



Abercorn House  
57 Charleston Road  
Ranelagh Dublin 6

TEL: +353 1 497 5859  
FAX: +353 1 497 7782  
email [info@ryanandcrowley.com](mailto:info@ryanandcrowley.com)

## in this issue...

tax briefs [page 3](#) • sole trader retirement [page 4](#)  
business briefs [page 5](#) • is my company insolvent? [page 6](#)  
legal briefs [page 7](#) • credit review office [page 8](#)

### Positive Thinking, Yes or No

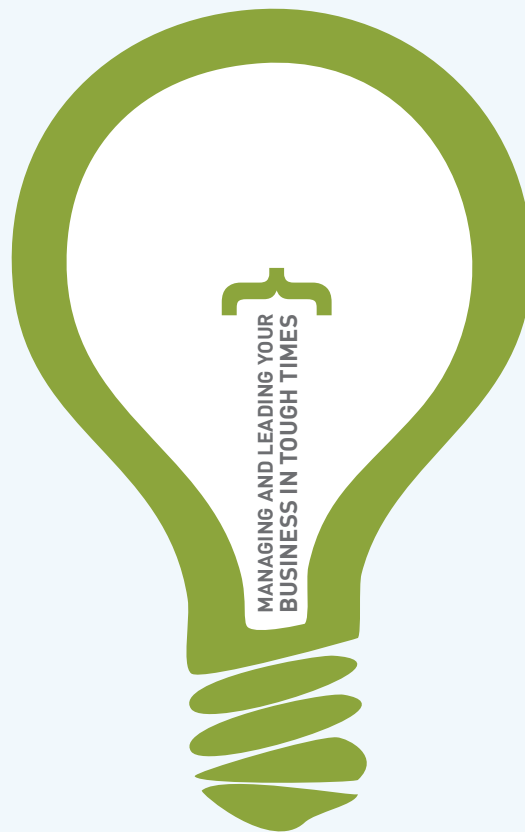
It's Wednesday morning, about 11 o'clock, your bank manager rings and asks,

"Will you be making a lodgement today - you are right up against your overdraft facilities and there are several cheques to clear by close of business?"

You get that feeling in your stomach which only those who have been there know about. Just then, out of the corner of your eye, you spot an article in a business magazine entitled "Positive Thinking" and you say to yourself,

"What good is "Positive Thinking" in my situation - I can't lodge "Positive Thinking" to my current account?"

[➔ more...](#)



# POSITIVE THINKING

You are of course correct – you cannot bring “Positive Thinking” to your local bank and use the funds to run your business or pay creditors. However, from another perspective, you are making an error of judgement which is detrimental to businesses large and small. You are focusing on the end rather than the means – focusing on the cash problem today rather than the means by which you ended up in this situation. “Positive Thinking” is pretty useless here – in fact it’s delusional.

In tough times, and particularly in crisis situations, there is a tendency for our attention and energy to be drawn towards the end objective e.g. winning more customers, retaining existing ones, maintaining margins or, in the example above, dealing with a cash problem. There is a law of cause and effect and it is operating whether we like it or not. Everything has a reason. The reason why businesses face challenges (effect) is because of actions or decisions taken previously (cause). “Positive Thinking” operates on the causes – the law of cause and effect takes care of the results (be they good or bad)! So for those of us who dismiss the notion of “Positive Thinking”, or who place little value on it, have a look at where ‘Positive Thinking is being applied - on the end result or what brings on the end result.

## “Yes We Can”

“If you believe you can do it you are right, if you believe you can’t do it, you are also right” is advice often offered to those in business. It has never been more appropriate. The notion of “doing it” and at the same time believing you are “not capable of doing it” makes no sense. Ask yourself what the chances are of winning a significant new client or taking your business to new levels of customer service or profitability, if you don’t believe you are capable of delivering. Now add to this the fact that your competitors have the self belief required and you don’t. Bill Gates said it best,

## “You’re toast!”

Get a transcript of President Obama’s famous acceptance speech in Chicago in Jan 2009 and replace all the utterances of “Yes We Can” with “No We Can’t”. Now revisit the question in the preceding paragraph. There really is only one conclusion: Getting the job done without self belief or “Positive Thinking” is practically impossible.

In order to cultivate the “Yes We Can” approach to our business lives we need to make efforts in that direction. In his 1958 essay “As a Man Thinketh”, James Allen describes our minds being very like gardens – they either grow beautiful flowers or ugly weeds (for flowers read “positive thoughts”, for weeds read “negative thoughts”). Staying with the garden analogy, if we don’t cultivate and plant flowers, weeds will grow by themselves: doing nothing is not an option – we must tend to our flowers (some gardening required) or weeds will arise by default. Practically speaking what does that mean? How do we cultivate flowers (“Positive Thinking”)? Here are a few ideas.

1. Drop the excuses and take responsibility. There will always be someone else to blame (the economy, the Government, business partners, employees, weather, Colonel Gadaffi – the list is endless). It’s not the situation we’re in that determines success, but how we deal with it.
2. Surround yourself with the best of company. Spend time with people who are upbeat, positive and hopeful – “Positive Thinking” is infectious.
3. Read and listen to voices which display hope rather than despair. There is an abundance of material available on “Positive Thinking”. Make an effort to read some of it and replace some of the energy-sapping stories in the media, with tales of success and achievement.
4. Be grateful for what you have and who you are. Gratitude changes your view of the world completely.
5. Think and dream big : look at a longer time frame, a bigger market, hiring the best people.

The next time the bank manager rings looking for a lodgement, deal with it there and then, but resolve in your own mind to replace this particular weed with a stunning orchid.

[doncullinane@ologycoaching.com](mailto:doncullinane@ologycoaching.com)



## ELECTRONIC FILING

Revenue produced a consultation document in July 2010 which outlined the proposed extension of mandatory electronic filing and payment for certain tax returns and liabilities. The new filing arrangements are to be included in regulations to be issued by Revenue in the coming weeks, but are likely to be introduced from 1 June 2011 and 1 October 2011 as follows:

Returns/payments due on, or after 1 June 2011, must be made on-line by:

- All companies
- All trusts
- All partnerships
- Individuals filing stamp duty returns in respect of instruments executed on, or after 1 June 2011
- Individuals or companies filing a return of payments to third parties (Form 46G)
- Individuals subject to the higher earners restriction
- Individuals benefiting from, or acquiring, Foreign Life Policies, Offshore Funds or other Offshore products.
- Individuals claiming a range of property based incentives (Residential Property and Industrial Buildings Allowances)

Returns/payments due on, or after 1 October 2011, must be made on-line by the following categories of persons/ businesses where they are not already the subject of such a requirement:

- Employers with more than 10 employees

Revenue will now commence a process of writing to individuals/business advising them of the obligations that will apply from, 1 June 2011 or, 1 October 2011, and of the steps that need to be taken to ensure compliance from the appropriate dates.

## TAX TIP

If you have capital gains tax losses the only way to unlock the tax advantage is to offset the losses against a capital gain. To that end it is worth taking a look at your investment portfolio to see if it can be re-organised to yield capital gains as against deposit interest which is taxable at a marginal rate of 55%. By utilising the capital losses, you can enjoy the gains tax free.



## CAPITAL ACQUISITION TAX

Finance Act 2011 has further reduced the lifetime limits for tax free gifts and inheritances as follows:

Relationship of beneficiary to donor/testator	Group threshold	
	2010	2011
<b>Group A:</b>		
Child of disponent, Minor child of a deceased child for inheritances only or parent of the disponent	€414,799	€332,084
<b>Group B:</b>		
A linear ancestor/descendant Brother sister, or child of a Deceased brother or sister of disponent	€41,481	€33,208
<b>Group C:</b>		
Any other person	€20,740	€16,604

While the value of the tax-free thresholds have dropped, it still is an opportune time to transfer assets to the next generation as property values are currently at an all time low.

## PAY AND FILE SUMMARY

The following is a summary of upcoming pay and file dates:

### Income Tax

Filing date of 2010 return of income	
- (self-assessed individuals)	31 October 2011
- (non self-assessed individuals)	30 September 2011

Pay preliminary income tax for 2010	
- (self-assessed individuals)	31 October 2011
- (non self-assessed individuals)	30 September 2011

### Capital Gains Tax

Payment of Capital Gains Tax for the disposal of assets made from 1 January 2011 to 30 November 2011	15 December 2011
--	------------------

### Corporation Tax

Filing date for Corporation Tax returns for accounting periods ending in August 2010	21 May 2011
--	-------------

Balancing payment of Corporation Tax for accounting periods ending in August 2010	21 May 2011
---	-------------

# SOLE TRADER RETIREMENT

## IF PROFESSIONALS OR SOLE TRADERS WANT TO FUND FOR RETIREMENT WHAT SHOULD THEY DO?

The recent Finance Act 2011 makes bewildering reading for sole traders and professionals who rely primarily on private earnings to fund for retirement. So-called high earning self-employed individuals be they doctors, dentists, GPs, accountants, legal practitioners or trades-people, are now limited to making pension contributions from income up to €115k pa. So, from a pension funding perspective €115k pa is the new rich!

Furthermore, any other pensionable income (such as employment income) makes up the first part of this €115k cap, resulting in little, or indeed no, scope for pension funding on sole trader income.

To add to the pain, the new Universal Social Charge (USC) is now payable on all Self-employed income over €16,016 @ 7% and @ 10% for earnings over €100,000 pa. (with no deduction for pension contributions). With the State Contributory Pension retirement age being pushed out to 68 from 2028, dreams of alternative property-based retirement plans are evaporating - it's very clear that there's a long working road ahead of us all.

The question that should be asked by every self-employed high-earner is simple:

## WHAT STEPS CAN I TAKE TO FUND A DECENT RETIREMENT LIFESTYLE (AND BEFORE I REACH 68)?

### A preferred solution

Many professionals within the private sector fund their pension schemes predominantly by employer paid contributions and can fund annual pensions for directors / employees up to 2/3rds of pre-retirement earnings.

### Employer funding

The benefits of employer pension-funding are simple and fundamental

- Employer paid pension contributions are exempt from benefit-in-kind, resulting in no PRSI and USC liability.
- €115,000 earnings ceiling does not apply to employer paid contributions.
- Employer-funded schemes may produce much higher levels of retirement benefits of up to the €2.3M threshold.

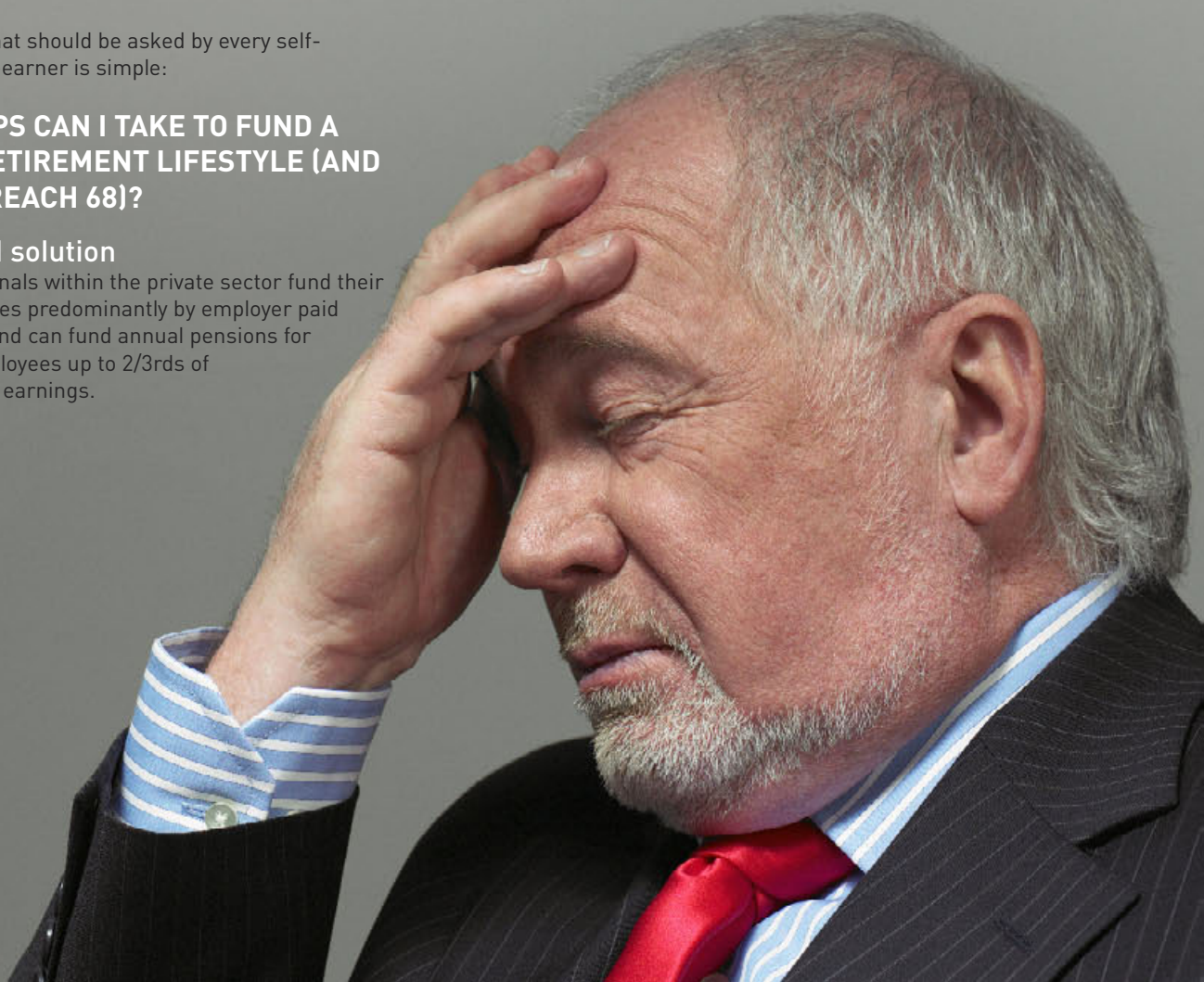
The key focus must now be to ensure that pension funding, where possible, is made by way of employer contributions, rather than by employee or self-employed funding.

### Recommendation

Carry out a Structural Review

One way of achieving this benefit is to review and assess the merits of incorporation. Incorporation may not be feasible, nor the best answer for all professionals. None the less, incorporation can provide significant other benefits. Pension funding and not being required to pay a 55% combined tax rate, genuinely make a difference.

Call us if you wish to discuss this further.



## €10M MEDTECH ACCELERATOR FUND

Kernel Capital has launched the €10M Bank of Ireland MedTech Accelerator Fund – Ireland’s First seed fund to focus exclusively on the indigenous medical technology sector. With investments ranging from €100,000 to €500,000, the fund is focused on export-orientated, high potential start-up life science companies operating in the medical device, diagnostics or medical / laboratory sectors. The launch of this fund marks the introduction of NUI Galway as an investor with Kernel Capital, joining its strategic alliance partners the University of Limerick, as well as Bank of Ireland and Enterprise Ireland. The MedTech Accelerator Fund will operate synergistically with other Funds Managed by Kernel Capital, including the Seroba Kernel Life Sciences Fund, which typically invests in the €2M to €5M range in later stage projects.

## EXCEL AT EXPORT SELLING WORKSHOP

Enterprise Ireland has developed a series of workshops aimed at rapidly embedding the proven tools of best international selling practice into Irish companies looking to upskill for export growth.

The Excel at Export Selling workshops have a single-topic-focus. The 2011 series maintains a deliberate focus on the three fundamental building blocks of successful international selling:

- Developing a Compelling Customers Value Proposition
- Following a Systematic Repeatable Sales Process
- Executing a Well-Defined Route-to-Market Strategy

In addition, it has been expanded to offer new topics such as Building a Competitive Intelligence Mindset in your Company and Doing Business in Different Cultural Environments. Each workshop is one day in duration and offers an individual company a follow-up session with expert facilitators.

For dates of forthcoming workshop visit 'Featured Events' at [www.enterprise-ireland.com/Events](http://www.enterprise-ireland.com/Events)



## INCREASED PERFORMANCE RELATED PAY

Irish Businesses are planning to make performance-related pay a key part of their 2011 plan, matching rewards with real results, according to a survey by Regus, the office accommodation specialist. In Ireland, firms' top New Year's resolutions were to reduce operating overheads, introduce more performance-related pay and add new staff.

"Business attitudes for 2011 show a gritty determination to go for growth and ride the wave of global economic development, but tolerance for any kind of "jobsworth" attitude is in freefall," commented Michael Barth, Regional Manger Northern Europe Regus. He added that staff, especially in small to medium sized enterprise where all will have to make measurable contributions to revenue growth, should expect, at least in part, to be rewarded accordingly.

## LANDMARK PATENT DEAL ACROSS EU 25 COUNTRIES

Small firms will find it easier to protect their inventions from copycats after a landmark deal in Brussels which paves the way for an EU-wide patent. The breakthrough comes after more than a decade of political wrangling and promises to cut the cost of patenting products in Europe. It will also radically reduce the amount of red tape faced by Irish based exporters keen on selling their wares in several European countries. At present, the cost of filing patents in Europe is significantly higher than in the US and Japan because innovative firms must secure patents in each of the countries where they want to do business. This means hefty legal and translation costs, as well as a degree of legal uncertainty arising from inconsistent interpretations of national patent law by individual national courts.

The EU could soon have an EU wide patent supported by a single European patent court which will settle intellectual property disputes. Until now, Italy and Spain have insisted that patents be translated into their languages, but a new compromise agreed by the majority of countries will see patents translated into English, French & German with machine translation for other Languages. This enhanced cooperation means the 25 Countries which agree on a new unified patent regime will press ahead and others can join later if they wish

# IS MY COMPANY **INSOLVENT**?

## WHAT ARE MY OPTIONS?

In the current economic climate a lot of directors are continuing to trade their companies whilst remaining unsure of their solvency position. There may be severe repercussions for directors who do not seek to clarify their position. In fact, they may be trading recklessly and therefore leaving themselves open to liability for the debts of the company.

There are two main tests to determine whether a company is insolvent or not.

- 'The balance sheet' test for insolvency
- 'The cash flow' test for insolvency

### The Balance Sheet Test

If the company's liabilities are greater than its assets it is deemed insolvent as per the balance sheet test. A crucial matter to consider is whether an estimation of "market" value and "depreciated book" value are significantly different. Furthermore it should be noted that a business and its assets are more valuable as a going concern than when subject to a forced sale

### The Cash Flow Test

If the company is unable to pay its debts as they fall due, it is deemed insolvent as per the cash flow test. Section 214 of the 1963 Companies Act is the key piece of relevant legislation. In summary, it states that where a company that owes a sum exceeding €1,269.74 (which is undisputed and has been served a 21 day notice to pay the debt) and has failed to satisfy the demand then a court is likely to deem that the company is insolvent.

Alternatively, the company may be deemed insolvent if it is proved to the satisfaction of the court that the company is unable to pay its debts, and in determining whether a company is unable to pay its debts, the court takes into account the contingent and prospective liabilities of the company.

Any company receiving a '21 day' letter from a creditor should treat it very seriously, and should seek professional advice. It is possible that if the company subsequently goes into liquidation, that the Section 214 letter will be used as evidence that the company was insolvent at a specific point in time, and that the directors traded "recklessly" beyond that date - directors could be held personally liable for the debts of the company.

If a creditor decides to proceed with a High Court Petition to wind up the company, and if the company is insolvent and is no longer viable, then it is better for the directors to immediately cease trading, and to place the company into a creditors voluntary liquidation. Company directors who oblige creditors to petition the High Court face a greater possibility of being restricted, pursuant to the Provisions of Section 150 of the 1990 Companies Act. They may also face greater costs.

If you believe that you may be trading while insolvent, it is vital that the board of directors take professional advice to assess the options available to the business. The company will need to swiftly address the insolvent position and protect the interests of creditors.

Even though insolvent, there may still be options open to save a company provided that there is a viable business to be saved.

#### Consider the following indicators of a viable business:

- Does the Company have a profitable order book?
- Does the Company have adequate production facilities?
- Does the Company have supplier co-operation?
- Does the Company have bank/shareholder support?
- Does the Company have customer support?
- Does the Company have a good product / brand name?
- Does the Company have an identifiable market position?

#### Consider the following indicators of a non-viable business:

- Industry over capacity
- Competitor price cutting
- Market collapse
- High fixed cost basis
- Long term loss making contracts
- Old, obsolete plant

If you believe you have a viable business (even though insolvent), then the following are the courses of action to be considered:

- Informal Schemes of Arrangement
  - Section 279 Schemes (binding if 75% of creditors agree in number and value)
  - Section 201 Schemes (binding if approved by court)
- Examinership
- Creditors Voluntary Liquidation
- Involuntary or "High Court" Liquidation
- Receivership

The earlier corrective action is taken, the better chance a viable business has of regenerating business growth.

## LIMITING THE LIABILITY OF EXAMINERS

### Limiting the liability of examiners: recent decision February 2011

The recent High Court decision of Mr Justice Clarke in the examinerships of Michael McLoughlin (Pharmacy) Limited and Sundrive Pharmacy Limited (the "Companies") has far-reaching implications for examiners.

Schemes of arrangement for the Companies were ultimately confirmed by the court but, in the course of the hearing, one of the creditors raised an objection to a clause excluding the examiner's personal liability. While the creditor did not suggest that there was any basis for believing that the examiner had not done anything other than a competent and professional job, the creditor objected to the inclusion of such a clause as a matter of principle. The judge decided that the Companies (Amendment Act) 1990 (the "1990 Act") does not allow the inclusion of a provision granting examiners immunity from suit for negligence arising out of the exercise of their functions. The judge went on to state that, while he was satisfied that the court does not have a jurisdiction to approve such a provision, even if the court had such a jurisdiction, it could only be exercised in a wholly exceptional case.

## RULE CHANGES-TEMPORARY WORKERS

By December 2011, the Agency Workers Directive (AWD), is expected to come into effect in both the Republic of Ireland and Northern Ireland. The directive states that temporary workers must receive equal treatment and rights as permanent workers in respect to pay, working time and annual leave.

The main focus of the directive is:

- The duration of working time, rest periods, night work, annual leave and public holidays
- Pay
- Work done by pregnant women and nursing mothers, children and young people
- Action taken to combat discrimination on the grounds of sex, race or ethnic origin, religion or beliefs, disabilities, age or sexual orientation.

Temporary agency workers must also have equal access to facilities such as childcare and must be informed of permanent employment opportunities.

## TERMINATING EMPLOYEE CONTRACTS

A recent High Court case has again illustrated the importance of ensuring that a termination of employment is dealt with in accordance with the employee's contract of employment.

While statute in Ireland provides for minimum notice to be given, if an employee's contractual notice period is longer than the statutory notice period, then notice of termination must be given in accordance with the contract. Should the terms of the contract be breached, the employee may seek an injunction to prevent the termination of their employment, arising from the defective notice of termination.

For example, in one case, an employee claimed that the notice of termination which he received breached his contractual terms, as it only provided for two weeks notice rather than the 16 week notice period as provided for in his contract. The employee also argued that his termination was not in accordance with the articles of association of the company.

The Court decided that the employee's contract had been improperly terminated, as the length of notice given by the employer did not correspond with the notice period in the employee's contract. Since the employee was also a director of the company, a resolution of the board should have been passed effecting his termination. No such resolution was passed in this case. The court held that due to the employer's "fundamental failure" to adhere to the contractual terms, the employee should be granted an injunction. The court did, however, state that so long as proper procedures were adhered to, the employer could still terminate the employee's contract at a future date.





# Credit Review Office

## A Valuable Asset for SMEs in Accessing Bank Credit

**The Credit Review Office (CRO) was established in April 2010 as part of the NAMA programme.** It has been created to ensure that viable SMEs and farms have access to credit from the NAMA recapitalised banks, primarily AIB and Bank of Ireland.

The purpose of the CRO is to help the estimated 20% of businesses that are being refused new, or additional, credit facilities up to €250,000. Any SME or farmer falling into this category can apply to the CRO to have their application independently reviewed by a panel of experienced lenders.

The appeals process is simple to operate for the borrower, with form filling kept to the minimum. The bulk of the work on each appeal is undertaken by the bank and the CRO. Full details of the process including the borrowers' application forms can be found at [www.creditreview.ie](http://www.creditreview.ie)

Any individual or business appealing a case will be happy to learn that the process is normally completed within a matter of just days.

From the reviews completed to date, around 1 in 3 cases have found in favour of the borrower. This may appear disappointing, however, it should be borne in mind that each lending application that is appealed to the CRO has been reviewed twice by the bank. That's once when the initial application is assessed, and again by a team of experienced lenders as part of an internal bank appeals procedure. It's also worth noting that the very existence of the CRO seems to have influenced the lending behaviours

of AIB and Bank of Ireland. For example, the CRO undertakes to ensure that these banks operate prudent lending practices, but in a manner which is responsive and more transparent to their customers' needs. This scenario can be contrasted with continuing difficulties highlighted by those dealing with banks outside the NAMA process - because these banks are outside the scope of NAMA, SME borrowers can't benefit from the CRO review facility.

While the decisions of the CRO are not binding on the banks, the senior executives of both banks are committed to the work of the CRO. Since the launch of the new review scheme, the banks have supported all cases where the CRO have found in favour of the borrower. In fact, in many cases, the CRO does not simply uphold or disagree with the bank's lending decision. They also use their skills, experience and creativity to help make an application more acceptable to the bank's credit division.

Some borrowers have expressed concerns that using the CRO process may jeopardise their ongoing relationship with their bank. This should not be a concern. Front line managers may already be supportive of a credit application. It's been recognised that the CRO procedure often acts as a means of helping these managers secure approval from their credit departments.

For more information, see [www.creditreview.ie](http://www.creditreview.ie)