

Department of Business Studies  
Letterkenny Institute of Technology

# An investigation into the possible need for reform of the examinership process in Ireland

**Author:** Andrew McDermott

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**Research Supervisor:** Mr. Paul O'Sullivan

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Degree of MA in Accounting, Letterkenny Institute of Technology.**

## **Declaration**

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## **Abstract**

Since the recession began there has been a reduced credit flow in this country. As a result many companies have found themselves insolvent. For viable companies there is an option available called examinership. This process provides a company with court protection from its creditors for a limited period. During this period the company will receive new investment and restructure. This involves the company being given the opportunity to significantly reduce its debts. In return for the writing down of the company's debts, their creditors will receive a dividend which is funded by this new investment. This legislation was enacted in 1990 to prevent the collapse of the Goodman group. This legislation was rushed into law and amendments had to be made in 1999 to rectify problematic issues with the original legislation. However many issues still remain with this legislation. It has been described by many as too expensive and inaccessible for small companies.

This thesis aims to discover whether there is a need for reform of the current legislation. It is important in recessionary times that there is an appropriate mechanism in place to help viable companies in financial difficulty to survive. This will aid in the recovery of the economy and the protection of jobs. This thesis will investigate the issues associated with the current examinership process and also how these issues may be rectified. Practitioners in this area were asked to give their opinions on the issues identified and also if they could suggest any further improvements to this process.

The research found that there may not be a need for reform; however there are minor amendments that may be required. Such as a further extension to the period of court protection for large and more complex companies. The research discovered that judges consider the number of employees a company has when deciding on a company's application for examinership even though this is not outlined in the legislation. This should not be a factor as every job is important and every job saved could save the government €14,000 per annum. Additionally the legislation makes it impossible for SME's to enter the process due to the high costs. Holding cases in the Circuit Court would significantly reduce these costs and make the process accessible to SME's. This research also found that the current alternatives are inadequate and can be only used in certain circumstances.

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## **Abbreviations**

CA.....	The Companies Act
C(A)A .....	The Companies (Amendment) Act
C(A)A(NO.2) .....	The Companies (amendment) Act (No.2)
CA .....	The Companies Act
CLRG.....	Company Law Reform Group
CVA.....	Commercial Voluntary Agreement
EA.....	Enterprise Act
EU.....	European Union
IA .....	Insolvency Act
LYIT .....	Letterkenny Institute of Technology
ODCE.....	Office of the Director of Corporate Enforcement
SME.....	Small and Medium Enterprises
UK .....	United Kingdom

## Table of Contents

<b>Declaration.....</b>	<b>i</b>
<b>Abstract.....</b>	<b>ii</b>
<b>Acknowledgements .....</b>	<b>iii</b>
<b>Abbreviations .....</b>	<b>iv</b>
<b>Chapter 1:Introduction.....</b>	<b>5</b>
1.1 Introduction and Justification for research .....	5
1.2 Research Questions and Objectives.....	6
1.3 Contributions of this study.....	8
1.4 Limitations of the Research .....	8
<b>Chapter 2: Literature Review .....</b>	<b>9</b>
2.1 Introduction.....	9
2.2 Examinership process .....	9
2.2.1 The Petition for Examinership.....	10
2.2.2 Independent Accountants report.....	10
2.2.3 Power of the court to appoint an examiner .....	11
2.2.4 The Role, Duties and Powers of an Examiner.....	12
2.2.5 Scheme of arrangement.....	12
2.3 Alternatives to examinership .....	13
2.3.1 Section 201 Scheme of Arrangement .....	13
2.3.2 An Informal Scheme of Arrangement.....	13
2.4 Issues with Examinership Ireland.....	14
2.4.1 Costs.....	14
2.4.2 Period of court protection.....	16
2.4.3 Unfair advantage.....	17
2.4.4 Accessibility to examinership.....	18
2.4.5 Directors retain control .....	19
2.4.6 Backing of secured creditors .....	20

2.5 Conclusion .....	20
<b>Chapter 3: Methodology .....</b>	<b>22</b>
3.1 Introduction.....	22
3.2 Definition of research .....	22
3.3 Research Design.....	22
3.3.1 Research Approach .....	22
3.3.2 Research Philosophy .....	23
3.3.2.1 Positivism.....	23
3.3.2.2 Interpretivism .....	24
3.3.2.3 Research Philosophy Adopted .....	24
3.3.3 Research Focus .....	24
3.3.3.1 Exploratory Research .....	24
3.3.3.2 Descriptive Research .....	25
3.3.3.3 Explanatory Research.....	25
3.3.3.4 Research focus adopted .....	25
3.3.4 Research Tools.....	25
3.3.4.1 Data Required.....	26
3.3.4.1.1 Quantitative .....	26
3.3.4.1.2 Qualitative .....	26
3.3.4.1.3 Information Required.....	26
3.4 Population .....	26
3.5 Data Collection Methods .....	27
3.5.1 Secondary Data.....	27
3.5.2 Primary Data.....	27
3.5.2.1 Case Study Analysis .....	27
3.5.2.2 Questionnaires.....	28
3.5.2.3 Focus Groups .....	28
3.5.2.4 Interviews.....	28
3.5.2.4.1 Structured Interviews .....	28
3.5.2.4.2 Semi-Structured .....	29
3.5.2.4.3 Unstructured Interviews .....	29
3.5.3 Research Tools Adopted and Justification .....	29

3.6 Analysis qualitative data.....	30
3.7 Ethical Considerations.....	31
3.8 Conclusion.....	31
<b>Chapter 4: Findings and Analysis .....</b>	<b>32</b>
4.1 Introduction.....	32
4.2 Issues with the Alternatives .....	33
4.2.1 Informal scheme of arrangement.....	33
4.2.2 Section 201 Scheme of Arrangement.....	33
4.3 Cost of Examinership .....	34
4.3.1 Costs of Petition.....	34
4.3.2 Cost after an examiner is appointed.....	35
4.3.3 High Court Involvement.....	35
4.3.4 Lease repudiation.....	37
4.4 70 day examinership period.....	38
4.5 Unfair advantage .....	39
4.6 Fresh cash.....	39
4.7 Low Staff Levels .....	40
4.8 Directors Retain Control.....	41
4.9 Improvements to Examinership not identified by the literature: .....	42
4.9.1 Redundancy payments .....	42
4.9.2 Abuse of the system .....	43
4.9.3 Independent accountants report .....	43
4.10 Conclusion .....	44
<b>Chapter 5: Conclusion.....</b>	<b>45</b>
5.1 Introduction.....	45
5.2 Alternatives to examinership .....	45
5.2.1 Informal scheme of arrangement.....	45
5.2.2 Section 201 scheme of arrangement .....	45
5.3 Cost of Examinership .....	46
5.3.1 High Court Involvement.....	46
5.4 70 day examinership period .....	47



5.5 Unfair advantage ..... 48

5.6 Fresh cash..... 48

5.7 Low Staff Levels ..... 49

5.8 Directors Retain Control..... 49

5.9 Improvements to Examinership not identified by the literature: ..... 50

5.10 Overall conclusion..... 51

**References .....52**

**Appendix 1 .....58**

**Appendix 2 .....60**

## **Chapter 1**

### **Introduction**

#### **1.1 Introduction and Justification for research**

Since the first signs of the economic downturn, in the latter stages of 2006, interest in debt stricken companies has increased significantly. During the boom year's debt stricken companies did not face failure as credit was readily available. Yet now in these recessionary times business failure is ripe, for the first six months of 2011, 819 companies were declared insolvent (Kavanagh and Fennell, 2011).

Examinership, receivership and liquidations have become topical issues as many companies face financial difficulties. In Ireland, these are the many routes that a company can take if they find themselves in financial difficulty.

Liquidation is the winding up of a firm by selling off its assets to convert them into cash (Callanan, 2007). Under Section 285 Companies Act (CA) 1963, these funds will pay the firm's creditors, and distribute any remaining funds among the shareholders in proportion to their shareholdings.

Receivership is the process whereby a secured lender, such as a bank, takes control of the secured assets in order to repay the debt due. Receivership is generally used by banks as a means of debt recovery (Callanan, 2007).

Finally examinership is the process where the company seeks protection of the court from creditors in order to negotiate a structured settlement with creditors on the back of further investment (Coyle, ND). The aim of examinership is to save a viable company from liquidation through a formal scheme of arrangement. Examinership is a specialist area of the accounting profession. This process is governed by the Companies (Amendment) Act (C (A) A) 1990 and the Companies (amendment) Act (No.2) (C (A) A (No.2)) 1999. The act was brought into law on the 29th August 1990 in order to prevent the collapse of the Goodman Group (McCaughey and Day, 2010). The law had to be rushed through emergency sessions of the House of the Oireachtas, taking less than one month, in order to have the law enacted as soon as possible

(McCaughe and Day, 2010). This needed to be amended with the C (A) A (No.2) 1999 in order to rectify some of the problematic issues that existed within the legislation. A report was issued by the Company Law Review Group (CLRG) (1994) which outlined several reforms which were implemented by the C (A) A NO.2 1999. Reforms included a change in wording from it is “likely to facilitate the survival of the company”, to the courts are satisfied that there is a “reasonable prospect of survival of the company”. The CLRG found that companies were using the law to postpone their inevitable winding-up, which was not the purpose of the legislation (Laga, 2002). The length of time under which court protection was allowed was reduced from 90 days to 70 days under section 14 C (A) A NO.2 1999 (Murphy, 2000). Many leading commentators including, Hughes (2011), Kavanagh (2006) and McCaughe and Day (2010) have argued the examinership process does not achieve its main objective of rescuing ailing companies. They criticise the legislation as being restrictive towards small and medium enterprises (SME’s) and companies with limited cash flow, due to the high legal costs. Currently all examinership cases must go to the High Court and this is unrealistic for many companies due to the high costs attached. Fine Gael (2011) is currently looking into bringing in a commercial voluntary agreement (CVA) for small enterprises so they will not have to go through the expense of examinership.

Examinership is a large and complex area and thus this paper critically examines the role of examinership in Ireland when dealing with companies in financial difficulties. This thesis will examine the published issues and also the views of insolvency practitioners regarding these issues associated with the current legislation in order to highlight whether there is a need for reform. Additionally, this research aims to discover whether there are any suitable alternative to the issues identified.

## **1.2 Research Questions and Objectives**

This research will specifically look at examinership in Ireland and by answering the following questions and objectives; the researcher will aim to investigate whether or not there is a need to reform the examinership process in Ireland.

The research question is:

“Is there a need for reform of the examinership legislation?”

The research objectives are:

1. To outline the legislation relevant to examinership and also the alternatives available to companies in financial difficulty
2. To identify and explain the issues with the examinership process
3. To ascertain appropriate solutions to these issues
4. Identify the perceptions and opinions of examiners and solicitors regarding the issues that have been identified in the literature review and the alternatives available
5. Identify improvements that examiners and solicitors would make to the current legislation to make the process more efficient and effective

Objectives 1, 2 and 3 will be answered through the literature review. In order to provide a background to this topic, objective 1 will detail the examinership process and outline the legal framework to which it relates. Objective 1 will also identify the alternative routes which companies in financial difficulty can take in order to provide the reader with an overall picture of the various options available to companies. Objective 2 is a discussion regarding the issues with the current examinership process. This will provide the reader with an insight into the problems faced by practitioners. Objective 3 aims to suggest solutions to the issues identified as this will show whether there is a need for reform or if minor amendments are required.

Objectives 4 and 5 will be solely a part of the primary research. Objective 4 will explore the issues identified with the current legislation by asking insolvency practitioners their views in order to provide a practical point of view on these issues. These issues will be explored in both the literature review and primary research, this will clearly identify what arguments exist regarding a reform. Finally, objective 5 will identify any issues which were not identified in the secondary research and how these should be resolved.

These objectives will provide a practical opinion on this topic and may shed light on areas which have not been identified throughout the literature.

### **1.3 Contributions of this study**

This study will benefit the business students of Letterkenny Institute of Technology (LYIT) as it will provide them with an insight into this complex area of accounting. It may also provide such students with ideas for areas of further research. Additionally it may be useful if the examinership legislation is amended or reformed as future researchers will be able to refer back to this study in order to establish if the issues identified were rectified. This research may also be of use to insolvency practitioners in this area as there is a lack of literature on this topic. This research may also be of benefit to companies who are in financial difficulties.

### **1.4 Limitations of the Research**

This study does have limitations, many of which stem from the constraints of the research. These are as follows:

**Interview constraints:** The use of interviews for data collection entailed certain constraints. Twenty five insolvency practitioners were asked to participate in primary research and only 7 responses were received. As the population size is small it is important for the researcher not to generalise their opinions.

**Time:** as the researcher is in full-time employment this restricted the time that was available for traveling to and from Dublin in order to conduct interviews. In order to overcome this restraint 3 interviews were conducted over the telephone.

## **Chapter 2**

### **Literature Review**

#### **2.1 Introduction**

This chapter will outline the current examinership process and the alternatives to examinership that are currently available to companies. Furthermore, this chapter will identify any issues with the current process that has been published and if any solutions have been suggested.

#### **2.2 Examinership process**

Examinership is a legal process which helps in the rescue of ailing but potentially viable companies. The statutory framework for placing a company in examinership is set out in the C (A) A 1990. Section 2(2) of this act states that:

“Without prejudice to the general power of the Court to appoint an Examiner the Court may in particular make an order under this section if it considers that such order would be likely to facilitate survival of the company and the whole or any part of its undertaking as a going concern.”

The central feature of examinership is to place ailing companies under the protection of the High Court for a period of 70 days. This period may be extended to 100 days on court approval. This means the company is immune from any actions by its creditors. Under section 5 of the C (A) A No.2 1999 the court must be satisfied that the company has a reasonable prospect of survival. There are several stages to the examinership process, the petition is brought to the High Court where the case is heard and the judge will decide whether to appoint an examiner. The examiner will formulate the proposals for a scheme of arrangement in order for the company to continue as a going concern (O’Neill 2007). New investment is injected into the company and finally the cessation of court protection. The petition for the application of examinership is prepared mainly by directors or shareholders. At the hearing the application is either accepted or denied. If accepted an examiner is appointed. It is their role to perform an examination of the company’s dealings and to report their findings to the High Court. While the company is under the protection of the court, a

receiver cannot be appointed and the company cannot be wound up. The formal scheme of arrangement is the agreement negotiated between the company and its creditor regarding the amount of money that will be repaid. New investment must be sought by the company in order to repay part of the debt. The details of this are set out in the scheme of arrangement, which outlines how much of a dividend each class of creditor will receive and how much debt they will be required to write-off.

### **2.2.1 The Petition for Examinership**

Petition for protection of the court is set out in Section 3 of C (A) A 1990 and C (A) A (No.2) 1999. The petition for the appointment of an Examiner must be presented to the High Court. Under section 3 (9A) C(A)A 1990 if the companies debts do not exceed €317,000 the court may order that the matter be remitted to the judge of the Circuit Court in whose region the company has its registered office or principal place of business. This petition may be lodged by the company itself through passing a resolution, or by the directors, creditors or by the members who hold not less than one tenth of the paid-up capital of the company or 10% of the voting rights at the general meetings (Sheehan 2010). The name of a nominated examiner must be accompanied with the application and under section 3(4A) C (A) A 1990, consent must be signed by that nominated person. Under section 7 C (A) A (No.2) 1999, the petition must include an independent accountants report.

### **2.2.2 Independent Accountants report**

C (A) A No.2 1999 introduced a requirement that a report be formulated by an independent accountant. This report will outline the accountant's views on the viability of the company and if it has a reasonable prospect of survival. Attached to the report will also be a statement of the conditions which the independent accountant considers are essential to ensure such survival (Moore 2010). A full list of the contents of the independent accounts report are set out in section 3B C (A) A (No.2) 1999 (see appendix 1). This report must be accompanied along with the petition to the High Court. This report is an important part of the petitioning process. Judge McCracken (2001) refers to the importance of the independent accountants report by stating that it is this report that will provide the basis for the final decision regarding the appointment of an examiner.

Under section 7 C (A) A No.2 1999 the independent accountants report must be prepared by the auditor of the company or by a person who is qualified to be appointed as an examiner. It is acceptable under examinership legislation for the individual who prepared the independent accountant report to become the company's examiner. However it was highlighted in the Tuskar Resources plc (2001) case that High Court judges do not advise this. They feel that in certain cases this may be undesirable as the independence to which the report was written could be questioned.

### **2.2.3 Power of the court to appoint an examiner**

In order for a court to appoint an examiner the conditions under Section 2 C (A) A 1990 must be satisfied. This states that a company must be deemed unable to repay its debts. Section 214 of Companies Act (CA) 1963 states that a company is unable to pay its debts if it owes more than £50 for a period not exceeding 3 weeks starting from the date the payment was demanded in writing from the creditor. In addition to this where the court has ordered a payment be made which has not been satisfied. Furthermore, if the company has no resolutions or orders regarding the winding up of the company an examiner may be appointed. Finally, under Section 2(2) C (A) A 1990 a company was granted court protection if it "would be likely to facilitate the survival of the company" in other words if the company had an identifiable prospect of survival. In a report in 1994 by the CLRG, they recommend that this phrase be changed. It found that companies were using the law to postpone their inevitable winding-up, which was not the purpose of the legislation (Laga 2002). Section 2(2) C (A) A 1990 was replaced by section 5 of the C (A) A No.2 1999 which states:

"The court shall not make an order under this section unless it is satisfied that there is a reasonable prospect of the survival of the company and the whole or any part of its undertaking as a going concern."

This condition is the most important as it is the principle test that must be satisfied (Hickey and Callanan 2009). The judge will ultimately decide if the company has a reasonable prospect of survival based on the independent accountant report.



#### **2.2.4 The Role, Duties and Powers of an Examiner**

The role of the examiner is to perform an examination of the company's dealings. Under section 7 C(A)A 1990 the examiner has the same rights and powers as an auditor in regards to the supply of information and general co-operation, and may apply to the court to resolve any question in relation to his office. An examiner shall have power to convene, set the agenda for, and preside at meetings of the board of directors and any general meetings. An examiner must be given notice to attend all meetings of the board of directors and given a description of the business to be conducted at any such meetings. The examiner must also formulate proposals for a scheme of arrangement and present them to the company's shareholders and creditors as soon as it is practicable. Once he has formulated his proposals, the examiner must assemble meetings of the members and creditors. After these meetings the examiner must report back to the court to seek approval within 35 days of their appointment (Murray ND).

#### **2.2.5 Scheme of arrangement**

A scheme of arrangement is a compromise or arrangement which a company negotiates with its creditors or members. If this scheme of arrangement is accepted by three-quarters of one class of creditors in value, it shall become legally binding on the whole group (Laga 2002). In order for the scheme of arrangement to be successful the examiner must convince at least one class of creditors such as secured or unsecured creditors to accept the scheme as this would be more beneficial to them than if the company was wound-up. After creditors approve the scheme it is brought to the High Court for approval. When the examiner is not able get one class of creditors to approve the scheme of arrangement, the court will, in most cases, appointment a liquidator to the company.

The first task of the examiner is to separate all creditors into classes. This is to ensure that all creditors within each class are treated fairly. The key to having the examiners proposals for a scheme approved is to show the creditors that receiving a dividend for their debt would be more beneficial to them than if the company went into liquidation. The scheme of arrangement is then shown to the court and is designed to indicate the views of the various classes of the company's creditors.

Under section 24(4) of the CA 1990 the court cannot confirm the proposals if a number of conditions exist. Firstly, where the primary purpose of the scheme is to avoid any payments of tax due or where the judge is not satisfied that each class of creditors or members are being treated fairly. In addition to this, if the judge believes that there has been prejudice towards any interested party, the proposal will not be confirmed. Finally, where it would have the effect of impairing the interests of the creditors of the company in such a manner as to favour the interests of the creditors or members of any company to which it is related. Also in this instance the proposal will not be confirmed.

There are alternatives available to companies in financial difficulties who wish to continue trading and not go through receivership or liquidation.

## **2.3 Alternatives to examinership**

### **2.3.1 Section 201 Scheme of Arrangement**

Under Section 201-204 of the CA 1963 a formal scheme of arrangement enables companies to negotiate a settlement with creditors. If a company makes a section 201 application to the courts and this is accepted, it can be given protection from its creditors, similar to examinership. This process must also take place in the High Court and as a result this is also expensive. Unlike with an examinership, each class of creditor both secured and unsecured must vote in favour of the scheme, three-quarters in number. Furthermore, this scheme does not have a time-limit in comparison to a maximum of 100 days in examinership. In a Section 201 scheme of arrangement an examiner is not involved, which means the directors must communicate and negotiate directly with creditors. This can be seen as an advantage as the directors are familiar with their creditors personally and have a better understanding for their company and how it operates. (Kavanagh et al 2009)An informal scheme is less expensive.

### **2.3.2 An Informal Scheme of Arrangement.**

This is a mechanism where a company or an individual agrees to pay a percentage of debts to creditors. This is more cost effective as it does not involve the courts but the downside to this is that there is no court protection from creditors. (Kavanagh et al.

2009) The informal scheme of arrangement is not suitable for all companies as it can be time consuming if there are a significant number of creditors. This is best suited to companies with a small number of creditors. Dialogue is important with creditors as there is no court protection, if one large creditor is not in support of this arrangement they could petition the court for a winding-up. (Murray 2004). Another disadvantage of an informal scheme is that getting all creditors to agree with the arrangement can be extremely difficult. An informal scheme of arrangement can be made legally binding in a court under section 279 of the CA 1963. In order for this arrangement to become legally binding three quarters of the creditors in number must accept the scheme (Stafford and Murray ND)

It is vital in order for both an informal and a formal scheme of arrangement to work, a report be sent to all creditors detailing how the company has found itself in this position, a list of all assets and liabilities of the company, the proposed dividend for each class of creditor, details of the new investment and finally what the creditors would receive if the company went into liquidation. This report should have as much detail as possible as this will help creditors decide whether or not to support the scheme (Kelly 2007).

## **2.4 Issues with Examinership Ireland**

Examinership is the least popular route taken by Irish insolvent companies. In 2010, 1% of these companies sought a High Court appointed examiner. In comparison to this, in the US, 23% of companies in financial difficulty sought protection from their creditors through a similar process to Examinership called chapter 11 bankruptcy. In 2010, the United Kingdom (UK) figure for administration is 17% of all companies in difficulties. Administration is a similar process to Irish Examinership. The main cause for the difference in these figures is the costs involved with the Irish examinership process. (Hughes 2011A)

### **2.4.1 Costs**

In order for a company to gain court protection it must petition to the High Court. The costs associated with this must be paid up front because of the high risk associated with the company being granted court protection. These costs relate to the independent accountants report, solicitor and counsel fees. Kavanagh (2006) estimates

that the costs associated with the petition are on average between €25,000 and €35,000. Hughes (2006) a partner of Hughes Blake, directly disagrees with this, stating that:

“The independent accountant’s report in a high profile examinership case last year was carried out for a fee of €5,000. The solicitor’s fees for the petition in another straightforward case I have recently been involved in were €3,000 plus counsel fees of €5,000.”

It should be noted that these costs relate to separate cases.

After the examiner is appointed it has been estimated by Kavanagh (2006) that a straight forward medium sized examinership could cost between €100,000 and €135,000 excluding VAT (Kavanagh 2006). This is due to accounting, solicitor and barrister fees. Furthermore, the fact that this process must take place in the High Court drives up costs. Kavanagh (2006) agrees by stating costs are far too high to justify restructuring a company with, say, €300,000 in assets. However, these costs can significantly increase, in 2009 an accountant working for Hughes Blake was taken to court by the ACC Bank and Ulster Bank challenging the fees run up during the course of the unsuccessful examinership of the Thomas Read Group of pubs. The total fees including legal expenses came to €1,072,126. This court reduced this amount to €725,000 including VAT (Kavanagh et al 2009).

This system would seem to suit large companies with significant amounts of assets worth millions, but for SME’s the cost is not justified. Therefore this removes examinership as a viable option for such companies. Mc Manus (2009) agrees indicating that “examinership fees need to be examined” as lawyers and accountants are charging “astronomical” prices such as €250 per hour for photocopying. Another issue with examinership is the low threshold limit of €17,000 which applies to the High Court, this limit has not changed since the legislation was first introduced in 1990 (McCague and Day 2010). This low limit has resulted in all examinership cases been held in the High Court (Laga 2010). Hughes (2010 A) believes that examination should not take place in the High Court and should be held instead at the District Courts or Circuit Courts.

Hughes (2010 B) in another article offers a solution to this problem, he recommends that the threshold limit of the High Court be increased to €1 million. As a result very few cases would be required to attend the High Court. This could be achieved easily and efficiently by ministerial order rather than another amendment as it is not a material change to the law.

Fine Gael (2011) has proposed a legally binding non judicial system be put in place. Fine Gael believes that this will make it more accessible to small companies by reducing costs which are associated with going to court. They plan to introduce a Commercial Voluntary Arrangement (CVA) this arrangement will become legally binding when it is agreed by no less than 75% of creditors. This arrangement will protect the debtor from the threat of enforcement during the period of the CVA normally five years and also any interest charges. They propose that the CVA process be only available to small companies as defined at European Union (EU) law. This means employs less than 50 staff, turnover of €10 million or less or balance sheet total of €10 million or less.

A similar non-judicial system has been offered to UK companies in financial difficulties since the insolvency act (IA) 2000. This system was introduced in order to make the process, quicker, cheaper and less bureaucratic (Insolvency Policy Team 2003). Turner and Parkinson (2006) finds that this has proved successful and more cost efficient for smaller UK firms in financial difficulty as it made the process more accessible to companies with limited assets.

#### **2.4.2 Period of court protection**

During the examinership process a company receives 70 days of protection which can be extended to 100 days on the courts approval. In the first 35 days a scheme of arrangement must be presented to the court, the examiner must draw up a scheme of arrangement and convene meetings with creditors. This can sometimes be an unrealistic time frame in order to secure new investment and restructure the organisation (Kavanagh 2006). In comparison, American chapter 11, which is a very similar process to Irish examinership, allows 120 days protection in order to develop a restructuring plan. This period can be extended to 300 days for small companies and

up to 18 months for large companies (United States Courts ND). In the UK's administration process companies enjoy a protection period of one year from the date the company entered into administration and can be extended with the consent of the creditors or the courts (Insolvency Policy Team 2003).

### **2.4.3 Unfair advantage**

Companies in examinership are granted protection from their creditors while their debtors are still obliged to pay what is owed. As a result, the company will have an increased cash inflow. In addition to this, when these companies come out of examinership, all their debts are significantly reduced. Some academics have argued that this gives Irish companies an unfair advantage over their competitors. Foley (2002) states that if court protection is to be extended to an Irish company that has competitors based in EU member states, then this would give those companies in examinership an unfair advantage over their EU counterparts. Foley (2002) also states that it would be an interesting development if the European Commission is called to decide on this issue in the future. This could lead to a change in the examinership process which would align it with similar processes available to companies throughout the EU.

Ó hÓbáin, the Irish Printing Federations President, cited by Irish Business and Employers Confederation (IBEC) (2010), highlighted his concerns regarding the effect examinership will have on the companies creditors. In many examinership cases, the debts of companies will have been written off almost entirely. As a result, creditors will be forced to write off large amounts of debts at their own expense. This could have a major impact on the creditor's statement of financial position. Ó hÓbáin argues that this is unfair as these companies receive no protection unlike their debtors. Mr Ó hÓbáin said:

"In practice, it seems that the financial impact of examinerships for these creditors is little better than liquidation. The industry can only hope that the cost of writing off these bad debts is not passed on to companies that continue to pay their bills on time, through price increases and tightening credit terms."

In the CLRG report of 1994, it had noted that companies coming out of examinership successfully will have an unfair advantage over its creditors and competitors. However the group decided that it was in the best interest of the public to allow this unfair advantage (Murphy 2000).

#### **2.4.4 Accessibility to examinership**

Examinership is not designed for companies who do not have a constant cash flow as this is an essential element, which must be satisfied in order for this process to be successful. Companies that do not have constant cash flow will not be advised by insolvency practitioners to take the examinership route as they need cash to keep the ordinary activities of the company financed and need breathing space in order to restructure during the 70 – 100 days of protection. However if a company is considering examinership it is likely this company is not trading (Kavanagh 2006). In order to overcome cash flow issues an injection of cash is required. The institution or individual which provides a loan to a company in examinership is eligible to obtain a section 10 certificate. This certificate means that the creditor will rank above any other unsecured creditors in a subsequent liquidation. This makes it easier for the examiner to secure funding which is vital in the survival of the company (Matheson, Ormsby, Prentice 2004). However, in current times there is a significant reduction in the flow of credit. The Irish small and medium enterprise association conducted a survey in order to assess the availability of credit in the first quarter of 2011. The findings show that 48% of SMEs were refused credit compared with 33% in the previous quarter. These figures show that this problem is worsening (ISME 2011).

Secondly, in order for examinership to be approved by the court, a key consideration is whether or not approval will aid the safe guarding of jobs. This is not defined in examinership legislation but has become a key issue through case law. This was seen in the *Traffic Group v Companies Act 2007*. In this case Judge Clarke states

“It is clear that the principal focus of the legislation is to enable, in an appropriate case, an enterprise to continue in existence for the benefit of the economy as a whole and, of equal, or indeed greater, importance to enable as many as possible of the jobs which may be at stake in such enterprise to be maintained for the benefit of the community in which the

relevant employment is located. It is important both for the court and, indeed, for examiners, to keep in mind that such is the focus of the legislation. It is not designed to help shareholders whose investment has proved to be unsuccessful. It is to seek to save the enterprise and jobs.”

This has become a real issue in the recession considering the rise in the number of petitions presented to the High Court under the C (A) A 1990, which relate to property development companies. Such companies mainly use contractors for building works and therefore have few direct employees. These companies are thus considered inappropriate candidates (Carney and Murphy 2010). In the cases of Laragan Developments (2009) and Vantine Holdings (2009) the deciding judges denied these companies protection of the court. In both cases it was noted that the safeguarding of jobs is key in considering any examinership petition. Furthermore it was also noted that this process is not to save shareholders from their poor investment decisions (Carney and Murphy 2010).

#### **2.4.5 Directors retain control**

After an examiner is appointed the directors still keep their powers of management and control, although in exceptional cases the court can order otherwise (Hartnett 2010). In examinership managers may be more willing to enter to a reorganisation process earlier if they know they will retain control during the process. This would mean managers would seek examinership when it is more likely to have a reasonable prospect of survival (Zaretsky 1993). However Chan and Ho (2010) find that this may promote wasteful, strategic behaviour from the company’s directors. Directors may be encouraged to adopt high risk strategies as they have nothing to lose. In addition to this, Bebchuk (2002) finds that directors who are associated with the company’s financial difficulties may not always be the best people to continue to control the company. Under the Enterprise Act (EA) 2002 in the UK, the administrator takes over control of the company. It is their role to manage the company’s dealings and property. This is done for the benefit of the companies creditors. This essentially means that the directors lose their powers of management and control (Hartnett 2010).



#### **2.4.6 Backing of secured creditors**

Until recently, secured creditors would receive all of the debts they are owed in an examinership case. There was an option for the company in examinership to repay this debt in instalments over a longer period of time. In some cases this involved the secured creditor writing off of part of the interest on the loan (Hughes ND). However in the recent examinership case of McInerney (2010), Justice Clarke ruled that a secured creditor can be forced to accept a discount on their loan in an examinership. The courts have shown that a scheme of arrangement can in fact write down the value of secured creditor's debt but only to the value that could be realised on an open market (Black 2011). The valuation methods have caused much controversy in cases where they do not have the backing of secured creditors. Black (2011) states that if the secured creditors can produce evidence that they will do better in a liquidation, this would be sufficient to persuade the court not to confirm a scheme of arrangement. This is evident in the on going McInerney case. In this case the secured creditors disagreed with the valuations placed the assets their debt was secured on. The scheme of arrangement in this case offered to pay the secured creditors €25 million as the examiner felt that no more than €1.9 million would be obtained on the open market for these assets. However the secured creditors disagreed with this valuation and hired professionals which valued the assets at €50 million on the open market. The court refused to confirm the scheme of arrangement on the basis that the secured creditors has given evidence that they may in fact receive more in a receivership (Black 2011). McInerney appealed this decision in 2010 and again was refused by the High Court on the same grounds. McInerney has since appealed to the Supreme Court and a ruling is expected in August of this year. This demonstrates the complexities that may be involved in the examinership process where the company does not have the backing of secured creditors.

#### **2.5 Conclusion**

The literature review provides insight into the examinership process and the legislation that governs it. Examinership is a legal process which helps in the rescue of ailing but potentially viable companies. This process provides a company with court protection from its creditors for 70days which may be extended on courts

approval. During this period the company will receive new investment and restructure. This involves the company being given the opportunity to significantly reduce its debts. In return for the writing down of the company's debts, their creditors will receive a dividend which is funded by this new investment.

There are many issues with the examinership process, these include the high legal costs associated with the High Court, many SMEs do not have the assets required to justify this expenditure (Kavanagh 2006). In addition to this, the period of court protection is 70-100 days which has been criticised as being too short (Kavanagh 2006). Furthermore, it has been argued that Irish companies in examinership have an unfair advantage over their creditors and competitors (Murphy 2000). Furthermore companies with limited employees may be restricted from using examinership as a possible route. Finally, directors retaining control has its positives and negatives. The researcher will uncover the opinions and perceptions of practitioners on the alternatives to examinership and issues identified in this chapter.

## **Chapter 3 Methodology**

### **3.1 Introduction**

This chapter outlines the methodology that was applied in conducting this research. Firstly, a definition of the research methodology is presented after which the aims of the research are specified in addition to the objectives which needed to be accomplished to achieve those aims. In addition to this, details of the research design, philosophy and approaches employed will be detailed. Also included is a discussion on the processes employed for collecting and analysing the data and an outline of the rationale for using the chosen research design tools.

### **3.2 Definition of research**

Research is a discerning pursuit of the truth (Hair *et al* 2007). It involves the collection and analysis of materials and sources in order to establish facts and reach conclusions. (Saunders *et al* 2009).

### **3.3 Research Design**

The research design is the master plan, which specifies the key methods and processes to be used in the collection and exploration of the required information (Saunders *et al* 2009). Kallet (2004) agrees stating that the research section “should describe what was done to answer the research question, describe how it was done, justify the experimental design, and explain how the results were analysed” (p: 1229)

The research design section is subdivided into five main categories; firstly the research approach, then the research philosophy, followed by the research focus; fourthly the research tools and lastly the instruments to be used for the data collection process. These categories are described in more detail within the following subsections.

#### **3.3.1 Research Approach**

Saunders *et al* (2009) states that research will involve the use of theory. Theory is defined by Gill and Johnson (1997: 178) as “a formulation regarding the cause and

effect relationships between two or more variables”. That theory will dictate the research approach adopted. The form of research can vary substantially between the deductive approach and the inductive approach. The deductive approach originated in the research of natural sciences and involves the development of a theory that is subjected to testing (Saunders *et al* 2009). It involves the testing of a theory from an existing body of knowledge. The inductive approach originates in the research of social sciences. It is designed to discover new relationships, patterns or themes (Saunders *et al* 2009). For example discovering the perceptions of insolvency practitioners in regards to Irish examinership legislation.

For the research presented in this thesis the inductive approach was considered to be the most suitable, mainly because the research strategy was developed to seek the opinions of insolvency practitioners rather than on scientific fact, an underlying assumption of the deductive approach and therefore not compatible with the objectives of this research.

### **3.3.2 Research Philosophy**

The research philosophy depends on the way in which the researcher thinks about the development of knowledge. The way in which the researcher thinks about the development of knowledge affects the way in which the research is conducted (Saunders *et al* 2009). Positivism and interpretivism are the two views about the research process which dominate the literature.

#### **3.3.2.1 Positivism**

A research philosophy which reflects the principals of positivism will more than likely adopt the philosophical stance of natural science. It is a structured approach to data gathering and tends to be analysed and interpreted in both a factual and statistical manner.

According to the work of Jankowicz (2000), positivism is based on the theory that there is only one truth and that there is no alternative to this truth. Gill and Johnson (1997) identified a number of distinguishing characteristics of positivist research; it is deductive, it seeks to illuminate relationships between variables, it commonly uses

quantitative data, it uses controls to test a hypothesis and it is a highly structured methodology to allow repetition.

### **3.3.2.2 Interpretivism**

Interpretive research is a flexible approach to data gathering, which focuses on the meanings and patterns behind the research, rather than measuring just the facts associated with the research (Ramenyi *et al* 2003). It takes into account the changing business environment and results in many different answers which facilitate the understanding of how and why (Saunders *et al* 2009).

Collis and Hussey (2003) identified many characteristics of interpretive research; it generally produces qualitative data, it uses smaller samples, it is concerned with producing theories, data is subjective, the location is neutral, dependability is low, validity is high and it generalises one situation to another.

### **3.3.2.3 Research Philosophy Adopted**

An interpretive philosophy was considered to be the most appropriate for this study, given the fact this research is based on the perceptions and opinions of insolvency practitioners regarding examinership law in Ireland. This approach will help understand the reasoning behind their opinions and perceptions. It was felt that a positivism philosophy would not be appropriate for this particular topic as the data cannot be derived based on the measurement of facts, the core ethos of this philosophy.

### **3.3.3 Research Focus**

According to Kumar (1999), research can be carried out using three main classifications including exploratory, descriptive and explanatory research. The classification chosen depends on the nature of the information, which was collected in order to answer the research question.

#### **3.3.3.1 Exploratory Research**

The main objectives of exploratory research is to; gain background information on the topic, then to define the key terms, explain the issues, establish the research priorities and finally to develop questions to be answered (Hair *et al*, 2007). Saunders *et al*

(2009) states the main advantage of the exploratory approach to research is its flexibility and its ability to adapt to changes. This approach allows the researcher to change the direction of the research as a result of new data or insights. Furthermore, this approach is particularly useful if little is known about the topic.

### **3.3.3.2 Descriptive Research**

The purpose of descriptive research is to address the "what, when, who, where, why and how" questions of the research and therefore data collection is often carried out using interviews or questionnaires (Hair *et al* 2007). Robson (2002) states the purpose of descriptive research is to expose an exact profile of a situation. A descriptive study assists the researcher in providing a basis for further research and develops an understanding of a situation (Sekaran 2003)

### **3.3.3.3 Explanatory Research**

Kumar (1999) suggests that explanatory research tries to explain how and why there is a relationship between two aspects of a situation. Saunders *et al* 2009 agrees stating the task here is to study a situation or problem in order to explain the relationship between variables.

### **3.3.3.4 Research focus adopted**

Both descriptive and exploratory research will be used in this particular thesis. Descriptive research was used when reviewing the literature in order to describe the examinership process and possible issues with that legislation. Exploratory research will be used in order to discover the opinions and perceptions of insolvency practitioners.

### **3.3.4 Research Tools**

The research tools section deals with the nature of the data required, explaining the main data collection methods available and highlighting which of these methods are to be used for this particular study.

### **3.3.4.1 Data Required**

The research procedure of any study can involve a quantitative or qualitative approach to data acquisition and analysis, although the data required will dictate the research tool adopted. “Both research methods have their own individual strengths and weaknesses. These need to be recognised so that the most suitable method can be applied to a research project” (O’ Neill, 2006, pg. 84).

#### **3.3.4.1.1 Quantitative**

The quantitative approach is associated with numerical data and quantifying the relationship between variables that can be illustrated by the use of charts, diagrams and statistics. It generally involves large representative samples and is a structured data collection method. Questionnaires and surveys are collection methods associated with the quantitative approach (Blaxter *et al.* 2006).

#### **3.3.4.1.2 Qualitative**

This method is subjective as it involves the individual’s interpretation of events rather than focusing on facts and evidence. It is concerned with the collection and the analysing of information which is chiefly non numerical (Blaxter *et al.* 2006). Interviews, focus groups, observation and case studies are all collection methods associated with the qualitative approach.

#### **3.3.4.1.3 Information Required**

Qualitative exploratory research will be used in this thesis as it is concerned with the opinions and perceptions of insolvency practitioners. It will also attempt to understand the reasoning behind their opinions and perceptions. There will be no statistical or numerical information gathered and therefore this research is not quantitative in nature.

### **3.4 Population**

It was decided that the target group for this study would be the parties that work with examinership on a daily basis, insolvency practitioners and solicitors. The objective

was to ascertain the opinions of these participants, in relation to the current legislation and any possible improvements that could be made to this.

### **3.5 Data Collection Methods**

Research data can be acquired through both primary and secondary sources. The most appropriate method to adopt depends on the type and purpose of the research.

#### **3.5.1 Secondary Data**

Secondary data is information that has been previously collected on a topic, and can include both quantitative and qualitative data (Saunders et al, 2009). Kumar (1999) states that the value of secondary data will vary depending on its availability, format and quality.

To the best of the author's knowledge, no previous peer reviewed studies on examinership legislation are available. The intention was to address this shortcoming by collecting the relevant data through primary research sources instead which included the interviews of experts in this field.

#### **3.5.2 Primary Data**

Primary data can be collected using several methods such as interviews, questionnaires, case study analysis and focus groups (Patton, 2002). Kumar (1999) argues that the method chosen will depend on factors such as the purpose of the study, the resources available, and the skills of the researcher. Each method has its own specific benefits and limitations and thus selection of the most appropriate method is important in order to answer the research question while also considering their constraints.

##### **3.5.2.1 Case Study Analysis**

Robson (2002, pg. 370) defines case study analysis as "a strategy for doing research which involves an empirical investigation of a particular contemporary phenomenon within its real life context using sources of evidence". As this study was mainly done through exploratory research and as it was important to gain insights from a variety of



insolvency practitioners, all who represent different firms, this method was disregarded as it would be unsuitable to focus this study on one of these firms.

### **3.5.2.2 Questionnaires**

Questionnaires are an organised framework consisting of a set of questions and scales designed to produce primary data (Hair *et al.* 2007). Questionnaires are a useful way of collecting primary data that is descriptive in nature and it provides an efficient way to collect responses from a large sample (Saunders *et al.* 2009). As the sample chosen is small in nature and also as this thesis requires information which is qualitative and exploratory, this method was also disregarded.

### **3.5.2.3 Focus Groups**

The focus group method of data collection is a technique of group interviews that produces data through the opinions conveyed by participants separately and together (Kitzinger, 1995). Whilst focus groups are a very effective method of collecting data, it would be impractical to get 7 insolvency practitioners from different counties to meet in the one location at the same time. Therefore, this method was disregarded and it was decided that the most appropriate method to collect the data required was interviews.

### **3.5.2.4 Interviews**

An interview is where the researcher “speaks” to the respondent directly. Interviews are particularly helpful when dealing with complex issues (Hair *et al.* 2007). According to Walliman (2001), interviews are particularly suitable for gathering qualitative data, but may also be used in circumstances where quantitative data is required. There are three main types of interviews, which can take place – structured, unstructured and semi-structured interviews.

#### **3.5.2.4.1 Structured Interviews**

Structured interviews use a prearranged and standardised set of questions which will not change. The interviewer reads out each question and then records the response on a standardised schedule. (Saunders *et al.*, 2009).

#### **3.5.2.4.2 Semi-Structured**

In semi-structured interviews, the researcher will have a list of themes and questions to be covered. This format of interview allows questions to be asked in no particular order (Saunders *et al.* 2007). In addition, questions may also be asked, according to how the interviewer sees fit, in order to further scrutinise related matters that arise in the course of the interview (Smith, 2003).

#### **3.5.2.4.3 Unstructured Interviews**

These interviews are informal in nature. These are used to explore in depth a general area. There are no pre determined list of questions to work with and this gives the interviewee the opportunity to talk without restrictions about events or and opinions in relation to the topic area (Saunders *et al.* 2009).

### **3.5.3 Research Tools Adopted and Justification**

After reviewing the various research tools available, the researcher decided that interviews were most appropriate to address the research aims and objectives outlined in section 1.2. As outlined in the previous subsections, there are many different types of data collection tools available however, based on the aims and objectives of the research, semi structured interviews were deemed appropriate as the others did not meet the required in-depth analysis necessary for the chosen sample.

Seven semi structured interviews were carried out with practitioners who deal with examinership. The reason why semi structured interviews was chosen is because they would give more flexibility and allow the interviewer to add and omit questions depending on the interviewees answers and reactions. Unstructured interviews were disregarded as it was felt these would be unsuitable as they are time consuming and it is difficult to interpret the findings as there is no standard on which to base the findings. Additionally, structured interviews were deemed unsuitable as there is no room for flexibility in relation to the questions asked and there is little room for interaction between the interviewer and interviewee.

All questions were developed and designed based on the literature review as there has not been any investigation into this research area in Ireland before. Prior to conducting the interviews, the questions were firstly appraised by the researcher's supervisor. An advantage of this pilot test is that any issues or problems with formatting, comprehensibility or structure can be identified before the interviews and subsequently questions can be deleted or revised.

The questions were also refined further after the first interview was conducted which resulted in some of the questions being changed or omitted and new questions added. It is very important to ensure that the interview questions are of a quality that maintains the interviewees' interest and that the format is such that the interviewees do not get confused about the purpose of the research. The interview questions (see appendix 2) has been developed to ensure the quality that is needed meets these objectives.

Four interviews were all conducted face to face in June 2011. Each interview was approximately 30 minutes in duration. Four of the interviews were tape recorded by kind permission of the interviewees. The other three interviews were conducted over the phone due to time constraints and notes were taken throughout. Phone interviews are not ideal as the researcher is not able to judge how the interviewee may feel about a certain question based on their body language. Face to face also adds a more personal approach and it has been found that interviewees are likely to reveal more interesting facts if they are in a face to face situation as they feel more comfortable (Saunders et al 2009).

### **3.6 Analysis qualitative data**

Firstly the data will be categorised into meaningful and related parts. Secondly, these categories will be matched to the research objectives outlined in section 1.2. This will allow data to be presented in a more manageable and comprehensible form. The third step which will be employed will be to reorganise the information in order to recognise relationships and patterns. Once these have been identified it will be possible to develop hypothesis in order to test them. It is important to test the

relationships and patterns in order to conclude that there is an actual relationship (Saunders *et al* 2009).

### **3.7 Ethical Considerations**

Good ethical practice necessitates that all research is completed on the basis of respect for and adherence to regulatory guidelines and internationally accepted ethical norms focusing on the welfare of the study participants (LYIT ethics form, 2011). The research undertaken was approved and governed by the LYIT School Research Ethics Committee.

### **3.8 Conclusion**

This research was carried out in an attempt to find the opinions and perceptions of insolvency practitioners regarding the need for a reform of Irish examinership legislation. The research took the form of interpretive research using the inductive approach. It was descriptive to an extent but mainly exploratory and the data collected was qualitative in nature. The research process consisted of four face to face interviews and three phone interviews with insolvency practitioners. This chapter has outlined the reasons for the approach taken, based on research into best practice. The findings from the research are discussed in chapter four.

## **Chapter 4**

### **Findings and Analysis**

#### **4.1 Introduction**

This chapter analyses and interprets the findings from the primary research. In order to carry out the primary research seven interviews were conducted with examiners and solicitors. These practitioners were picked as these are professionals in this field and have a wealth of experience among them. The interviewees will be able to provide a practical point of view regarding the issues identified in the literature. In addition, it is also vital to discover if there are any other issues which have not been identified in the literature. Finally, they were asked to highlight any improvements that could be made to the legislation.

The interviewees were as follows:

**Jim Stafford**

Mr. Stafford is one of Ireland's leading specialists in corporate recovery and insolvency practice. Mr. Stafford established his company FrielStafford in 1994.

**Brendan Cooney**

Mr. Cooney is a partner in the Corporate Recovery Department of Arthur Cox, where he has worked for 8 years. He was an advisor for Kieran Wallace of KPMG on the successful examinership of two companies involved in the Parkside retail and residential development in Port Laoise.

**Dessie Morrow**

Mr. Morrow is an accountant for Hughes Blake chartered accountants. Hughes Blake was involved in 8 out of the 16 examinership cases in 2010.

**Michael McAteer**

Mr. McAteer is a partner in recovery and reorganisation in Grant Thornton. Mr. McAteer has been appointed examiner to a number of high profile companies.

including Lynch Hotel Group, Toni & Guy (Ireland) Limited and Golden Discs Limited, who all successfully exited the examinership process.

Sean Kelly

Mr. Kelly is the Director of Restructuring & Insolvency at RSM Farrel Grant Sparks.

Two interviewees wanted to remain anonymous for the purpose of this research.

In the interest of confidentiality, all interviewees will be anonymous from this point onwards and will be referred to as interviewee A, interviewee B, interviewee C, interviewee D, interviewee E, interviewee F and interviewee G in no particular order.

## **4.2 Issues with the Alternatives**

### **4.2.1 Informal scheme of arrangement**

Interviewee D states that small companies frequently use informal schemes of arrangement as they have limited numbers of creditors. However, the general consensus was that these are rarely used as they are unrealistic for most companies. Interviewee B discusses that these do not provide High Court protection from the creditors and are in her opinion, unworkable in practice in the majority of instances. She explains that all creditors must agree and this rarely happens as not all creditors will attend the meeting. This results in the company “usually considering examinership anyway”. Interviewee F agrees stating that for most companies this would rarely be an option as there is no protection from creditors. This highlights a fundamental flaw in the current system as it is only suited to a small company with a limited number of creditors and it does not provide court protection.

### **4.2.2 Section 201 Scheme of Arrangement**

All interviewees agreed that a section 201 is rarely used in practice. Interviewee F states that this scheme is cumbersome and bureaucratic with too much High Court involvement. These issues make this process very expensive. Interviewee B further explains that this process is more often used for solvent restructuring rather than insolvent restructuring for two reasons. Firstly, under a section 201 the company does

not get automatic protection from their creditors. In order to receive this protection the company would be required to apply to a High Court which would give a company the same protection from creditors as if they were in examinership. Secondly, you need approval from three quarters of creditors in number. This is much more difficult than in an examinership, where three quarters in value of creditors must approve.

In some instances however, Interviewee B explains that this process can be successful. A company called Millstream applied for a section 201 scheme of arrangement as the 100 day limit in examinership would not have worked for this particular company. Interviewee B further explains that this is a rare occurrence and for the most part this section is seldom used. Interviewee D agrees that this process is rarely used and there are only 5 – 10 cases each year. Although it has been found that this process is successful in some instances, it is still not an option for SME's considering the high costs involved.

#### **4.3 Cost of Examinership**

The literature found that the cost of examinership is the main barrier to entry for SMEs from entering this process however; this is not an issue for large companies. Issues surrounding cost include; the petition, costs after the examiner has been appointed and the High Court involvement. All interviewees were asked to comment on these in order to find if they are a real issue and whether there are any improvements which could be made to the process in order to make it more accessible to SME's.

##### **4.3.1 Costs of Petition**

All interviewees agreed that the cost of the petition is too high for SME's. Interviewee G explains that the costs associated with the independent accountant report and also all legal fees must be paid up front. This is necessary because if the judge refuses to appoint an examiner, it is unlikely these fees would get paid as in the majority of cases a liquidator would be appointed. Interviewee C suggests that these up front cost can range from €50,000 to €100,000. Interviewee A discusses that these costs are “the first stumbling block” for companies entering the examinership process. If a small company is in financial difficulty they will not be able to finance the petition “as they

will not have say €50,000 in cash lying around” and will only have two options available to them. These two options are an informal scheme of arrangement or to go into liquidation. Considering the issues highlighted with an informal scheme of arrangement, this option is also likely to be eliminated for SME’s leaving them with no choice but to liquidate.

#### **4.3.2 Cost after an examiner is appointed**

All interviewees agreed that the costs after the examiner is appointed are too high for SME’s. Interviewee C explained that after an examiner is appointed the company will need to pay his fees and also any legal fees. These costs will be paid out of the investment. The general consensus among the interviewees was that on average an examiner costs between €100,000 and €150,000. However, these costs can vary and depends on, as interviewee D states “the size and complexity of the company”. Interviewee E explains that he has dealt with cases in excess of €500,000, while interviewee C has dealt with cases in excess of €1 million. Interviewee F states that for a large case like Goodman, the fees could reach millions.

#### **4.3.3 High Court Involvement**

Interviewees were asked their opinion on High Court involvement in order to establish whether or not it is necessary as this significantly increases the costs. All interviewees agreed that the High Court is necessary as they would be concerned about the competence of the judges in Circuit Court considering their lack of experience and expertise in commercial matters. Interviewee E explained that it is necessary to have a competent judge to oversee this process in order to ensure it is carried out in accordance with the relevant legislation. Interviewee C and D agreed that the process needs High Court judges because of their independence and ability to drive the process and to ensure that deadlines are met. Interviewee C and F believe that High court judges are able to “weed out inappropriate candidates” for this process. However, interviewee F believes that the High court leads to excessive legal costs which SME’s are unable to afford.



## FINE GAEL

In order to reduce the costs and to make this process more accessible for small companies, Fine Gael have proposed a non judicial system called a CVA. However, all interviewees dismissed this idea as they all agreed that court involvement is essential. As mentioned previously, they feel that competent judges are necessary to oversee the process in order to ensure it is carried out in adherence to the correct legal framework. Furthermore, interviewees B and E, feel that this proposal will not be introduced for some time, interviewee E stating that he does not expect this will happen in the lifetime of the current government. Interviewee C refers to the fact that CVA's were introduced in the UK in 2000. He described this system as "not hugely successful" and that it effectively results in the "parking of debt" and the putting off of the difficult decisions instead of dealing with the real cause of the problem.

## CIRCUIT COURT

The majority of interviewees agreed that Circuit Court involvement would be more appropriate than the CVA non judicial system. The current threshold of debt which must not be exceeded in order to have proceedings held in the Circuit Court is €17,000. Interviewees agreed that this limit is too low and as a result all cases must be held in the High Court. Interviewee C suggested that the smallest of companies would have debts in excess €17,000 and in his practical experience has never seen this part of the legislation invoked. Interviewee G suggested that a limit of €1 million would be a more appropriate in the current economic climate.

However, interviewee G stated that training would be required for Circuit court judges. Interviewee E explains that taking this process out of the High Court would lead to inexperienced judges dealing with the cases and that this would result in uncertainty as to the result of the company's application. However, he agrees with interviewee G and suggests training would be sufficient in order to combat this inexperience.

Interviewee C suggested the idea of an "examinership light" process for SMEs. This would take place in the Circuit or District Court, therefore reducing the costs and making it more accessible to smaller companies while also keeping the process in the courts.

When asked do these cost deter smaller companies from entering examinership, all interviewees agreed. Interviewee A explained that out of all the companies that went into examinership in 2010 none were small companies. He explained that SMEs in Ireland employ over 80% of the workforce and that examinership isn't designed for these types of companies and these companies end up in liquidation as a result. He believes that thousands of jobs could be saved.

Interviewee C suggests that the examinership legislation was not designed for small companies and because of the high costs small and sometimes medium sized companies cannot enter the examinership process as interviewee F states it is "just simply too expensive". Interviewee G suggests that before any company goes into liquidation they should all be advised to look at examinership as an option first. He went on to discuss that for every job saved the government will be saving minimum of €10,000 a year in social welfare payments. Furthermore, that individual and their employer will be paying taxes which could raise €4,000 for the exchequer; therefore the government would potentially save in excess of €14,000 for each individual job that is saved.

#### **4.3.4 Lease repudiation**

Interviewee C and G referred to the difficulties associated with the repudiation of leases. Interviewee C explains that the vast majority of companies do not own the premises from which they operate and therefore will have been required to lease the property. In some cases where the company operates from a chain of stores, the number of leases can amount to 20 or 30. This means that the examiner may be dealing with 20 or 30 repudiation cases. Under current legislation each one of these cases must be treated separately in court. This results in an extremely complex and time consuming process as it is likely each lease agreement will have different terms and conditions attached. In order to make this process more cost effective interviewee C suggests these court proceedings should be streamlined. This would also save a considerable amount of the courts time.

#### **4.4 70 day examinership period**

From a practical position, all interviewees agreed that the 70 day limit with an extension up to 100 days was appropriate however issues do arise in complex cases.

Interviewee C found that if there are a number of overseas creditors, the time limit is a particular issue. Communicating with all these creditors can be very time consuming. He explained that overseas creditors may be represented by one solicitor and the examiner would “hammer out a deal” in 30 to 40 days. However, problems occur when convening those creditors to vote on the proposals and that this could take another 20 days. Interviewee E suggests that there is an argument to extend the time frame in order to give other potential investors a better opportunity to look over the company’s books and records in order to decide whether they want to invest. However, in the majority of cases the company will have sought investment before they enter the examinership process so the time limit is suitable.

Interviewee G explains that time is lost as the courts are currently not appointing interim examiners. Instead, the examiner is appointed 10 days into the process therefore leaving only 60 days for the examiner to complete his job. This puts more pressure on the deadlines. Interviewee G further explained, although the 70 day limit can be extended to 100 days, the examiner will only ask for this extension if they are very positive in their assertion that the company has a reasonable prospect of survival.

However, interviewee B does state that the one positive associated with this short time frame is that it keeps everyone involved focused. She suggests there is an argument to extend this timeframe for larger companies as they are more complex and generally have foreign creditors. This puts a lot of pressure on all involved and a further extension may be merited in these circumstances.

Although all interviewees agreed this timeframe is appropriate, they felt that in certain circumstances there should be an extended time limit given in order to facilitate the restructuring of a more complex company effectively.

#### **4.5 Unfair advantage**

The general consensus among the interviewees was that companies in examinership do benefit from an advantage however; they do not feel that it is unfair. All interviewees agreed that these companies do have an advantage considering up to 90% of their unsecured creditor will be written off and also as their balance sheets will have no debt. However, interviewee A and B explained that in addition to the company gaining an advantage, it can be argued the creditors would also gain as they will receive a higher percentage of the money they are owed in an examinership rather than in liquidation. Additionally, they also get to retain a client for future trading.

Interviewee C argues that a company should not be punished because of adverse circumstances leading to the examinership, which were out of their control. He gives the example of the Aer Arann case where the increase in the price of oil and the volcanic ash, which closed down Irish airspace, caused their insolvency, through no fault of their own. He went on to explain that “examinership isn’t without its pain” and that in many instances there are many disadvantages associated with the process especially for directors and shareholders. He explains how Padric Pearse went from a 100% shareholder to a 30% shareholder in Aer Arann as a result of the examinership.

On the other hand, interviewee F explained that after a company exits examinership unsecured creditors would have been written off by 90%, this gives a company a very lean balance sheet and this is unfair on competitors who have to meet their liabilities in full.

However, it is unlikely this legislation will be changed to make this process fairer for competitors as interviewee A explains that even the CLRG have accepted the fact that it does give companies an advantage but they decided to ignore this as it is in the best interest of the economy.

#### **4.6 Fresh cash**

All interviewees agreed that it is difficult for companies going into examinership to get investment, considering the fact that the banks are not lending to companies, especially those who are considered to be high risk. Interviewee D explains that investment is an essential part of the examinership process. He states that “for viable

companies investment is possible but the banking crisis has made it more difficult”. Interviewee C further explains that this is “a blockage” to an examinership case and one of the reasons for the reduction in the number of examinerships in the past 12 months.

Interviewee G states that there are investors who are only interested in investing in distressed assets and companies but these “are few and far between”. Interviewee A agreed with interviewee G and went on to explain that there is also venture capital money available but these venture capitalists are strict on how they will invest their money.

Interviewee E disagrees with the other interviewees as in his experience, if a company is in financial difficulty the shareholders will provide the fresh investment required and as a result of this the company does not need to turn to the banks for financing. However if the shareholders do not have sufficient funds, they may be forced to turn to the banks. Considering the nature of the investment it is likely these individuals will also be denied the funds required.

These issues with obtaining finance demonstrate the difficulties faced by companies considering examinership as an option for restructuring.

#### **4.7 Low Staff Levels**

The majority of interviewees state that staff levels are not a requirement under examinership legislation. However, they agree that it is an important factor considered by judges when deciding to appoint an examiner.

Interviewee E explained that if a company had 50 high skilled employees it would “definitely be easier” to enter examinership particularly “at this stage in the economic cycle” when it is essential to save jobs. Interviewee G explains that the legislation was put in place to protect jobs and to keep individuals off the live register. In his opinion a company would need at least six employees to enter the examination process. Interviewee A argues the point further describing judges as “discriminatory”. He explained that if you have two companies that are identical however, company one

and two have 10 and 200 employees respectively. Company two will have a better chance of an examiner being approved.

Interviewee C explains, he has dealt with examinerships that have had no staff “so it doesn’t stop you but it is a help.” He went on to explain that if a company is right for examinership, staff levels should be irrelevant as the company could have sub-contractors who in-turn will have staff or service providers who also will have staff.

In light of the current economic crisis employee levels should not be a deciding factor as each job is important.

#### **4.8 Directors Retain Control**

All interviewees agreed that it is the decision of the shareholders whether the directors should retain control. Interviewee A explained that in the UK administration process, the directors automatically lose their powers. He does not feel this is effective considering the fact the majority of companies have found themselves in examinership due to the economic downturn. Furthermore he believes that hard working and honest directors should not be punished for factors outside their control.

Interviewee B explains that currently there is a system in place and if the examiner feels that the directors were not doing their job properly it is in the legislation that the examiner can take executive powers from the directors on the courts approval. She feels that this part of the legislation is sufficient to protect all parties involved.

Interviewee B also believes that if the directors were to lose their jobs and the examiner was required to take over executive powers from the outset, this will drive up the costs significantly. This is not in the interest of the company or its creditors considering the other costs associated with this process discussed above. Interviewee F agrees stating that this would make the process even more unattractive for small companies

Interviewee G explains that if the directors have breached the C A 1963 they should be advised early in the examinership process that they will have no involvement going forward with the company and referred to the Office of the Director of Corporate Enforcement (ODCE). Interviewee G also feels that if directors wish to stay in control

they will have to invest a lot of their own money. Interviewee C and E agree stating that it is the decision of the new investors whether directors keep their positions. This is because in the majority of cases the new investors will take between 50% and 100% of the company shares and as majority shareholders they have the right to decide who the directors will be. Interviewee E also stated that in order for a current director to retain their position, he must be independent or an essential part of the business.

In light of this, it has been discovered that the most viable option is to allow competent and honest directors to remain while removing directors who have contributed to the downfall of the company.

#### **4.9 Improvements to Examinership not identified by the literature:**

All interviewees had different improvements that they would make to the examinership legislation.

##### **4.9.1 Redundancy payments**

Interviewee C explains that in an examinership situation, the company must pay for any redundancies that happen as a result of restructuring. In comparison to this, in a liquidation situation as it is an insolvency action, the Department of Enterprise, Trade and Employment pays the redundancies bill. After this the department takes the place of employees as creditors. This is to ensure that all employees get paid as if employees had to join the list of creditors it is almost certain that they would not receive what they are entitled. Companies in examinership do not benefit from this as examinership is not viewed as an insolvency action.

Interviewee C suggests that companies in examinership and liquidation be treated the same in this instance as it merely adds to the financial difficulties of an already troubled company. In addition to this it may cause the company not to make any redundancies because of the high costs. This can result in the company being overstaffed, which may have lead to the company becoming insolvent in the first place and may also lead to its future liquidation. This will create a much larger draw on the Department of Enterprise, Trade and Employment in the medium term as instead paying for a limited number of employee redundancies they are now required

to pay redundancies for all employed by that company. Interviewee F further argues this is an “excellent idea because of the inherent fairness”, as the employee will get paid their entitlements and the department will step into their shoes as creditors.

#### **4.9.2 Abuse of the system**

Interviewee E describes that there may have been cases where the system has been abused. He explains that a company may pay high dividends to its shareholders in order to give the impression that the company is in financial difficulty.

Interviewee E reiterated the fact in his experience it is the shareholders who invest in the company during the examinership. This effectively means that the shareholders would merely be re-investing the funds that were paid to them in dividends. However, as this company is now in examinership the creditors will be forced to effectively write down any debts that are owed to them. In the majority of cases the creditors are “very poorly paid”. Basically the creditors have funded the new working capital of the company. Interviewee E thinks that “this is wrong and is a difficulty with examinership”

This highlights a potential loophole in the current legislation which needs to be addressed.

#### **4.9.3 Independent accountants report**

The literature in section 2.2.2 found that the independent accounts report must be prepared by the auditor of the company or by a person who is qualified to be appointed as an examiner. Interviewee D suggests that auditors of the company should not be allowed to formulate the independent accountants report. He questioned whether the auditor of the company is truly independent and whether there would be a conflict of interest. He went on to discuss that the auditors of a company would have a vested interest as to whether or not an examiner is appointed. If a liquidator is appointed the auditor will lose that client and possibly any amounts owing to them. Interviewee D believes that an independent accountants report should be completed by an “independent” accountant and that the law should be changed to reflect this.

This conflict of interest is a potential hazard as the auditors could construct this report in order to show that the company has a reasonable prospect of survival.



#### **4.10 Conclusion**

All interviewees did agree that no major amendments are required, as the legislation works well for large companies. However they agreed that a new system is required for SME's as this process is not appropriate for such companies in the current times. Interviewee's C suggestion of an "examinership light" process for smaller companies would be the most viable option offered by the interviewees.

## **Chapter 5 Conclusion**

### **5.1 Introduction**

This chapter will summarise the main findings of the primary and secondary findings. Furthermore, it will draw conclusions and make recommendations based on the findings.

### **5.2 Alternatives to examinership**

The literature found that there are two alternative to examinership available in Ireland. These are the informal scheme of arrangement and the section 201 scheme of arrangement.

#### **5.2.1 Informal scheme of arrangement**

One alternative is the informal scheme of arrangement; the literature found that this is only a viable option for companies with a limited number of creditors. The primary research agrees and many interviewees felt that this would be unworkable if there are several creditors.

It has been concluded that this process is unrealistic for most companies considering all creditors must agree and that it is unsuitable if there are a large number of creditors.

#### **5.2.2 Section 201 scheme of arrangement**

The literature found that the section 201 scheme of arrangement is similar to examinership as it is expensive and has to take place in the High Court. Interviewees were not in favour of this process. Interviewee F described it as cumbersome and bureaucratic with too much court involvement. The literature found that this process is not bound by the 100 day limit as is examinership. Interviewee B stated that this process is more suitable to companies who will be unable to restructure in 100 days.

The section 201 scheme of arrangement is expensive and a cheaper alternative is required so that SME's can view this as an option especially in the current economic climate

There are several stages to the examinership process. Firstly, there is the petition which involves going to the High Court to seek protection from the company's creditors. In order to do this an independent accountants report must be formulated and presented with the petition. Secondly the examiner is appointed and begins formulating a scheme of arrangement. Thirdly, after 35 days the examiner returns to the court to present a scheme of arrangement. Finally, after 70 days have elapsed the protection period ends, however, the examiner can applying for a 30 day extension of court protection if necessary. The literature found that there are many issues with the examinership process. These were also explored in the primary research section.

### **5.3 Cost of Examinership**

Examinership is an expensive process, the literature found that the process can cost in excess of €100,000 and that a company must pay the petitioning costs upfront. Interviewees agreed with the literature stating that the average cost of examinership would be €150,000. Of this €50,000 of this must be paid up front due to the high risk involved. However, the primary research identified that the cost depends on the size and complexity and many interviewees have dealt with cases in excess of €500,000.

The literature found that the cost is examinership is too expensive for SME's and that examinership is only suited to large companies that are able to afford this process. The majority of interviewees agreed with this explaining that the current legislation is not designed for small companies.

#### **5.3.1 High Court Involvement**

The literature found that all examinership cases to go through the High Court. The primary research found that this is a necessary part of the process as the High Court judges have developed a commercial reality towards the type of company that is

suitable for examinership. Additionally, these judges are independent, competent and able to drive this process in order to ensure tight deadlines are met.

#### FINE GEAL

The literature revealed that Fine Geal have proposed a non-judicial system called a CVA for small companies. By taking this process out of the courts they hoped to make it easily accessible for small companies. The general consensus among the interviewees was that this would not be ideal as they felt Court involvement is necessary. Interviewee C furthers this argument by stating that CVA's effectively "park debt" and therefore not getting to the route of the problem.

#### CIRCUIT COURT

The literature found that examinership cases can be remitted to the Circuit Court if the company's debts are below €317,000. However the literature and primary research have agree that this part of the legislation has never been invoked rendering it irrelevant. Interviewees believe that holding examinership in the Circuit Court for SME's would be more appropriate than a CVA as there is a judge to oversee matters.

It has been concluded that the total cost of examinership is too high for SME's. The petitioning costs alone are too excessive and the fact that these costs have to be paid up front is unrealistic for a SME in financial difficulty. Additionally it has been concluded that the Courts involvement is essential in this process and that a non-judicial system would be unsuitable. The Circuit Court is a viable option to decrease costs and make it more accessible for SME's while keeping this process in the legal system. However, the interviewees suggested that Circuit Court judges lack the experience which the High Court judges have gained. In order to ensure the competence of these judges the interviewees suggested that training will be necessary. Training these judges will be a viable idea considering the benefits that will be gained.

#### **5.4 70 day examinership period**

The literature found that the 70 day period of court protection may not be sufficient in order to restructure a large company. A similar process in the US offers companies protection for 120 days which can be extended up to 18 months depending on the company's size. The primary research found that the 70 day limit is in fact an

appropriate time frame as it keeps all involved in the process focused. Additionally, this limit ensures that the process is not prolonged unnecessarily.

It has been concluded that the 70 day court protection with the extension of 30 days is appropriate and sufficient to restructure companies. However, perhaps a further extension period should be offered to larger companies. Such companies may have a greater degree of complexity as they will generally have foreign creditors and numerous lease repudiations. This will make sure the process is more efficient and effective as there will be less pressure placed on practitioners.

### **5.5 Unfair advantage**

When exiting examinership the literature found that companies have an unfair advantage over their competitors as they will have had a significant amount of debt written off. In comparison to this their competitors will have to pay creditors in full. The primary research found that this is an advantage but there were differing opinions as to whether this was an unfair advantage. Interviewee C suggests that this is not an unfair advantage as it must be considered why the company went into examinership and whether it was the companies fault or if it was out of their control.

It has been concluded that companies exiting examinership do have an advantage over their competitors. Whether this is an unfair advantage still remains to be seen. However, it is a worrying factor is that this may be challenge in the EU courts and the appropriate steps must be taken to prevent this from happening in the future.

### **5.6 Fresh cash**

In order for a scheme of arrangement to be successful, the literature found that a fresh injection of cash is required in order to pay dividends to creditors for writing off debts. In the current economic climate, banks are not lending to companies making it more difficult for such companies to obtain finance during the examinership process. The primary research agrees with the literature. The interviewees however, highlighted that there are other means of raising the finance required. These include investors who are only interested in distressed assets, venture capitalists and the

companies own shareholders. However, interviewees felt that these types of investors are limited in numbers as a result of the recession.

In this current economic climate, companies in examinership are finding it more difficult to raise the finances required. Raising the finance is possible but extremely difficult therefore it is recommended that the government should provide funding to viable companies in order to prevent their closure and help grow the economy.

### **5.7 Low Staff Levels**

It was discovered in the literature that judges may be discriminating against companies with low staff levels by denying their application for examinership. The majority of interviewees disagreed with the literature as they did not believe the process was discriminatory. Interviewees highlighted that the number of employees required for this process is not mentioned in the legislation. However all interviewees did agree that the level of employment is a main factor judges consider when deciding to approve the petition.

It is recommended that judges should not take this factor into consideration when deciding on the company's application for examinership. If a company has a reasonable prospect of survival, the number of employees should be irrelevant as any job saved in the current economic climate is important.

### **5.8 Directors Retain Control**

The literature found that there is an argument for the directors retaining their executive powers once the company has gone into examinership. However, the primary research highlighted the fact that the examiner has the power to, with court approval, take over the executive powers of the company if he feels that the directors have acted irresponsibly or fraudulently. Furthermore, considering the fact that new investors will likely take over a majority shareholding in the company, they will have the right to remove or retain the current directors. In the majority of cases directors will only be retained if they are independent or considered an essential part of the business.

In conclusion the current legislation is appropriate on this issue as if the directors have acted irresponsibly they can be removed. Furthermore if the directors were not at fault for the companies financial difficulties it would not be appropriate to punish them.

### **5.9 Improvements to Examinership not identified by the literature:**

In order to answer objective 5 interviewees were asked are there any improvements they would make to the examinership process. Interviewees had different suggestions to offer.

#### Suggestion 1

One interviewee suggested that examinership should be treated as an insolvency action in order for the Department of Enterprise, Trade and Employment to finance the redundancy payments during examinership. The remaining interviewees all agreed that this would be an “excellent idea”.

This will need further research in order to discover whether this is a viable idea. This might make the examinership process less expensive and may also make it easier for companies to find investment. This would also free up more cash for the company to put towards restructuring. Furthermore, this could help a company solve any overstaffing issues.

#### Suggestion 2

One interviewee suggested the examinership process is open to abuse from shareholders who cause the company to become insolvent. However, this is beyond the scope of this thesis and further in depth research would be required in order to form a conclusion and make recommendations.

#### Suggestion 3

One interviewee suggested that the independent accountants report should be prepared by an independent accountant and not by the auditor of the company, which the norm is. He feels that this causes a conflict of interest.

However, auditors of the company are familiar with the company and this reduces the cost. An independent accountant may be appropriate for large companies who have the funds available however, for SME's this may not be affordable. Although hiring an independent accountant to produce this report would increase the reliability that could be placed on its contents, this would further increase the cost of an already expensive process.

### **5.10 Overall conclusion**

The overall conclusion of this research is that the examinership legislation is not in need of reform. The legislation is appropriate and it works well this is evident from the amount of companies that have exited the process successfully. However, many issues have been identified and amendments to the law may be required in order to rectify these issues as mentioned above

However, this research finds that the legislation only works for large companies who have the appropriate finances. SME's currently do not have the finances available to fund this process leaving it inaccessible. This legislation was brought in to help any viable company that is in financial difficulty and this is not the case.

The proposals made by Fine Geal for a non-judicial system is an option but however the research found that this is just parking debt and not getting to the root cause of the problem. Furthermore this research found that a non-judicial system is not appropriate and that there is need for a Court to oversee matters. Therefore, this leaves the Circuit Court as the most attractive option available. There are two options available in order to make this process more accessible for SME's by allowing the process be held in the Circuit Court. The threshold of €17,000 is raised to an acceptable level or that new legislation is brought in allowing all SME's as defined under EU law to have the examinership process held in the Circuit Court.



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## **Appendix 1**

(3B) The report of the independent accountant shall comprise 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 the survival of the company, and the whole or any part of its undertaking, as a going concern,

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

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

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

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

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

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

(m) such other matters as he thinks relevant.”.



## Appendix 2

### Examinership Questionnaire

- On average how much does an examinership case cost?
- Does the cost deter smaller companies from entering examinership?
- What is your opinion on High Court involvement?
- Is the current threshold of €17,000 to low in current times? Why or why not?
- Is the current 70 day limit to short and if so what would be a more appropriate time frame?
- In your opinion does examinership give companies an unfair advantage over their competitors? Why or why not?
- For companies to survive examinership they need an injection of fresh cash. In the current economic crisis do you think this is possible? Why or why not?
- Do you think directors should retain control during examinership process? Why or why not?
- In your opinion does the examinership legislation discriminate against companies with low staff levels? Why or why not?
- Fine Gael has proposed a non judicial system similar to the UK's CVA. The proposed new system will only be available to small companies. What is your opinion on this?
- There are alternatives to examinership such as, the informal scheme of arrangement and a section 201 scheme of arrangement. Are these used in practice and if so how often?
- Do you think examinership should be treated in the same manner as a liquidation in relation to the payment of employee redundancies by the Department of enterprise trade and employment? Why or why not?
- Are there any improvements that could be made to the examinership process?
- Do you feel that the current legislation needs to be reformed? Why?