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# COMPANIES BILL 2012

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*Unofficial version*

As amended in ~~Committee-Report~~ Stage (Seanad)  
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**Arthur Cox**

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**PART 10**  
EXAMINERSHIPS

**Chapter 1**  
Interpretation

**Interpretation (Part 10).**

[508]. (1) In this Part –

“court” shall be read in accordance with *section [509](7)*;

“director” includes a shadow director;

“examiner” means an examiner appointed under *section [509]*;

“independent expert” shall be read in accordance with *section [511](2)*;

“insurer” has the same meaning as it has in the Insurance Act 1989;

“interested party”, in relation to a company to which *section [509]* relates, means –

(a) a creditor of the company; or

(b) a member of the company;

“petition” means a petition referred to in *section [509](1)* (and, for the purposes of the Circuit Court’s jurisdiction under this Part,

“petition” includes any originating process specified by rules of court for those purposes) and references to the presentation of a petition are references to its presentation under *section [509](1)*.

(2) This Part is subject to the Insolvency Regulation.

(3) The provisions of *Chapter 15 of Part 11* apply to proceedings under this Part with the substitution of references to “examiner” for references to “liquidator” and any other necessary modifications.

**Chapter 2**

Appointment of examiner

**Power of court to appoint examiner.**

[509]. (1) Subject to *subsection (2)*, where it appears to the court that—

(a) a company is, or is likely to be, unable to pay its debts;

(b) no resolution subsists for the winding up of the company; and

(c) no order has been made for the winding up of the company,

the court may, on application by petition presented, appoint an examiner to the company for the purpose of examining the state of the company’s affairs and performing such functions in relation to the company as may be conferred by or under this Part.

(2) 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.

(3) For the purposes of this section, a company is unable to pay its debts if —

- (a) it is unable to pay its debts as they fall due;
- (b) the value of its assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities; or

~~[\[\(e\) — section \[570\]\(a\), \(b\) or \(c\) applies to the company.](#)~~

[\(c\) the circumstances set out in section 570\(a\), \(b\) or \(c\) are applicable to the company.<sup>372</sup>](#)

(4) In deciding whether to make an order under this section, the court may also have regard to whether the company has sought from its creditors significant extensions of time for the payment of its debts, from which it could reasonably be inferred that the company was likely to be unable to pay its debts.

(5) The court shall not make an order under this section unless —

- (a) the court is satisfied that the company has no obligations in relation to a bank asset that has been transferred to the National Asset Management Agency or a NAMA group entity; or
- (b) if the company has any such obligation -
  - (i) a copy of the petition has been served on that Agency; and
  - (ii) the court has heard that Agency in relation to the making of the order.

(6) In *subsection (5)* “bank asset” and “NAMA group entity” have the same respective meanings as in the National Asset Management Agency Act 2009.

(7) In this section “court” means —

(a) in the case of any company (including one referred to in *paragraph (b)*), the High Court; or

[(b) in the case of a company that, in respect of the latest financial year of the company that has ended prior to the date of the presentation of the petition, fell to be treated as a small company by virtue of *section [350]*, the Circuit Court,<sup>373</sup>

and —

- (i) [subject to *subsection (9)*, ]<sup>374</sup>all subsequent references to the court in this Part shall, as respects the powers and jurisdiction of the court with respect to an examinership on foot of an appointment made under this section by the Circuit Court, be read accordingly; and
- (ii) the jurisdiction under *section [512](7)* to appoint an examiner on an interim basis, and the jurisdiction to do the things referred to in *section [513]*, are likewise available to the Circuit Court in the case of a company specified in *paragraph (b)*.

[(8) For the purpose of *paragraph (b)* of *subsection (7)*, if the latest financial year of the company concerned ended within 3 months prior to the date of the presentation of the petition, the reference in that paragraph to the latest financial year of the company shall be read as a reference to the financial year of the company that preceded its latest financial year (but that reference shall only be so read if that preceding financial year ended no more than 15 months prior to the date of the presentation of the petition).

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<sup>372</sup> [Substituted by point 63 of Seanad Report Amendments.](#)

<sup>373</sup> Substituted by point 162 of Report Amendments.

(9) *Subsection (7)* does not confer on the Circuit Court any jurisdiction that is provided under this Part to hear a petition for the winding up of, or to wind up, a company.]<sup>375</sup>

([10]) The jurisdiction of the Circuit Court under this Part in relation to a company shall be exercisable by the judge of the Circuit Court –

- (a) for the circuit in which the registered office of the company is situated at the time of the presentation of the petition or in which it has, at that time, its principal place of business; or
- (b) if, at that time, there is no registered office of the company and its principal place of business is outside the State, for the Dublin Circuit.

([11]) On the making of an order appointing an examiner to a company, the proper officer of the Central Office of the High Court or, as the case may be, the county registrar shall, on request and payment of the prescribed fee and subject to any conditions that may be specified in rules of court, give to the examiner concerned –

- (a) a copy of the order[...] <sup>376</sup>, certified by the officer to be a true copy; and
- (b) any other prescribed particulars.

#### **Petition for court.**

**[510].** (1) Subject to *subsections (2) and (3)*, a petition in relation to a company may be presented by all or any of the following (separately or together):

- (a) the company;
- (b) the directors of the company;
- (c) a creditor, or a contingent or prospective creditor (including an employee), of the company;
- (d) a member or members of the company holding at the date of the presentation of the petition not less than one tenth of such of the paid-up share capital of the company as carries at that date the right of voting at general meetings of the company.

(2) Where the company referred to in *section [509]* is the holding company of an insurer, a petition may be presented only by the Central Bank, and *subsection (1)* shall not apply to the company.

(3) Where the company referred to in *section [509]* is—

- (a) the holding company of a [credit institution]<sup>377</sup>; or
- (b) a company which one or more trustee savings banks have been reorganised into pursuant to an order under section 57 of the Trustee Savings Banks Act 1989,

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<sup>374</sup> Substituted by point 163 of Report Amendments.

<sup>375</sup> Inserted by point 164 of Report Amendments.

<sup>376</sup> Deleted by point 165 of Report Amendments.

<sup>377</sup> Substituted by point 166 of Report Amendments.

a petition may be presented only by the Central Bank, and *subsection (1)* shall not apply to the company.

(4) Where the company referred to in *section [509]* is a Schedule 5 company, the following provisions shall apply—

(a) a petition may be presented by—

(i) any of the persons referred to in *paragraph (a), (b), (c) or (d)* of *subsection (1)* (including by one or more of such persons acting together);

(ii) the Central Bank; or

(iii) one or more of such persons and the Central Bank acting together;

(b) if the Central Bank does not present a petition—

(i) the petitioner shall, before he or she presents the petition at the office of the court, cause to be received by the Central Bank a notice in writing of his or her intention to present the petition, and shall serve a copy of the petition on the Central Bank as soon as may be after the presentation of it at that office;

(ii) the Central Bank shall be entitled to appear and be heard at any hearing relating to the petition.

(5) In this section “Schedule 5 company” means a company falling within any provision (in so far as applicable to a private company limited by shares) of *Schedule 5*.

#### **Independent expert’s report.**

[511]. (1) In addition to the matters specified in *section [512]*, a petition shall be accompanied by a report in relation to the company prepared by a person who is either the statutory auditor of the company or a person who is qualified to be appointed as an examiner of the company.

(2) The person who undertakes the preparation of that report is referred to in this Part as the “independent expert”.

(3) The report of the independent expert shall comprise the following—

(a) the names and addresses of the officers of the company;

(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 each of them and the dates when the securities were given to each of them;

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

(e) his or her 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 or she considers are essential to ensure such survival, whether as regards the internal management and controls of the company or otherwise;

- (f) his or her 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 or her 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 or she thinks should be taken in relation to the company including, if warranted, draft proposals for a compromise or scheme of arrangement;
- (i) his or her opinion as to whether the facts disclosed would warrant further inquiries with a view to proceedings under *sections [610] and [611] or section [722]*;
- (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 or her recommendations as to which liabilities incurred before the presentation of the petition should be paid;
- (l) his or her 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 [538]*; and
- (m) such other matters as he or she thinks relevant.

**Supplemental provisions in relation to *sections [510] and [511]* – other matters to be mentioned in petition, hearing of petition, etc.**

**[512].** (1) A petition shall nominate a person to be appointed as examiner.

(2) A petition shall be accompanied—

- (a) by a consent signed by the person nominated to be examiner; and
- (b) if proposals for a compromise or scheme of arrangement in relation to the company's affairs have been prepared for submission to interested parties for their approval, by a copy of the proposals.

(3) The court shall not give a hearing to a petition presented by a contingent or prospective creditor until such security for costs has been given as the court thinks reasonable.

(4) The court shall not give a hearing to a petition if a receiver stands appointed to the whole or any part of the property or undertaking of the company the subject of the petition and such receiver has stood so appointed for a continuous period of at least 3 days prior to the date of the presentation of the petition.

(5) On hearing a petition the court may dismiss it, or adjourn the hearing conditionally or unconditionally, or make any interim order, or any other order it thinks fit.

(6) Without prejudice to the generality of *subsection (5)*, an interim order under that subsection may restrict the exercise of any powers of the directors or of the company (whether by reference to the consent of the court or otherwise).

(7) Without limiting *subsection (5)* or *(6)*, on or after the presentation of a petition, the court may, on application to it, appoint an examiner to the company on an interim basis.

**Cases in which independent expert's report not available at required time: powers of court.**

**[513].** (1) If a petition is presented and the court is satisfied—

- (a) that, by reason of exceptional circumstances outside the control of the petitioner, the report of the independent expert is not available in time to accompany the petition; and
- (b) that the petitioner could not reasonably have anticipated the circumstances referred to in *paragraph (a)*,

and, accordingly, the court is unable to consider the making of an order under *section [509]*, the court may make an order under this section placing the company concerned under the protection of the court for such period as the court thinks appropriate in order to allow for the submission of the independent expert's report.

(2) That period shall be a period that expires not later than the 10th day after the date of the making of the order concerned or, if the 10th day after that date would fall on a Saturday, Sunday or public holiday, the first following day that is not a Saturday, Sunday or public holiday.

(3) For the avoidance of doubt, the fact that a receiver stands appointed to the whole or any part of the property or undertaking of the company at the time of the presentation of a petition in relation to the company shall not, in itself, constitute, for the purposes of *subsection (1)*, exceptional circumstances outside the control of the petitioner.

(4) If the petition concerned has been presented by any of the persons referred to in *section [510](1)(c)* or *(d)* and an order under *subsection (1)* is made in relation to the company concerned, the directors of the company shall co-operate in the preparation of the report of the independent expert, particularly in relation to the matters specified in *section [511](3)(a) to (c)*.

(5) If the directors of the company concerned fail to comply with *subsection (4)*, the petitioner concerned or the independent expert may apply to the court for an order requiring the directors to do specified things by way of compliance with *subsection (4)* and the court may, as it thinks fit, grant such an order accordingly.

(6) If the report of the independent expert is submitted to the court before the expiry of the period of protection specified in an order under *subsection (1)*, the court shall proceed to consider the petition together with the report as if they were presented in accordance with *section [509]*.

(7) If the report of the independent expert is not submitted to the court before the expiry of the period of protection specified in an order under *subsection (1)*, then, at the expiry of that period, the company concerned shall cease to be under the protection of the court, but without prejudice to the presentation of a further petition.

**Certain liabilities may not be certified under *section [529](2)*.**

**[514].** Any liabilities incurred by the company concerned during the period of protection specified in an order under *section [513](1)* may not be the subject of a certificate under *section [529](2)*.

**Creditors to be heard.**

[515]. (1) The court shall not make an order dismissing a petition presented to it or an order appointing an examiner to a company without having afforded each creditor of the company who has indicated to the court his or her desire to be heard in the matter an opportunity to be so heard.

(2) Nothing in this section shall affect the power of the court under *section [512](5) or (7)* to make an interim order, including the appointment of an examiner on an interim basis, in the matter.

**Availability of independent expert's report.**

[516]. (1) The independent expert shall supply a copy of the report prepared by him or her under *section [511]* to the company concerned or any interested party on written application being made to the independent expert in that behalf.

(2) If the court, on application to it in that behalf, directs that that supply may be the subject of such omission, there may be omitted from any copy of the report supplied to the company or an interested party such parts of it as are specified in the direction of the court.

(3) The court may, in particular, on such an application, direct that there may be omitted from such a supply of a copy of the report any information the inclusion of which in such a copy would be likely to prejudice the survival of the company or the whole or any part of its undertaking as a going concern.

(4) If –

(a) the company concerned is a company referred to in *section [509](4)*; and

(b) the Central Bank does not propose to present, or has not presented, (whether alone or acting together with other persons) a petition in relation to the company,

the independent expert shall, as soon as may be after it is prepared, supply a copy of the report prepared by him or her under *section [511]* to the Central Bank and *subsections (2) and (3)* shall not apply to such a copy.

**Related companies.**

[517]. (1) Subject to *subsections (2), (3), (6) and (8)*, where the court appoints an examiner to a company, it may, at the same or any time thereafter, make an order—

(a) appointing the examiner to be examiner for the purposes of this Act to a related company; or

(b) conferring on the examiner, in relation to such company, all or any of the functions conferred on him or her in relation to the first-mentioned company.

(2) In deciding whether to make an order under *subsection (1)*, the court shall have regard to whether the making of the order would be

likely to facilitate the survival of the company, or of the related company, or both, and the whole or any part of its or their undertaking, as a going concern.

(3) However, the court shall not, in any case, make such an order unless it is satisfied that there is a reasonable prospect of the survival of the related company, and the whole or any part of its undertaking, as a going concern.

(4) A related company to which an examiner is appointed by an order under *subsection (1)* shall be deemed to be under the protection of the court for the period beginning on the date of the making of the order and continuing for the period during which the company to which it is related is under such protection.

(5) Where an examiner stands appointed to 2 or more related companies, he or she shall have the same functions in relation to each company, taken separately, unless the court otherwise directs.

(6) The court shall not make an order under this section unless –

- (a) the court is satisfied that the related company has no obligations in relation to a bank asset that has been transferred to the National Asset Management Agency or a NAMA group entity; or
- (b) if the related company has any such obligation -
  - (i) a copy of the application for the order has been served on that Agency; and
  - (ii) the court has heard that Agency in relation to the making of the order.

(7) In *subsection (6)* “bank asset” and “NAMA group entity” have the same respective meanings as in the National Asset Management Agency Act 2009.

[8] The Circuit Court shall only have jurisdiction to make an order referred to in *subsection (1)(a)* or *(b)* if the related company is a company that, in respect of the latest financial year of it that has ended prior to the relevant time referred to in *subsection (1)*, fell to be treated as a small company by virtue of *section [350]*.

(9) For the purposes of *subsection (8)*, if the latest financial year of the company concerned ended within 3 months prior to the relevant time referred to in *subsection (1)*, the reference in *subsection (8)* to the latest financial year of the company shall be read as a reference to the financial year of the company that preceded its latest financial year (but that reference shall only be so read if that preceding financial year ended no more than 15 months prior to the relevant time referred to in *subsection (1)*).]<sup>378</sup>

**Duty to act in utmost good faith.**

[518]. The court may decline to hear a petition presented to it or, as the case may be, may decline to continue hearing such a petition if it appears to the court that, in the preparation or presentation of the petition or in the preparation of the report of the independent expert, the petitioner or independent expert—

- (a) has failed to disclose any information available to him or her which is material to the exercise by the court of its powers under this Part; or

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<sup>378</sup> Substituted by point 167 of Report Amendments.

(b) has in any other way failed to exercise utmost good faith.

**Qualification of examiners.**

[519]. (1) A person shall not be qualified to be appointed or act as an examiner of a company unless he or she would be qualified to act as its liquidator (but disregarding for this purpose the requirements of *section [634]* concerning professional indemnity cover).

(2) A person who acts as examiner of a company when he or she is not qualified to do so under *subsection (1)* shall be guilty of a category 2 offence.

**Effect of petition to appoint examiner on creditors and others.**

[520]. (1) Subject to *section [513]*, a company is, for the purposes of this Part, under the protection of the court during the following period.

(2) That period is one –

- (a) beginning with the date of the presentation of a petition in relation to the company; and
- (b) (subject to *section [534] (3) and (4)*) ending on –
  - (i) the expiry of 70 days after that date; or
  - (ii) the withdrawal of, or refusal by the court of, the petition,whichever first happens.

(3) The reference in *subsection (2)* to the refusal by the court of the petition shall be deemed to include a reference to its deciding to decline to hear, or to continue to hear, the petition under *section [518]*.

(4) For so long as a company is under the protection of the court in a case under this Part, the following provisions shall have effect—

- (a) no proceedings for the winding up of the company may be commenced or resolution for winding up passed in relation to the company and any resolution so passed shall have no effect;
- (b) no receiver over any part of the property or undertaking of the company shall be appointed, or, if so appointed before the presentation of a petition shall, subject to *section [522]*, be able to act;
- (c) no attachment, sequestration, distress or execution shall be put into force against the property or effects of the company, except with the consent of the examiner;
- (d) where any claim against the company is secured by a mortgage, charge, lien or other encumbrance or a pledge of, on or affecting the whole or any part of the property, effects or income of the company, no action may be taken to realise the whole or any part of that security, except with the consent of the examiner;
- (e) no steps may be taken to repossess goods in the company's possession under any hire-purchase agreement (within the meaning of *section [530]*), except with the consent of the examiner;
- (f) where, under any enactment, rule of law or otherwise, any person other than the company is liable to pay all or any part of the debts of the company—

(i) no attachment, sequestration, distress or execution shall be put into force against the property or effects of such person in respect of the debts of the company; and

(ii) no proceedings of any sort may be commenced against such person in respect of the debts of the company;

(g) no order for relief shall be made under *section [212]* against the company in respect of complaints as to the conduct of the affairs of the company or the exercise of the powers of the directors prior to the presentation of the petition.

(5) Subject to *subsection (4)*, no other proceedings in relation to the company may be commenced except by leave of the court and subject to such terms as the court may impose and the court may, on the application of the examiner, make such order as it thinks proper in relation to any existing proceedings including an order to stay such proceedings.

(6) Complaints concerning the conduct of the affairs of the company while it is under the protection of the court shall not constitute a basis for the making of an order for relief under *section [212]*.

#### **Restriction on payment of pre-petition debts.**

[521]. (1) No payment may be made by a company, during the period it is under the protection of the court, by way of satisfaction or discharge of the whole or a part of a liability incurred by the company before the date of the presentation of the petition in relation to it unless –

(a) the report of the independent expert contains a recommendation that the whole or, as the case may be, the part of that liability should be discharged or satisfied; or

(b) the court authorises such payment under *subsection (2)*.

(2) The court may, on application being made to it in that behalf by the examiner or any interested party, authorise the discharge or satisfaction, in whole or in part, by the company concerned of a liability referred to in *subsection (1)* if it is satisfied that a failure to discharge or satisfy, in whole or in part, that liability would considerably reduce the prospects of the company or the whole or any part of its undertaking surviving as a going concern.

#### **Effect on receiver or provisional liquidator of order appointing examiner.**

[522]. (1) Where, at the date of the presentation of a petition in relation to a company, a receiver stands appointed to the whole or any part of the property or undertaking of that company the court may make such order as it thinks fit, including an order as to any or all of the following matters—

(a) that the receiver shall cease to act as such from a date specified by the court;

(b) that the receiver shall, from a date specified by the court, act as such only in respect of certain assets specified by the court;

(c) directing the receiver to deliver all books, papers and other records, which relate to the property or undertaking of the company (or any part of it) and are in his or her possession or control, to the examiner within a period to be specified by the court;

(d) directing the receiver to give the examiner full particulars of all his or her dealings with the property or undertaking of the company.

(2) Where, at the date of the presentation of a petition in relation to a company, a provisional liquidator stands appointed to that company, the court may make such order as it thinks fit, including an order as to any or all of the following matters—

- (a) that the provisional liquidator be appointed as examiner of the company;
- (b) appointing some other person as examiner of the company;
- (c) that the provisional liquidator shall cease to act as such from a date specified by the court;

(d) directing the provisional liquidator to deliver all books, papers and other records, which relate to the property or undertaking of the company (or any part of it) and are in his or her possession or control, to the examiner within a period to be specified by the court;

- (e) directing the provisional liquidator to give the examiner full particulars of all his or her dealings with the property or undertaking of the company.

(3) The court shall not make an order under *subsection (1)(a) or (b)* or *subsection (2)(c)* unless the court 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 subsection is in addition to *sections [509](2) and [517](3)*.

(4) Where the court makes an order under *subsection (1) or (2)*, it may, for the purpose of giving full effect to the order, include such conditions in the order and make such ancillary or other orders as it deems fit.

(5) Where a petition is presented in respect of a company at a date subsequent to the presentation of a petition for the winding up of that company, but before a provisional liquidator has been appointed or an order made for its winding up, both petitions shall be heard together.

**Disapplication of *section [440]* to receivers in certain circumstances.**

[523]. (1) This section applies where either –

- (a) an examiner has been appointed to a company; or
- (b) an examiner has not been appointed to a company but, in the opinion of the court, such an appointment may yet be made.

(2) Where this section applies, on application being made to it in that behalf, the court may, subject to *subsections (4) and (5)*, make, in relation to a receiver who stands appointed to the whole or any part of the property or undertaking of the company referred to in *subsection (1)*, the following order.

(3) That order of the court is one providing that *section [440]* shall not apply as respects payments made by the receiver out of assets

coming into his or her hands as such receiver.

(4) The court shall only make such an order if it would, in the opinion of the court, be likely to facilitate the survival of the company, and the whole or any part of its undertaking, as a going concern.

(5) An order referred to in *subsection (2)* shall not be made without each creditor of the company of the following class being afforded an opportunity to be heard, namely a creditor any of the debts owed to whom by the company are debts which in a winding up are (by virtue of the provisions of *Part 11* relating to preferential payments) required to be paid in priority to all other debts.

(6) *Subsection (2)* is without prejudice to the generality of *section [522](1)*.

### Chapter 3

#### Powers of examiner

##### **Powers of an examiner.**

[524]. (1) Any provision of this Act relating to the rights and powers of a statutory auditor of a company and the supplying of information to and co-operation with such auditor shall, with the necessary modifications, apply to an examiner.

(2) Notwithstanding any provision of this Act relating to notice of general meetings, an examiner shall have power to convene, set the agenda for, and preside at meetings of the board of directors and general meetings of the company to which he or she is appointed and to propose motions or resolutions and to give reports to such meetings.

(3) An examiner shall be entitled to reasonable notice of, to attend and be heard at, all meetings of the board of directors of a company and all general meetings of the company to which he or she is appointed.

(4) For the purpose of *subsection (3)* “reasonable notice” shall be deemed to include a description of the business to be transacted at any such meeting.

(5) An examiner has the power referred to in *subsection (6)* where he or she becomes aware of any actual or proposed act, omission, course of conduct, decision or contract, by or on behalf of –

- (a) the company to which he or she has been appointed;
- (b) that company’s officers, employees, members or creditors; or
- (c) any other person,

in relation to the income, assets or liabilities of the company which, in the examiner’s opinion, is or is likely to be to the detriment of the company, or any interested party.

(6) That power of the examiner is to take whatever steps are necessary, subject to the right of parties acquiring an interest in good faith and for value in such income, assets or liabilities, to halt, prevent or rectify the effects of such act, omission, course of conduct, decision or contract.

(7) The examiner may apply to the court –

- (a) to determine any question arising in the course of his or her office; or
- (b) for the exercise in relation to the company of all or any of the following powers which the court may exercise under this Act, namely those exercisable by it upon the application of any member, contributory, creditor or director of a company.

(8) The examiner shall, if so directed by the court, have power to ascertain and agree claims against the company to which he or she has been appointed.

(9) No professional or legal duty to which an examiner is subject by virtue of his or her appointment as such to a company shall be regarded as contravened by, and no liability to the company, its shareholders, creditors or other interested parties shall attach to, an examiner by reason of his or her compliance with an obligation imposed on the examiner by or under this section.

**Repudiation by examiner of contracts made before period of protection and of negative pledge clauses whenever made : prohibitions and restrictions.**

[525]. (1) Without prejudice to *subsection (2)*, nothing in *section [524]* shall enable an examiner to repudiate a contract that has been entered into by the company to which he or she has been appointed prior to the period during which the company is under the protection of the court.

(2) A provision referred to in *subsection (4)* shall not be binding on the company at any time after the service of the notice under *subsection (3)(b)* and before the expiration of the period during which the company is under the protection of the court if the following 2 conditions are satisfied.

(3) Those conditions are –

(a) the examiner is of the opinion that the provision, were it to be enforced, would be likely to prejudice the survival of the company or the whole or any part of its undertaking as a going concern; and

(b) the examiner serves a notice on the other party or parties to the agreement in which the provision is contained informing the party or parties of that opinion.

(4) The provision referred to in *subsection (2)* is a provision of an agreement entered into by the company concerned and any other person or persons at any time (including a time that is prior to the period during which the company is under the protection of the court) that provides that the company shall not, or shall not otherwise than in specified circumstances—

(a) borrow moneys or otherwise obtain credit from any person other than that person or those persons; or

(b) create or permit to subsist any mortgage, charge, lien or other encumbrance or any pledge over the whole or any part of the property or undertaking of the company.

**Production of documents and evidence.**

[526]. (1) It shall be the duty of the officers and agents of a company or a related company to which an examiner has been appointed to –

(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.

(2) If the examiner considers that a person, other than an officer or agent of any foregoing company, is or may be in possession of any information concerning the company's affairs, the examiner may require that person to –

- (a) produce to the examiner any books or documents in his or her custody or power relating to the company;
- (b) attend before the examiner; and
- (c) otherwise give to the examiner all assistance in connection with the examiner's functions which that person is reasonably able to give,

and it shall be the duty of that person to comply with the requirement.

(3) If the examiner has reasonable grounds for believing that a director of any foregoing company maintains or has maintained a bank account of any description, whether alone or jointly with another person and whether in the State or elsewhere, into or out of which there has been paid—

- (a) any money which has resulted from or been used in the financing of any transaction, arrangement or agreement particulars of which have not been disclosed in the financial statements of any company for any financial year as required by this Act; or
- (b) any money which has been in any way connected with any act or omission, or series of acts or omissions, which, on the part of that director, constituted misconduct (whether fraudulent or not) towards that company or its members,

the examiner may require the director to produce to the examiner all documents in the director's possession, or under his or her control, relating to that bank account and it shall be the duty of the director to comply with the requirement.

(4) In *subsection (3)* –

“bank account” includes an account with any person exempt by virtue of section 7(4) of the Central Bank Act 1971 from the requirement of holding a licence under section 9 of that Act;

“director” means –

- (a) any present or past director (including any present or past shadow director); and
- (b) any person connected, within the meaning of *section [220]*, with such a director.

(5) An examiner may examine on oath, either by word of mouth or on written interrogatories, the officers and agents of any such company or other person as is mentioned in *subsection (1)* or *(2)* in relation to that company's affairs and may—

- (a) administer an oath accordingly; or
- (b) reduce the answers of such person to writing and require him or her to sign them.

(6) If any officer or agent of a foregoing company or other such person—

(a) refuses to produce to the examiner any book or document which it is his or her duty under this section to produce;

(b) refuses to attend before the examiner when requested by the examiner to do so; or

(c) refuses to answer any question which is put to him or her by the examiner with respect to the affairs of the company,

the examiner may provide a certificate under his or her hand to the court stating that such a refusal has occurred.

(7) On such a certificate being provided to it, the court may enquire into the case and, after hearing any witnesses who may be produced against or on behalf of the officer, agent or other person to whom the certificate relates or any statement which may be offered in defence, make any order or direction it thinks fit.

(8) Without prejudice to the generality of *subsection (7)*, the court may, after a hearing under that subsection, make a direction—

- (a) to the person concerned to attend or re-attend before the examiner or produce particular books or documents or answer particular questions put to him or her by the examiner; or
- (b) that the person concerned need not produce a particular book or document or answer a particular question put to him[ or her]<sup>379</sup> by the examiner.

(9) *Section [795]* shall apply for the purposes of this section as it applies for the purposes of *Part 13* and, accordingly, for the purpose of this section, references in *section [795]* to *Part 13*, or relevant provisions of that Part, shall be read as references to this section.

(10) In this section-

- (a) any reference to officers or to agents includes a reference to past, as well as present, officers or agents, as the case may be;
- and
- (b) “agents”, in relation to a company, includes-
    - (i) the bankers and solicitors of the company; and
    - (ii) any persons employed by the company as auditors, accountants, book-keepers or taxation advisers, or other persons employed by it in a professional, consultancy or similar capacity, whether those persons are (or were) or are not (or were not) officers of the company.

**No lien over company’s books, records, etc.**

[527]. (1) Without prejudice to *subsections (2) and (3)*, where the court has appointed an examiner to a company or a company is under the protection of the court, no person shall be entitled as against the examiner to -

- (a) withhold possession of -
  - (i) any deed, instrument, or other document belonging to the company; or
  - (ii) any accounting records, receipts, bills, invoices, or other papers of a like nature relating to the accounts or trade,

dealings or business of the company; or

(b) claim any lien on any document or paper referred to in *paragraph (a)*.

(2) Where a mortgage, charge or pledge has been created by the deposit of any such document or paper with a person, the production of the document or paper to the examiner by the person shall not operate to prejudice the person's rights under the mortgage, charge or pledge (other than any right to possession of the document or paper).

(3) Where by virtue of this section an examiner has possession of –

(a) any document or papers of a receiver; or

(b) any documents or papers that a receiver is entitled to examine,

the examiner shall, unless the court otherwise orders, make the document or papers available for inspection by the receiver at all reasonable times.

#### **Further powers of court.**

[528]. (1) Where it appears to the court, on the application of the examiner, that, having regard to the matters referred to in *subsection (2)*, it is just and equitable to do so, it may make an order that all or any of the functions which are vested in the directors (whether by virtue of the constitution of the company or by law or otherwise) shall be performable only by the examiner.

(2) The matters to which the court is to have regard for the purpose of *subsection (1)* are—

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

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

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

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

(3) Where the court makes an order under *subsection (1)*, it may, for the purpose of giving full effect to the order, include such conditions in the order and make such ancillary or other orders as it sees fit.

(4) On an application under *subsection (1)*, in addition to the powers under that subsection and *subsection (3)*, the court may, having regard to the matters referred to in *subsection (2)*, provide, by an order under *subsection (1)* or by a further order, that the examiner shall have all or any of the powers that he or she would have if he or she were a liquidator appointed by the court in respect of the company.

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<sup>379</sup> Inserted by point 103 of Seanad Committee Amendments.

(5) Where such an order so provides, the court shall have all the powers that it would have if it had made a winding-up order and appointed a liquidator in respect of the company concerned.

**Incurring of certain liabilities by examiner.**

[529]. (1) Any liabilities incurred by the company during the protection period which are specified in *subsection (2)* shall be treated as expenses properly incurred, for the purpose of *section [554]*, by the examiner.

(2) The liabilities referred to in *subsection (1)* are those certified in writing by the examiner, at the time they are incurred, to have been incurred in circumstances where, in the opinion of the examiner, the survival of the company as a going concern during the protection period would otherwise be seriously prejudiced.

(3) In this section “protection period” means the period, beginning with the appointment of an examiner, during which the company is under the protection of the court.

**Power to deal with charged property, etc.**

[530. (1) Where, on an application by the examiner, the court is satisfied that –

(a) the disposal (with or without other assets) of any property of the company concerned which is subject to a security which, as created, was a floating charge; or

(b) the exercise by the examiner of his or her powers in relation to such property,

would be likely to facilitate the survival of the whole or any part of the company as a going concern, the court may by order authorise the examiner to dispose of the property, or exercise his or her powers in relation to it, as the case may be, as if it were not subject to the security.

(2) Where, on an application by the examiner, the court is satisfied that the disposal (with or without other assets) of—

(a) any property of the company concerned subject to a security other than a security to which *subsection (1)* applies; or

(b) any goods in the possession of the company concerned under a hire-purchase agreement,

would be likely to facilitate the survival of the whole or any part of the company as a going concern, the court may by order authorise the examiner to dispose of the property as if it were not subject to the security or to dispose of the goods as if all rights of the owner under the hire-purchase agreement were vested in the company.

(3) Where property is disposed of under *subsection (1)*, the holder of the security shall have the same priority in respect of any property of the company directly or indirectly representing the property disposed of as he or she would have had in respect of the property subject to the security.

(4) An order under *subsection (2)* shall include a condition that—

(a) the net proceeds of the disposal of the property or goods concerned; and

(b) where those proceeds are less than such amount as may be determined by the court to be the net amount which would be realised on a sale of the property or goods concerned in the open market by a willing vendor, such

sums as may be required to make good the deficiency,

shall be applied towards discharging the sums secured by the security or payable under the hire-purchase agreement.

(5) Where a condition imposed in pursuance of *subsection (4)* relates to 2 or more securities, that condition operates to require the net proceeds of the disposal and, where *paragraph (b)* of that subsection applies, the sums mentioned in that paragraph to be applied towards discharging the sums secured by those securities in the order of their priorities.

(6) A certified copy of an order under *subsection (1)* or *(2)* in relation to a security shall, within 7 days after the date of the making of the order, be delivered by the examiner to the Registrar.

(7) If the examiner, without reasonable excuse, fails to comply with *subsection (6)*, he or she shall be guilty of a category 4 offence.

(8) References in this section to a hire-purchase agreement include references to –

- (a) a conditional sale agreement;
- (b) a retention of title agreement; and
- (c) an agreement for the bailment of goods which is capable of subsisting for more than 3 months.

#### **Notification of appointment of examiner.**

[531]. (1) Where a petition has been presented, notice of the petition in the prescribed form shall, within 3 days after the date of its presentation, be delivered by the petitioner to the Registrar.

(2) An examiner shall, within the respective periods specified in *subsection (3)*, cause to be published in [*Iris Oifigiúil*]<sup>380</sup> and in at least 2 daily newspapers circulating in the district in which the registered office or principal place of business of the company is situated a notice of his or her appointment and the date of that appointment.

(3) The periods referred to in *subsection (2)* are –

- (a) 21 days after the date of the examiner's appointment – in the case of [*Iris Oifigiúil*]<sup>381</sup>; and
- (b) 3 days after the date of the examiner's appointment – in the other case referred to in that subsection.

(4) An examiner shall, within 3 days after the date of his or her appointment, deliver to the Registrar a copy of the order appointing him or her.

(5) Where a company is (by virtue of *section [520]*) under, for the purposes of this Part, the protection of the court, every invoice, order for goods or business letter issued by or on behalf of the company, being a document on or in which the name of the company appears, shall, immediately after the mention of that name, include the words “*in examination under Part 10 of the Companies Act 2012*”.

(6) A website of a company that is (by virtue of *section [520]*) under, for the purposes of this Part, the protection of the court,

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<sup>380</sup> Substituted by point 88 of Committee Amendments.

and any electronic mail sent to a third party by, or on behalf of, such a company, shall contain a statement that the company is in examination under this Part (and such a statement on a website shall be in a prominent and easily accessible place on it).

(7) In *subsection (6)* “third party” means a person other than –

- (a) an officer or employee of the company concerned; or
- (b) a holding company or subsidiary of the company or an officer or employee of that holding company or subsidiary.

(8) A person who fails to comply with *subsection (1), (2), (4) or (5)* shall be guilty of a category 4 offence.

(9) If default is made in complying with the requirement under *subsection (6)* concerning the company’s website, the company concerned and any officer of it who is default shall be guilty of a category 4 offence.

(10) If default is made by a company, or any person acting on its behalf, in complying with the requirement under *subsection (6)* concerning electronic mail, then –

- (a) in every case, the company and any officer of it who is in default; and
- (b) where the default is made by a person acting on the company’s behalf, that person,

shall be guilty of a category 4 offence.

**General provisions as to examiners – resignation, filling of vacancy, etc.**

[532]. (1) An examiner may resign or, on cause shown, be removed by the court.

(2) If, for any reason, a vacancy occurs in the office of examiner, the court, on application to it, may by order fill the vacancy.

(3) An application for an order under *subsection (2)* may be made by—

- (a) any committee of creditors established under *section [538]* in relation to the company concerned; or
- (b) the company concerned; or
- (c) any interested party.

(4) An examiner shall be described by the style of “the examiner” of the particular company in respect of which he or she is appointed and not by his or her name.

(5) The acts of an examiner shall be valid notwithstanding any defects that may afterwards be discovered in his or her appointment or qualification.

(6) An examiner shall be personally liable on any contract entered into by him or her in the performance of his or her functions (whether such contract is entered into by the examiner in the name of the company concerned or in his or her own name as examiner

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<sup>381</sup> Substituted by point 89 of Committee Amendments.

or otherwise) unless the contract provides that he or she is not to be personally liable on such contract.

(7) The examiner shall, in respect of that personal liability, be entitled to indemnity out of the assets of the company concerned.

(8) Nothing in *subsection (6)* or *(7)* shall be taken as limiting any right to indemnity which the examiner would have apart from either subsection, or as limiting the examiner's liability on contracts entered into without authority or as conferring any right to indemnity in respect of that liability.

(9) A company to which an examiner has been appointed or an interested party may apply to the court for the determination of any question arising out of the performance or otherwise by the examiner of his or her functions.

### **Hearing regarding irregularities.**

[533]. (1) Where, arising out of the presentation to it of the report of the independent expert or otherwise, it appears to the court that there is evidence of a substantial disappearance of property of the company concerned that is not adequately accounted for, or of other serious irregularities in relation to the company's affairs having occurred, the court shall, as soon as it is practicable, hold a hearing to consider that evidence.

(2) If, before the hearing referred to in *subsection (1)* is held, the court directs the examiner to do so, the examiner shall prepare a report setting out any matters which the examiner considers will assist the court in considering the evidence concerned on that hearing.

(3) The examiner shall supply a copy of a report prepared by him or her under *subsection (2)* to the company concerned on the same day as he or she causes the report to be delivered to the office of the court.

(4) The examiner shall also supply a copy of a report prepared by him or her under *subsection (2)* to each person who is mentioned in the report and any interested party on written application being made to him or her in that behalf.

(5) If the court, on application to it in that behalf, directs that that supply may be the subject of such omission, there may be omitted from any copy of the report supplied to a person referred to in *subsection (4)* or an interested party such parts of it as are specified in the direction of the court.

(6) The court may, in particular, on such an application, direct that there may be omitted from such a supply of a copy of the report any information the inclusion of which in such a copy would be likely to prejudice the survival of the company or the whole or any part of its undertaking as a going concern.

(7) If the company concerned is a company referred to in *section [510](2), (3) or (4)*, the examiner shall, as soon as may be after it is prepared, supply a copy of the report prepared by him or her under *subsection (2)* to the Central Bank, and *subsections (5) and (6)* shall not apply to such a copy.

(8) The following persons shall be entitled to appear and be heard at a hearing under this section —

(a) the examiner;

(b) if the court decided to hold a hearing under this section because of matters contained in the report of the independent expert, the independent expert;

(c) the company concerned;

(d) any interested party;

- (e) any person who is referred to in the report of the independent expert or the report prepared under *subsection (2)*;
- (f) if the company concerned is a company referred to in *section [510](2), (3) or (4)* - the Central Bank;
- (g) irrespective of whether it constitutes any of the foregoing kinds of company - the Director of Corporate Enforcement.

(9) The court may, on a hearing under this section, make such order or orders as it deems fit (including, where appropriate, an order for the trial of any issue relating to the matter concerned).

(10) The court may, if it considers it appropriate to do so, direct that a certified copy of an order under *subsection (9)* shall be delivered to the Registrar by the examiner or such other person as it may specify.

**Report by examiner.**

[534]. (1) An examiner shall—

- (a) as soon as practicable after he or she is appointed, formulate proposals for a compromise or scheme of arrangement in relation to the company concerned;
- (b) without prejudice to any other provision of this Act, perform such other functions as the court may direct the examiner to perform.

(2) Notwithstanding any provision of *Part 4* relating to notice of general meetings (but subject to notice of not less than 3 days in any case) the examiner shall –

- (a) convene and preside at such meetings of members and creditors as he or she thinks proper for the purpose of *section [540]*; and
- (b) in accordance with *section [536]*, report on those proposals to the court,

within 35 days after the date of his or her appointment or such longer period as the court may allow.

(3) Where, on the application of the examiner, the court is satisfied that the examiner would be unable to report under *subsection (2)* to the court within the period of 70 days referred to in *section [520](2)* but that he or she would be able to report under that subsection to the court if that period were extended, the court may by order extend that period by not more than 30 days to enable him or her to do so.

(4) Where the examiner has submitted a report under this section to the court and, but for this subsection, the period mentioned in *section [520](2)* (and any extended period allowed under *subsection (3)*) would expire, the court may, of its own motion or on the application of the examiner, extend the period concerned by such period as the court considers necessary to enable it to take a decision under *section [541]*.

(5) The examiner shall supply a copy of his or her report under this section —

- (a) to the company concerned on the same day as he or she causes the report to be delivered to the office of the court; and

(b) to any interested party on written application being made to him or her in that behalf.

(6) The examiner shall, as soon as may be after it is prepared, supply a copy of his or her report under this section to—

(a) if the company concerned is a company referred to in *section [510](2), (3) or (4)* - the Central Bank;

and

(b) irrespective of whether it constitutes any of the foregoing kinds of company - the Director of Corporate Enforcement.

(7) If the court, on application to it in that behalf, directs that that supply may be the subject of such omission, there may be omitted from any copy of the report supplied under *subsection (5)(b)* to an interested party such parts of it as are specified in the direction of the court.

(8) The court may, in particular, on such an application, direct that there may be omitted from such a supply of a copy of the report any information the inclusion of which in such a copy would be likely to prejudice the survival of the company or the whole or any part of its undertaking as a going concern.

**Procedure where examiner unable to secure agreement or formulate proposals for compromise or scheme of arrangement.**

[535]. (1) If the examiner is not able to –

(a) enter into an agreement with the interested parties and any other persons concerned in the matter; or

(b) formulate proposals for a compromise or scheme of arrangement in relation to the company concerned,

the examiner may apply to the court for the grant of directions in the matter.

(2) The court may, on such an application, give such directions or make such order as it deems fit, including, if it considers it just and equitable to do so, an order for the winding up of the company.

**Content of examiner's report.**

[536]. An examiner's report under *section [534]* shall include—

(a) the proposals placed before the required meetings;

(b) any modification of those proposals adopted at any of those meetings;

(c) the outcome of each of the required meetings;

(d) the recommendation of the committee of creditors, if any;

(e) a statement of the assets and liabilities (including contingent and prospective liabilities) of the company as at the date of his or her report;

(f) a list of the creditors of the company, the amount owing to each such creditor, the nature and value of any security held by any such creditor, and the priority accorded under *sections [621] and [622]* to any such creditor or any other statutory provision or rule of law;

- (g) a list of the officers of the company;
- (h) the examiner's recommendations;
- (i) such other matters as the examiner deems appropriate or the court directs.

**Repudiation of certain contracts.**

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

(2) Any person who suffers loss or damage as a result of such repudiation shall stand as an unsecured creditor for the amount of such loss or damage.

(3) In order to facilitate the formulation, consideration or confirmation of a compromise or scheme of arrangement, the court may hold a hearing and make an order determining the amount of any such loss or damage mentioned in *subsection (2)* and the amount so determined shall be due by the company to the creditor as a judgment debt.

(4) Where the examiner is not a party to an application to the court for the purposes of *subsection (1)*, the company shall serve notice of such application on the examiner and the examiner may appear and be heard on the hearing of any such application.

(5) Where the court approves the affirmation or repudiation of a contract under this section, it may, in giving such approval, make such orders as it thinks fit for the purposes of giving full effect to its approval, including orders as to notice to, or declaring the rights of, any party affected by such affirmation or repudiation.

**Appointment of creditors' committee.**

[538]. (1) An examiner may, and if so directed by the court shall, appoint a committee of creditors to assist the examiner in the performance of his or her functions.

(2) Save as otherwise directed by the court, a committee appointed under *subsection (1)* shall consist of not more than 5 members and shall include the holders of the 3 largest unsecured claims who are willing to serve.

(3) The examiner shall provide such a committee with a copy of any proposals for a compromise or scheme of arrangement and the committee may express an opinion on the proposals on its own behalf or on behalf of the creditors or classes of creditors represented on the committee.

(4) As soon as practicable after the appointment of a committee under *subsection (1)*, the examiner shall meet with the committee to transact such business as may be necessary.

**Proposals for compromise or scheme of arrangement.**

[539]. (1) Proposals for a compromise or scheme of arrangement under this Part in relation to a company shall—

- (a) specify each class of members and creditors of the company;
- (b) specify any class of members and creditors whose interests or claims will not be impaired by the proposals;

- (c) specify any class of members and creditors whose interests or claims will be impaired by the proposals;
- (d) provide equal treatment for each claim or interest of a particular class unless the holder of a particular claim or interest agrees to less favourable treatment;
- (e) provide for the implementation of the proposals;
- (f) if the examiner considers it necessary or desirable to do so to facilitate the survival of the company, and the whole or any part of its undertaking, as a going concern, specify whatever changes should be made in relation to the management or direction of the company;
- (g) if the examiner considers it necessary or desirable to do so to facilitate such survival, specify any changes he or she considers should be made in the constitution of the company, whether as regards the management or direction of the company or otherwise;
- (h) include such other matters as the examiner deems appropriate.

(2) A statement of the assets and liabilities (including contingent and prospective liabilities) of the company as at the date of the proposals shall be attached to each copy of the proposals to be submitted to meetings of members and creditors under *section [540]*.

(3) There shall also be attached to each such copy of the proposals a description of the estimated financial outcome of a winding up of the company for each class of members and creditors.

(4) The court may direct that the proposals include whatever other provisions it deems fit.

(5) For the purposes of this section and *sections [541] to [543]*, a creditor's claim against a company is impaired if the creditor receives less in payment of his or her claim than the full amount due in respect of the claim at the date of presentation of the petition for the appointment of the examiner.

(6) For the purposes of this section and *sections [541] to [543]*, the interest of a member of a company in the company is impaired if—

- (a) the nominal value of his or her shareholding in the company is reduced; or
- (b) where the member is entitled to a fixed dividend in respect of his or her shareholding in the company, the amount of that dividend is reduced; or
- (c) the member is deprived of all or any part of the rights accruing to him or her by virtue of his or her shareholding in the company; or
- (d) the percentage of his or her interest in the total issued share capital of the company is reduced; or
- (e) the member is deprived of his or her shareholding in the company.

#### **Consideration by members and creditors of proposals.**

**[540].** (1) This section applies to a meeting of members or creditors or any class of members or creditors summoned to consider proposals for a compromise or scheme of arrangement in relation to a company to which an examiner has been appointed.

- (2) Save where expressly provided otherwise in this section, this section shall not authorise, at such a meeting, anything to be done in relation to such proposals by any member or creditor.
- (3) At a meeting to which this section applies a modification of the proposals may be put to the meeting but may only be accepted with the consent of the examiner.
- (4) Proposals shall be deemed to have been accepted by a meeting of creditors or of a class of creditors when a majority in number representing a majority in value of the claims represented at that meeting have voted, either in person or by proxy, in favour of the resolution for the proposals.
- (5) Nothing in *subsection (4)* shall, in the case of a creditor who abstains from voting, or otherwise fails to cast a vote, in respect of the proposals, be read as permitting such an abstention or failure to be regarded as a casting by that person of a vote against the proposals.
- (6) Where a State authority is a creditor of the company, such authority shall be entitled to accept proposals under this section notwithstanding -
- (a) that any claim of such authority as a creditor would be impaired under the proposals; or
  - (b) any other enactment.
- (7) In *subsection (6)* “State authority” means the State, a Minister of the Government, a local authority or the Revenue Commissioners.
- (8) *Section [192]* shall apply to any resolution to which *subsection (4)* relates which is passed at any adjourned meeting.
- (9) *Subsection (1)(a)(iii)* and *(b)*, and *subsections (2) to (7)*, of *section [452]* shall apply to meetings under this section with the modifications specified in *subsection (10)* and any other necessary modifications.
- (10) The modifications mentioned in *subsection (9)* are –
- (a) the reference in *paragraph (a)(iii)* of *section [452](1)* to the explanation required to be given under *paragraph (a)(ii)* of *section [452](1)* in relation to the company’s directors shall be read as a reference to the explanation required to be given under *subsection (11)* of this section in relation to those directors; and
  - (b) the reference in *section [452](5)* to a liquidator of the company shall be read as a reference to the examiner of the company.
- (11) With every notice summoning a meeting to which this section applies which is sent to a creditor or member, there shall be sent also a statement explaining the effect of the compromise or scheme of arrangement and in particular stating any material interests of the directors of the company, whether as directors or as members or as creditors of the company or otherwise and the effect thereon of the compromise or arrangement, in so far as it is different from the effect on the like interest of other persons.
- (12) Without prejudice to *subsections (1) to (11)*, in the case of a company referred to in *section [510](3)* or *(4)*, the examiner shall also afford the Central Bank an opportunity to consider the proposals for a compromise or scheme of arrangement and, for this

purpose, shall furnish to the Central Bank a statement containing the like information to that referred to in *subsection (11)*.

**Confirmation of proposals.**

[541]. (1) The report of the examiner under *section [534]* shall be set down for consideration by the court as soon as may be after receipt of the report by the court.

(2) The following persons may appear and be heard at a hearing under *subsection (1)* —

- (a) the company concerned;
- (b) the examiner;
- (c) any creditor or member whose claim or interest would be impaired if the proposals were implemented;
- (d) the directors of the company;
- (e) if the company concerned is a company referred to in *section [510](2), (3) or (4)* - the Central Bank.

(3) At a hearing under *subsection (1)*, the court may, as it thinks proper, subject to the provisions of this section and *sections [542]* and *[543]* -

- (a) confirm;
- (b) confirm subject to modifications; or
- (c) refuse to confirm,

the proposals for the compromise or arrangement concerned (referred to subsequently in this section as “proposals”).

(4) The court shall not confirm any proposals unless -

- (a) at least one class of creditors whose interests or claims would be impaired by implementation of the proposals has accepted the proposals; and
- (b) the court is satisfied that—
  - (i) the proposals are fair and equitable in relation to any class of members or creditors that has not accepted the proposals and whose interests or claims would be impaired by implementation; and
  - (ii) the proposals are not unfairly prejudicial to the interests of any interested party,

and in any case shall not confirm any proposals if the sole or primary purpose of them is the avoidance of payment of tax due.

(5) Without prejudice to *subsection (4)*, the court shall not confirm any proposals in respect of a company to which an examiner has been appointed under *section [517]* if the proposals would have the effect of impairing the interests of the creditors of the company in such a manner as to unfairly favour the interests of the creditors or members of any company to which it is related, being a company to which that examiner has been appointed examiner under *section [509]* or, as the case may be, *[517]*.

(6) Where the court confirms proposals (with or without modification), the proposals shall be binding on all the members or class or classes of members, as the case may be, affected by the proposal and also on the company.

(7) Where the court confirms proposals (with or without modification), the proposals shall, notwithstanding any other enactment, be binding on all the creditors or the class or classes of creditors, as the case may be, affected by the proposals in respect of any claim or claims against the company and any person other than the company who, under any enactment, rule of law or otherwise, is liable for all or any part of the debts of the company.

**Supplemental provisions in relation to *section [541]*.**

[542]. (1) Any amendments of the constitution of the company concerned which are specified in the relevant proposals shall, after confirmation of the proposals by the court under *section [541]* and notwithstanding any other provisions of this Act, take effect from a date fixed by the court.

(2) Where the court confirms proposals under *section [541]* it may make such orders for the implementation of its decision as it deems fit.

(3) A compromise or scheme of arrangement, proposals for which have been confirmed under *section [541]*, shall come into effect from a date fixed by the court, which date (unless the court deems it appropriate to fix a later one) shall be a date falling no later than 21 days after the date of the proposals' confirmation.

(4) On the confirmation of proposals, a certified copy of any order made by the court under *section [541]* shall be delivered by the examiner, or by such person as the court may direct, to the Registrar.

(5) Where—

(a) the court refuses to confirm proposals under *section [541]*; or

(b) the report of an examiner under *section [534]* concludes that, following the required meetings of creditors of a company under this Part, it has not been possible to reach agreement on a compromise or scheme of arrangement,

the court may, if it considers it just and equitable to do so, make an order for the winding up of the company, or any other order as it deems fit.

(6) Notwithstanding –

(a) *subsection (4)*, or any other provision of this Part, nothing in this Part shall prevent the examiner from including in a report under *section [534]* proposals which will not involve the impairment of the interests of members or creditors of the company nor the court from confirming any such proposals; or

(b) any foregoing provision of this Part or any provision of *Part 3*, nothing in this Part or *Part 3* shall prevent the examiner from including in a report under *section [534]* proposals which provide for a reduction of the company's company capital nor, subject to *subsection (7)*, the court from confirming any such proposals.

(7) If the extent of the reduction of the company's company capital provided for in the proposals as referred to in *subsection (6)(b)*

would, in the opinion of the court, and having regard to –

(a) the scale and nature of the business that the company carries on;

and

(b) the likely liabilities it will incur on an on-going basis after the period of protection has expired,

result in the company's having an amount of company capital that is manifestly inadequate, the court shall not confirm the proposals or, where appropriate, shall confirm the proposals subject to a modification that a lower level of reduction, as determined by the court, of the company's company capital shall have effect under the compromise or scheme of arrangement.

(8) References in *section [541]* or any other provision of this Part to acceptance by a class of creditors or members of proposals are references to the proposals' acceptance at the relevant meeting held under *section [540]*, that is to say acceptance signified by a resolution passed, at that meeting, by the requisite majority referred to in (in the case of creditors) *section [540](4)* or (in the case of members) *section [191](1)*.

#### **Objection to confirmation by court of proposals.**

[543]. (1) At a hearing under *section [541]* in relation to proposals referred to in that section, a member or creditor whose interest or claim would be impaired by the proposals may object in particular to their confirmation by the court on any of the following grounds—

(a) that there was some material irregularity at or in relation to a meeting to which *section [540]* applies;

(b) that acceptance of the proposals by the meeting was obtained by improper means;

(c) that the proposals were put forward for an improper purpose;

(d) that the proposals unfairly prejudice the interests of the objector.

(2) Any person who voted to accept the proposals referred to in *section [541]* may not object to their confirmation by the court except on the grounds—

(a) that such acceptance was obtained by improper means; or

(b) that after voting to accept the proposals the person became aware that the proposals were put forward for an improper purpose.

(3) Where the court upholds an objection under this section, the court may make such order as it deems fit, including an order that the decision of any meeting be set aside and an order that any meeting be reconvened.

#### **Provisions with respect to leases.**

[544]. (1) Subject to *subsection (3)*, proposals for a compromise or scheme of arrangement shall not contain, nor shall any modification by the court under *section [541]* of such proposals result in their containing, a provision providing for either or both—

(a) a reduction in the amount of any rent or other periodical payment reserved under a lease of land that falls to be paid after the date from which the compromise or scheme of arrangement would come into effect under *section [542](3)* or the complete extinguishment of the right of the lessor to any such payments;

(b) as respects a failure—

(i) to pay an amount of rent or make any periodical payment reserved under a lease of land; or

(ii) to comply with any other covenant or obligation of such a lease,

that falls to be paid or complied with after the date referred to in *paragraph (a)*, a requirement that the lessor under such a lease shall not exercise, or shall only exercise in specified circumstances, any right, whether under the lease or otherwise, to –

(I) recover possession of the land concerned;

(II) effect a forfeiture of the lease or otherwise enter on the land;

(III) recover the amount of such rent or other payment; or

(IV) claim damages or other relief in respect of the failure to comply with such a covenant or obligation.

(2) Subject to *subsection (3)*, proposals for a compromise or scheme of arrangement in relation to a company shall not be held by the court to satisfy the condition specified in *section [541](4)(b)(ii)* if the proposals contain a provision relating to a lease of, or any hiring agreement in relation to, property other than land and, in the opinion of the court—

(a) the value of that property is substantial;

and

(b) that provision is of like effect to a provision referred to in *subsection (1)(a)* or *(b)*.

(3) *Subsection (1)* or *(2)* shall not apply if the lessor or owner of the property concerned has consented in writing to the inclusion of the provision referred to in *subsection (1)* or *(2)* in the proposals for the compromise or scheme of arrangement.

(4) In deciding, for the purposes of *subsection (2)*, whether the value of the property concerned is substantial, the matters to which the court shall have regard shall include the length of the unexpired term of the lease or hiring agreement concerned.

## Chapter 4

### Liability of third parties for debts of a company in examination

#### What this Chapter contains.

[545]. This Chapter contains provisions –

(a) specifying the effect on the liability of a person (under a guarantee or otherwise) to another person in respect of a debt of a company in examination under this Part where a compromise or scheme of arrangement takes effect in

relation to the latter;

(b) restricting the enforcement of that liability by that other person unless a certain procedure is employed; and

(c) providing for other matters relating to the foregoing (including a saver for cases falling within *section [520](4)(f)* or where, by operation of any rule of law, a discharge or release of the first-mentioned person's liability occurs).

#### **Definitions (*Chapter 4*).**

[546]. In this Chapter –

“creditor” shall be read in accordance with *section [547]*;

“debt” shall be read in accordance with *section [547]*;

“liability” shall be read in accordance with *section [547]*;

“third person” shall be read in accordance with *section [547]*.

#### **Circumstances in relation to which subsequent provisions of this Chapter have effect.**

[547]. Subject to *section [548](2)*, the subsequent sections of this Chapter have effect in relation to the following liability (the “liability”), namely the liability –

(a) of any person (the “third person”) whether under a guarantee or otherwise;

(b) in respect of a debt (the “debt”) of a company to which an examiner has been appointed that is owed to another (the “creditor”).

#### **General rule: liability of third person not affected by compromise or scheme of arrangement.**

[548]. (1) Notwithstanding *section [541](7)*, the liability shall not be affected by the fact that the debt is the subject of a compromise or scheme of arrangement that has taken effect under *section [542](3)*, but this is subject to *subsections (2) and (3)*.

(2) The third person and the creditor may provide in an agreement between them that the liability shall be so affected.

(3) Neither *subsection (1)* nor any of the subsequent provisions of this Chapter shall apply if the third person is a company to which an examiner has been appointed.

**Enforcement by creditor of liability: restrictions in that regard unless certain procedure employed to the benefit of third person.**

[549]. (1) If the creditor proposes to enforce, by legal proceedings or otherwise, the obligation of the third person in respect of the liability, then he or she shall—

(a) if 14 days or more notice is given of such meeting, at least 14 days before the day on which the meeting concerned under *section [540]* to consider the proposals is held, or

(b) if less than 14 days' notice is given of such meeting, not more than 48 hours after he or she has received notice of such meeting,

serve a notice on the third person containing the following offer.

(2) That offer is an offer in writing by the creditor to transfer to the third person (which the creditor is, by virtue of this section, empowered to do) any rights, so far as they relate to the debt, he or she may have under *section [540]* to vote in respect of proposals for a compromise or scheme of arrangement in relation to the company.

(3) If that offer is accepted by the third person, that offer shall, if the third person furnishes to the examiner at the meeting concerned, a copy of the offer and informs the examiner of his or her having accepted it, operate, without the necessity for any assignment or the execution of any other instrument, to entitle the third person to exercise the rights referred to in *subsection (2)*.

(4) However neither that transfer nor any vote cast by the third person on foot of the transfer shall operate to prejudice the right of the creditor to object to the proposals under *section [543]*.

(5) If the creditor fails to make the offer referred to in *subsection (1)* in accordance with that subsection, then, subject to *subsection (6)*, the creditor may not enforce by legal proceedings or otherwise the obligation of the third person in respect of the liability.

(6) *Subsection (5)* shall not apply if –

(a) a compromise or scheme of arrangement in relation to the company is not entered into or does not take effect under *section [542](3)*; and

(b) in either of those cases, the creditor has obtained the leave of the court to enforce the obligation of the third person in respect of the liability.

**Payment by third person to creditor post period of protection – statutory subrogation in favour of third person in certain circumstances.**

[550]. (1) This section applies where the third person makes a payment to the creditor in respect of the liability after the period of protection in relation to the company concerned has expired.

(2) Where this section applies any amount that would, but for the foregoing payment, be payable to the creditor in respect of the debt under a compromise or scheme of arrangement that has taken effect under *section [542](3)* in relation to the company shall become and be payable to the third person upon and subject to the same terms and conditions as the compromise or scheme of arrangement provided that it was to be payable to the creditor.

**Saving for cases falling within *section [520](4)(f)* and cases where third person discharged or released from liability**

[551]. Nothing in this Chapter shall affect the operation of—

- (a) *section [520](4)(f)*; or
- (b) any rule of law whereby any act done by the creditor results in the third person being discharged or released from his or her obligation in respect of the liability.

**Chapter 5**

Conclusion of examinership

**Cessation of protection of company and termination of appointment of examiner.**

[552]. (1) Subject to the provisions of that section, the protection granted by virtue of *section [520]* to a company shall cease—

- (a) on the coming into effect of a compromise or scheme of arrangement under this Part in relation to the company; or
- (b) on such earlier date as the court may direct.

(2) Where a company ceases to be under the protection of the court, the appointment of the examiner shall terminate on the date of such cessation.

**Revocation.**

[553]. (1) The company or any interested party may, within 180 days after the date of confirmation by the court, under *section [541]*, of the proposals in relation to the company, apply to the court for revocation of that confirmation on the grounds that it was procured by fraud.

(2) On such an application, the court, if satisfied that that confirmation was procured by fraud, may revoke the confirmation on such terms and conditions, particularly with regard to the protection of the rights of parties acquiring interests or property in good faith and for value in reliance on that confirmation, as it deems fit.

(3) As soon as practicable after the revocation under this section of such a confirmation, a certified copy of the order made by the court shall be delivered to —

- (a) the Registrar;
- (b) if the company to which the order relates is a company referred to in *section [510](2), (3) or (4)* - the Central Bank;
- (c) irrespective of whether it constitutes any of the foregoing kinds of company - the Director of Corporate Enforcement,

by such person as the court may direct.

### **Costs and remuneration of examiners.**

[554]. (1) The court may from time to time make such orders as it thinks proper for payment of the remuneration and costs of, and reasonable expenses properly incurred by, an examiner.

(2) Unless the court otherwise orders, the remuneration, costs and expenses of an examiner shall be paid and the examiner shall be entitled to be indemnified in respect thereof out of the revenue of the business of the company to which he or she has been appointed, or the proceeds of realisation of the assets (including investments).

(3) The remuneration, costs and expenses of an examiner which have been sanctioned by order of the court (other than the expenses referred to in *subsection (4)*) shall be paid in full and shall be paid before any other claim, secured or unsecured, under any compromise or scheme of arrangement or in any receivership or winding up of the company to which he or she has been appointed.

(4) Liabilities incurred by the company to which an examiner has been appointed that, by virtue of *section [529]*, are treated as expenses properly incurred by the examiner shall be paid in full and shall be paid before any other claim (including a claim secured by a floating charge), but after any claim secured by a mortgage, charge, lien or other encumbrance of a fixed nature or a pledge, under any compromise or scheme of arrangement or in any receivership or winding up of the company.

(5) In *subsections (3) and (4)*, references to a claim shall be deemed to include references to any payment in a winding up of the company in respect of the costs, charges and expenses of that winding up (including the remuneration of any liquidator).

(6) Subject to *subsection (7)*, the functions of an examiner may be performed by him or her with the assistance of persons appointed or employed by him or her for that purpose.

(7) An examiner shall, in so far as is reasonably possible, make use of the services of the staff and facilities of the company to which the examiner has been appointed to assist the examiner in the performance of his or her functions.

(8) In considering any matter relating to the costs, expenses and remuneration of an examiner the court shall have particular regard to *subsection (7)*.

### **Publicity.**

[555]. (1) An examiner or, where appropriate, such other person as the court may direct, shall, within 14 days after the date of delivery to the Registrar of every order made under *section [533], [541] or [553]*, cause to be published in the CRO Gazette notice of such delivery.

(2) Where a person fails to comply with this section, that person and, where that person is a company, the company and any officer of it who is in default, shall be guilty of a category 4 offence.

### **Hearing of proceedings otherwise than in public.**

[556]. The whole or part of any proceedings under this Part may be heard otherwise than in public if the court, in the interests of

justice, considers that the interests of the company concerned or of its creditors as a whole so require.

**Power of court to order the return of assets which have been improperly transferred.**

[557]. (1) Where, on the application of an examiner of a company that is under the protection of the court it can be shown to the satisfaction of the court that -

- (a) any property of the company of any kind whatsoever was disposed of either by way of conveyance, transfer, mortgage, security, loan, or in any way whatsoever whether by act or omission, direct or indirect; and
- (b) the effect of such disposal was to perpetrate a fraud on the company, its creditors or members,

the court may, if it deems it just and equitable to do so, make the following order.

(2) That order of the court is one requiring any person who appears to have the use, control or possession of such property or the proceeds of the sale or development of it to deliver it or pay a sum in respect of it to the examiner on such terms or conditions as the court sees fit.

(3) *Subsection (1)* shall not apply to any conveyance, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company to which *section [604]* applies.

(4) In deciding whether it is just and equitable to make an order under this section, the court shall have regard to the rights of persons who have *bona fide* and for value acquired an interest in the property the subject of the application.

**Reporting to Director of Corporate Enforcement of misconduct by examiners.**

[558]. (1) Where a disciplinary committee or tribunal (however called) of a prescribed professional body –

- (a) finds that a member of that body who is conducting or has conducted an examinership has not maintained appropriate records in relation to that activity; or
- (b) has reasonable grounds for believing that such a member has committed a category 1 or 2 offence during the course of conducting an examinership,

the professional body shall report the matter, giving details of the finding or, as the case may be, of the alleged offence, to the Director of Corporate Enforcement forthwith.

(2) If a professional body fails to comply with this section, it, and any officer of the body to whom the failure is attributable, shall be guilty of a category 3 offence.