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Do You Need the Consent of Paid Secured Creditors to An Administration Extension?

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This question was considered in the recent case of *Pindar* where the judge concluded that an administration had been validly extended where the consent of one of the secured creditors (who had been paid) was *not* obtained.

Many insolvency practitioners are likely to welcome this decision with open arms given that it can be problematic to obtain the consent of paid secured creditors, not only when it comes to consensual administration extensions but also when seeking remuneration approval. In practice (and understandably) secured creditors who have been paid do not wish to agree matters where they no longer have any economic interest in the outcome of the process.

But is this decision the answer?

Before we explore that (and flag a few words of warning), it is worth noting why the judge concluded that the administrators did not need the consent of a paid secured creditor, who had been paid in full post-appointment and who had filed form MR04 at Companies House to mark its charge as satisfied.

The judge looked at the language of s248 of the Insolvency Act 1986. This defines secured creditor in the present tense as a creditor that “holds security” – with the judge saying it was “obvious” that this meant one who presently holds security – not one who previously held security. Simple enough, but a view that goes against the views of the Insolvency Service who in the first review of the Insolvency Rules 2016 confirmed their position that the classification of creditor is set at the point of entry into a procedure. When you work through the insolvency legislation (which we don’t intend to in this blog) that is certainly the case when classifying unsecured and preferential creditors – but the legislation is less clear when it comes to secured creditors with practitioners taking a different view on how to classify paid secured creditors.

Should this decision be relied on as a definitive answer?

It is very helpful to practitioners who did not have the consent of secured creditors when extending the administration at the one-year anniversary because they *might* be able to rely on it to support that the first extension was valid. We say *might* because in *Pindar* the administrators were still able to tick the requirements of Sch B1 para 78(2) because they did have the consent of the other secured creditor who had not been paid off, and the preferential creditors as required. But what if all secured creditors have been paid, which can often be the case. In that situation, applying *Pindar,* para 78 does not then seem to work.

If an administration is extended by consent, then in all cases the consent of “each secured creditor” is required and either the consent of unsecured creditors or preferential creditors, depending on whether a para 52(1)(b) statement is given. In both cases para 78 requires the consent of the secured creditor and another group of creditors – it does not say “or”.

It is also possible that only the consent of secured creditors is required if the administrators have given a para 52(1)(b) statement but they do not “think” that there will be a distribution to preferential creditors.

If there are no secured creditors (because they have been paid) then how can para 78 work? It doesn’t seem to, and if that is correct, it seems the only solution where all secured creditors have been paid is to go to court to obtain an extension. Is this really what parliament can have intended?

There is also the underlying risk – given that this is a first instance decision – that another judge on another day may come to a different view. The consequences of an invalid extension are significant because the administrators will not be in office. Although the courts are helpful in trying to remedy situations where the first extension is invalid – by making a retrospective administration appointment – this isn’t a given and practitioners will need to jump through several hoops to satisfy the court that the company should remain in administration and to make a retrospective order.

The simple (and safest) way to deal with an administration extension is to obtain the consent of all secured creditors, whether paid or not, and even better to leave £1 outstanding so that all secured creditors remain unpaid. This overcomes the difficulties we have flagged above, it remains consistent with the Insolvency Services view and provides certainty should another judge decide on another day that s248 should be interpreted differently. Although what it does not do is address the need for all secured creditors to engage – which as noted at the outset, can prove difficult in practice.

Pindar only appears helpful if there is at least one unpaid secured creditor who can consent (otherwise how does para 78 work), but even then – do you take the risk of an invalid extension? If relying on *Pindar* as support for the fact that the consent of paid secured creditors is not required, then sensibly practitioners should ask the court to confirm that the first extension was valid when making the second court application. At least then, if the court disagrees with *Pindar* the court does have discretion (but it is discretion) to remedy an invalid extension.

What the case does flag, is the need for this part of the legislation to be clarified and potentially updated. When it was first introduced parliament considered it was desirable for all secured creditors to participate in the decision process because they were the creditors that had an economic interest. This is something the judge touches on in the *Pindar* judgment. But since the legislation was enacted practice has changed. Secured creditors are paid much earlier than previously was the case and therefore don’t always have an economic interest as envisaged. The legislation has not moved on to reflect that – perhaps it should.

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