Association of Business Recovery Professionals

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Email only - [redacted]

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Dear Ms. Crossley

Secured creditors and seeking consent to an administration extension

I am writing to you to raise a matter that requires urgent clarification from the Insolvency Service ('INSS') to assist insolvency practitioners in carrying out their functions as an administrator of a company.

Introduction

There have been two court decisions this year where the court was required to consider whether an office holder should have sought the consent of paid secured creditors to extend the period of administration under paragraph 76 of Schedule B1 of the Insolvency Act 1986. In both cases the court determined that the administration period had been validly extended and the consent of the paid secured creditors was **not** required.

The issue at the core of the two decisions relates to extensions in administrations and secured creditor apathy when they have been paid off in full by the time the extension is required and the additional costs if relevant creditor consent is not forthcoming.

The definition of a secured creditor is contained within s 248 of IA 1986 which states that *"a secured creditor is a creditor who holds in respect of his debt a security over property of the company ..."* therefore if there is no debt, there is no creditor, which contradicts the government's view. If the secured creditor has been paid off in full, the creditor is generally of the view that they are no longer a creditor (no economic interest) and therefore has no desire or willingness to approve any resolution for an extension of the administration period. As a consequence, the administrator has no option but to apply to the court for an extension leading to additional costs, time and taking up court time, which is precious.

Seeking an extension

Paragraph 76 of Schedule B1 to the Insolvency Act 1986 'Automatic end of administration' states the following -

"76(1)The appointment of an administrator shall cease to have effect at the end of the period of one year beginning with the date on which it takes effect.
(2)But—

> *(a)on the application of an administrator the court may by order extend his term of office for a specified period, and*
> *(b)an administrator's term of office may be extended for a specified period not exceeding one year by consent."*

Paragraph 78(1) of Schedule B1 to the Insolvency Act 1986 states the following -

"78(1)In paragraph 76(2)(b) "consent" means consent of—

(a)each secured creditor of the company, and

(b)if the company has unsecured debts, the unsecured creditors of the company.

(2)But where the administrator has made a statement under paragraph 52(1)(b) "consent" means—

(a)consent of each secured creditor of the company, or

(b)if the administrator thinks that a distribution may be made to preferential creditors, consent of—

(i)each secured creditor of the company, and

(ii)the preferential creditors of the company.

(2A)Whether the company's unsecured creditors or preferential creditors consent is to be determined by the administrator seeking a decision from those creditors as to whether they consent.

..."

The key phrase is '*each secured creditor of the company*'.

The previous Government

Since the introduction of The Insolvency (England and Wales) Rules 2016 (the 'Rules'), there have been debates amongst the profession as to whether a secured creditor whose debt is subsequently paid ceases to be a secured creditor for the purposes of Schedule B1 to the Insolvency Act 1986 and the Rules, and therefore whether their consent is required to amongst other things, an administration extension. Several respondents, including R3, to the First Review of the Insolvency (England and Wales) Rules 2016: Call for evidence asked the previous Government to clarify the position. In its reply published in April 2022: First Review of the Insolvency (England and Wales) Rules 2016 the previous Government said...

"It has been the Government's position for some time that the classification of a creditor is set at the point of entry to the procedure and that this remains, even if payment in full is subsequently made. We believe that to legislate away from this position could cause more problems than it would seek to solve. Accordingly, the Government has no plan to change its long-standing view on this matter."

It is because of this statement that the administrators in both cases (set out below) sought confirmation from the court that the relevant administrations had been validly extended even though the consent of one of the "secured creditors" (which had been paid in full) had not been obtained.

Re Pindar Scarborough Ltd (in administration) 2024 EWHC 908 (Ch) (13 March 2024) (Appendix 1)

The administrators had previously extended the administration by consent ("the first extension") having obtained the consent of the company's secured creditor (who was unpaid), and the preferential creditors. However, the administrators did not get the consent from Barclays Bank plc, who had been repaid in full after the administrators' appointment. With Barclays having confirmed to the administrators that they no longer had a secured interest and were not in a position to consent to the administrators' fee proposals – having at that point been paid in full - the administrators did not then seek consent from Barclays when extending the administration by consent.

ICC Judge Prentis heard an application by administrators for a second extension of the administration period. As part of that application the court was also asked to make a retrospective appointment, if necessary, if a potential flaw in the first extension by consent meant that the administration has not been validly extended.

In light of the previous Government's Report (see above) the administrators asked the court to consider whether a retrospective appointment was necessary because if the consent of Barclays should have been obtained there was concern that the first extension by consent was invalid.

The question for the court was "what is meant by "secured creditor" in the context of paragraph 78(2)(b)(i)?"

The court considered the definition of secured creditor which is set out in s248(b) of the Insolvency Act 1986 (which is applied to Schedule B1 by virtue of s8 of the Act) taking note of the language of that section which is framed in the present tense. S248(b) defines a secured creditor as "a creditor of the company who holds...a security" and the judge decided that a creditor who had once held security would not be within the definition. Therefore, at the time that paragraph 78 was engaged, the court found that Barclays was no longer a creditor within the definition of s248 and as such the consensual extension was valid.

In this case there was one other secured creditor who had not been paid and who did consent to the first extension. The consent of the preferential creditors was also required and that was obtained. There was no issue with either of those consents.

Boughey & Anor v Toogood International Transport and Agricultural Services Ltd (Re Insolvency Act 1986) [2024] EWHC 1425 (Ch) (11 June 2024) (Link)

The factual background of this case is similar in some respects to Pindar above. The administrators made an application to court to extend the administration having previously extended the administration by consent from one secured creditor and the unsecured creditors – a paragraph 52(1)(b) statement having been given.

In this case however the administrators had not sought consent from two other "secured" creditors – one of which had been paid following the administrators being appointed, the other's debt had been transferred prior to the appointment (the charges register at Companies House not reflecting this on appointment). The administrators took the view – having taken legal advice - that they did not need the consent of these creditors because they had no economic interest in the administration.

HHJ Paul Matthews also examined the definition of a "secured creditor" in s248, agreeing with ICCJ Prentis view but also saying that: "*A secured creditor is defined as "a creditor ... who holds ... a security". Even if one were to construe "security" as including a reference to a security for a debt of zero ....section 248 still refers to "a creditor". A creditor who has been repaid is no longer "a creditor"*".

HHJ Paul Matthews concluding that:

"A secured creditor is one who is owed a debt that is secured. Any creditor whose debt has been paid off is ex hypothesi no longer a creditor, and therefore no longer a secured creditor. Nothing in the legislation suggests, let alone compels, the conclusion that the position is to be governed only at the point of entry into the administration process. And, as it seems to me, that is as it should be. Only those who have an economic interest in the outcome should be concerned to make decisions about the continuance of the administration. There is no reason why a commercial organisation such as a bank that has been repaid in full should have to be bothered thereafter with making administration decisions that do not affect it. Why should it spend its time, unremunerated, in doing so?"

HHJ Matthews went on to say this about the previous Government's view about the classification of creditor:

"If the Government wishes there to be a different result, then it must legislate more clearly than it has done, and moreover explain why those with no economic interest in the outcome of an administration should nevertheless determine what happens. In the meantime, I hold that a secured creditor whose debt is paid off ceases to be a secured creditor for the purposes of Schedule B1 of the 1986 Act, and its consent is no longer needed for any decision requiring the consent of such a creditor. No prejudice can be or is caused to such a person by not obtaining its consent."

The Positions of R3 and the Regulatory Professional Bodies ('RPBs') (ICAEW, IPA and ICAS)

Whilst the decisions, on the face of it, are welcomed by the profession, it is important to note that the persuasive weight of these judgments is likely to be limited, as each was argued on one side only and was accordingly reached without the benefit of adversarial argument. Although judges considering the point in the future are likely to be willing to have regard to them, it is the view of R3 that strictly speaking the cases are not citable as authorities pursuant to the 'Practice Direction (citation of authorities) [2001] 1 W.L.R 1001' for this reason, whereas the RPBs view is that they may not be citable as authorities.

Neither do they address questions such as: "what if all secured creditors have been paid in full?" or "is a consent valid if the secured creditor is only owed £1?" or "what if the creditor that holds security has not submitted a claim form as they are uncertain whether they have a claim or not - are they a secured creditor? (it is a contingent amount that may be due depending upon whether certain conditions are met)". The court was not asked to consider these questions, because they were not an issue in either case.

Given that there may be uncertainty about how these decisions could be applied in other factual circumstances and the suggestion that they may lack authority (or be persuasive authority only), until there is further clarity on this point – by way of legislative change or further case law – members of R3 are being asked by R3 to seek legal advice on which creditors they should obtain consent from when seeking to extend an administration by consent. However each IP seeking their own advice on this issue is inefficient and not a good use of creditor money.

Conclusion

Given the findings in these cases conflict with the views of the previous Government and the persuasive weight of these judgments is likely to be limited, it is unsatisfactory for insolvency practitioners to have to rely on these unopposed decisions when seeking to extend the period of administration. We would therefore ask that the INSS consider the following options –

(1) As a matter of priority amend its view that 'a creditor is set at the point of entry to the procedure and that this remains, even if payment in full is subsequently made' and issue a Dear IP to the profession to assist insolvency practitioners as soon as possible.

And/or

(2) Amend the Insolvency (England and Wales) Rules 2016 to reflect the practical approach demonstrated by ICC Judge Prentis and HHJ Paul Matthews.

I look forward to your reply.

If you would like to meet or if you have any other queries, please contact me at .

Yours sincerely,

Caroline Sumner
On behalf of R3
R3, The Insolvency and Restructuring Trade Body

Email:

With support from –

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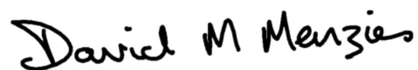

David Menzies
Director of Practice
On behalf of ICAS

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