

STATEMENT OF INSOLVENCY PRACTICE 19B

APPOINTMENT AS EXAMINER OR INDEPENDENT EXPERT UNDER PART 10, COMPANIES ACT 2014 – REPUBLIC OF IRELAND

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INTRODUCTION

1. The Statement of Insolvency Practice is one of a series issued by the ACCA in Ireland to insolvency practitioners with a view to maintaining standards by setting out required practice and harmonising members' approach to particular aspects of insolvency.
2. The purpose of Statements of Insolvency Practice is to set out basic principles and essential procedures with which insolvency practitioners are required to comply. Departure from the standards set out in the Statements of Insolvency Practice is a matter that may be considered by the Association for the purposes of possible disciplinary or regulatory action.
3. The supplemental practical guidance is intended to assist the insolvency practitioner to comply with the Statement. The insolvency practitioner is entitled to adopt alternative procedures in the detailed circumstances of a particular assignment where they judge that tailored approach to be more appropriate.
4. The nature and extent of the work involved in each assignment will differ, but, generally, will include compliance with the standards outlined below.
5. This Statement addresses:
 - the statutory basis for appointment of an examiner and an interim examiner,
 - the independent expert's report,
 - role of the examiner,
 - report of the examiner, and
 - powers and duties of directors of the company.
6. Remuneration of the examiner is dealt with in the Statement of Insolvency Practice 9B 'Remuneration of Insolvency Office Holders'.

SCOPE

7. The Statement addresses the insolvency practitioner's responsibility when appointed as an examiner of a company, and the responsibility of a practitioner when acting as independent expert.

PRINCIPLES

8. The Statement has been prepared taking account of the following principles:
 - (a) Ensure members are familiar with their legal and professional obligations when appointed examiner or an independent expert to a company.

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- (b) Practitioners must maintain proper records and account for how they have discharged their obligations in accordance with the law.

REQUIREMENTS

9. The statutory framework governing the examination process is set out under Part 10, Companies Act, 2014 (the 'Act').
10. Specific requirements governing the examination process are also set out in Order 74A of the Rules of the Superior Courts (Companies Act 2014) 2015, which came into operation on 1 July 2015 and for "small" companies Order 53A of the Rules of the Circuit Court Rules (Companies Act 2014) 2015, which came into operation on 9 November 2015. These rules are available at www.courts.ie.
11. Insolvency practitioners should have regard to the impact of Court decisions on developing practice.

APPOINTMENT OF AN EXAMINER

12. In order to appoint an examiner, a petition must be presented to the court. The petition will nominate a person to be appointed as examiner to a company and may be presented by any of the following, individually or collectively – the company, the directors, a creditor (a contingent or prospective creditor including an employee), or a member(s) with a shareholding of more than 10% of the company.
13. The petition must be accompanied by:
 - (i) a consent signed by the person nominated to be examiner;
 - (ii) a report in relation to the company by an independent expert; and
 - (iii) a copy of a compromise or scheme of arrangement in relation to the company's affairs if one has been prepared for approval by interested parties.
14. The court may then appoint an examiner to the company, where it appears to the court that:
 - (i) the company is, or is likely to be, unable to pay its debts (on either a balance sheet or cashflow test);
 - (ii) there is no resolution for the winding-up of the company; and
 - (iii) no order has been made for the winding-up of the company.
15. The court will only make an order if it is satisfied that there is a 'reasonable prospect of survival of the company and the whole or any part of its undertaking as a going concern'.

16. In the case, Re: Tuskar Resources plc, Judge McCracken stated:

“If the Court is “satisfied”, it must be satisfied on the evidence before it, which is in the first instance the evidence of the petitioner. If that evidence does not satisfy the Court, the order cannot be made, and in my view that is tantamount to saying there is an onus of proof on the petitioner at the initial stage to satisfy the Court that there is a reasonable prospect of survival.”.

17. In the case of Vantive Holdings and Others, Judge Murray stated:

“In order to be satisfied that a company has a reasonable prospect of survival as a going concern the Court must have before it sufficient evidence or material which will permit it to arrive at such a conclusion on the basis of an objective appraisal of that evidence or material.....

The opinion of the independent accountant as set out in the report which a petitioner is required to provide to the Court under the provisions of the Act must be given due weight. Again, the weight to be attached to the accountant’s opinion will depend on the degree and extent to which he supports that opinion by his or her own objective reasoning and the appraisal of material or factors relied upon for reaching his or her conclusions.”

18. The court will not make an order under certain circumstances, including, where a company has obligations in relation to a bank asset that has been transferred to NAMA unless the company has submitted a copy of the petition to NAMA and the court has heard from NAMA in making the order.
19. The court will not hear a petition for appointment of an examiner if a receiver has been appointed to the company for a continuous period of at least three days prior to the date of the presentation of the petition. If the petitioner is a contingent or prospective creditor the court will not hear the petition unless the petitioner has provided reasonable security for costs.
20. The court may decline to hear or continue hearing a petition if it appears to the court that the petitioner or independent expert failed to disclose material information or exercise utmost good faith in the preparation and presentation of the petition or independent expert’s report respectively.
21. The effect of presenting a petition to appoint an examiner, is to place company under court protection for a period of 70 days (unless the petition is earlier withdrawn or refused by the court) commencing from the date the petition was presented. During this period, the company is protected from a number of actions, including but not limited to, for example, proceedings to wind up the company, appointment of a receiver, crystallisation of security charges, repossession orders.

22. Under certain circumstances, the court may grant an extension not exceeding 30 days on application by the examiner.

INDEPENDENT EXPERT'S REPORT

Independent Expert

23. As noted in paragraph 13, the petition should be accompanied by an independent expert's report. This report should be prepared by a person who is either the statutory auditor of the company or who is qualified to be appointed as an examiner of the company.

Independent Expert's Report – Legislative requirements

24. The independent expert's report should consist of the following:
- (i) the names and addresses of the officers of the company;
 - (ii) the names of any other bodies corporate of which the directors of the company are also directors;
 - (iii) a statement of affairs of the company;
 - (iv) their opinion as to, whether:
 - any deficiency between the assets and liabilities of the company has been satisfactorily accounted for;
 - 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/she considers are essential to ensure such survival;
 - 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;
 - 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;
 - the facts disclosed would warrant further inquiries;
 - the work of the examiner would be assisted by a direction of the court.
 - (v) recommendations as to the course they think should be taken in relation to the company, including, draft proposals for a compromise or scheme of arrangement;

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- (vi) recommendations as to which liabilities incurred before the presentation of the petition should be paid;
 - (vii) details of the extent of funding required to enable the company to continue trading during the period of protection, including the sources of funding; and
 - (viii) any other relevant matters.
25. During the hearing of the petition the independent expert may be questioned on oath and cross examined on aspects of the work they carried out and the reasoning leading to the formation of the opinion that the company has a reasonable prospect of survival as a going concern.
26. There may be cases where the independent expert's report is not available at the time of presenting the petition. In such cases, the court must be satisfied that the reasons for this are due to exceptional circumstances outside the control of the petitioner and could not have been reasonably anticipated by the petitioner.
27. The court may make an order placing the company under the protection of the court for such period as the court thinks appropriate to allow for the submission of the independent expert's report. If the deadline is not met, the company will cease to be under the court's protection.
28. The independent expert is required to supply a copy of their report to the company concerned or any interested party where a written application has been received by the independent expert. Certain parts of the report may be redacted with court permission.

Independent Expert's Report – Other considerations

29. International Standard on Assurance Engagements (ISAE) 3000 (Revised) 'Assurance Engagements Other than Audits or Reviews of Historical Financial' provides a framework for assurance engagements, other than audits of historical financial information and is effective for assurance reports dated on or after 15 December 2015.
30. The preparation of the independent expert's report constitutes an assurance engagement as defined under ISAE 3000. As such, it is encouraged to consider the requirements of the standard. ISAE 3000 is available at www.IFAC.org/IAASB

Practical considerations

31. Given the significance of the independent expert's report, together with the obligatory and evidential nature of the report as supporting evidence to the petition for appointment of an examiner, the expert should be conscious of practical matters, which may preclude them from accepting the assignment or

being able to form the opinion that the company and the whole or any part of its undertaking would have a reasonable prospect of survival as a going concern.

32. Examples of circumstances that could constrain the expert, include:
- (i) time constraints, including where a petition is made within 3 days of a receiver's appointment;
 - (ii) lack of information and/or satisfactory evidence to support the directors' "belief" that appointment of an examiner would save some or all of the company's business; and
 - (iii) The cumulative impact of significant caveats and/or uncertainties referred to within the report where that report expresses the opinion the appointment of an examiner would be more advantageous than liquidation.

THE EXAMINER

Notification of appointment

33. The examiner must arrange for the publication of their appointment as examiner to the company in Iris Oifigúil within 21 days, and two daily newspapers circulating in the district of the registered office of the company within 3 days, of the date of the appointment.
34. The examiner must deliver a copy of the order appointing them as examiner to the Registrar of Companies within 3 days of the date of appointment.

Overview of the Role of the Examiner

35. The examiner must act independently of the company, its Board of Directors, shareholders, creditors, or prospective investors.
36. The company's directors remain responsible for its operations following the examiner's appointment. Accordingly, if contacted directly by the company's creditors, the examiner should inform the creditor that ongoing trade is between the creditor and the company, which is under the control of the directors.
37. The role of the examiner is to oversee the formulation, acceptance and confirmation of proposals for a compromise or scheme of arrangement to facilitate the survival of the company. The role can vary during the assignment, occasionally being analogous to that of a chairman overseeing the development of proposals, at other times to that of an investment banker seeking new investors for the company, and sometimes to that of an executive director negotiating the proposals. Whilst other parties, including professional advisors, will frequently participate in the process, the examiner retains the

statutory responsibility for the formulation and recommendation of the scheme proposals.

38. Professional judgment is exercised to ensure that all stakeholders in the process are dealt with in a manner, which takes account of the commercial and legal issues arising in the development of the compromise or scheme of arrangement. This assists the examiner to form the opinion that they have achieved the best possible outcome for all stakeholders in the process.
39. If the examination is to come to a successful conclusion, the examiner must be able to recommend the proposed compromise or scheme of arrangement to each class of creditor and to the court.
40. When chairing the meetings of each class of creditor, the examiner needs to explain to each class of creditor why the proposed compromise or scheme of arrangement offers a better outcome to that class than a liquidation.
41. The examiner is required to prepare and present a report to the court, which includes proposals for a compromise or scheme of arrangement. The court may: confirm, confirm subject to modifications or refuse to confirm the proposals for the compromise or arrangement.
42. Where the examiner is not able to enter into an agreement with interested parties or formulate proposals for a compromise or scheme of arrangement, the examiner should without delay apply to court for direction. The court may give directions or make an order as it deems fit, including, an order for the winding up of the company.

Report of the Examiner

43. The examiner is required to provide an examiner's report, including proposals for a compromise or scheme of arrangement within 35 days of the date of their appointment as examiner or a longer period as the court may see fit.
44. The examiners' report must include:
 - the proposals placed before the required meetings;
 - any modification of those proposals adopted at any of those meetings;
 - the outcome of each of the required meetings;
 - the recommendation of the committee of creditors, if any;
 - a statement of the assets and liabilities (including contingent and prospective liabilities) of the company as at the date of the report;
 - a list of the creditors of the company;
 - a list of officers of the company;

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- the examiner’s recommendations; and
 - any other matters the examiner deems appropriate or the court directs.
45. It is expected that an examiner’s report will include his recommendation that the confirmation of the proposals will facilitate the survival of the company, and the whole or any part of its undertaking as a going concern. Such a recommendation will typically necessitate meaningful commentary regarding the viability of the business.
46. The examiner must supply a copy of the report to the company, the Office of the Director of Corporate Enforcement (ODCE) and to any interested party on written application.

EXAMINATION PROCESS FOR SMALL COMPANIES

47. The Act allows an examination process application to be made by an originating Notice of Motion to the Circuit Court as opposed to the High Court, where the company, in respect of its latest financial year-end prior to the date of presentation of the application, meets the definition of a small company under the Act.
48. If the latest financial year of the company ended within three months of the date of the application, then the previous financial year-end shall be used, once that financial year-end is within fifteen months of the date of the application.
49. In the case of Rathmond Ireland Ltd, where the High Court found that the petitioning company was a small company for the purpose of the Act, the judge appointed the examiner and remitted the case to the Circuit Court for all further hearings. The court indicated that in the case of a small company, as defined in the Act, it was inappropriate to petition in the High Court.

POWERS AND DUTIES OF DIRECTORS

50. The powers and duties of directors are generally unchanged following the appointment of an examiner to the company. The obligation to maintain the company’s statutory records, including its accounting records remains with the directors.
51. The Examiner has power to convene, set the agenda, attend and preside at meetings of directors, and may apply to the court for an order conferring on him the powers of directors. In exceptional cases, he may apply to exercise the powers of a liquidator in relation to the company.
52. Section 526 of the Act states “It shall be the duty of the officers and agents of a company to which an examiner has been appointed to-

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- (a) produce to the examiner all books and documents of, or relating to, any such company which are in their custody or power,
- (b) attend before the examiner when required by the examiner so to do, and
- (c) otherwise give to the examiner all assistance in connection with the examiner's functions which they are reasonably able to give."

UPDATED

53. This Statement was updated on 1 January 2018.