

Are you Making Progress? The Scottish Court Provides Helpful Pointers to English Administrators Seeking to Extend on the Content of Progress Reports

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Although the case of *Anthony John Wright and Alastair Rex Massey vs. Scottish Court of Session [2024] CSOH 105* is (as the name suggests) a Scottish decision, there are several takeaways from the case relating to the content of progress reports, which could usefully be applied and followed by English practitioners when making their own application. Not least, because of the words of warning from the judge:

“It is important that administrators and their advisers bear in mind that an extension of an administration should never be applied for, or granted, as a matter of formality. It is not uncommon for the court to encounter cases where serial applications have been made, often on (literally) the same grounds from 1 year to the next, with no discernible sign of progress being made; and of course, if there is an expectation that extensions will be granted without difficulty, there is a danger that administrators will not be incentivised into completing the administration within the existing deadline, confident that another one will be along in the fullness of time”

This case concerned an application to extend an administration that had originally commenced on 19 November 2020 and had been extended on three previous occasions. The court was keen to understand what progress had been made, that creditors had been informed of the application and given a chance to object and that the extension period was the appropriate length.

Despite the warning above the judge acknowledged that this administration was complex and did not fall into that category and was prepared to take at face value the assertion that further time was required to conclude the administration, despite some misgivings about the information in the progress reports.

Progress Reports

Typically, when making an application to extend, an administrator will rely on the last progress report to evidence what work has been undertaken and what additional work is still to be done.

However as noted by the judge it is not uncommon to see applications to extend made on the same grounds from one year to the next – and this is something which we also see in applications made

before the English courts. That is not to say that an extension will not be granted where the reasons for the extension are the same, but there are some helpful lessons from this judgment which could usefully be utilised by English practitioners.

Evidence of progress following previous extensions

In this case the judge said that at the very least, when a previous extension has been granted on essentially the same grounds, the administrators should explain why they have been unable to complete the outstanding steps in the time available.

The judge extracted a few examples from the progress reports where it was not obvious (without further explanation) why it had taken the administrators more than four year to complete the work:

- reconcile issues with a small number of trade suppliers,
- interrogate the company's records,
- continue investigations into the affairs and transactions of the company, as well as the conduct of directors,
- continue liaising with the purchaser's finance and property teams,
- review and deal with any third-party assets.

Each time an extension had been requested the progress reports had listed much of the same work that needed to be completed and the same, or similar wording appeared in the reports.

That is not to say that an extension won't be granted when the reasons for an extension are the same, but the court was critical of the fact that year on year the same statements were used in the progress report to explain what work was still to be done. For example, this statement was repeatedly given:

"The Administrators' trading account is not yet complete due to unreconciled positions with several of the cash processing providers and trade suppliers alike. It is envisaged that all these matters will be finalised in the next reporting period"

The same or similar wording appeared in multiple reports and the judge said that repeating the expression that it was envisaged that "these matters" will be finalised in the following reporting period was starting to sound "somewhat hollow".

The underlying message was that a progress report should evidence what progress had been made in the last period and simply tweaking a report without giving meaningful updates and explanations is unsatisfactory – becoming more so, the longer the administration continues.

Statutory Tasks

In this case multiple reasons were given to support the extension including finalising *"all costs associated with the administration"* and attending to and completing *"all statutory and administrative matters necessary for completion of the administration"*. The judge noted that those tasks are applicable in any administration, and to say that they are outstanding does not really go any way towards explaining why an extension is necessary.

Regardless of whether an application is made before an English or Scottish court it would be unusual to rely on these as the only reasons for an extension, but clearly as the judge's comments indicate,

more is required to justify an extension than statutory tasks that a practitioner can be expected to undertake as a matter of course.

Information to creditors

The process and expectations of the Scottish courts in dealing with an administration extension are different, compared to English practice and procedure – the Scottish courts expect unsecured creditors to be notified of the application and to be given an opportunity to object even where they are not expected to get a return. Actively inviting objections is not, as a rule of thumb, something that English courts expect practitioners to do.

However, English practitioners will, as standard, notify all creditors of their intention to seek an extension and their reasons for doing so in a progress report. The Insolvency Service has previously suggested (see *Dear IP October 2010*) that this should be done only where there is a realistic expectation that an application for an extension will be made within three or four months of the progress report. This is a much shorter period than that mentioned by the judge in this Scottish case who said that it was likely to be acceptable for administrators to rely on a report that was 6 months old, where creditors had been told that an extension was required.

There isn't, in our view, a hard and fast rule about the age of a progress report, the key question must be whether at the time of the report the administrator knew and could give reasons why an extension was required. Where a creditor portal is being used, informing creditors is much easier and if circumstances have changed or the progress report is a bit older updating creditors with a letter via the portal seems a sensible thing to do – the court can then be satisfied that creditors are informed.

However, there was no suggestion by the Insolvency Service in *Dear IP October 2010* that English administrators should actively invite objections – this seems to be a long-standing practice confined to the Scottish Courts and we are sure that English administrators will hope it stays that way!

Key Takeaways

Although this decision is not binding on the English courts, the below takeaways are sensible and would undoubtedly assist English practitioners with an application to extend given that an English court will also want to understand why an extension is required and what progress has been made:

- Simply saying that more time is required, for the same task without more detail is unlikely to be viewed favourably especially so where the task appears on the face of it to be something that can be completed within the extended period.
- If a prior report says that the administrators expect/hope that a task will be completed in the next reporting period, but it hasn't, explain why that hasn't been possible.
- Ensure reports contain 'meaningful' and sufficient information. Avoid simply repeating or regurgitating the same statements in successive progress reports as a matter of course. A progress report should evidence progress.
- If using a previous version of a progress report to produce the next one, review the statements given previously and add an update.
- If the circumstances have changed since a progress report was produced or it is becoming a bit old, consider updating creditors with a letter via the creditor portal (if there is one).
- Requiring an extension to complete statutory tasks is unlikely on its own to be sufficient justification for an extension.

Separately, the court was required to consider the length of the extension having agreed to extend. The secured creditor had consented to an extension (but only for a 6-month period) the administrators wanted a 12-month extension. The judge confirmed that there isn't a policy of granting year long extensions and that granting an extension for a year should not therefore be presumed. He also referenced instances of where administrators had asked for 12 months but when pressed they had accepted a shorter period.

As noted at the outset, administrators have to be incentivised to conclude an administration, and countless extensions are unlikely to do achieve that. But there is a balance between imposing a realistic deadline so that the tasks which need to be done, can be, and not giving enough time such that further cost will be incurred in having to come back to court to extend again. Each case will be considered on its own merits, and we have seen the English courts grant long extensions where administrators have been able to justify why a long period is required, but as with any application to extend practitioners should not assume that these will be rubber stamped without full explanation and justification for the extension as this case also demonstrates.

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