

A Practical Guide to Extending an Administration

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1. Introduction

Administration is an insolvency regime that offers an insolvent company the opportunity to reorganise and/or realise its assets under the protection of a statutory moratorium, with the aim of rescuing the company, achieving a better result for the company's creditors, or making a distribution to one or more secured or preferential creditors.¹

The term of an administration automatically comes to an end one year after it started.² However, this can often be insufficient time for the administrator to have completed all the activities or tasks identified in the proposals necessary to achieve the aim of the administration.³

It is therefore common for an administrator to seek an extension of the term of the administration to allow additional time to achieve the aim of the administration, and to

avoid the company otherwise losing its moratorium protection and entering liquidation.

There are two methods that an administrator can use to extend the term of an administration: (i) by creditor consent; and (ii) by court order.⁴

There are limitations on, and formal requirements applicable to, those two methods of extension. This article will provide a practical guide to administrators and solicitors considering an extension to an administration by explaining the limitations and formal requirements applicable to those two methods of extension.

2. Extension by creditor consent

2.1 Limitation on extension by creditor consent

The limitations applicable to an extension by creditor consent are as follows:

¹ Insolvency Act 1986, schedule B1, para. 3(1).

² *Ibid*, para. 76(1).

³ *Ibid*, para. 49(1).

⁴ *Ibid*, para. 76(2).

- Creditors cannot extend the term of the administration after it has already expired.⁵
- Creditors can only consent to the extension of an administration once.⁶
- Creditors cannot extend the term of an administration by more than one year, and the extension must be for a specified period.⁷
- Creditors cannot extend the term of the administration after it has previously been extended by a court order.⁸

Extension by creditor consent is the option that an administrator will ordinarily use when considering a first extension of the administration, as it avoids the need for making an application to court. However, there must be compliance with the procedural requirements to ensure that the administration has been properly extended.

2.2 Procedural requirements for extension by creditor consent

Which creditors' consent is required is determined by whether the administrator included a statement in their proposals pursuant to IA 1986, Schedule B1, para. 52(1)(b) that '*the company has insufficient property to enable a distribution to be made to unsecured creditors other than by virtue of section 176A(2)(a)*'.

- Where a statement has not been made pursuant to IA 1986, Schedule B1, para. 52(1)(b), the administrator is required to obtain the consent of (i) each secured creditor of the company; *and* (ii) if the company has unsecured debts, the unsecured creditors of the company.⁹
- Where a statement has been made pursuant to IA 1986, Schedule B1, para. 52(1)(b), the administrator is required obtain the consent of (i) each

secured creditor of the company; *and* (ii) if the administrator thinks that a distribution may be made to preferential creditors, the preferential creditors of the company.¹⁰

When seeking the consent of unsecured creditors or preferential creditors, as the case may be, the administrator must seek a decision from those creditors as to whether they consent by using one of two procedures¹¹:

- Firstly, a qualifying decision procedure.¹²
- Secondly, the deemed consent procedure.¹³

When obtaining the consent of secured creditors, the administrator is not required to use any set procedure to obtain this consent. It is common in practice to obtain secured creditors' consent by way of written correspondence (letter or email). Having this evidence is also helpful if there is any future extension of the administration by court order (as explained further below). While no set procedure is applicable to obtain secured creditors' consent, for the avoidance of doubt it should be noted that neither the qualifying decision procedure nor the deemed consent procedure can be used to obtain the secured creditors' consent.¹⁴ The secured creditors' consent must be actual consent.¹⁵

In any event, when the administrator is giving notice to the creditors requesting their consent, the notice must comply with Insolvency Rules 2016 ("**IR 2016**"), r. 3.54(2) by stating the reasons why the extension to the administration is sought. Those reasons will be, for example, that the administrator has not yet completed all the activities or tasks identified in the proposals necessary to achieve the aim of the administration.

⁵ *Ibid*, para. 78(4)(c).

⁶ *Ibid*, para. 78(4)(a).

⁷ *Ibid*, para. 76(2)(b).

⁸ *Ibid*, para. 78(4)(b).

⁹ *Ibid*, para. 78(1). See also Insolvency Act 1986 ("**IA 1986**"), s. 248.

¹⁰ *Ibid*, para. 78(2). See also IA 1986, ss. 175, 248, 386 and Schedule 6.

¹¹ *Ibid*, para. 78(2A).

¹² IA 1986, s. 246ZE.

¹³ IA 1986, s. 246ZF.

¹⁴ *Baker and another v Biomethane (Castle Easton) Ltd* [2019] EWHC 3298 (Ch), [5]-[6] (Norris J).

¹⁵ (n1), para. 78(1)(a) and 78(2)(a).

2.3. Failure to comply with the procedural requirements

It is possible that circumstances may arise where the incorrect consent procedure had been used, or that a secured creditor was not recognised as a secured creditor at the time the purported extension by creditor consent was obtained. This would have the effect of rendering the extension defective and a nullity.

If an extension by creditor consent is purportedly obtained and an application to court is made later for a further extension by court order, the Judge hearing that application will require evidence demonstrating that the extension by creditor consent was properly completed. If at this stage (or otherwise) it is discovered or anticipated that the extension was defective and a nullity, it will then be necessary for the administrator to make an application for a retroactive administration order.¹⁶ It is likely that an application for a retroactive administration order will also be accompanied by an application for a court order to extend that retroactive administration order (discussed further in section 3 below). This process may result in a period where no administration was in place.

If, however, there is a defect in the extension by creditor consent that is considered procedural rather than substantive, then it is possible to cure this defect pursuant to IR 2016, r. 12.64. An example of a procedural defect capable of being cured pursuant to IR 2016, r. 12.64 is a notice to the creditors requesting their consent to the extension not including reasons why the extension to the administration is sought.¹⁷

2.4 Notification requirements following extension

As soon as is reasonably practicable after the administration has been extended by creditor consent, the administrator must:

- File a notice of the extension with the court.¹⁸
- Notify the registrar of companies.¹⁹
- Notify the creditors.²⁰

It is important to note that each of these notices must comply with the general requirements of Part 1 of the IR 2016.

3. Extension by court order

3.1. Extension cannot be granted if the administration has already expired

For an administration to be extended there must be an administration in existence.²¹ Before making an application to the court, an administrator and their legal advisors should satisfy themselves that (a) the original appointment was valid; and (b) if applicable, any extension by creditor consent was valid using the procedure discussed above.

A common pitfall is having not obtained the actual consent of each secured creditor to the extension.²² The effect of invalidity is there was either never an administration in existence (in the case of an invalid appointment) or the administration ended on the expiry of its term (having not been validly extended, usually by creditor consent after one year).

The court has taken a number of approaches when dealing with and attempting to regularise a defective appointment of administrators.²³

¹⁶ (n14); *Re Mederco (Cardiff) Ltd* [2021] EWHC 386 (Ch), [30], [35], [39]-[40] and [47] (HHJ Davis-White QC).

¹⁷ *Re Caversham Finance Ltd* [2022] EWHC 789 (Ch).

¹⁸ (n1), para. 78(5)(a)).

¹⁹ (n1), schedule B1, para. 78(5)(b); see also Insolvency Rules 2016 (“**IR 2016**”), r. 3.54(7).

²⁰ IR 2016, r. 3.54(6). See also IR 2016, r. 3.54(3) for the circumstance where the requirement to give notice to creditors does not apply where the original notice included a separate notice stating that ‘*if the extension*

is granted a notice of the extension will be made available for viewing and downloading on a website and that no other notice will be delivered to the creditors’.

²¹ (n1), schedule B1, para. 77(1)(b).

²² For example, see *Baker and another v Biomethane (Castle Easton) Ltd* [2019] EWHC 3298 (Ch), (Norris J) and *Re Mederco (Cardiff) Ltd* [2021] EWHC 386 (Ch).

²³ Summarised in *Re A.R.G. (Mansfield) Limited* [2020] EWHC 1133 (Ch), [54] (HHJ Davis-White QC).

Given the urgency which arises from invalid, or arguably invalid, appointments or extensions, it is common for applicants to ask the court to grant relief on a “worst case scenario” of invalidity and to make a retrospective administration order, avoiding the question of whether the defective appointment or extension could be validated by other relief (such as pursuant to rule 12.64 IR 2016).²⁴

The court’s jurisdiction to make a retrospective order has been held to arise from para. 13(2) of Schedule B1 of the IA 1986, which provides an administration order takes effect ‘*at a time appointed by the order*’.²⁵ The procedural rules, service requirements and applicable test for the making of a new administration order will apply.²⁶

Importantly, the applicant must have standing to make the application.²⁷ The list of persons who have standing to apply to the court for an administration order does not include former administrators.²⁸ However, where there has been a valid administration and the administrators have unpaid fees for work undertaken during that period, the administrators have standing to make the application in their capacity as creditors of the company.²⁹ Where there has been an invalid appointment or the administrators do not have unpaid fees incurred during a valid administration (or there is any doubt as to the same) an application will need to be made by one of the other persons who have standing

pursuant to para. 12(1) of Schedule B1 of the IA 1986. In practice, the most likely applicant in these circumstances will be one of the company’s major creditors.

On the application:

- The question of whether a new administration order should be made should be approached on the basis of the facts as they are at the date of the application.³⁰
- The court will consider whether the conditions set out in para. 11 of Schedule B1 of the IA 1986 are satisfied, namely: (a) that the company is insolvent; (b) that the administration order is reasonably likely to achieve the purpose of the administration; and (c) that the court should exercise its discretion.
- The court must then consider whether it is appropriate to make a retrospective order, taking extreme caution before exercising its jurisdiction.³¹

An administration order can only be backdated to 364 days before the date of the court’s order.³² Retrospective extensions are not possible under para. 76 of Schedule B1 of the IA 1986 and this impediment cannot be avoided by making two successive retrospective administration orders.³³ Where a potential invalidity is identified, it is imperative an administrator considers making an application urgently as this limitation may result in a period where no administration was in

²⁴ *Petit v Bradford Bulls (Northern) Limited* [2016] EWHC 3557 (Ch) (Mann J).

²⁵ A line of authority has developed in the High Court whereby the words in paragraph 13(2) of Schedule B1 are to be read as enabling the Court to make an order appointing an administrator at a time earlier than the date of the order. The trail of authority started with the reported but unapproved judgment in *Re G-Tech Construction Limited* [2007] BPIR 1275 (Hart J) and the subsequent authorities were helpfully summarised in *Re A.R.G. (Mansfield) Limited* [2020] EWHC 1133 (Ch), [55]-[88] (HHJ Davis-White QC). The learned Judge concluded at [122]: ‘*As regards the question of the appointment being retrospective: the jurisdiction to make a retrospective appointment, though it has been questioned, has not been relied upon (and exercised) consistently for many years. I agree with Mann J in the Bradford Bulls case that is there is to be a challenge to*

the existence of that jurisdiction, such challenge should now be raised in the Court of Appeal’.

²⁶ IR 2016, r. 3.3-3.15; IA 1986, schedule B1, paras 10-13
²⁷ (n1), para. 12(1).

²⁸ *Ibid.*

²⁹ (n1), para 12(1)(c); *Re Elgin Legal Ltd* [2016] EWHC 2523 (Ch), [7]-[10] (Snowden J); *Re Mederco (Cardiff) Ltd* [2021] EWHC 386 (Ch), [47] (HHJ Davis-White QC).

³⁰ *Re Care Matters Partnership Limited* [2011] EWHC 2543 (Ch), [10]-[11] (Norris J).

³¹ *Baker and another v Biomethane (Castle Easton) Ltd* [2019] EWHC 3298 (Ch), [18] (Norris J).

³² *Re Kaupthing Capital Partners II Master LP Inc* [2010] EWHC 836 (Ch), [58]-[59] (Proudman J); *Re Mederco (Cardiff) Ltd* [2021] EWHC 386 (Ch), [19]-[44] (HHJ Davis-White QC).

³³ *Ibid.*

place and any steps taken by the administrator during that period being ultra vires.

It is common on an application for a retrospective order for an extension of the new administration to also be granted. Such an application should comply with the requirements set out below.

If an order is granted, the usual notification, proposal and meeting requirements will apply. An administrator may wish to make ancillary applications to disapply the notice requirements and for an order directing the administrator not to comply with the requirement to file proposals and hold an initial meeting.³⁴ This is likely to be appropriate where the administration is to end within a short period of time and the matters remaining in the insolvency are minimal.

3.2. Limitations on extensions by court orders

Save that there must be a valid administration for the court to make an extension, there are no limitations on court ordered extensions. The court:

- Has the power to make an order where an administration has already been extended by creditor consent.³⁵
- Extend an administration by order more than once.³⁶
- Is not limited on the duration for which an administration can be extended. The most common extension is for 12 months, however much longer extensions have been ordered in rare cases.³⁷

3.3. Applicable test

The court's jurisdiction under para. 76(2)(a) of Schedule B1 of the IA 1986 is unfettered.³⁸

³⁴ *Re Advent Computer Training Limited (No 2)* [2011] B.C.C. 52 (HHJ Purle QC); *Re Coal UK Operations Limited* [2013] EWHC 2581 (Ch) (HHJ Purle QC).

³⁵ (n1), para. 77(1)(b).

³⁶ *Ibid.* In *Re TPS Investments (UK) Ltd* [2020] EWHC 1135 (Ch), HHJ Hodge QC granted a fifth extension taking the administration to over four years.

³⁷ A three-year extension was granted in *Re Lehman Brothers International (Europe) (In Administration)* [2022] EWHC 2995 (Ch) (Hildyard J).

However, a number of cases have set out relevant considerations for the court to consider.

The leading case addressing the exercise of the court's discretion is *Re Nortel Networks UK Ltd* [2017] EWHC 3299 (Ch) in which Snowden J (as he then was) held the court's discretion should be exercised in the interests of the creditors of the company as a whole and the court should have regard to all the circumstances including:

- Whether the purpose of the administration remains reasonably likely to be achieved;
- Whether any prejudice would be caused to the creditors by the extension; and
- Any views expressed by the creditors.³⁹

In *Re TPS Investments (UK) Ltd* [2020] EWHC 1135 (Ch) HHJ Hodge QC (sitting as a Judge of the High Court) further considered the relevant questions in deciding whether to grant the extension are:

- Why the administration had not yet completed;
- Whether an alternative insolvency regime would be more suitable;
- Whether an extension was likely to achieve the purpose of the administration; and
- How long any extension should be.

The tests identified in *Re Nortel* and *Re TPS* should be considered by an administrator and their legal advisors prior to making an application for an extension.

³⁸ *Re Nortel Networks UK Ltd* [2017] EWHC 3299 (Ch), [22] (Snowden J).

³⁹ *Ibid.*, [22]. The considerations identified in *Re Nortel* have been applied by the court in a significant number of other cases; cf. *Re Biomethane (Castle Eaton) Limited* [2019] EWHC 3298 (Ch) (Norris J) and *Re Lehman Brothers International (Europe) (In Administration)* [2022] EWHC 2995 (Ch) (Hildyard J).

3.4. Procedural requirements for an application to the court

An application to the court for an extension is made by an administrator.⁴⁰ The application is made to an Insolvency and Companies Court Judge in the Royal Courts of Justice (as opposed to a High Court Judge) or a District Judge sitting in a District Registry of the High Court.⁴¹

The procedure required for an application is as follows:

- The application should be made not less than one month before the end of the administration.⁴² If the application is less than one month before the expiry of the administration, the supporting witness statement must explain why the application is late. Costs as an expense may be disallowed for late applications.
- The only document required for the application is an application notice in compliance with IR 2016, r.1.35. The application notice must state the reasons why the administrator is seeking an extension.⁴³
- However, the court will also expect a detailed witness statement in support of the application. The witness statement should address the considerations set out in *Nortel* and *TPS* above, explaining in particular why the administration is incomplete, why no other insolvency regime is suitable and how the extension sought is likely to achieve the purpose of the administration. The length of the extension sought should also be justified, with a common pitfall in witness statements being that they fail to address with sufficient detail why the period sought is required. The evidence should demonstrate that the original appointment and any subsequent extension were valid and set out any non-objection or support from creditors.

- A draft order in word should also be filed.
- In practice, a covering letter to the court (confirming the date that the administration will end) will assist the court office in listing the application prior to the expiry of the administration.
- There is no requirement to serve the application. However, it is best practice to have notified the creditors in the most recent progress report (if possible) and to have expressly notified and sought the consent of the secured creditors (or any creditor with a major economic interest in the administration). If any creditor objects, the administrator should consider whether to give formal notice of the hearing.

3.5 Notification requirements following a court ordered extension

As soon as reasonably practicable after the order is made, the administrator must give notice to:

- The registrar of companies⁴⁴; and
- The creditors, by delivering a notice together with the reasons for seeking an extension given in the application to the court.⁴⁵

Each of these notices must comply with the general requirements of Part 1 of the IR 2016.

4. Conclusion

The key points to bear in mind when considering an application to extend an administration are:

1. Check whether the original appointment of the administrator and/or earlier extension of the administration has been completed correctly.
2. If there has been an error in the original appointment of the administrator and/or an earlier extension of the administration, consider (i) who has standing to make an application for a

⁴⁰ (n20), r. 3.54.

⁴¹ Civil Procedure Rules, Practice Direction – Insolvency Proceedings, para. 3.1.

⁴² *Ibid*, para. 8.3.

⁴³ (n20), r. 3.54(2).

⁴⁴ (n1), para. 77(2).

⁴⁵ IR 2016, r.3.54(5).

retroactive administration order; and (ii) including an additional application for an extension to the administration. Remember to act quickly to avoid any gaps in the administration.

3. If there are no errors, ensure that an application to extend the administration is made not less than one month before the administration is due to expire, and that the application provides all information necessary to demonstrate the basis upon which the extension is

sought and why the extension is necessary.

4. Do not forget to comply with any notice requirements if an application to extend is successful.

If you would like to discuss this article with Thomas or Georgia or if you are interested in instructing them, please contact Chambers' clerks at clerks@3harecourt.com or 020 7415 7800.



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