

The below sets out key considerations when dealing with an extension of an administration at the end of the first-year anniversary.

If you intend to extend the administration by consent, then you will need to consider whether any/all of the secured creditors have been paid in full since the start of the administration. The approach you take to obtaining consent is likely to differ depending on whether you have paid or unpaid secured creditors.

You may also need the consent of the unsecured or preferential creditors depending on whether a paragraph 52(1b) statement has been given or a distribution to preferential creditors is envisaged.

## Secured Creditors

### Dealing with Paid Secured Creditors

Following the cases of *Pindar Scarborough* and *Toogood*, the question of whether an administrator needs the consent of a secured creditor who has been paid post appointment is unclear. Until there is further clarity consider the following:

- Have all secured creditors been paid?
  - If there are no unpaid secured creditors it would be unwise to rely on the consent of paid secured creditors given that they have no economic interest in the remaining administration.
  - It is also unclear whether you can rely solely on the consent of preferential or unsecured creditor (as appropriate).
  - It would be sensible to apply to court to be certain that the extension is valid or consider whether it is appropriate to convert the administration to a creditors voluntary liquidation (CVL)
  - If an administration is/has been extended by consent when all secured creditors have been paid it would be sensible to ask the court to confirm the validity of that extension to ensure you are in office.
- Have some secured creditors been paid?
  - Ask all secured creditors (both paid/unpaid) for consent. There is no harm in obtaining the consent of a paid secured creditors if it turns out to be unnecessary, provided you also have the consent of the unpaid secured creditors.
  - If you ask a paid secured creditor for consent, but they won't provide it, consider:
    - Applying to court to ensure the extension is valid
    - Relying on *Pindar* and *Toogood* and extending based on the consent of unpaid secured creditors alone. In this case it would be sensible to apply to court to confirm the validity of the extension.

### Other Procedural Considerations

- Do not forget about lien holders and those that hold "other security" – you will need their consent (s248 Insolvency Act 1986 (Act)).
- If in doubt about whether a lien holder has a valid lien, or whether a creditor falls within the definition of someone who holds "other security" consider obtaining their consent in any event – it is often quicker and more cost effective to do that, than work through legal arguments about, for example, what constitutes a valid lien.
- Ensure all necessary consents are obtained before the administration period expires.
- Do not use a qualifying decision process or rely on deemed consent to obtain consent.
- Obtain written consent where possible.
- Consent cannot be obtained retrospectively – or late.
- Do not get consent "just in case".
- Do not get consent too early (unless you can give reasons), but you will need to consider whether you can comply with para 78(5) of Schedule B1.

## Preferential/Unsecured Creditors

- You do not need to deliver notices to paid creditors (Rule 15.11(1) Insolvency Rules 2016 (Rules))
- You can obtain consent using a qualifying decision procedure/deemed consent process (Para 78(2A) Schedule B1 and s246ZE of the Act)
- Notices must contain the prescribed information set out in Rule 15.8, although you can depart from this if appropriate/immaterial (Rule 1.9)
- Ensure you explain the reasons why an extension is required in the notice (Rule 3.54(2))
- Do not get consent “just in case”
- Do not get consent too early (unless you can give reasons) but you will need to consider whether you can comply with para 78(5) of Schedule B1

If in doubt, do ask your lawyers whether you should apply to court for an extension, rather than rely on consent, but do not leave that question until the last minute – leave time for an application to court in case one is required.

## Extend or Convert to CVL?

Para 83 of Schedule B1 provides that an administration can be converted to CVL when

- Secured creditors have been paid or sufficient funds have been set aside to pay them
- A distribution will be made to unsecured creditors (which is not a distribution of the prescribed part)

The case of *Hobson* interprets “unsecured creditors” in this context to include both ordinary and preferential unsecured creditors.

Practitioners may have previously relied on para 83 to justify an extension where there was going to be no payment to ordinary unsecured creditors outside of the prescribed part – however this decision gives scope to move a company to CVL where:

- Secured creditors have been/will be paid in full
- Preferential creditors will receive a distribution but have not yet been paid
- There will be no payment to ordinary unsecured creditors

## When Should You Convert?

Para 83 is qualified by the word “thinks” – therefore an administrator is not obliged to move a company to CVL just because secured creditors have or will be paid, and there are only the preferential creditors to pay.

An office holder is given latitude when making decisions, which will only be wrong if they are perverse.

There may be reason why an administrator might wish to move the company to CVL earlier than they may have done in the past – for example to pursue a s212 claim or for costs reasons (i.e. the insolvency is expected to last longer than another year). Or there might be reason why it is appropriate for the company to remain in administration – and this can be justified.

It would be reasonable for an administrator to decide based on the specific facts which is the best course of action.

If a court on hearing an application to extend decides that it is more appropriate for the company to go into CVL, rather than extend, provided the administrator made a reasoned decision as to why they applied to extend, rather than convert, they should not be criticised for making such an application.

Equally if an administrator converts the administration to CVL and they have come to that decision based on the *Hobson* decision, it would seem reasonable for them to have relied upon that (and legal advice) to do so.

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