountants Report. So it's normally the Directors or the members who put together a petition to appoint an examiner, and what they will have to do is, they will first have to go to an Independent Accountant, such as Alan McLean, he will assess the company and he will have to ascertain whether it can operate as a going concern and then it's at that point that they will apply to the court for an interim examiner or possibly a full examiner to be appointed. As regards who chooses which examiner, it is usually more word of mouth than anything else. I suppose Neil Hughes here would have quite a good reputation as an examiner. Hughes Blake have now carried out maybe 25 examinerships so it's really word of mouth but it's normally the company who will go to an Independent Accountant, a solicitor, barrister and normally the examiner is involved maybe a few days before the petition is actually presented. They will actually come to you and ask will you act as an examiner and then you are actually appointed as a court officer thereafter.

Q.2 Are there any cases where a company doesn't go to an examiner where maybe the court has to appoint somebody?

In the case of a creditor it's the courts decision, the court has discretion whether to appoint an examiner. The creditors can go to the court and the court can actually impose an examinership on a company. In that instance, in the case I mentioned earlier a voluntary scheme of arrangement was what the company were attempting to use and one of the creditors, the largest creditor decided that they weren't interested in

using a voluntary scheme, they wanted to have a control in effect over the voluntary scheme so they went to the courts and applied for an examiner to be appointed. We do have a case where a minority shareholding, a number of shareholders they went against 90% of the shareholders and they got an examiner appointed and they got ourselves appointed (Hughes Blake) and it was on the basis of what was actually going on in the company that they just believed the company was insolvent and the rest of the shareholders and directors weren't actually recognising that the company was insolvent.

Q.3 Do you think that examinership is the best option or do you think maybe an informal scheme of arrangement would be suitable as well?

It depends on the company, I mean with examinership it's getting more difficult for a company to be accepted into examinership. A particular judge, judge Kelly has said there recently that he is going to be scrutinising Independent Accountants Reports and that he didn't like the formatted independent accountants report. With the company its specific criteria they have to meet first of all to go into examinership. The voluntary scheme, the problem with that is when somebody jumps rank, it could be the secured creditor or the revenue commissioners, more likely the secured creditor and then they will attempt to appoint a receiver and then the company may then not have enough time. Once a receiver is appointed you'd have maybe two or three days were you'd have to move very quickly, you'd have to get an independent accountant to put together their report and then you would have to apply to the high court for an interim examiner to be appointed and try to stop the receivership going ahead. So, an informal scheme, it depends, it's really company specific like its quite specific criteria for a company going into examinership so it would depend on that and the breathing space, you may not get the same breathing space in a voluntary scheme of arrangement. As I said you could have 100 creditors and two or three is all it takes to say no and they might continue with proceedings against the company. Sometimes it doesn't.

Q.4 Do you think the informal scheme might be more suited to a smaller company who can't really afford an examinership?

Yes, possibly, I mean with an informal scheme, you could look at that route first but I think if you're looking at an informal scheme you would have to keep in mind that you don't have the protection of the court and you may need to appoint an examiner.

So you might run the two of them parallel always having the option of examinership there but it is definitely true to say that examinerships isn't suitable for a very small company because with examinerships it's actually through the high court, you need a barrister, you need your own solicitor, then the examiner needs a barrister and solicitor, so there can be significant costs of an examinership and so it wouldn't be of as much benefit to a small company.

Q.5 What kind of cash flow would you need to have to cover the examinership process?

Well as part of the independent accountant report, the independent accountant has to demonstrate in the appendix to his report that the company has enough cash flow for the next 10 weeks. So the significance of the 10 weeks is the initial examinership period, they give you 35 days first and it used to be a formality to go from 35 to 70 but now again they're looking at it as the revenue are objecting, or the revenue may object if it's a small company and they think it should be done quicker and that it should be done within 70 days but the independent accountant has to demonstrate that the company has enough funds to operate for the next 10 weeks. Now that doesn't automatically mean that the company has to be profitable for them 10 weeks. I mean the whole restructuring might during the 10 weeks bring them back into profitability after the examinership but it does have to demonstrate, it may be the case were the directors need to put in 100 grand at the start of the examinership just to keep the company going for the next ten weeks, but if they can't demonstrate that the company can't really go into examinership, it doesn't really meet the criteria to go into examinership, so it may need funding straight away from the directors.

Q.6 Do you think there's any possibility the examinerships could be moved down to the circuit court or is it always going to be through the high court?

No, without a doubt, I think in some cases it needs to be moved down to a circuit court and it would certainly have the effect of reducing costs, for smaller cases definitely I think it certainly would be something that should be considered.

Q.7 Do you think it would be likely?

I'm not too sure, I don't know but I would imagine there is talk of change but I don't know how likely that is but I think other people have certainly mentioned it before

and I would imagine it would be a good idea and it would allow the smaller companies to consider examinership as such and the costs to be reduced in line with that.

Q.8 What would you consider the main role of the examiner?

The examiner's first job is really to communicate with all the creditors of the company and inform them that the company is going into examinership and give them the background into examinership and communicate with the directors and communicate with the shareholders. The examiner's job used to include examining the books and records of the company, now that job, because of the changes in the act has now become the job of the independent accountant. So when you're actually in there that job, in effect, maybe the independent accountant has worked on a very tight time scale but he would have done the majority of that job. So I suppose it really is to oversee the company, to allow them a breathing space in which, that they can restructure and so you may use your expertise to assist with the restructure, but you always have to remember that the executive powers of the company remain with the directors. The examiner doesn't take over the executive powers of the company, so even if you writing to the bank you still have to get the company to write to the bank at the same time, so we'd often give our instructions but we'd copy the directors and get them to give the same instructions. So your main job is to oversee the whole process and then it's to formulate a scheme of arrangement with the creditors of the company. So you're an officer of the court acting on behalf of the creditors and all interested parties so the main job really is to formulate a scheme of arrangement but in addition to that it's to give your expertise for restructuring, reviewing where the company is actually going and to assess whether the company can continue as a going concern.

Q.9 How useful do you think the Independent accountants report is?

It's great, when you get the independent accountants report; it gives you a great background to the company straight away. An independent accountants report is actually something that the company can look at themselves, it's of great use to the company, it's something that the company can show and say that someone has come in and looked at the company and it's not a dead duck, there is a prospect that the company can continue as a going concern. The information, the background, the

actual story behind what has happened to the company it gives you a picture straight away; it might say the difficulties the company is in. The worst possible scenario for the creditors is if a company came out of examinership and then went into liquidation a few weeks later and they lost out again, like you don't want to see that. So the independent accountant report would give you all that background of the company and it would give you a good briefing before you actually start the case. It also is information required by the judge in order to assess their decision as to whether to put the company into examinership and allow an examiner to be appointed.

Q.10 Would you use the report as a point of reference throughout the process or is it only used in the initial stages?

We would, we spoke earlier about the 10 week cash flow, we would monitor the cash flow on a weekly basis, I would assume other examiners do that as well, because we are required to submit a court report and in that we would always assess, the two things that you have to remember is that if the company doesn't have a reasonable prospect of survival, the duty is on the examiner to go immediately back or as soon as possible back to the high court, to confirm to the high court that it no longer has a reasonable prospect of survival and then the company is effectively put into liquidation. So we have to monitor the actual cash flow, if we see from an early stage that there is going to be a shortage of cash, we'd have to say to the directors or if there is already an investor lined up, that they need to put in cash to keep the company going. So you always compare the actual with the expected within the cash flow. You would also straight away have their list of creditors, the list of banks and similar lists so you would most certainly use the report, and you find yourself using it throughout the course of the examinership as well.

Q.11 Do you think increasing the awareness of examinership would increase its success rate?

Yes, I suppose it would in that the company hasn't got to a terminal stage before they are aware of the process of examinership, which you find can be the case. We now see the majority of clients that come in are at the stage were they are not suitable for examinership anymore. Of course we'd love to do as many examinerships as we could but you find now that your advice wouldn't always be examinership because the reasonable prospect of survival is one of the criteria. I think awareness is growing

with examinership, it's gone from less than 10 examinerships to 30 or 40 there last year, but it is growing and the awareness is growing with examinership. I suppose it depends on the advice people get, people always go to their accountant first so I think the awareness of examinership within the professional industry would be just as important as advertising it to the public. It would be more that the actual accountants should be aware of the criteria of examinership and what fits into an examinership and they'd be able to forward them on to Hughes Blake.

Q.12 Perhaps accountants could then recognise different factors of suitable examinership candidates?

Yeah they could recognise different factors that would be suitable for examinership and that would not necessarily be looking at liquidation and so they could advice their clients correctly.

Q.13 Do you think the process ultimately benefits the economy?

Yes I do believe it does, if you think about it, first of all a company going out of business reduces competition and in any economy were the competition is reduced it's going to be us the customers that end up paying more. If jobs are saved, which is one of the main things, if you're going back convincing a judge to accept proposals for a scheme of arrangement following the creditors meeting, one of the main things that you're saying is that you are going to be saving X number of jobs here. You will say to the revenue commissioners you're getting a 20% dividend, however, if the company goes into liquidation the cost to the state is, between redundancy, insolvency payment schemes it could be anything up to half a million or three quarters of a million. So we'd always say that to the revenue commissioners because they have to make a decision whether they vote in favour or against. So we would always add what the state is actually saving from the decision to let the company continue. Again, I suppose with companies at the moment, there are just so many of them going out of business. So if the company is given the breathing space that it's allowed, time to actually get an investor in, it may be the case that it is making terminal losses but it may be the case that the company can be saved and I think that overall is better for the economy.

Q.14 Are there any cases that you have worked on that were particularly successful for a particular reason?

I suppose the football clubs we've done, we've done three football clubs at this stage, League of Ireland football clubs and they have all come out of examinership successfully, but now one of them was back in the high court last week. The reason they survived wasn't because they're a hugely profitable business, football clubs should just be looking to reduce their costs and break even as such or they are going to need someone to pump money into them, but they survived because of what they meant to the community and in two of the cases it was actually the community who put the money in rather than an investor so I suppose they survived for that specific reason. Companies survive for different reasons, it could be just timing where you get the right investor involved, and it all depends on getting the right investor or getting the right investment in.

Q.15 And any cases that you have previously worked on that weren't successful for any particular reason?

I think we have only worked on one that wasn't successful, well maybe one or two which is quite good out of 25. The most recent one we worked on was a group of bars (Thomas Read), we could probably be here all day as to why it wasn't successful but the main reason was because the company had such a huge burden of historical debt, we as examiners have to satisfy ourselves that the company can continue as a going concern into the future, so in order to do that, we felt that a serious restructuring of that debt was required and the banks in question did not agree with that opinion and the banks as the company's largest creditor didn't support our proposals for the scheme of arrangement. So it was a different vie point, we were looking at it as this company needs to continue as a going concern, they just weren't budging, they have a mode of different perspectives, and they had to answer to their shareholders as such as well and so they felt justified in the view that they were taking and we had felt justified in where we were taking it.

Q.16 Do you think the wrong types of companies are entering examinership?

Well, I think the stage of the Independent Accountant report is getting more vital now or even the early consultation stage when they walk in the door first, when the decision is made whether they should go into examinership. If a football club came in

here tomorrow; I would say the courts are going to be looking at it in a different way now. It's getting to the stage where you're going to have to have an investor lined up before you go into examinership; it really is getting to that stage. I don't think you can say in a particular industry a company can't go into examinership because there could be a set of circumstances, specific to the company that has forced it into examinership. They could have had a debtor, where that debtor went into liquidation and they were owed a huge amount of money and other than that the company would have been able to trade through, so that company could be operating in any industry. I just think it's more the actual company itself, rather than the industry, there are a couple of industries where you might say, the smaller businesses or the not for profit football clubs that may not be 100% suitable for examinership going forward, because of the stricter approach the courts are taking.

Q.17 Would you agree that the main reasons for the decrease in success of examinership would be due to a lack of credit given by the banks, and an inability to attract investment?

Yes, it's pretty much throughout the economy at the moment what's actually going on. It is harder to get an investor, it's more difficult for that investor to get money and I suppose undoubtedly that's the main reason that companies are not coming out of the whole process at the minute. It really is the investor stage as such.

Q.18 Do you think that there are any areas of the law regarding examinership that need to be reformed?

The actual examinership law, there is one, it's not actually directly in the 1999 act, it's the law in relation to the insolvency payment scheme which covers liquidations and receiverships but it doesn't cover examinerships and that in effect means that a company could be just better off going into liquidation rather than trying to save the company because the department of enterprise, trade and employment don't cover arrears of wages, minimum notice for companies that go into examinership. So I think that act, the insolvency payment scheme act, which has been in place before examinership was introduced in 1990, may need to be amended to include examinership, I think maybe so. Also, the 100 day period, I think if I said you need more time, I think there would be a lot of objectors to it but from an examiners point of view you do sometimes need more time. One hundred days if it is a large group of

companies you may require further time, so I think there should be some sort of discretionary period there for the courts to allow, now the creditors including the revenue commissioners would argue that that's just going to build further costs for the company, if it can't be saved in 100 days, then it can't be saved, but because it is taking longer for loans to be approved, funding to come through then I think extra time, an extra 20 or 30 days could be very valuable to any examinership. I'm not suggesting anything longer than the extra 20 or 30 days but I think 20 or 30 days should be allowed, because you could have the scheme prepared, you could have an investor in place and they could have a loan approved but I know certainly from Hughes Blake that we won't send out the schemes until the money is in our solicitors account because when we send out those schemes then we're pretty much putting it to the creditors this is the deal on the table. If there is some problem with the funds getting transferred or a loan getting rejected for any reason then we have already carried out a large amount of work that ultimately wasn't required so with the delay in people getting funds I think an extra 20 or 30 days at the discretion of the courts I think would be beneficial, certainly from the examiners and saving the companies point of view.

Q.19 Do you think that the process of examinership could be moved to a personal level with large scale investors and those involved in the property market?

Yes, it is starting up a bit now but it's more on an agreement by consent basis and there is no protection of the court there for the individual. I think certainly it is something that could be looked at. I know we are doing more personal insolvency but it's more of a solicitor's thing personal insolvency at the moment but it's certainly insolvency practitioners could do a good job there and if there was some sort of protection or again a shorter period to restructure the debts but again it goes back to the voluntary schemes of arrangement where a creditor jumps ship or you need a larger majority of the creditors to actually formulate, the rules set down for personal insolvency in Ireland I don't think are that considerable, I'm pretty sure there is something in the UK but I am not overly familiar with it.

Q.20 So, if an examiner was appointed on a personal level, would it lead to a better outcome than what is available at the minute?

From the overall creditors it possibly could, I suppose whether it'd work for an investor I'm not too sure because whatever way you look at it, the assets are probably devalued, the banks are probably first in line and you're looking for another investor to come in to invest in that investor. If it was someone in property or a sole trader or some sort of business it might apply more so but I think with most investors they are secured by the bank and the bank is going to be in there first regardless, unless you are trying to ask the banks to write down debt for an individual investor, it'd be a very, very hard sell I'd imagine just on the basis that you're not saving any particular jobs it's not of any great benefit, it's just enriching this individual. But certainly if he had a development ready to go and by reducing the debts or getting some investment it'd enable them to finish the development and complete the development, that could be for the benefit of the secured creditor as well, because the piece of land would probably be worth nothing without it.

Q.21 Putting a company into examinership early, what do you think the main benefits are of that?

I suppose the earlier you address the problem, no matter what you are working in it's a benefit. If there is a winding up order against the company I don't think you can present the petition to put the company into examinership. I think at the petition stage the barrister needs to be able to stand up and say there is no winding up order against the company. So if you have already lost the faith of all your creditors, proceedings have been issued, it's been going on for say a number of months, maybe there are creditors there who haven't issued proceedings but the debts have been outstanding for a long time, you might have lost their trust and it might be easier to get it an early stage and the investor coming in might see that as more of a positive move.

Q.22 Would it be easier to attract investors if the company is not considered terminal?

When the investor is putting in his money, the investment will have to cover the scheme of arrangement which includes a dividend to the creditors, the examiners fees and costs and also legal fees. So that will be dependant on the level of debts, now after that with the exception of maybe lease agreements which will continue going forward, there may be a secured banking loan which will continue going forward, all of the revenue debts, trade creditor debts will be extinguished by the scheme of

arrangement, but the value for the investor would be more that the coming is going forward, what he can actually get out of the company going forward. So I would imagine the investor would look at any investment as how they can actually assist the company and benefit the company going forward. Certainly a company that hasn't made losses for the last couple of years and hasn't lost the faith of their suppliers because We see a lot of companies now that come out of examinership and they are having difficulties, although their supplier has accepted their percentage dividend, they sort of turn around and say you know I'm not really accepting that, I know the court said I have accepted but I'm not and you say well you just have to accept it and they may turn around then and say I'm not supplying you and you could lose the best supplier or the cheapest price and your costs could be increased because of that going forward. The majority of suppliers do accept the terms and do trade forward with the company but it's a commercial decision for them as well to trade going forward and they're actually trading with a lean, mean company coming out the other side where it doesn't have debts and they're more likely to have a successful company going forward to trade with.

Q.23 What are the main difficulties facing the company after they have gone through the examinership process and have made it through?

I think that one I mentioned, dealing with suppliers certainly would be a difficulty. Maybe if the company did have a bank overdraft and the bank overdraft wasn't secured and the bank overdraft was treated as an unsecured amount they may have problems getting another bank overdraft going forward. I don't have evidence of it but I would imagine that banks would, probably for new loan arrangements the banks might look at the fact that they were in examinership and they might charge them a higher margin, I don't know because I haven't see it. I think the main, I wouldn't say problem but it's something that you have to recognise, that the suppliers aren't going to be coming back in on the Monday after you've written off a huge amount of their debt and it'd be business as normal, they may try and increase prices but you then have the choice to change your supplier. If we're talking to a creditor we would say you are writing off that debt but you've had, if it's a company in existence for 5 months then obviously they don't care about it but a company in business ten years we'd say you've traded with that company for 10 years, you've got 10 years profit out of them, are you going to trade with them going forward. Often the creditors will say

to us what guarantee do we have that they will continue to use us after the examinership and we certainly can't make that guarantee but we'd say the directors have told us, if they have, it's their intention to use the same suppliers and a lot of them then do make the commercial decision to supply the company going forward.

Q.24 Do you think the problems with the bank loans, fluctuating interest rates and large capital repayments lead to cash flow problems that can result in an examinership?

The debts and the capital repayments where the banks are insisting that the capital repayments are made, which the banks are entitled to do, but often the capital repayments are far too much for the group or the company; we certainly have seen that as being the reason why the company has to go into examinership.

Q.25 Do you think after the examinership is it difficult for the company to get loans, especially if the bank has written off some of their debt? Do you think that it is held against the company?

Yes I would imagine that the banks would, again when they come out of examinership, after the effective date which is the date set by the high court for the implementation of the proposals our involvement as such with the company has seized. So, but we would still keep in contact with them I mean I often ring them and see how they are getting on, make sure they're still trading away but we're not responsible for the day-to-day running of them, but I would imagine the banks consider that and they would hold it against them. It's another risk for the bank, but I don't have any evidence of this I haven't seen it, but I think they would apply a risk factor to it.

Q.26 Do you think bad business planning can result in examinership?

Yes, we have seen it where the actual Directors in place don't have the required abilities, sometimes they are fantastic at the specific element of the business and actually working within the business but the running of the business the actual structure of the business they can be clueless about in some situations. So bad business planning would be a factor and I can think of a couple of examinerships where it was specifically down to bad decisions that were made, and even things like keeping your records up to date and just knowing that the company is making a loss

or what element of the business is making a loss. Some people just look at the top figure, the turnover. Part of the scheme of arrangement the examiner will include details of change of management or new board of directors who will actually come into the company as part of the proposals.

Q.27 And does that often happen, does management change after the process?

You'll find if a new investor comes in, the investor will want control whether it's 51% or 99%, it depends on how much they're investing and the level of risk they are taking. They would then want to be a director or they may, if they have a number of companies they may just want to put one of their guys in there as director. I it's the incumbent directors who are making the investment, which is very regular, the actual directors themselves are putting the money back in, they would normally stay on but we certainly would advise them, it could be something as simple as you need a financial controller or you need a sales manager, or a sales rep or you may need another director with a skill or you may need to step down. If they're the actual investors they would normally stay on but they might get extra assistance in.

Appendix D-Interview Transcript Three

Brian McEnery, HBC

Q.1 How is an examiner appointed and how is a decision reached as to what examiner gets assigned to each case?

An examiner is appointed usually by virtue of being approached by a company or the directors, or shareholders. The companies act sets out who can petition for the appointment of an examiner and it can be a number of parties including directors, shareholders, the company itself, the creditors in circumstances and that has happened recently in one or two cases, then the petition is presented before the high court and when it is lodged in the central office of the high court the company is automatically in examinership. Albeit, that it is interim examinership, then what will happen is that the courts will set a date, usually a number of days afterwards for the full hearing of the petition. The reason the court sets a date a number of days afterwards is to give what's known as "notice parties" an opportunity to be heard as to whether or not they would be supportive of the company being given the status of full examinership. Typically the notice parties would be the likes of the revenue commissioners and the major creditors, so what a notice party means is that every item of correspondence which is given to the court is also, in advance circulated to the notice party so that they can be heard on any matter which comes up in front of the court. Typically, how examiners gets appointed or why might one examiner get appointed as opposed to another, well there could be an accountancy practise next door and why might I get it, It's usually given by virtue of the fact that people know that they have expertise in turnaround. So, that's how I would have got some of my examinership work.

Q.2 Are there any cases where a company doesn't go to an examiner where maybe the court has to appoint somebody?

Well. As I said there are opportunities for, for instance the creditors to petition for the appointment of an examiner and that has happened recently, it is very infrequent but it has happened once or twice in recent times so that isn't the company going at all, it's a creditor going and petitioning for the appointment of an examiner and then the high

court can approve the appointment of an examiner in those circumstances. So, unusual but it can happen.

Q.3 And is that difficult because the creditors wouldn't have the company's books and records?

Yes, it is much more difficult because you are supposed to have what's known as an Independent Accountant's Report as part of the grounding affidavit for protection and for the granting of examinership and it is much more difficult to get that information if you are external rather than internal to the company but what may happen is that in extenuating circumstances, the court might grant interim examinership status to a company based on just the petition without an independent Accountants Report and may then give the company the opportunity of presenting the independent accountants report subsequently.

Q.4 Do you think that examinership is the best option or do you think maybe an informal scheme of arrangement would be suitable as well?

I think an informal scheme of arrangement is more suitable if the circumstances are right for an informal scheme of arrangement and if you can see a route to turning a company around through an informal scheme, I think it's more advisable to go down that route in a lot of circumstances as it can be significantly less expensive and you can very often pull off an informal scheme of arrangement without it really getting that public, so it mightn't damage the company as much as a formal scheme of arrangement might. Typically, however informal schemes are used for smaller companies and examinership is used where the absolute protection of the court is necessary. There can be circumstances, for instance where if it is a large company you can have hundreds and hundreds of creditors and all you need is for one creditor to apply for the winding up of the company and then you could be forced out of an informal into a formal situation.

Q.5 Is that the main disadvantage of an informal scheme?

It is, it is the main disadvantage as you're not guaranteed the support of the creditors, what you typically try and do is you put a scheme of arrangement out to them and you seek their voluntary support for the scheme and if they're supportive then what you do then is you get them to sign that the they accept the scheme of arrangement is binding

upon them. If there is bona fides with the scheme and if you can show that they would be much worse off if they went into liquidation, they can work almost as effectively, or even in many instances more effectively than an examinership.

Q.6 If the creditors have agreed to the scheme can they later reject it?

No, what you do is you get a binding agreement, so that therefore in effect, if for instance somebody is owed €10,000, and if you say we'll give you €4,000 for now and we'll give you €2,000 in twelve months time and if the company makes profits we'll pay you the balancing amount, over the next three years for example. Once the creditor has signed up to this, then they have to agree.

Q.7 What kind of cash flow would you need to have to cover the examinership process?

Typically, I have to say I think your costs are likely to be, between legal and the examiners and the barristers, they are likely to be of the order of €200,000. It's a lot of money and that's why examinership can be seen as being very expensive but a successful examinership is likely to last for at least seventy days and it may go out to the maximum possible which is one hundred days and in those circumstances, as you can imagine it's very intensive and the amount of time which the examiner, the examiner's legal advisors and the examiner's barristers and lawyers, you'd probably have a junior and senior counsel, is quite intensive. A phenomenal amount of time is put into an examinership and that's why the costs are that high. It is very expensive on a company.

Q.8 Do you think there's any possibility the examinerships could be moved down to the circuit court or is it always going to be through the high court?

I think there is the possibility. I think particularly if there were certain circuit court judges that had specialisms and if you had one circuit court judge on the different circuits that had a specialism in commerce and commercial matters generally well then I think it could. What that would potentially do is take it out of the realms of counsel, senior and junior counsel and bring it more back into the levels of the lawyer as opposed to the barrister and I think it would reduce the costs absolutely.

Q.9 The recent survey indicated that you thought the main role of the examiner was to examine the possibility of rescue, how do you do that?

Well, I think first of all part of that work has to be done by the Independent Accountant in the first instance because they have got to determine whether there is a reasonable prospect of survival and hence, the Independent Accountant's Report if it is done properly, should consider some of those factors in the first instance. Then the examiner has got to go in and see if the Independent Accountant's report actually holds water or if there are other circumstances which need to be factored into the equation. Fundamentally, I think this is the best way of summarising it, I think an examiner has got to believe that there's fundamentally a business there or indeed if there's even part of a business that you could separate out because you don't have to save the whole company, you can save part of a company. So, if you can see that there is a business and their difficulties arose either out of bad luck or bad management, then you could say, well fine we can strengthen the management or we can try and put in factors that would legislate against that bad luck happening again, so whether it is better systems or more capital or whatever it may be so long as you can see that there is a business worth saving and that it's plausible, that you can get in more capital and other factors. So that's the starting out point, is there a decent business. Then there is a whole other set of criteria that has to met, like for instance, what new capital is required and can you raise it. You might think that there is a business potentially there but you mightn't be able to go out and get new capital and that's particularly prevalent in this market and hence the reason why Justice Peter Kelly said in a judgement recently that investors are becoming as scarce as hen's teeth, and the reason being is because of the credit crunch. So in some instances you might have a business that potentially has the possibility of being a survivor but you can't get the money to recapitalise it, or you might have a business that you believe is potentially viable but the creditors might not approve the scheme of arrangement that you propose. So there's a number of hurdles to be jumped and that's why examinership is very intensive because the examiner who goes in has got to first of all make a determination whether the company has a prospect of survival and then if it can jump all the other hurdles which are already lining up in front of him, new capital, new management, getting approval from the creditors etc. So there is a lot of work to be done in it.

Q.10 Do you think that restoring confidence in the company is also a role of the examiner?

I think it is, I think in many instances I think creditors might have come to a stage where they are disenchanted with the management and they would see the examiner as being welcome. In a number of instances where we would have come in as examiner, suppliers that might have been spun yarns by the company prior to going into examinership they would at least feel and would have indicated to us in the past that they think that the honesty is a bit more refreshing of an examiner coming in because the truth of it is, is that I would be very careful, if I felt that creditors couldn't be paid during the examinership period for debts incurred during the examinership period, then I would call an end to an examinership, as I did recently.

Q.11 How useful do you think the Independent accountants report is?

Again, as Justice Kelly stated recently, some of the reports were becoming almost formulaic in their presentation. I've seen one recently which had the name of the wrong company on it because they cut and pasted it and certainly he wasn't impressed with that. Therefore, I think some practitioners are willing to sign Independent Accountant Reports without giving them enough care and attention and it can be difficult because time pressures are very often intense upon the practitioner. For instance, if a receiver has been appointed then you have three days to get your papers lodged to try and set aside the appointment of that receiver so it can be difficult but I think a well worked out Independent Accountant Report can be very helpful to an examiner because if you really answer the questions required in an Independent Accountants Report then there's quite a bit of the thinking already done. For instance, the independent accountants report has got to outline what circumstances would he believe would be necessary for the company to come through, so some of that thought process should be started. In addition, the independent accountants report is supposed to look at things like, the expected outcome of liquidation etc etc. So if the independent accountant report is well done it can be very useful to the examiner.

Q.12 Would you use the report as a point of reference throughout the process or is it only used in the initial stages?

No, I think it would be used throughout the process, as well as that you'd hope that the independent accountant report has good accurate information relating to the

opening balance sheet of the examinership period and that would be used right throughout the scheme of arrangement. It's not something you set aside and don't look at but the more accurate it is the more useful it will be through the process. On the contrary of course, however the less accurate it transpires, say for instance as in one examinership that I did, the statement of affairs attached to the independent accountants report was radically different to what I actually encountered on the ground, in that instance the report became of very little use to me.

Q.13 Does that mean then you'd have to do a lot more ground work?

You do, in actual fact what you have unfortunately in those circumstances is shifting sands, and when you have shifting sands like that, a seventy day period is not the ideal time to have it. So in that instance I have to say I went in and made the court aware of the fact that the statement of affairs was quite different to what I was experiencing when I did an asset listing and an asset registrar and I informed the court of that fact and the court continued to leave the company in examinership albeit that it noted with disappointment the fact that the independent accountants report and statement of affairs were inaccurate.

Q.14 Do you think increasing the awareness of examinership would increase its success rate?

In some ways maybe yes, I think there is some ignorance out there as to what examinership is, for instance, a company came to me which was heavily debt laden and it really wasn't trading that much and they said they were looking for an examinership and they'd run out of money and it was absolutely impossible because the bank wouldn't have supported an examinership and so therefore there was ignorance really as to what examinership is about and what examinership can do and in what circumstances it's plausible. I have to say, I think a lot of people particularly in recent times know an awful lot more about examinership than they would have a few years ago. I can remember when I was the examiner of a company in 2005, I think it was only one of four that year and there were 62 last year, so the incidents of examinerships are growing quite well.

Q.15 Do you think if external accountants were made more aware of the process would they be able to advise their clients more efficiently?

I think so; having said that I think there has been an awful lot of initiatives. I know I have done about nine lectures around the country on behalf of ACCA, ranging from Sligo to Waterford, I did a lecture in Galway recently and in Limerick, I also did lectures in Cork, Kilkenny, Carlow and Athlone and I'm doing one later in the year in Dundalk. I think I'm only one of a number of practitioners who are going around the country outlining what is possible in an examinership. I think there are attempts to try and propagate the message of what can and can't be done.

Q.16 If you were to set out factors that accountants should be aware of to enable them to advise their clients what would they be?

I think the same criteria I mentioned earlier, which is that fundamentally they have to believe that there is a business there, that is in trouble maybe because they took on a bad contract or maybe there is a bad managing director or maybe they don't have enough capital. You can come over all of those kinds of things so long as; fundamentally there is a reasonable business there.

Q.17 Do you think the process ultimately benefits the economy?

I think it absolutely does, for instance, the company that I was examiner of in 2005 has been in existence now for four years after that date and is still in existence, it's paying taxes, it's continuing to employ people and they have learned the lessons of it and are a much reformed company than they were at that time and look how the economy has benefited from it since.

Q.18 I had a quote recently that suggested that "examinership is a very powerful restructuring tool if used appropriately. Too many companies use it as an alternative to liquidation and merely delay liquidation", would you agree?

I think it is true, I think, in actual fact I believe that the examinership legislation can be abused. The process can be somewhat abused and there can be instances where I can well understand creditors were they become aggrieved that an examinership is being used to put the same management and the same shareholders back into the company and all they have done is written off a pile of debt and they're not bringing in that much new capital and the process is often seen as being used to their disadvantage but not to the shareholders or the managements disadvantage and I've seen one or two instances where I think that is a legitimate concern. That isn't to say that's the case

with all of them and one examinership that I was examiner to, we had creditors who were completely up in arms and they asked Justice Finlay Geoghan to have me investigate whether there was reckless trading and as a consequence whether there would be personal liability back on to the directors and I was instructed by the high court to carry out that investigation and I reported back to the fact that I didn't think there was reckless trading, but in that examinership I brought in external capital, I brought in a new finance director, I got rid of one of the shareholders who was the finance director and so I brought in new management, new capital, I diluted their existing shareholdings down to a very small minority shareholding and subsequently the family who originally set up the company were able to buy out the other shareholders but that's fine, that was good the fact that they had got the company back up and going and turned it around and that company now trades a few years later and people have very much forgotten the fact that it was ever in examinership. That's a sign of a successful one. Some, I agree that the examinership is ill founded because there isn't really the prospect of a decent business and all you do is you write off a load of debt and it struggles on into liquidation and it may even go into liquidation 30 days after the examinership has started and all you have in that instance is examiners fees and liquidators fees and creditors then suffer as a consequence out of that.

Q.19 Is that why the examinership process is seen as anti-creditors?

It's not really creditor friendly and the banks have never really been that fond of the examinership legislation and that is why. I mean very often you'll find that a company doesn't come out of examinership and maybe that's for completely legitimate reasons, I have been an examiner to a company where I went into the high court and I said I don't believe the company warrants having continued protection and the high court made me the liquidator. I think it would be better I have to say, if in the new consolidated bill, whenever it is going to come out, if there was a process whereby if an examiner goes into the high court and he says that he doesn't believe that the company has a continuing reasonable prospect of survival, I think it would be preferable to appoint some other practitioner as the liquidator, because I think it gives the appearance of maybe the examiners getting the double dip, he's getting both the examiner's fees and the liquidator's fees and so I have worries about that role.

Q.20 Are there any cases that you have worked on that were particularly successful for a particular reason?

Yes, there was one where I brought in a new managing director who was quite dynamic, he went in on a contract and I could only do so much of the turnaround of the company during the examinership period and he certainly led it after the examinership had been concluded. All I had done was facilitated the writing off of the debt and given the company a new chance and I knew in bringing in that the managing director on a contract basis that he would continue to do it afterwards. So a seventy day or a hundred day period is a very short time in which to make radical changes, I always think of examinership as like a medical procedure and it's very hard to do all of that, what is required within a period of that time. I think some of it is about having a good structure and management structure after the examinership has concluded because it does need a strong platform and very often you'll find that companies that get into trouble, there is usually management deficiencies.

Q.21 And any cases that you have previously worked on that weren't successful for any particular reason?

Yes there was, the last examinership I did wasn't successful because ultimately the statement of affairs didn't hold water and during due diligence, even though we had a number of interested parties who had expressed an interest in looking at investing in the company and taking control of it, they didn't because the due diligence didn't stack up.

Q.22 Do you think the wrong types of companies are entering examinership?

Well for instance at this moment in time you'd be saying to yourself isn't it very hard to see how a construction company has a reasonable prospect of survival, maybe that's true maybe it's not, I don't think you should generalise, I think you've got to look at the circumstances of each case on its own merits but I think certainly I think the court would assume that a number of companies that were in the construction industry that were going into examinership and really and truly they didn't have a lot of contract work after it either.

Q.23 When surveyed you said that you thought the main reason for a decrease in the success of examinership was because practitioners were too busy to give the examinerships the time necessary.

Yes, I think there is a significant element of truth to that, I know one practitioner who I think had five examinerships ongoing at one stage and I don't think any of them came through and that wouldn't surprise me because one examinership is awfully intensively and to turn one company around in a hundred day period is a huge achievement. My simple thought on this is it's better to turn one company around in a hundred days, rather than to take five on and put the five of them into liquidation and I believe that and certainly we've had a client who we advised them to seek the appointment of an examiner and we were very disappointed with the performance of the examiner even though he was one that we went out and put as an option to the company to talk to and that can happen.

Q.24 Do you think then there should be a limit as to how many examinerships a practitioner can take on?

I think that's difficult to interfere with the market in that way but what I would say is and I think it is important and I've written on this once or twice, I think it's important for companies not to automatically go for the busiest because in actual fact if the examiner is that busy, it might be because people believe he is a good examiner but it should also be an alarm bell to the fact that he mightn't be able to give the company the attention it requires and I've seen that happen. One director rang me because he heard my name but the company was sixty four days into examinership and they had only met the examiner once.

Q.25 You also thought inexperienced examiners also contributed to the decrease in the success of examinerships

Yes there are a number of examinerships which have collapsed because I believe the examiner didn't number one- do enough and number two- he probably didn't have enough of experience and wasn't hands on enough. I believe an examiner should be really in at the cold face of it and including trying to cut a deal and to try and go out and get investors. Some examiners are very hands off they believe all they are is a conduit and that if investors want to come to them then they should do that rather than practically going out and trying to seek it and I think that's where they are maybe too

hands off or not experienced enough and I think more examinerships would succeed if examiners were more energetic about the process.

Q.26 Do you think that there are any areas of the law regarding examinership that need to be reformed?

Well particularly I would like to see the one about the examiner becoming liquidator. I think there are certain provisions inside there relating to guarantees under sec 25 of the companies act, I think it's sec 25 of the 1963 act, around personal guarantees which I think are very onerous on financial institutions, now companies and guarantors I'm sure, many of them who got away and being removed from significant elements I'm sure they are quite happy about it, but it does seem a little bit onerous on financial institutions. What else would I like to see, I think the point that you raised in relation to circuit courts I think would be useful because it can be particularly difficult and time consuming for companies with examiners that are based down the country to spend a full day in Dublin maybe waiting to get into court to have a petition heard. So, I think for a few of those reasons, I think it does need looking at, the other thing about it is I think who can be an examiner should be defined in company law, to my mind, with greater clarity and I believe it should be a qualified accountant, I believe it shouldn't be a member of the law society or what have you because I believe an examiner really needs to be a commercial person, somebody who is trained in commerce and commercial matters and I believe the new consolidated companies bill, where it is giving regulatory status to the law society for liquidator and receivers and a number of other office holders, I believe is wrong, fundamentally because I don't believe that lawyers are trained in that and I think that's something which I think is a bad step.

Q.27 The insolvency payment scheme which covers arrears of wages and minimum notice in liquidations and receiverships doesn't cover examinerships; do you think that should be changed?

I do, I mean I think the insolvency payment scheme is a little bit more flexible maybe than people think, if you can prove that a company is unable to make the payments, I

think the insolvency payment scheme will pay the hundred percent. So, I think it's a bit more flexible than people might assume, so long as there is the proper basis for that application but I absolutely do believe, I mean the thing about it is that, obviously examinership itself doesn't terminate employment, or indeed does receivership or indeed does an ordinary liquidation, it is only in a compulsory liquidation that that is the case.

Q.28 Do you think that the process of examinership could be moved to a personal level with large scale investors and those involved in the property market?

I think yes, I think this a very important point and is very much along the UK lines of the individual voluntary arrangement. I believe it's something that we need to look at in Ireland to get over some of the real loss of value surrounding some of our property developers and their own insolvency and I think if we had better provisions, than obviously what we have under the 1988 bankruptcy act I think it would be welcome. I am president of ACCA Ireland this year and this is one of the things we've been interacting with the department of finance on, trying to see if we could move them along that road, I think there is a need for that.

Q.29 Do you think that would lead to a better outcome than what is available at the minute?

I do, yes and I think it would lead to a greater speed in dealing with it because I suppose it's a kind of a Mexican stand off at the moment.

Q.30 Putting a company into examinership early, you thought that there was a need to identify investor's pre examinership and there was more time pre examinership to put a shape on the scheme of arrangements. Is that the main benefits?

I think it is because in reality if I'm sitting down with a company, I will ask them before I will take on the examinership if there is a reasonable prospect of going out and getting new capital and if they would have thoughts in their own head. It is very difficult to get external capital, completely external to the company or to the shareholders or the directors during an examinership, so very often and it often tends to be from somebody that they know or somebody that they would think well maybe they would invest and what I would subsequently do as examiner is try and be the

conduit to that happening and I'll take a very hands on role then and I'll try and cut a deal, maybe not always in the interests of the existing shareholders but to make sure that the company survives because your role is to help the company survive, not to help preserve value for the existing shareholders. So if there is no prospect, if for instance they say they don't know anybody who might look at investing and if you have doubts about whether the business is really viable at all, then I wouldn't take it on, but were you believe it is potentially viable that there might be contracts there that you could realise into the future only if the following things are met and one of them usually tends to be capital. So, if you can get in the run up and you can still see that the company can pay it's debts as they fall due now, albeit that it is insolvent well then what I would try and say is use that time period pre examinership to go out and get some of the ducks lined up in a row.

Q.31 Would it be easier to attract investors if the company is not considered terminal?

Yes, but it very much does depend I suppose on what the examiner can go to maybe new investors and say well this is the way I'll present the company to you and if you write off a load of debt, but the worse it is obviously the harder it is to get in the new capital.

Q.32 What are the main difficulties facing the company after they have gone through the examinership process and have made it through?

I suppose the main difficulty is their own credibility subsequently and whether they will continue to get credit and that's why you often need to recapitalise a company with more than what it might have needed previously and the reason being is that they might only get one weeks credit or for a period of time afterwards they might have to pay cash on delivery and so therefore it needs more cash and at the same time for it to make sales then it needs to give credit out. So if it needs to pay for stuff up front and needs to give credit to their customer, that's a very difficult thing to bridge and that's often the biggest single issue.

Q.33 Do you think the problems with the bank loans, fluctuating interest rates and large capital repayments lead to cash flow problems that can result in an examinership?

They most certainly do, the one thing about an examinership however and the bank loans is that unless you've got a voluntary arrangement with the bank in terms of they agreeing to write off debt on the secured assets it's very difficult to write it down. If it is unsecured, now that's a different matter but if it's secured well then you may very well as in the Birchport Case, you may very well seek to a voluntary arrangement with the bank to write it down but there has been very few of those cases where that has happened and in a lot of instances the bank will not see it as in their interests to support an examinership. So your scope around dealing with companies that are heavily debt laden and the debts are secured on the assets and almost always in those circumstances you will find that there is invoice discounting as well and that can make it very difficult then to do it without the bank's support and approval.

Q.34 Do you think after the examinership is it difficult for the company to get loans, especially if the bank has written off some of their debt? Do you think that it is held against the company?

Oh very much, very often what would happen is if the bank has written off some of its debts it generally tends to try and not trade with the company then subsequently in respect of new facilities.

Q. 35 Have you seen that happen in practise?

I have but I have also seen where the banks haven't been that badly exposed through the examinership and that they have worked with the company subsequently and I seen that happen as well to some of the bank's credit.

Q.36 Bad business planning and overtrading has been sighted as resulting in examinership. What would you consider overtrading?

Well overtrading of course can happen and can cause a company to get into cash flow difficulties and an examinership usually comes out of the fact that the cash has run out and is that a plausible reason, it certainly is why companies require restructuring of the balance sheet and you may very well continue to generate good sales but you mightn't be recovering the debtors or whatever. So in those circumstances it may very well be an opportunity to slow the company right back down and to downsize the company and maybe to get rid of some of the overheads that are there, some of the employees that are there, some of the debtors that are there or some of the creditors

that are there and in effect to say well I might not ever realise those debtors and as a consequence you know that the balance sheet needs to be restructured and it often can be a means of bring a company that has grown far too fast back down in one go and it often is a means of remedying overtrading very quickly.

Q.37 Do you think that increasing the debtor collection would be a way of targeting that problem earlier?

But of course it's not always possible and particularly when a company is overtrading it generally tends to be aggressive in the market, and so therefore it might be out selling at a slightly discounted price, it might also be out selling to customers that have dubious credit worthiness and so therefore in actual fact if true debtors realisability were to be done well then the situation might be very different.

Q.38 Bad business planning was also highlighted as a problem which led to examinership. Do you think it is a big factor?

Bad business planning and bad financial management generally tend to result in companies not making the right decisions at the right time and if you make the right decisions at the right time, then you will possibly find yourself in the situation were you don't need examinership. Even good businesses or well run businesses fail and we've seen that now more so than ever before in our lives, solely from the fact that their turnover has collapsed because demand has collapsed and unfortunately every accountancy practise has to deal with their clients who are facing those issues and indeed many accountancy practises are finding that themselves; they're finding that maybe they needed 100 staff last year but now they only need 60 staff and as a consequence they need to restructure for themselves and if they don't well then they'll face financial concerns as well.

Q.39 After the examinership process, does management often change?

Yes, I think it has to. Examinership isn't just solely about finances it's also about what is in addition needed to ensure that the company is strengthened not just in terms of finances but indeed its systems and structures and as a consequence management does often change and I think a good examiner will look at that but some examiners overlook that completely.

Q.40 Is that an important part of the process?

I think it is because if that's one of the criteria that an examiner believes needs to be strengthened and often a sign of that is a thing like the company cannot produce good accounting information to the examiner and they're fluffing all over the place trying to get it, that's a sign of bad systems and that's a sign that it's the reason why the company went into financial difficulty in the first place.

Q.41 How can a company demonstrate a reasonable prospect of survival?

I think that maybe they can show that maybe there is orders out into the future albeit that they have to get over these few crises' that are there now, that if they could only get the balance sheet restructured that they have got the prospect of being there and I think what they got to be able to do is to demonstrate that in financial modelling; they will look at for example the turnover for last year was 7million but if we downsize the company we will be able to survive on 3 million and for the next three months we have orders that will be totalling 1 million so it's credible to show that we can generate 3 million turnover a year and that's the kind of thing, is there reasonableness around it and that's very much based on, what I would say, robust financial modelling that is well interrogated.

Q.42 Would the company need an expert to come in and help them with these decisions or should the company be capable of making these decisions themselves?

Well you'd hope that if it's a company that warrants going into examinership that they would have a pretty decent internal account function because they're of a size that would warrant it but that doesn't always mean that they will have decent internal account functions. So maybe they do need advice and guidance from a practitioner in that regard.

Q.43 What are the investigative powers granted to the examiner?

An examiner's duty is to be an examiner you have to go in and assess the assets and liabilities and the companies act very clearly says that that's what the examiner does. An examiner, I suppose specifically under the companies act, is not there to go out and get new capital and so that's why some examiners who are in practise decide that they will go in and examine and they do not do the rest of it but that's what your

investigative powers are and as I said to you in one case the high court asked me to investigate whether the directors had acted recklessly and that was specifically in relation to the assets and liabilities that had been accumulated. So that's your job, it's to go in and examine the situation and to investigate but I think the examinership process needs to be a little bit more than maybe what is set out in the companies act and I think it should be more prescriptive of what's expected of an examiner to include that the examiner should look at what is necessary to turn the company around and should be actively involved in that process.

Q.44 What is the relevance of the examiners report? When it goes to court, do they present it themselves?

Well they do through their barrister and the section 18 report is the results of all the meetings with the creditors and the proposals and what would happen if the company went into liquidation versus what would happen under the examinership and it's a summary of what has gone on and what has been presented to the creditors around the creditor meetings.

Q.45 And is that presented to the court to decide whether the court will affirm the examinership?

Yes, if the judge agrees with it then examinership is granted but obviously the other pre determined criteria's that you must have at least one class of creditors whose rights have been impaired to vote in favour of the proposals and if you don't have any class of creditors whose rights have been impaired voting in favour of it well then it doesn't matter the court can't approve it anyway. Just say for instance that all the creditors approve it, it's still up to the high court justice to affirm it.

Q.46 So what is the format of the process?

Well what you do is you formulate a scheme of proposal then you send the scheme of proposal out to the creditors, you hold the creditors meetings typically within 35 days unless you're granted an extension. Once you hold the creditors meetings you've the proposals gone out to them in advance, you hold your creditors meetings, then your section 18 report is a summary of what you presented to them and what the results of those meetings were.

Q.47 Do you then just continue on with examinership?

Well, typically once you've your section 18 report in, the court will again set a date for the hearing of the final petition and it will either confirm or deny the cramming down of the debt or the approval of the scheme of arrangement.

Q.48 What is the likelihood of successful emergence in the current climate?

Well the most recent statistics are that it's of the order of about 30% or less and that's for companies I suppose that are getting through the examinership process and out the other side. I suspect if you were to look at that and then see that they were subsequently in existence a year or two years later that might be less, but it's of that order and I think that's a little bit generous.

Q.49 Do you think there is any kind of formula of how success can be achieved?

I think it's very company specific but I have to say it's back to the same criteria, is there a business, is there a likelihood that you'll be able to attract cash to capitalise the company because very often companies are not going into examinership if they have loads of cash sitting on their balance sheet, it's that they need money.

Q.50 In your article you said that if you recognise problems as early as possible you should take the necessary actions, do companies often come to you after the problems have become too severe? [Article provided in Appendix H]

Yes and there's no prospect of survival, I mean we've seen situations where a company comes to us and they have no cash and they can't pay the wages next Friday, I mean that's not a company that can go into examinership because how can you show that you'll be able to pay the ongoing liabilities because you've to present a cash flow as part of the independent accountants report and that has to show that the company can meet its ongoing obligations for the duration of the examinership period and if you can't well then it's not a suitable case and the court won't grant the protection.

Q.51 You compared specific turnaround activities to medical procedures, what are the emergency measures in a turnaround?

Well for instance if you're running out of cash you might say well look, I've got a load of assets outside in the yard and I know a fella down the road wants them and so therefore I can get €300,000 for those and that'll pay the next month's wages, that's

the kind of emergency measure that might be necessary, or you know that you can draw down facilities, that type of thing, it's to keep the company afloat until such time that you get the opportunity to put the schemes together. So what I would say it's like taking the tumour out of the body, if it's not done within the next 48 hours or whatever it is, you won't be able to pay the wages or you know the tumour will explode that's the equivalent of it and then the remedial action, the longer term stuff is like what I'd say the post operative care.

Q.52 And would you find that although those steps are necessary some companies are reluctant to take them?

Maybe they are and I think in reality I think very often examiners have got to be very frank and very decisive individuals because if they are not and if they are not clear enough with the company and if they are fluffing around then the company could go and so you have to be frank and say well this is what you have to do and if they don't do it then the examiner has got to step back and say well fine this isn't one we can save, examiners and directors usually tend to work together but I've seen situations and also been in situations where that hasn't occurred where we've been misinformed or whatever it is and that doesn't help.

Q.53 Whenever a company is in its growth stage do companies often learn or do you find that sometimes they just go back into old habits?

There's no doubt, I think if you put the same management back in and the same shareholders then the likelihood is they'll go back because it's the old phrase a leopard never changes its spots and that's why I think it's necessary to look at new management whether it is strengthening the board or whatever it is or putting in new finance directors or somebody stronger so that if you see and you often see as it's well written on the diagnostic test of whether a company is a strong company or not and if its owner managed and if there is dominant ownership in terms of, there's no other outside directors, these are signs that a company is not well founded to continue into the future.

Q.54 Are some companies not aware of the growth, declining and other stages of the business cycle?

Some people don't, some people are in business and they wouldn't understand what that is. The truth of it is, is that some people and a lot of businesses in Ireland are very much seated ads, there's no doubt about it and they don't look at an issue until it bites them.

Q.55 And if they were aware of the declining stages could something be done in the company, like new innovations, if they knew about these stages and what to do would examinations be less frequent?

Well I'll give you an example of one situation like that now which I discussed with one of my partners this morning, which is one of his clients that made a few million of profits over the last number of years and now has only broke even last year, so it's gone from making maybe two and a half million profit and is down now to break even. They realised this is where they were in 2006 and 2007 (growth stage) and now they are down here (declining stage) and now they are talking about going out and spending, because they have money, they're talking about spending €1.3million on a new technology which hopefully will bring them back up there again(growth stage) but if they had allowed that to go on for another two years (declining stage) and didn't face the issue they would be down here (loss stage) and trying to do it, but except they'd have maybe two or three million gone in cash, like cash burned.

Q.56 So do you think that companies who are willing to face their problems now will survive?

Absolutely, early decision making is the key.

Appendix D-Interview Transcript Four

Michael McAteer-Grant Thornton

Q.1 How is an examiner appointed and how is a decision reached as to what examiner gets assigned to each case?

An examiner is appointed by any interested party such as the company itself, director's employees, creditors, shareholders or the minister for finance. Any of those parties can make an application to have an examiner appointed and every case is different. In the majority of cases it would be either the directors or the company who would appoint an examiner but it can be those varieties of people. Then the choice of examiner, it's the person who makes the petition to put the company into examinership that chooses an insolvency practitioner and they would do so either by reference to a recommendation from an accountant or solicitor.

Q.2 Does the minister for finance often petition for the appointment of an examiner?

No, I'm not aware actually of any cases. I know he considered it with Waterford glass but decided not to do it. I think if it was deemed to be in the national interest he may appoint an examiner but in the main, no, I'm not aware of any cases where he has appointed one before.

Q.3 Are there any cases where a company doesn't go to an examiner where maybe the court has to appoint somebody?

No, the company must bring forward a name for appointment, whoever is in the petition document must nominate an examiner, and it's their job.

Q.4 Do you think that examinership is the best option or do you think maybe an informal scheme of arrangement would be suitable as well?

No. I don't believe informal schemes of arrangement are suitable, my experience would be that most informal schemes of arrangement fail, they either fail at the start, middle or the end, they're impossible to manage and impossible to control and while

examinerships are not ideal because of the costs associated with them, they are far better than informal arrangements.

Q.5 What kind of cash flow would you need to have to cover the examinership process?

You need to cover a period of a hundred days and the company must trade cash positively during that one hundred day period, but how much cash is totally dependant on the type of the company, in other words, we've had property companies that are frozen so the cash requirement for a hundred day period can be less than €5,000 but a trading company could require €200,000 and some companies could require €2million so it is company specific but it does require to be for a one hundred day period.

Q.6 Do you think there's any possibility the examinerships could be moved down to the circuit court or is it always going to be through the high court?

That's one of the pints that I made just a minute ago in the sense that the process itself is actually quite a good process but because there is high court involvement the costs involved in examinership are preclude- 80% of companies availing of them. One way to make that cheaper could be to reduce it to the circuit court.

Q.7 Do you think it's likely?

I don't know, I mean the problem we have at the moment is that the governments headspace is dealing with a lot of other big problems at the moment and that would require a change in legislation and whether the government is focused on changing legislation versus all the other problems to do with banking and unemployment. I mean it should, my opinion is yes absolutely it should be given a high priority because it could actually assist in job creation and saving of companies. Will it be done? I don't know.

Q.8 What would you consider the main role of the examiner?

The main role of the examiner is a couple of folds, one is that he needs to regularly report back to the high court on the facts that when the company was put into an examinership footing certain things were said in the petition document, certain positions were put in front of the court, cash flows were presented, statement of affairs presented so the first fold of an examiner as an independent person is to make

sure that what the court were told to put the examiner in place actually is the truth, so I suppose one is to report back to the court. Two, then is to give the management of the company breathing space to allow them to focus in on the management of the company and for the examiner to deal with all the historical issues because when a company is in financial difficulty, management spend 80% of their time dealing with old stuff and not enough time to be able to bring the company forward, so there is a huge role there to take some of the burden off existing management. Three, then is to review and to meet with potential investors and again from an independent view point look at what is best for the company not necessarily what is best for the shareholders. While existing management will always be looking at what is best for them so it's really to bring somebody new to the table and then I suppose finally is to review business plans and the overhead structure of the company to ensure that the company when rescued can trade itself out of difficulty going forward.

Q.9 Do you think part of the examiners role is to restore confidence in the company?

I think it is but I am not too sure, I mean restoring confidence should be at the creditor level, I'm not convinced in kind of a practical basis that creditors have any more confidence when a company goes into examinership because a creditor sees examinership, receivership and liquidation as the same thing and I'm not convinced that they say that now an examiner is appointed I'm more comfortable. It should do but I don't believe it does.

Q.10 How useful do you think the Independent accountants report is?

I think it's very useful because it's a document that even though it's prepared in a very short time basis and therefore has certain limitations, it's a very good starting point to work from. It gives a snap shot of where the company is at, it identifies any key risks and issues that should be addressed by the examiner so when the examiner starts in day one, the independent accountant report is a very important document at least to have. It loses its importance as the time goes on because the examiner then starts to add his kind of information to the melting pot but from a day one perspective it is a very important document.

Q.11 Would you use the report as a point of reference throughout the process or is it only used in the initial stages?

Yes, it is used mainly in the initial stages because basically the independent accountants report has been prepared very quickly, it has been given from management information the independent accountant hasn't got a huge amount of time to go and verify that information and so it's a starting point but then the examiner will take that document, verify what's right, verify what's wrong, verify what circumstances have changed into the future that the independent accountant couldn't have foreseen. So, good starting point but that's basically as far as I would say about it.

Q.12 Do you think increasing the awareness of examinership would increase its success rate?

No, because of the fact that I think that the amount of money required to put a company into examinership is so expensive that I believe that any company that needs to avail of examinership knows about it, because of the level of money that's required, you're talking about say the top 5%-7% of companies in the country and they would tend to have independent accountants, quite good law firms who in turn would know of the processes available to them so if a company of that size needs to go into examinership, I would believe in general that they would know of the process.

Q.13 Do you think external accountant should be aware of the process and be able to recognise factors associated with the process?

Well they do in the sense that a lot of stuff that we would do, myself in various network groups and also in the ACCA, and the ACCA would ask us to do CPD classes to other accountants and we would explain what examinerships are but because the type of company tends to be the bigger type of company, they tend to have the larger firm of accountants, the larger firm of solicitors so the majority of them know about it, the examinership you know is not going to be suited to your local corner shop.

Q.14 Do you think the process ultimately benefits the economy?

Yes, I think it does and its simply because the alternative is liquidation and every examinership does give a dividend of some sort to the creditor, the vast majority of

liquidations don't give a dividend so while a creditor might be sore and upset of losing 80 or 90% of their money, its still far better than the alternative which would have been liquidation.

Q.15 Are there any cases that you have worked on that were particularly successful for a particular reason?

Most of the examinerships that we have been involved in have been successful but they've all got various reasons for why they are. Golden Discs which is a recent example at the moment, one of the reasons for going through examinership was to be able to deal with a number of leaseholds the company had that were very unprofitable and the company found itself that it was in the situation where it couldn't get out of those leases because the leases were for ten, fifteen or twenty year lease terms. So the process was used as a way of isolating four unprofitable stores, pushing them off to one side thereby leaving the remaining ten stores that were profitable and giving the company some future. So that was an example of something that I think is worthwhile, we've been involved in publishing companies where again the company would have gone off, the publishing house had nine different products, it expanded into one product range which was an absolute disaster, the level of indebtedness built up, it then got itself into the situation where the level of creditor debt was getting so big, the remaining eight publications were profitable but the ninth one that was closed down was going to bring the whole group down. So it does give an opportunity that where a company tries something new and fails and yet you've got a core business that's profitable you're able to eliminate the old business and preserve the good business.

Q.16 And any cases that you have previously worked on that weren't successful for any particular reason?

Yeah we've worked on them as well, again every case is absolutely different but in regards to one example we worked on Iqon technologies, they were involved in manufacturing PC's up in Dundalk, it had a huge product and a huge customer base with Tesco in the UK but what happened there was, we were about to restructure the company and bring it out of examinership and Dell announced for the first time that it was going to sell it's product in the retail market and it was going to be sold in Tesco. So we were left with a situation were you would have had a company called Iqon

computers selling their product at €699 sitting beside the shelf space of Dell computers selling at €799 and the belief was that the brand of Dell for the difference of a hundred euro for a computer would have resulted in that company not being able to sell, so what happened there was during the period of examinership the market changed, which you could never predict.

Q.17 Do you think the wrong types of companies are entering examinership?

I certainly think that was a problem especially in the last quarter of 2008, there were too many building and construction related property development type companies that were going into examinership. While they were suitable for examinership maybe a year earlier because there was banking available and there was corporate finance and there was capital available for projects to be re-floated but by the last quarter since September of last year there is no finance available from a banking perspective or private equity and a construction company is a long period of development, if you go on site today it could be two years before your site becomes say 74 houses and it could be another year before you sell those houses, so you have a three year process and yet you're trying to squeeze that process into a hundred days and it just doesn't work. So I think that a lot of companies that went into examinership in the last quarter were the wrong type of companies.

Q.18 Would you agree that the main reasons for the decrease in success of examinership would be due to a lack of credit given by the banks, and an inability to attract investment?

Absolutely they are the two reasons but also the fact that the wrong companies went in as well. The number of companies coming out of examinership that was successful was actually close to the same number as the year previous at around eight or nine, the big difference was, there was twelve companies that went into examinership in 2007 and there was eighty companies that went into examinership in 2009, so the same number of companies are coming out but the number of companies that went in was a much higher number.

Q.19 Do you think that there are any areas of the law regarding examinership that need to be reformed?

I think getting back to the fundamental principle of the fact that because the process is high court driven, the costs associated with the process is too onerous and that we should have something whether it be circuit court or whether it be akin to a combination of examinership and what's known in the UK as CVA's (creditor voluntary arrangements)- which is, you get a circuit court type application and you get the company protection and then an accountant restructures the company and the company comes out the far side. It's a far cheaper process. So I think either the examinership process needs to be domed down, or a new process that is quasi examinership and quasi CVA needs to be developed.

Q.20 What are your thoughts on the Insolvency payment scheme which covers receiverships and liquidations but not examinership?

In fairness, yes I think that is a hindrance because if you take into account that a lot of companies' restructuring plans are going to require a number of job losses and unfortunately the insolvency payment scheme doesn't apply to examinerships therefore a company has to bank on the cash flow for the employee restructuring component which can be a hindrance then to restructuring. It also has a further complication in the collective bargaining redundancy programme; where if 20% of the workforce is going to be made redundant then you need to give four weeks notice to the minister, those rules apply as well. So I would see that as, that's one of the ones that wouldn't cost the state any amount of money if you could by pass that process because if you're going in and you've got 200 staff and you need to get rid of 40 immediately, keeping 40 for four weeks so that you can inform the minister of your intention to make them redundant can cost an awful lot of money, especially when those 40 people, probably once they know they're going to be made redundant are probably not going to work for that month anyway, so you get a double whammy-unproductive and costly.

Q.21 Do you think the insolvency payment scheme has leniency with regards to examinership?

Yes, I have to say the Insolvency payment guys are very good, of all the sections in the department, we would have a very good working relationship with them, I find them very commercial, I find them very obliging and if they can do something to help

a company they will. So the individuals and certainly the people in there do a very good job.

Q.22 Do you think that the process of examinership could be moved to a personal level with large scale investors and those involved in the property market?

Absolutely yes, I mean that it's the biggest issue that we probably face at the moment and its two fold, as every corporate insolvency has a personal insolvency aspect associated with it, be it because the director has given a personal guarantee to either the bank, leasing companies, trade creditors, his landlord, so every corporate insolvency has a personal insolvency associated with it and yet you can't deal with that, there's no process associated with it and if the country wants to basically encourage entrepreneurship, if somebody owes a million euro in relation to personal debts because of his business failure and he can't restructure his personal component well then he's not going to take the chance to try and build a new business going forward because if he does every single amount of money he makes is going to go towards this million euro so where's the encouragement for that person to actually take a chance next time round, it's not there.

Q.23 So, if an examiner was appointed on a personal level, would it lead to a better outcome than what is available at the minute?

Yes, I mean I suppose the issue that I'd see is that in the UK they probably have gone too far the other side in the sense that there are approximately between bankruptcy and individual voluntary arrangement, there's somewhere in the region of about 100,000 appointments every year. Now if we're 9% of the population of the UK, we should have 9,000 appointments per year, last year we had nine bankruptcies, so there are 8,991 people, if you just take two countries that are like each other in a lot of ways, that aren't being looked after by our legislation here. I would think the UK has gone too far because you can get out of bankruptcy within one year but we're too far the other side where it takes twelve years and you've got to hand your passport in, so somewhere in-between there needs to be a process here.

Q.24 The new consolidated bill that has been proposed will allow lawyers to do the receivership and liquidation process, do you think that is a good idea?

I don't see it making any real difference to be honest because that's the current process in the UK, but what tends to happen is that the solicitors and lawyers tend to take a license but become advisors to the accountants and use their license as a sales and marketing tool that they are an insolvency practitioner advising accountants. I still think it's traditionally an accountant's role because it tends to be more numerically based so I would see no difference in that on a practical basis.

Q.25 Putting a company into examinership early, what do you think the main benefits are of that?

It's like any issue not just examinership, if you're in trouble the earlier you deal with the problem the better the likelihood that you will be successful from the outset, so whether it be examinership or liquidation, the key aspect is attacking the problem early rather than later because by the time it gets to later the problem is usually bigger, your goodwill which you have built up and which you need with your suppliers has probably been eliminated, so the sooner the better no matter what the problem is.

Q.26 Would it be easier to attract investors if the company is not considered terminal?

Yes, I mean if the company hasn't got a prospect of survival, one of the key aspects of getting yourself into examinership is that the independent accountant must form the opinion that the company or part thereof has a reasonable prospect of survival, if the independent accountant cannot form that opinion well then the company is terminal and it won't go into examinership in the first place.

Q.27 What are the main difficulties facing the company after they have gone through the examinership process and have made it through?

I think it's, getting back to one of the earlier questions you asked there, is credence and creditability with your creditors. On a technical point, a company that comes out of examinership should be far more secure and financially viable than the company that went into examinership, the creditors were dealing with the company before examinership and were putting credit out, the company that they're dealing with post examinership should be a far better commercial entity for them to be dealing with but emotion takes over and they feel that if it's gone into examinership it must be sick,

we're not going to deal with them going forward unless on a C.O.D basis (cash on delivery), when in fact they should be dealing with it because it's a better company and sometimes the lack of confidence and the lack of ability to give credit going forward can put what then is a healthy company back into financial difficulty once again.

Q.28 Do you think the problems with the bank loans, fluctuating interest rates and large capital repayments lead to cash flow problems that can result in an examinership?

Yes, I mean cashflow is huge, I mean the problem with cash flow at the minute is that because the banking system is so unworkable and it's not a normal banking system at the moment, there is no cash, it's impossible to get cash out of a bank even from invoice, everything is being credit squeezed all the way down. So if you go back to most basic thing if you're a building company and you're selling houses, if the person can't get a mortgage for a house, he can't pay the developer, if the developer can't get the money he can't pay the builder, if the builder can't get the money he can't pay the electrical supplier, the plasterer and so it goes back to the most basic situation and the same can be said in the retail sector as well people don't have the confidence to put the money on credit card or take it out of their bank account because they're unsure of whether they're going to have a job and it's confidence at the smallest level and that's where the cash is being starved from that the cash can't get up through the system

Q.29 Do you think after the examinership is it difficult for the company to get loans, especially if the bank has written off some of their debt?

Yes absolutely it is because there is that kind of negativity associated with it and it gets back to that confidence thing that it's not even just the creditors having a lack of confidence, believe it or not there is I suppose a lack of knowledge within the banking sector, a bank official at the end of a day reports into credit and a bank official likes to be under the radar, doesn't want to have his loan book bad or good he just wants to be able to float along, he gets known and recognised by his applications that go to credit which is on the higher sector of the bank, sending up a loan application, which most of these credit applications say enclosed last three years of accounts, enclosed this, enclosed that and the end of the application it will say and this company went into examinership, your credit committee is immediately going to say I don't want to

touch that so then you have the bank official saying well I'm not going to send something up there if I know it's going to be rejected, so there is a very, very difficult process of getting new finance from a bank for a company that's been in examinership.

Q.30 Do you think going into examinership is held against them?

It is held against them absolutely.

Q.31 Do you think bad business planning results in a need to go into examinership?

I suppose you could be cynical and say well every examinership has to have been caused because somebody didn't plan for the unknown. Examinerships tend to happen because of a couple of things; one- management went into a new area and that area didn't prove successful or proved to be an absolute disaster and the good area has now been affected by the bad area, two- it happened because of a change in legislation or a change in an outside factor, in other words lets take a pork manufacturer for example, so he's making sausages and he's happy as larry making a few quid every year and all of a sudden what happened last year happens, so completely outside his control, he couldn't have planned for that but that happened. So the reasons for examinership can be wide and varied, they can be either internal or they can be external.

Q.32 Does management usually change after the process?

I would say probably not enough, we would always as part of our process in a lot of examinerships, would certainly look at the reasons why the company went into examinership in the first place and if we think management has got a weakness, whether it be on a financial side or on a technical side or whatever we'd always recommend that the management team itself improves. If I was to guess it probably changes in only about 20% of times, should it change more often I would say yes absolutely. Maybe not that the whole team has to change but maybe that somebody new should join their team to make the proposition better.

Q.33 Do you think overtrading also leads to examinership?

I think overtrading certainly was a problem in 2007 and 2008, where that expansion trend actually happened but at the moment there is no company overtrading.

Q.34 How can a company demonstrate the reasonable prospect of survival?

What you have to do is basically, lets take the publishing house for example, it had eight profitable products, it had one very unprofitable product, so when you did your management accounts you could see- well if I could get rid of that one these ones are actually quite successful so it's identifying businesses that you can get rid off and not, you may have a situation say where a hotel had been renovated and you spent €2 million on the renovation and the hotel is now going to make a profit of €100,000 but it needed to make €500,000 to be able to pay for the €2million, so again the core business is profitable but it's not going to be sufficiently profitable for you to be able to charge all the liabilities. So with every case it's either if you slimmed down a component or if you got rid of historical debt then you could get back to showing that some part of the business is profitable.

Q.35 Is the element of a having a core business essential to survival?

You need to demonstrate to the court that some aspect of the business is profitable.

Q.36 What investigative powers are granted to the examiner?

I suppose this is maybe a slight weakness with the process in the sense of a mismatch of what the creditors think is the examiners role and what the examiner thinks his role is. In every insolvency a creditor always looks for somebody to blame and it's always easy to blame the director of the company, you know they must have misappropriated X,Y and Z, quite often it would be my experience , that isn't the case. So an examiners role of investigative powers unless specifically asked by the court to do something and quite often a creditor could say something in court like I want the examiner to investigate this transaction and if the court makes that order well then the examiner must do so. The rest of the issues, the examiner really only has to report something if something comes obvious to the examiner, so if he sees something. He doesn't have either the right or the duty to actually go looking for something.

Q.37 What is the relevance of the examiners report?

There are a number of different examiners reports, I mean there's the section 18 report which is the report which happens at the end and there are interim reports

which happen during the process. The interim reports are very simple, they're really to keep the court abreast of what's happening and the examiner in that report must still believe that there is a reasonable prospect of survival for some aspect of the business. The moment the examiner believes that the business doesn't have the prospect of survival, he needs to tell the court straight away and the company will go into liquidation immediately. The rest of the reports are statutory driven, the section 18 report is to tell the court how the meetings went, what such steps were on the proposal and things like that.

Q.38 If a company which was in examinership subsequently goes into liquidation, do you think the same practitioner should be appointed as liquidator after acting as examiner?

I don't necessarily have a problem with it; I think every case needs to be different in the sense that wouldn't like to see a hard and fast rule of saying yes and no. I don't see a problem with it, the examinership is dealt with through the high court, it's an open process, the examiner is an officer of the court when it goes into liquidation it's also a court liquidation and so immediately the liquidator is also going to be an officer of the court and his reports go to the court as well so it's a very open and transparent process. There's a huge advantage because the examiner has been there for 60, 70 or 80 days so he has a knowledge and is able to hit the road running in terms of the official liquidation whereas if you brought somebody new in all of a sudden there's a learning curve associated. In saying that, then the liquidator is also reviewing the examiners work which is himself and maybe there's an opportunity in some cases where if the examiners been at fault for it not being a successful examinership then the liquidator should be looking at what happened so I think the examiner should be allowed be the liquidator but it should be at the courts discretion.

Q.39 Do you think some of the examiners dealing with examinerships at present are too inexperienced to deal with the process?

Absolutely yes, most definitely.

Q.40 What is the likelihood of successful emergence at the present time?

The rate of successful emergence has gone up because the number of examinerships has gone back down again, so I'd say because we did some statistical analysis and put

a press release out in December as well and it showed the rate of examinership success rolling in at around 18% in the last quarter of 2008. I would say this quarter; we could be back up as far as 50% or 60% success rate.

Q.41 So it is actually increasing?

It's increasing because the number going into examinership has come way, way down. We're looking at maybe, I think in the October, November, December quarter last year there might have been 75 or 85 examinerships, I think in this quarter you could be looking at twelve and yet the number being successful is about eight or nine so you can see that the number going in has come way, way down but the number being successful is probably about the same number.

Q.42 The number of successful examinerships remains quite constant from year to year; do you think that is because there is only enough investment in the country for that number of companies?

No, because the type of companies have changed, the early ones were construction then that's left but I just think its pure coincidence I don't think it's due to any other reason. The number happens to be coincidental.

Q.43 Are there any steps that you would outline as to how success can be achieved?

I think one of the key aspects to success is acting early and an example of what mean by that is, we would have come across situations where a director would have made good money over the last ten or fifteen years in the company, but the company has hit a tough period, so the director basically goes off and re-mortgages his house or pulls in some cash savings and he puts it into the company without actually getting to the root cause of the problem and that becomes a drop in the ocean, he just throws the money into a big hole. The company limps on for another six months and then he comes and talks to us and we say well if you had €400,000 or €500,000 we could probably do an examinership and restructure your company and he says well I had that money but I put it in six months ago. So, realistically if he of stopped when he had a problem and sought professional advice, there is a far better chance of saving the company then, then throwing money in and then trying to look at restructuring later on.

Appendix E

Case Study- Shamrock Rovers

History and Background of the Company

Shamrock Rovers are a football club, founded in 1901 in Ringsend, a southside inner suburb of Dublin. Shamrock Rovers are Ireland's most successful football club having won the League of Ireland a record 15 times, including four times in a row in the 1980s, along with the FAI Cup a record 24 times, including six times in a row in the 1960s. They were also the first Irish club to participate in European competition, playing in the European Cup in 1957. Further, Shamrock Rovers were one of the European club teams which spent the 1967 season in the United States founding the United Soccer Association, representing Boston as the Boston Rovers. The club was always well supported with between 20,000 and 45,000 supporters showing up to games. However, Shamrock Rovers spent 22 years as a homeless club (1987-2009) and encountered severe financial difficulties in 2005 and were put into Examinership.

Examinership and Survival

The financial difficulties began in the season of 2003 over reluctance to sell their land. By 2005 the football club had debts of €2.3 million and was placed in Examinership. Neil Hughes of Hughes Blake was appointed examiner in April 2005, he was optimistic that his term as examiner would increase the possibility of the club's survival, he told the Irish Times "The period of examinership will allow Shamrock Rovers to attract investment required to deal with its historic liabilities so as to ensure its survival in the short term, and the structure to provide for its success in the future."

Neil Hughes was right, and investment was widely attracted, it was reported "that eleven individuals and consortiums declared an interest in buying "The Hoops"" (Shamrock Rovers). The Shamrock Rovers supporters club, known as the "400 club" committed to bankroll the club during the three month long process. It was not long before they too were declaring their interest to buy Shamrock Rovers and highlighted the success of fan-owned entities in England. The chairman of the 400 club, at the

time, Jonathan Roche said “This is an opportunity not just to save Rovers, but to secure the club going forward and to develop a more professional approach to running Shamrock Rovers. Who better to trust with this task than the fans, whose loyalty is beyond question? We need an open and accountable Shamrock Rovers to ensure that the club never sees days like these again.”

After consideration by the Examiner, he too felt that this was the best way of ensuring the club’s survival after the Milseon/Quigley deal was withdrawn and so the 400 club acted quickly and submitted a formal bid to the Examiner. The proposal would bring the gross investment in the examinership process from the 400 Club consortiums to €750,000. They paid off a portion of the club's debts and assumed responsibility for the running of the football club. After the successful acquisition of the club through the Examinership process, the 400 Club Trustees became the Board of Directors of Shamrock Rovers Football Club and began the process of building a sustainable club through sensible business practices.

The High Court approved the scheme of arrangement which saw many creditors writing off considerable sums. John Maddock also reported “that the Revenue Commissioners will only be paid approximately €40,000 out of a total of some €1.5m they were due from the club”. However the Revenue will benefit in later years from tax payable by the club, tax which would not exist if the club had been liquidated.

Success of Examinership

At the 2006 Annual General Meeting of the 400 Club, the members voted to rename the club as the SRFC Members Club, reflecting the reality that the fans’ organisation was now the football club. The club currently has over 500 members. Since the club was acquired by its supporters in 2005 it has operated on sound financial principles and meets its tax requirements on a monthly basis. The success of Examinership and the survival of the club have led to many benefits, not just for the Revenue but also for the club and the community. They include:

1. Revenue Benefits
 - During 2006 €102,423.09 was paid in tax by Shamrock Rovers

- In 2005, post date of the club's examinership, the total was €175,153.06
- This year's tax total is expected to reach €193,595
- It has been envisaged, with more staff on the pay roll in Tallaght, a tax payment of around €1.5m over the next five years

2. Club Benefits

- Shamrock Rovers will host Spanish club Real Madrid and play a friendly against them on July 20th. This will undoubtedly lead to the club's international exposure.
- Through the efforts of club volunteers, a sum of €46,000 was raised to bring the Shamrock Rovers Under-19 team to the USA next month to participate in the prestigious Dallas Cup tournament. Not only will this provide players with the opportunity to compete against some of the world's greatest football clubs, it also offers them the experience of a lifetime.
- For the first time in 22 years, the club are no longer homeless after finally declaring the new Tallaght Stadium their home grounds.

3. Community Benefits

- Shamrock Rovers operates Scholarships covering all levels of education. In conjunction with IT Tallaght, the club offers third level education to players, and has more recently introduced a scholarship scheme that facilitates primary school students through the Junior Certificate cycle.
- Through its professional Eircom League of Ireland section, the club also creates employment for upwards of 30 people and generates income tax revenue that goes directly to the State. Shamrock Rovers is fully tax-compliant and a model employer

The above illustrates a few reasons why Examinership should be encouraged. The success of the process should not be viewed on overall statistics alone but on the merits of each case which has survived. Hence the reason case studies have been used, to confirm the success of the process in Ireland.

Appendix E

Mini Case Studies

ISTC

The International Securities Trading Corporation (ISTC) announced profits of almost €1 million for the nine-month period since it emerged from examinership.

ISTC, which lends capital to banks, went into examinership in November 2007 with losses of more than €800 million. Under the scheme of arrangement proposed by the examiner, creditors received 12 per cent of their debts and investment bank Collins Stewart invested €5 million to take ISTC out of examinership and allow it to continue trading.

AgCert

Irish carbon emissions trader AgCert International sought the protection of the High Court in February 2008 after it failed to generate enough carbon offsets to satisfy customer orders. It had accumulated debts of €90 million.

In June, however, examiner David Hughes of Ernst & Young arranged a deal with power giant AES Corporation, which was AgCert's largest creditor. The US firm took full control of AgCert, writing off €20 million of its own debt and investing €7 million to pay other creditors.

The Golden Grill

The Golden Grill in Donegal, one of the country's largest entertainment venues, is one of several pubs that have successfully used the examinership process.

The 30-year-old establishment ran into trouble after an over-budget renovation and a period when it couldn't trade due to licence infringements. It went into examinership in July 2008 with debts of €8.2 million.

Examiner Michael McAteer of Grant Thornton arranged a survival package. The Golden Grill was taken over by Donegal oil and property company the Tinney Group,

which invested nearly €3 million in loans and also secured more than €3 million in bank debts.

The Grill nightclub was reinvented and relaunched under new management and has once again claimed its position in the social scene.

Drogheda United

League of Ireland Premier Division club Drogheda United emerged from examinership in January having successfully raised the investment it needed to survive. The club had debts of more than €700,000 but, after it rose over €300,000 from supporters, the High Court approved examiner Kieran McCarthy's survival plan.

Fellow Premier Division side Cork City also came out of examinership in October last year following investment from new owner Tom Coughlan. (The company has until Friday the 31st of July 2009 to repay debts to the revenue; otherwise it will unfortunately be wound up)

Ardmore Technologies

The Waterford-based broadband network firm went into examinership in September 2007 after major cost over-runs on a wireless contract. It had liabilities of €2 million.

Under the scheme of arrangement presented by Neil Hughes, Ardmore sold its non-core assets, including its broadband network, and restructured its business.

Preferential creditors received 16 per cent of their debts, while unsecured creditors received 8 per cent.

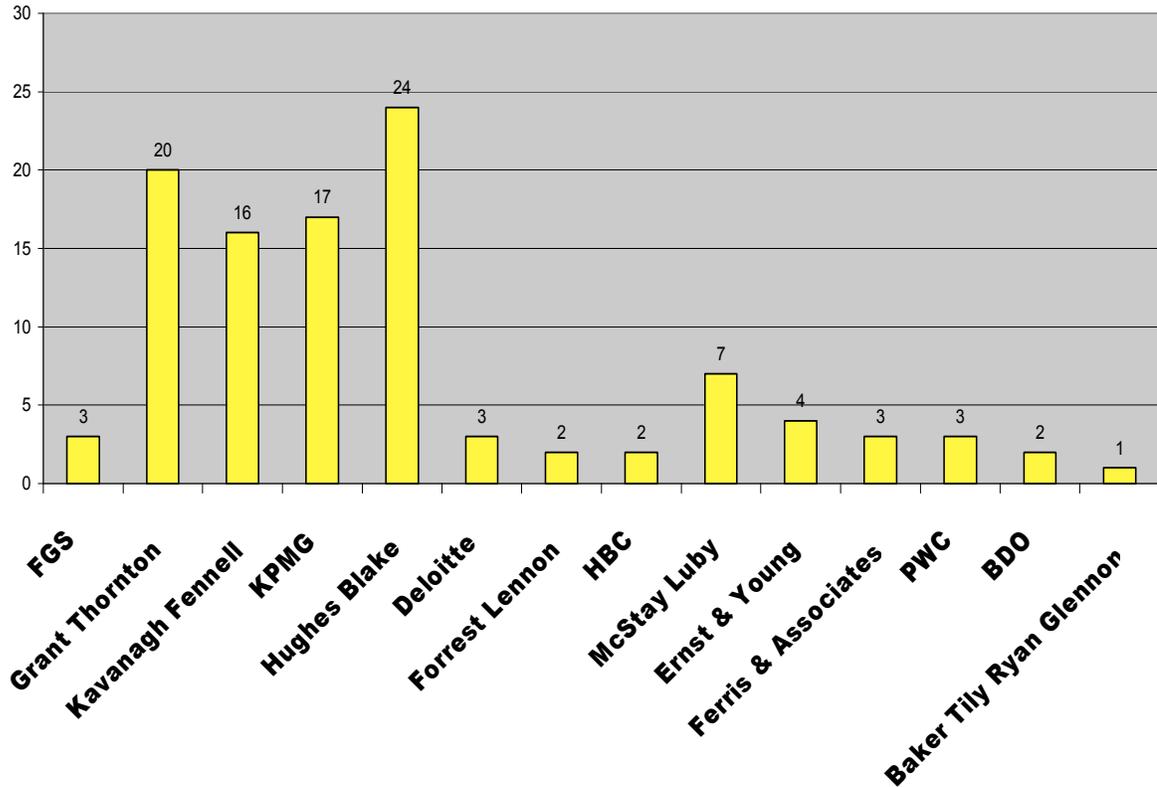
Ardmore Technologies is now one of Ireland's leading communications companies specialising in wireless network installations, local/wide area networks and structured cabling. The company has been at the forefront in introducing wireless technologies to the Irish market and has built up an exceptional team of highly skilled individuals outside of a major urban centre.

Other High profile companies which have successfully emerged from Examinership and are still trading, employing and paying taxes at present, include the following:

- Chartbusters
- M&C Publishing
- Toni and Guy
- Goodman Group
- Chorus Communications
- Birchport Limited
- Burke Civil Engineering Ltd
- Twin Builders Ltd
- Lyons Excavations Limited

Appendix F

Examiner appointments as stated in Iris Oifigúil 2002-2009

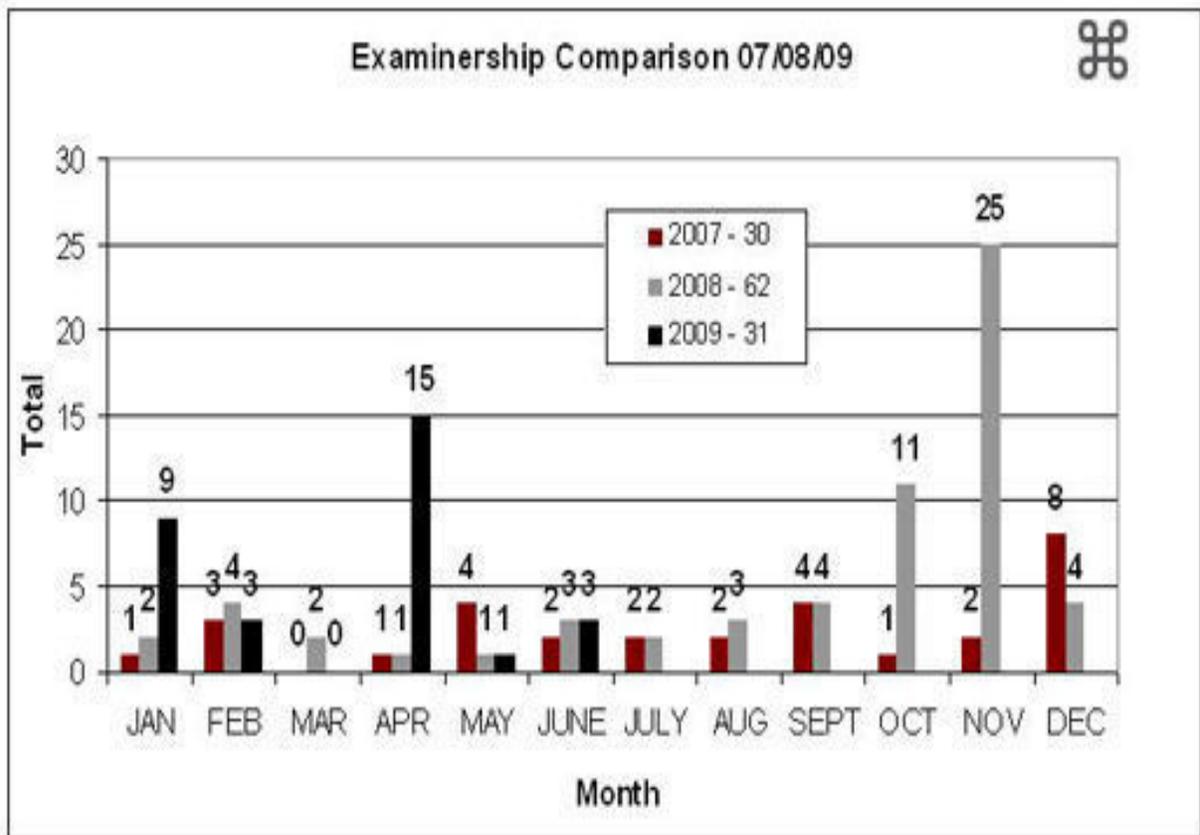


The above graph represents the companies which have conducted all the cases of Examinership in the years 2002-2009. The researcher conducted interviews with Examiners from three of the above companies. Those companies were Hughes Blake, Grant Thornton and HBC (Harwoth Bastow Charleton)

Appendix G

Examinerships Totals: 2007 vs. 2008 vs. 2009

Increase in Examinerships- statistics provided by the Insolvency Journal.



Appendix H

Future Research

- Personal Insolvency

As Examinership ensures that the debts of a company are written down, there exists an element of personal insolvency as some private investors are exposed to a large loss. The researcher suggests a study into what options are available to an individual to help restructure their debts. During the study the researcher did question practitioners about this and they stated that personal insolvency in Ireland needs to be reformed to something similar to that offered in the UK under the “individual voluntary arrangement”, and introduced a process such as this would encourage investors to take more chances because at present they are deterred by the looming bankruptcy laws.

- New Companies Consolidation Bill part A10-Examinership

The survey indicated that law reforms were needed in the area of Examinership. One practitioner suggested that the new companies bill was wrong in granting solicitors and lawyers the authority to act as liquidators, receivers and Examiners, a role which he felt was better suited to a qualified accountant that could use their commercial background to restructure and save a company in the case of Examinership. This new bill will offer an area of further research in deciding whether the inexperience of lawyers and solicitors acting as Examiners will have a detrimental effect on the success of the process. As the current findings suggested practitioners already were of the opinion that inexperienced Examiners can lead to an Examinership unnecessarily failing. (The new companies consolidated bill can be found on the CLRG website, available at www.clrg.ie)

- Time Extension

Another area of law reform was suggested by a practitioner that felt that sometimes if a large group of companies are in Examinership it can be difficult to turn the company around within the time constraint of 100 days. Large groups can be complex to examine and restructure and it was suggested that extra time should be granted at the discretion of the court, in such cases to aid the survival of the company. Research could be conducted in examining the appropriate time needed to thoroughly examine and restructure a company and questions could be put to the Law Reform Commission to examine if such reforms were plausible.

- Subsequent appointment as liquidator

It was suggested that where a company which was in Examinership subsequently went into liquidation that the same individual should not act as both the Examiner and the Liquidator. One practitioner believes that this is wrong as it gives the one individual “two bites of the cherry” and they should be precluded from accepting the subsequent appointment as liquidator. This suggestion when presented to other practitioners did face some opposition as it was argued that the Examinership and Liquidation processes are both open and transparent as they are conducted through the High Court. However there is the existence of self review whereby the liquidator must look at why the examinership wasn’t successful and this could cause conflict. Whether or not an independent should be appointed to subsequent liquidation should be explored further

- Informal Scheme of Arrangement

The process of Examinership as stated previously is an extremely expensive process and for that reason it is not suitable for small businesses. However the researcher is sure that small businesses too are encountering difficulties and would benefit from a less costly restructuring process. The suggestion of the researcher is a study into another restructuring tool, namely the Voluntary scheme of Arrangement. The voluntary scheme of arrangement does not offer court protection but it does ensure that an insolvency practitioner identifies problems which exist and offers solutions to

these problems. The process does not go through the court system and therefore is a more economical process suited to small businesses. A scheme of arrangement is also prepared and acts as a legally binding contract if the creditors sign and agree to reduce their debt, this ensures that creditors don't "jump ship" and apply for liquidation as court protection doesn't exist. (One practitioner stated, when questioned about using this process, felt that it was a very good idea as it is less expensive and also does not attract as much publicity. The company is therefore not negatively affected by stricter credit deadlines or the banks adding a risk factor to their loans)

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