



Client Update

In the matter of Gallium Limited (trading as the First Equity Group) (Under the Protection of the Court) Supreme Court Judgment 2 February 2009

By order dated 20 January 2009, the Supreme Court, in the first case on examinership to come before it in over 10 years, allowed an appeal against the order of the High Court dated 13 January 2009 (McGovern J) which refused the petition of Gallium Limited (trading as the First Equity Group) (under the protection of the Court) for the appointment of an examiner and appointed Mr Kieran Wallace of KPMG as examiner of the Company. The Supreme Court delivered its reasoned judgment on 3 February 2009.

Contrary to expectations and despite having the opportunity to do so, the judgment does not provide any detailed guidance in relation to what must be contained in the independent accountant's report (the "IAR").

Whilst the judgment has not formally raised the bar in relation to the requirements of the IAR, it is possible, in light of comments made by the Supreme Court at the hearing, that the bar may be raised in the future. If this happens, it is likely that the independent accountant will have to include more detail than has been the practice to date in relation to the basis for his conclusions. The prudent approach would be to ensure that the court can be satisfied that the conditions identified by the independent account as being essential for the survival of the company (whether as regards the internal management and controls of the company or otherwise) are achievable and, where possible, that the IAR gives evidence as to whether there is a reasonable prospect of those conditions actually being satisfied.

In the present case, in allowing the appeal against the order of the High Court, the Supreme Court was influenced by additional evidence which was placed before it on appeal and the fact that no creditors were now opposing the petition.

In line with previous case law, the judgment notes the following:

- The onus of proof is on the petitioner to establish that there is a reasonable prospect of the survival of the company and the whole or part of its undertaking as a going concern.
- A reasonable prospect of survival test does not require probability of survival to be established.
- Even if the petitioner establishes that there is a reasonable prospect of survival, the court retains a discretion in relation to the appointment of an examiner and can refuse the application.
- In exercising its discretion, the court should take into account all relevant interests (including the interests of creditors and employees) and not just the fact that the independent accountant has concluded that examinership would be more advantageous to the members/creditors as a whole than a winding up of the company.

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