SQUIRE PATTON BOGGS

Who Is a "Secured Creditor"?

The Insolvency Service Confirms That Insolvency Practitioners (IPs) Should Decide

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The Insolvency Service (in reply to a letter from R3) has confirmed that it will be reframing its view of the term "creditor". This follows the cases last year of *Pindar* and *Toogood* where the court was asked to consider whether a paid secured creditor should have consented to an administration extension and therefore, in the absence of consent, whether the extensions were valid – in both cases, the judges confirmed that the consent of paid secured creditors was not required.

Initially, the decisions were welcomed, given the difficulties that IPs can sometimes face when trying to obtain the consent from secured creditors who have been paid (or are just about to be). The reason for seeking consent was because of the Insolvency Service's "long-standing" view that a creditor is classed as such at the date of entry into an insolvency process.

However, that relief was somewhat short lived, as practitioners started to think about the wider implications of those decisions. Could those decisions be relied upon? What if all secured creditors have been paid? Did the findings apply to other parts of the insolvency legislation – for example, remuneration approval where the consent of secured creditors is also required? Consequently, many practitioners urged caution and recommended that IPs continued to obtain the consent of paid secured creditors where practicable to do so.

The Insolvency's Services Reframed View

In light of such uncertainties, R3 wrote to the Insolvency Service asking it to confirm whether it would amend its view that a creditor is set at the point of entry and/or amend the Insolvency Rules to provide clarity to practitioners.

In reply, the Insolvency Service has confirmed that it has reframed its view, and that "creditor" is no longer fixed and crystallised at the date of entry into an insolvency procedure.

Therefore if, as in the case of *Pindar* and *Toogood*, a secured creditor has been paid at the point that consent to an extension is required, an officeholder could now reasonably decide that they do not need to obtain the consent of the paid secured creditors for the purposes of an extension. The same could also now be said when seeking remuneration approval under rule 18.18.

But it will be for the officeholder to decide what the meaning of "creditor" is for the purposes of a particular provision in the legislation – introducing an element of flexibility and requiring an officeholder to apply their professional judgment.

Is This Response Helpful?

Yes, because, for a long time, officeholders have faced uncertainty, particularly around administration extensions and fee approval, where it can be difficult to obtain the consent of (in particular) paid secured creditors. Understandably, such creditors often feel it is inappropriate to engage in decisions where they no longer have an economic interest in the ongoing procedure, but now they will not have to.

The views of the Insolvency Service apply beyond secured creditors and apply to all creditors, but there are likely to be some remaining questions that will take time for the professional to work through – for example, if all secured creditors have been paid, can an IP simply rely on the consent of preferential creditors? Sensibly, one would say yes where the consent of that group of creditors is required as well, but what if only the consent of secured creditors is required?.

To the extent that there is uncertainty, IPs would be best advised to take advice and make a decision based on that. Given that IPs are given flexibility to exercise their own professional judgment, and if, having taken advice, they decide a creditor is not a creditor for the purposes of a particular provision, then unless such a decision is completely perverse, an IP is unlikely to have their decision overturned by the Court.

To discuss the impact of this further, please do not hesitate to contact one of the team whose details are below.

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