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INSOLVENCY PRACTITIONERS

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Administration and Pre pack administration

What is administration? What does it mean to appoint an administrator and how does it work? Who can appoint an administrator? What is a pre pack administration ? How do you do an administration followed by CVA?

What is Administration - a Simple Guide

Administration is a very powerful process for control, where a company is insolvent and facing serious threats from creditors. The Court, directors or bank may appoint a licensed insolvency practitioner as Administrator, this places a moratorium around the company and stops all legal actions.
The Administration must have a purpose and the Government encourages the use of company rescue mechanisms after Administration.

Under the Administration option it is possible for the company and its directors (or a creditor like the bank) to apply to the court to put the company into Administration through a streamlined process by applying to the High Court.

But the law requires that any finance provider (like a bank or lender), with the appropriate security, is contacted and the aims of the administration be discussed and approved. The finance provider must have a fixed and floating charge (usually under a debenture) and the charge holder will need to give permission for the process to go ahead. Five days clear notice is required.

This mechanism is designed to protect a company from its creditors while a restructuring plan is completed. This technique can be very powerful where the company has a very aggressive creditor or creditors and needs to protect itself from them whilst a rescue plan can be worked out. It is not the same as an administrative receivership.

What are the key components?

The company must be a reasonable size, have reasonably predictable cash flows and must be able to predict profitability. There must be an insolvent position or contingently insolvent position and the directors think that a hostile creditor will seriously affect the future trading possibilities. This is often a landlord or the Crown creditors.

The administration process requires a licensed insolvency practitioner (IP) to act as the Administrator appointed by the court. The court appointed Administrator takes over the management of the company and takes responsibility for restructuring the company or business.

If the company has little in the way of assets, poor cashflow and no future then creditors voluntary liquidation is probably more appropriate than administration.

There are two types of application to the High Court. There is the "without court order" appointment route for holders of qualifying floating charges and companies/directors – this is quick and does not need a court application or hearing. But sometimes it is better to still make the second type of detailed application which asks for a Court Hearing.

Who can appoint an Administrator?

Companies and Directors can appoint an administrator quickly with the IP's guidance. This does not require a Court Order it requires a fax to be sent to the court with the appropriate forms. Clearly the IP must have done some work to establish if the company is insolvent, should it go into administration, what the process will involve and the planned outcome.

Where a company is in liquidation or in a CVA then the proposed administrator must obtain a Court Order.

No administration order will be granted unless the holders of all qualifying floating charges have been given 5 days clear notice of the company's or directors' intention to appoint an administrator.

The floating charge holder (usually a bank) will still retain the ability to step in and appoint their own choice of administrator should they so wish.
So it's possible that board decides to appoint an Administrator and the bank refuses and appoints its own.

How can the bank appoint an Administrator?

Banks can appoint an administrator if they hold a qualifying floating charge under new debentures granted after 15th September 2003. If the bank holds an older debenture it can appoint an administrative receiver. The banks have the right to appoint an administrator.

But it should be pointed out that the administrator has a duty to act in the interests of all creditors not just on behalf of the bank/floating charge holders.

There must be one (or two) of three "Objectives" for the Administration:
In the application to the Court the proposed administrator must state which is his or her main objective of the following three:

1 Company rescue, as a going concern, should be the primary objective. This usually means that the company proposes a CVA or a scheme of arrangement.

2 If that is not possible (or if the second objective would clearly be better for the creditors as a whole), then the administrator can achieve a better result for the creditors than would be obtained through an immediate winding-up of the company, possibly by trading on for a while and selling the business as a going concern.

3 Only if neither of the first two objectives is possible, can the administrator realise any property to make a distribution to secured and/or preferential creditors.

In cases where speed is essential in making the appointment, the rules include a provision that will allow for filing a notice of appointment during times when the court is not open for business' typically this is by FAX.

The filing of such a notice will bring into effect an interim moratorium on insolvency proceedings and other legal processes being taken against the company.

In a moratorium no one can "knock the company over" without the leave of the Court. When the Court has effectively ratified the administrator's appointment this is unlikely! The Court will want to have as much information as possible to ensure that the application for Administration is correct and appropriate.

Administration Sale

The company can enter administration to be sold. A typical scenario would be

1 Company is under severe pressure, creditors circling, possibility of legal action.

2 A decision is taken to protect the business and to stop legal actions. The company is insolvent but there is a viable business.

3 The IP draws up a report on the options available looking at CVA, Administrative Receivership, Administration, trade sale etc. The board believes that a sale could be achieved but the company needs to be protected.

4 An administrator is appointed and he / she will then run the business for a period of say 1-2 weeks.

5 In that time he markets the business under insolvency guidelines called Statement of Insolvency Practice 13, he must be seen to market the business for sale.

6 He will obtain valuations from a professional valuer for all of the assets, goodwill and so on.

7 In an agreed period the directors of "oldco" can buy the business provided the valuations are met and the administrator gets the best deal for the creditors.

8 "Newco" has no debt, no creditor pressure, it can take on leases for example.

9 General guideline is that TUPE applies and therefore all employees rights move across to Newco.

10 The oldco is then liquidated

How long does the Administration process last?

The process can generally only last for up to 1 year, although this can be extended by the consent of the creditors and/or by the court. The administrator is also required to do everything as soon as reasonably practicable. There is a time-limit of eight weeks for getting his proposals (in other words what he proposes to do with the company) out to creditors, and holding the initial creditors meeting. This can be extended by the creditors' consent and/or by the court.

These proposals will include full details relating to his appointment, and the circumstances leading up to it, as well as exactly how the administrator proposes to achieve the purpose of administration, including details of how he anticipates the administration will end.

Statement of Affairs:

Upon appointment the Administrator will require one or more of the current or former directors or company officers to provide him with a statement of the company's affairs.

This is a prescribed form which details the company's assets and liabilities, including those assets that are subject to any fixed or floating charges. This can be difficult to produce.

A copy of the statement of the company's affairs, or a summary of it, must be attached to the administrator's proposals. See above for the 3 different types of proposals.

A copy of the proposals will also be filed with the registrar of companies for placing on the companies' public file. Interestingly though, where the information included in the statement of affairs is commercially sensitive, the administrator can apply to court to have the statement, or the relevant part of it, withheld.

Included with each creditor's copy of the administrator's proposals will be an invitation to the initial creditors' meeting, at which the creditors vote on those proposals and whether to accept them.

Creditor's Meetings

The initial creditor's meeting must be held within 10 weeks of the date that the company entered administration, and the creditors must be given at least 2 weeks notice of the meeting, although these time-limits can be extended by the creditors and/or the court.

- The business of this meeting could be carried out by correspondence, although if 10% or more of the creditors (in value of their claims) demand a meeting, then the administrator is still required to call one.

- The proposals can be accepted (by a majority vote, measure in value of claims), modified and then accepted, or rejected. If the latter, then the administrator is required to report that fact to the court and seek further directions from the court.

- Following the initial creditors' meeting, and any subsequent meeting of creditors, the Administrator is required to send a report of the outcome of the meeting to the court and to the registrar of companies for filing on the company's public file.

- A creditors committee can be formed if the creditors require it. This must be between 3 and 5 people.

- The Administrator then manages the company's affairs, business and property in accordance with the proposals that have been agreed by the creditors.

- He must send regular progress reports to the creditors, the court and the registrar of companies covering each six-month period from the date that the company entered administration until the administration ends, or until he ceases to act.

- These reports will provide full details of the progress of the administration to date, including a receipts and payments account (or what cash has been received and paid out) and any other relevant information for the creditors.

Just by reading this you will see that the law surrounding Administration is complex and very powerful for companies in distress.

BUT!! Do not appoint an Administrator before calling us to discuss any questions you have.
Once appointed it's too late to change your mind!

What are the disadvantages of Administration?

- The directors are not in control of the business and an offer from a third party may lead to their removal as directors.
- Tax losses can be lost if no CVA is proposed.
- Another buyer may buy the assets.
- It is a public event, all creditors and all correspondence (invoices, advice notes, orders, emails, websites, letters) must say XYZ Co Ltd (In Administration). Most customers and suppliers therefore become very aware of the insolvency.
- All orders must be ratified by the Administrator or his staff.
- The directors have no powers to run the company.
- As soon as reasonably practicable after his appointment, the administrator must obtain details of the company's creditors and must notify the company and all of its creditors of his appointment. This is also an advantage as it stops legal actions.
- The appointment must also be advertised in the London Gazette and in a relevant local or national newspaper - one that the administrator thinks is appropriate for ensuring that the appointment comes to the notice of the company's creditors.
- Clearly the bank can be forced into appointing their own administrator if it decides its position is going to be compromised by the proposed Administration of the company.
- Costs are often very high for this procedure therefore in our opinion it is only really suitable for larger companies where aggressive creditors threaten future viability.
- TUPE applies to Newco - in other words the new company cannot remove employees and must adopt their contracts. This can be a problem when planning how to cut costs in the new company.
- Financing trade and other supplies can be difficult unless adequate resources are available and or new funds can be introduced in the administration period.

What are the advantages of Administration?

Administration can be a very useful and powerful tool for insolvency practitioners to control the company, banks, and creditors to ensure survival of the business.

- All legal actions are stayed by the process.
- It stops the financial position getting worse and putting directors at further risk.
- It can be very quick and cost effective if an "Administration pre pack" is used properly. (See below).
- All unsecured debt is removed.
- From the creditor's perspective, because a licensed insolvency practitioner is appointed to administrate the company, it also ensures that the administrator considers all creditors positions correctly.
- Protection from creditors can allow the administrator a reasonable time frame (the 8 week period) to negotiate a deal to achieve the objectives which may include selling the company thus protecting jobs and economic activity.
- It is possible for the administrator to appoint directors or managers to run the company. With our vast turnaround experience this is often preferable to the administrator's staff.