

Corporate Recovery Group

SIAC Examinership: Nature of Unfair Prejudice

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The Supreme Court has laid down criteria for assessing unfair prejudice in examinership cases in a recent decision delivered 8 April 2014.

Relevant Factors

In *SIAC Construction Limited and Others (In Examination) [2014, IESC 25]* a creditor of the SIAC Group appealed the Examiner's proposed scheme of arrangement ("Scheme") on the basis it was unfairly prejudicial to its interests. It was found by the Supreme Court that in assessing unfair prejudice under a Scheme a wide range of potentially relevant factors must be taken into account. Such factors include the prejudice potentially caused to other creditors and employees if the Scheme is not approved.

Main Points

- 1 The Court has the power to hear submissions made by an investor in relation to a Scheme. This is particularly the case where any proposed modification of the Scheme may cause the investor to withdraw its funding.
- 2 The notion of unfair prejudice to a creditor under a Scheme must be considered from at least two points of view:
 - (a) Whether they are unfairly treated in comparison to how they would fare in a liquidation; and
 - (b) Whether they are unfairly treated by comparison to other creditors.
- 3 Showing that a creditor is prejudiced is not sufficient for the Court to refuse to confirm a Scheme. The prejudice must, in addition, be unfair.
- 4 In considering if a Scheme is unfair the Court will take into account all relevant factual circumstances affecting the objector. This will include factors which may favour the objector and counterbalance any prejudice.
- 5 The Court must also consider the potential prejudice caused to other creditors and employees if a Scheme is not approved.

Implications

Interested parties considering objecting to the confirmation of a Scheme should be mindful that the Court, in assessing whether a Scheme is unfairly prejudicial, will take into account the totality of the objector's circumstances. It is not, therefore, sufficient for an objector to simply distinguish itself from other similar creditors. Rather, it should go further to show that the effect of the Scheme as a whole is unfairly prejudicial and amending or refusing to confirm the Scheme will not result in unfair prejudice to other creditors or employees.

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