

# Collection Manual

## Examinership Caseworking Guidelines

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# 1 Background/Legislation

Examinership is the process whereby an insolvent company petitions the court for protection from its creditors and seeks the appointment of an examiner in an attempt to restructure the company and secure an investment. It is an option available to insolvent companies as an alternative to liquidation or receivership, where certain criteria are met. The period of protection of the company will usually last 70 days from the date of issuing the court papers but can be extended to 100 days if the examiner is unable to formulate a scheme of arrangement, which will allow the company to survive after examinership, within the initial 70-day period. The Companies (Miscellaneous Provisions) (Covid-19) Act 2020 increased the maximum days to 150 days. The Act has been extended to 30<sup>th</sup> April 2022. Once the court makes an order appointing an examiner, no legal proceedings may be initiated against the company and creditors cannot collect any debt incurred by the company up to the date the petition papers are filed with the court.

## 1.1 Which Court deals with the Examinership

The size of the company will determine which court deals with the company. The High Court will deal with examinership applications except for a company that, in respect of the latest financial year ended prior to the date of presentation of the petition, fell to be treated as a small company, by virtue of Section 350 Companies Act 2014. In this case, the examinership application will be dealt with in the Circuit Court.

## 1.2 Conditions to place a Company into Examinership

Section 508-558 Companies Act 2014 deal with examinership. The main conditions that must be met when petitioning to place a company into examinership include:

- The company must be insolvent and unable to pay their debts as they fall due;
- There is no resolution for the winding up of the company and no order has been made for the winding up of the company;
- No receiver has been appointed within the previous 3 days to the company petitioning for the appointment of an examiner;
- The company has no obligations in relation to a bank asset that has been transferred to the National Asset Management Agency (NAMA), or if the company has such an obligation – (i) a copy of the petition has been served on that agency and (ii) the court has heard that Agency in relation to making of the order;
- There must be a reasonable prospect of survival of the company as a going concern.

### 1.3 Application Process

Examinership is initiated by a petitioner making an ex-parte application to either the High Court or Circuit Court. The majority of applications are made by the company, however, an application can be brought by the company, the directors, the shareholders or a creditor of the company. An ex-parte application is one where the petitioning party is present in court seeking various directions or emergency orders pending a full hearing at a later date. These include service of papers on the notice parties and advertising of the hearing.

Once the applicant issues papers to the court, the company will come under the protection of the court. The applicant may seek the appointment of an interim examiner pending a full hearing, if this is deemed appropriate. The applicant must convince the court that the appointment of an interim examiner is appropriate. Once court protection is granted to a company, a date is given by the Judge for a full hearing to appoint an examiner or, where an interim examiner has been appointed, confirm the appointment of the interim examiner over the company. The hearing normally takes place 1-2 weeks after court protection is first granted.

A legal notice is placed in two national newspapers and *Iris Oifigiúil*, advertising that a petition for examinership was presented in respect of the company/companies. The legal notice gives details of the date the petition was presented to the court, whether an interim examiner has been appointed and the date the petition will be heard in court. The legal notice gives creditors and other interested parties notice of the examinership and the hearing and allows them the opportunity to support or oppose the examinership. If a creditor wishes to object to the examinership, an objection must be raised on affidavit. This affidavit must be filed with the court and on the petitioner's solicitor in advance of the full hearing.

### 1.4 Papers Presented to the Court

The petition papers grounding the application for examinership are filed with the court by solicitors acting on behalf of the petitioner. Once the ex-parte application is granted, copies of these papers should be served on the notice parties as directed by the court. The petition papers include:

- (i) Petition seeking the appointment of an examiner;
- (ii) Grounding Affidavit sworn by the petitioner (usually, but not always, a director of the company)
- (iii) The Independent Expert Report (IER)

The IER and grounding affidavit normally contain certain information including background information on the company, the company's trading history, an outline of the circumstances which led to the petition being presented, a summary of the factors that indicates that the company has a 'reasonable prospect of survival' as a going concern, and that creditors are likely to receive a higher dividend in an examinership than in a liquidation or receivership.

It is a statutory prerequisite that every petition for examinership must include an IER, except in very limited circumstances, i.e. when the petition has been prepared in a very short timeframe. In the IER, the Independent Expert must give an opinion as to the company's prospects of survival and must exhibit projections to support his/her opinion. The IER should set out projected trading results:

- (i) for the period of examinership which should show the company can trade and pay its debts as they fall due, and;
- (ii) 12-month post examinership projections which should demonstrate that the company will be able to trade profitably once it successfully exits examinership.

All applicants have a duty to act in utmost good faith. The court, pursuant to Section 518 of the Companies Act 2014, may decline to hear a petition if there is a breach in this regard.

## 1.5 Notice Parties

The papers outlined above are served on a number of notice parties and Revenue is usually a notice party. Counsel for the petitioner will open the papers to the court. The court will hear from all creditors and interested parties who appear in court before making a decision whether to grant an order appointing an examiner.

## 1.6 Role of the Examiner

While the examiner is nominated by the petitioner, he or she is also an officer of the court and must act independently. The role of the examiner is to ensure the company continues to trade during the protection period while he or she attempts to secure investment and formulate proposals for restructuring the company to allow it to survive after the examinership concludes. The outcome for creditors must be better than in a liquidation or receivership.

The investment will provide a dividend to creditors and working capital into the company, if required. A successful examinership ensures the liabilities of the company are reduced to a sustainable level to enable it to survive as a going concern.

## 2 Role of the Insolvency Section before the appointment of an Examiner

When the Insolvency Section is notified about a company entering Examinership, a number of steps are taken:

## 2.1 Input stop

The following material is either exempt from or not required to be published under the Freedom of Information Act 2014.

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## 2.2 Contact Debt Management

The insolvency caseworker will contact the relevant segment in Debt Management to have all enforcement withdrawn and direct debits cancelled. Where relevant, a commonality check must be completed by the DM caseworker. The insolvency caseworker will request any background information on the company if this is available.

## 2.3 Contact Branch

The audit manager in the relevant branch will be contacted to check whether an audit or other intervention is underway or likely to be carried out.

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## 2.4 Review of company's compliance history

A review of the company's compliance history is carried out to determine Revenue's approach to the examinership;

- The number of times the company has been referred to enforcement;
- The liability owing to Revenue;
- Have returns been filed and paid on time?
- How long the company has been trading and the number of years it has been insolvent;
- Other directorships of the directors and the compliance of those companies;
- Review documents filed with the Companies Registration Office (CRO) for any useful information such as details of charges held by the bank on company assets or judgements registered against the company;
- The company's interaction with Debt Management. Where a company is in an instalment arrangement (Phased Payment Arrangement) or has applied for one, a copy of the PPA1 should be examined so ensure the details in the PPA1 are in line with the details outlined in the IER.

## 2.5 Review of the IER

Following a review of the company, the IER should be examined to ascertain whether the company has a reasonable prospect of survival. When examining the IER, the insolvency caseworker should consider the following:

- Has the Independent Expert (IE) had access to the books and records to make an informed decision?
- The reason for the company becoming insolvent;
- Can the company trade during the examinership period and pay all debts as they fall due?
- Are the figures on the cashflow projections realistic? Are the VAT and PREM payments in line with the returns previously filed by the company?
- How many employees the company has. The court will always consider this when confirming the examinership as one of the primary purposes of examinership is to save jobs.

Once the insolvency caseworker has reviewed all relevant information, he or she will submit a report to the line manager and the Revenue Solicitor's Division (RSD) advising them of the approach Revenue should take.

## 2.6 Neutral Position

Where the caseworker doesn't identify many issues with the IER and the company has been compliant, the court will be advised that Revenue is taking a neutral position and will monitor the examinership closely. Agreement must be reached between the insolvency caseworker and manager prior to advising the court.

## 2.7 Raising Concerns

Where Revenue is not objecting to an examinership but has a number of concerns, counsel representing Revenue will normally raise the concerns with the court, instead of filing an affidavit, but advise the court the examinership isn't being opposed. This will allow Revenue to raise the concerns again during the examinership.

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## 2.8 Opposing the Examinership

Opposing the examinership involves Revenue filing an affidavit listing the objections to the examinership. There are several reasons for objecting which can include:

- It appears to Revenue that the main reason the company has petitioned to the court for the appointment of an examiner is to avoid paying taxes;
- It appears to Revenue the company does not have a 'reasonable prospect of survival' on a going concern basis;
- The conduct of the company's directors in the past, along with the company's compliance history.

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## 2.9 Orders of the Court

Where an examiner is appointed by the court, a number of orders are made on the application of counsel for Revenue. One of the orders directs the company to file and pay their taxes as they fall due during the examinership period. Companies will usually comply with this order as failure to file and pay their taxes indicates that the company does not have a reasonable prospect of survival and may result in court protection being removed and the company being placed into liquidation/receivership.

If the company fails to comply with the order to file returns and make the necessary payments in respect of current taxes, the insolvency caseworker should immediately notify RSD, who will write to the solicitors acting for the company. If the non-compliance continues, Revenue may apply to the court to have the protection lifted from the company.

# 3 Role of the Insolvency Section during the Examinership

## 3.1 Establishing Revenue's claim

During the examinership, the insolvency caseworker must monitor the case closely. The caseworker will liaise closely with the examiner's office during this time. Unlike other creditors, Revenue will not be able to definitively establish its claim at the start of the examinership and therefore will require the company to submit all outstanding returns to Revenue.

The insolvency caseworker will write to the examiner requesting details of all taxes owing. The date of petition can be made at any point during the month which will normally be in the middle of a tax period. Where the petition occurs during a tax period, the insolvency caseworker will need to establish the portion of tax that is owing from the first day of the relevant tax period up to the day before protection was granted (pre-petition) and the taxes owing from the date protection was granted until the end of the relevant tax period (post-

petition). For the VAT liability, the pre-petition period will often be the month prior to the date the company petitioned for examinership.

### 3.2 Section 62A VATCA 2010

The insolvency caseworker will also ask for details of any liability that may occur under Section 62A VATCA 2010. This liability may arise post examinership as a result of the write down in payments to creditors where a VAT deduction on the payment has been claimed by the company prior to, or during, the examinership.

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### 3.3 Pre-petition/Post-petition Liabilities

The insolvency caseworker will monitor all returns falling due during the examinership period. For the tax period in which the examinership falls, only the post-petition taxes must be paid in full. The pre-petition taxes in that period form part of Revenue's claim. For example, court protection was granted on the 14<sup>th</sup> of the month. The company is required to pay the taxes owing from the 14<sup>th</sup> – 31<sup>st</sup> of the month. The taxes owing from the 1<sup>st</sup> – 13<sup>th</sup> of the month form part of Revenue's claim.

### 3.4 VAT Refund

Where the company is in a VAT refund position in the period in which the examinership falls, the sales and purchases must be split between pre and post-petition. This could result in a refund for the pre-petition and a liability for the post-petition. In this case the company is obliged to pay the liability owing on the post-petition in full and the pre-petition refund is offset against other pre-petition debts.

VAT refund example –

Total VAT on Sales	€10,000
Total VAT on Purchases	€15,000
Total VAT refund	€ 5,000
Pre-petition VAT on sales	€ 4,000
Pre-petition VAT on purchases	€11,000
Pre- petition VAT refund	€ 7,000
Post-petition VAT on sales	€6,000
Post-petition VAT on purchases	€4,000
Post-petition VAT due	€2,000

The company is obliged to pay Revenue €2,000 and €7,000 will be offset against other debts due.

## 4 Role of DMS during Examinership

### 4.1 Commencement of the Examinership

When the Insolvency Section is notified that a company has petitioned for examinership, the insolvency caseworker will contact the relevant segment in Debt Management to have all enforcement withdrawn and direct debits cancelled. Where relevant, a commonality check must be completed by the DM caseworker. The insolvency caseworker will look for any available background information on the company.

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## 5 Duties of the Examiner during Examinership

The period of an examinership usually lasts 70 days, which can be extended by application to the court to 100 days if the examiner is unable to formulate proposals for a scheme of arrangement within the initial 70-day period. The Companies (Miscellaneous Provisions) (Covid-19) Act 2020 increased the maximum days to 150 days. The Act has been extended to 30<sup>th</sup> April 2022. During this time the examiner must carry out statutory duties set out in the Companies Acts. This includes conducting an examination of the company's affairs with a view to formulating proposals for a scheme of arrangement, laying the proposals for a scheme of arrangement before the creditors for approval and, finally, presenting the scheme to the court for its ultimate approval. The examiner is also required to report periodically to the court during the examinership on the affairs of the company and the progress he or she has made in respect of formulating proposals during the protection period.

While an examiner is an independent person appointed by the court, a significant amount of the examiner's time involves working with the directors, employees and suppliers of the company to ensure its ability to continue trading successfully. The examiner must monitor the cash flow of the company throughout the protection period to ensure the company trades in accordance with the projections furnished to the court at the petition stage. The examiner must be able to show the court that, based on the trade of the company during the protection period, the company has a reasonable prospect of survival as a going concern.

### 5.1 Day to Day responsibility for running the Company

During the protection period, the day to day responsibility for running the company lies with the directors. The examiner will only take on those responsibilities where he or she is directed to do so following a court order.

### 5.2 Initial Protection of the Court is 35 days

The protection of the court is initially for 35 days following the presentation of the petition. At day 35 (or such other date as the court may order), the examiner is required to prepare a report to the court, outlining details of the work carried out during the examinership, along with details of the trading of the company. This report must be made available to any notice party listed at the start of the examinership. Revenue is usually a notice party in an examinership and will receive a copy of the report. It is highly unlikely an examiner will have the scheme of arrangement formulated by day 35 and will usually return to court and seek an extension to day 70 of the protection period.

When Revenue receives the report accompanying an application by the examiner to extend time, the insolvency caseworker must review the report to ensure Revenue is satisfied to allow the protection to remain in place. The insolvency caseworker will instruct the RSD accordingly and if there are no major issues, counsel for Revenue will advise the court that Revenue has no objections to the extension of time application.

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### 5.3 Extended Protection of Court for 70 Days

At day 70 of the examinership, an examiner must return to court to present his or her scheme of arrangement or to seek an extension of time up to day 100. This stage of the examinership is similar to what happens at day 35. A report must be presented to the court and sent to all notice parties. At this stage, an examiner should have an investor secured or an interested party willing to invest.

### 5.4 Extended Protection 100 days or 150 days

Once the extension of time to day 100 has been granted, an examiner must formulate the scheme of arrangement and hold the creditors meetings. During the interim period under The Companies (Miscellaneous Provisions) (Covid-19) Act 2020, the maximum extension of time is 150 days. An examiner must present his or her final report containing the proposals for a scheme of arrangement, which the creditors have voted upon, to the court no later than 100/150 days after the presentation of the petition. The hearing to confirm the scheme of arrangement may, however, take place after that 100/150-day period has elapsed.

### 5.5 Examiner's Report for the Court

An examiner is required to formulate proposals for a scheme of arrangement in respect of the company within the given timeframe of 35-150 days. (During the interim period as set out in The Companies (Miscellaneous Provisions) (Covid-19) Act 2020, the maximum days to formulate the scheme is temporarily extended to 150 days. The Act has been extended to 30th April 2022.) If he or she is unable to do so within that timeframe, he or she must apply to court to extend the time for the presentation of such proposals. Each application for an extension of time must be accompanied by a report to the court outlining the work completed by him or her, including a summary of the trading results of the company along with details of the work undertaken in securing investment into the company.

The case is generally listed for hearing on the following occasions:

- for the appointment of the examiner/confirmation of the appointment of the interim examiner;
- on day 35 of the examinership (or such other day as the court may order);
- on day 70 of the examinership, and;
- for the hearing to either confirm or refuse the scheme of arrangement.

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## 6 Scheme of Arrangement

A scheme of arrangement is a statutory compromise or arrangement, under S.534 to S.541 of Companies Act 2014, between a company and its creditors or members for a payment of a dividend in an examinership.

The scheme of arrangement is formulated by the examiner once he or she has secured investment which is a requirement of the examinership. The investment is used by the examiner to pay their fees, pay some form of dividend to the different classes of creditors and as working capital in the company if required.

### 6.1 Securing Investment

To secure investment, the examiner will normally place an advertisement in a national newspaper. Interested parties will have to sign a **Non-Disclosure Agreement (NDA)** before any details of the company are provided. Once the NDA is signed, the potential investor will receive an Information Memorandum from the examiner giving high level information relating to the company. Each interested investor is given the opportunity to submit an investment proposal. The examiner is required to review each proposal and, if a decision hasn't been reached, the examiner may invite more than one interested party to carry out due diligence. Once completed, the examiner will choose the investor who offers the best result for the creditors of the company.

Once the preferred investor is chosen, the examiner will formulate a scheme of arrangement. Formulating the scheme of arrangement will involve the examiner determining how the investment will be utilised. The examiner must determine what level of dividend can be paid to each class of creditor and whether any of the investment will be required for working capital for the company once they successfully exit examinership.

### 6.2 Class of Creditor

There are several different classes of creditors in every examinership, for example secured creditor, retention of title creditor, unsecured creditor etc. Revenue usually has a liability in up to four classes – Super-preferential, Preferential, Contingent Preferential and Unsecured.

- **Super-preferential** is the employee's portion of all unpaid PRSI.
- **Preferential** is PAYE/employer PRSI/USC for the previous 12 months from the date of the examinership, highest CT liability where there is a liability owing for more than 1 year, RCT for the previous 12 months from the date of the examinership and VAT for the previous 6 months ending in the period prior to the date of examinership.
- **Contingent Preferential** is any VAT due under Section 62A VATCA 2010.

- **Unsecured** is PAYE/Employer PRSI/USC owing for more than 12 months prior to the date of examinership, CT not included in Preferential class, RCT owing for more than 12 months prior to the date of examinership and VAT owing for the VAT period in which the Examinership falls in (up to the date of examinership) and any owing for more than 12 months prior to the date of examinership.

### 6.3 Dividends

In an examinership, all creditors should receive a higher dividend than they would expect to receive if the company was placed into liquidation or receivership. The typical scheme will usually involve a secured creditor receiving most, if not all, of the debt owing to them, however the repayment terms may be restructured in some way e.g. payable over a longer period, reduction in interest payable etc. It should be noted that a secured creditor's debt can only be written down to the value of the underlying security it holds.

### 6.4 Conditions for a Successful Scheme

For the scheme of arrangement to be successful, at least one class of creditor who is impaired by the scheme must vote to accept the scheme before it can be laid before the court for approval. A creditor is impaired if the debt due to them is reduced by the scheme, or if that debt is repayable on terms which are less favourable to the creditor.

The proposals must not unfairly prejudice the creditors of the company. This means an examiner must ensure each class of creditor will fare better under the proposals he/she has formulated than they would in a liquidation or receivership scenario.

### 6.5 Meeting of Creditors

Following the formulation of the scheme of arrangement, the examiner will convene meetings for all classes of creditors. A notice of the meeting is issued to each creditor, together with a copy of the scheme of arrangement. A separate meeting is convened for each class of creditor. The meetings give every creditor who wishes to attend (either in person or by proxy) the opportunity to ask questions of the examiner relating to the scheme of arrangement prior to voting on the scheme of arrangement.

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### 6.6 Reviewing the Scheme of Arrangement

Before attending the meeting and voting on the scheme, the insolvency caseworker will review the scheme of arrangement. The caseworker reviews the expected dividend and the write-down. The insolvency caseworker will speak with management and agree Revenue's position in respect of the scheme.

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## 6.7 Contingent Creditor

Occasionally, there may be an ongoing audit that is not finalised by the end of the protection period. Any liabilities arising from the audit should be clearly included in the scheme of arrangement. The scheme should refer to the tax, interest and penalty. Where the audit liability hasn't been established, a provision should be included in the scheme for some form of payment of any liability arising from the audit.

## 6.8 Voting in favour of a Scheme

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## 6.9 Opposing a Scheme

The following material is either exempt from or not required to be published under the Freedom of Information Act 2014.

[...]

The main reasons for opposing the scheme are:

- Revenue is unfairly prejudiced by the scheme i.e. Revenue would receive a higher dividend in a liquidation or receivership;
- Revenue does not believe that the scheme provides for a reasonable prospect of the company's survival;
- Revenue is of the opinion that there has been serious non-disclosure of material facts.

In certain examinership cases, Revenue may seek the opinion of their own Independent Expert to determine whether the company has a prospect of survival after the examinership.



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## 6.10 Report to the Court of the Creditors' Meeting

Once all attendees at the various creditors' meetings have considered and voted on the scheme, the examiner must present a report to the court on the outcome of the meetings and setting out any modifications of the proposals adopted at the meetings. This report is designed to indicate to the court the views of the various classes of the company's creditors. It will be up to the court to approve the scheme of arrangement.

## 6.11 Court Approval/ Disapproval of Scheme

Once the court has heard from all parties present at the hearing, the court will make the final decision on whether to approve or reject the scheme. Where the court approves the scheme, Revenue must accept the dividend provided for in the scheme. If the court refuses to confirm the scheme, it will be rejected and the company will be placed into liquidation or receivership.

# 7 Conclusion of Examinership

When the scheme of arrangement has been approved by the court, the court will order the date on which the scheme will become effective ("the effective date"). The effective date is the time at which the scheme of arrangement becomes binding on all parties affected by the scheme. This is usually the same day on which the scheme is approved by the court. At the effective date, court protection is removed, and the examiner's role will cease. Payment to all creditors must be made within the timeframe outlined in the scheme of arrangement. This is normally within 30 days of the effective date.

## 7.1 Dividend Payments Received

Normally Revenue will receive the dividend payment 30 days after the effective date has lapsed. When the dividend payment is received, the insolvency caseworker will advise the CG's Payment and Accounts Section as to which tax periods the payment should be offset against. This will depend on the percentage of dividend being paid under each class of creditor.

## 7.2 Write-Outs

Once the full payment has been allocated, the insolvency caseworker will arrange to have the balance of the debt written-out. This debt is never collectable.

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### 7.3 Debt Management post Examinership

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### 7.4 Removal of Protection

If, at any time during the 100/150 days, the examiner believes the company no longer has a reasonable prospect of survival as a going concern or the examiner is unable to secure investment, he or she must return to court immediately to have protection removed. If this happens, the company will be placed into liquidation or in circumstances where the petition was presented in response to a receiver being appointed, be placed in receivership.

### 7.5 Liquidation

Where court protection is lifted, a liquidator must be appointed. If the examinership is dealt with in the High Court, a liquidator can be appointed at the time the court protection is withdrawn. On occasion, the liquidator appointed will be the court appointed examiner.

Where the Examinership is dealt with in the Circuit Court, a liquidator cannot be appointed straight away as the Circuit Court does not have jurisdiction to appoint liquidators. An application must, therefore, be made to the High Court to have a liquidator appointed or, alternatively, the company may elect to hold a creditors' meeting to appoint a voluntary liquidator. The onus is on the company to have a liquidator appointed.

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## 8 Causes of Examinership Failing

There are a number of reasons why an examinership might fail:

- That it has become apparent to the examiner that the company no longer has a prospect of survival on a going concern basis;
- The projections outlined in the IER have not been met and the company is unable to pay their debts as they fall due;
- The examiner is unable to secure investment to formulate a scheme of arrangement;

- A creditor has concerns during the examinership and successfully objects to an extension of time being granted by the court;
- The Judge refuses to grant the application to appoint an examiner.

As outlined above, where it becomes apparent there is no prospect of survival or the examiner fails to secure investment or formulate a scheme of arrangement, the examiner must return to court at the earliest opportunity and apply to have the protection removed. This will result in the company being liquidated or (in circumstances where the petition was presented in response to a receiver being appointed) being placed in receivership.