

Administrations in Scotland – a creditor's guide

Contents

- 1. Introduction..... 1
- 2. Why is the company in administration? 2
- 3. What do the Joint Administrators do?..... 3
- 4. What will happen to my debt?..... 4
- 5. What information will I receive? 6
- 6. What will happen after the administration is finished?..... 7
- 7. What rights do I have as a creditor? 8
- 8. A guide to the remuneration of the Joint Administrators 9

Appendices

Appendix A. A creditor’s guide to administrators’ remuneration – Scotland

1. Introduction

Insolvency is a complex process whose boundaries are defined by legal requirements and case law. It can be difficult for those unfamiliar with insolvency to understand the reasons why decisions are taken by insolvency practitioners, and what impact a company's insolvency might have on them. The purpose of this document is to provide creditors with some context to help them understand the administration process better, what they may expect in terms of information provision, and their rights as creditors of an insolvent company.

2. Why is the company in administration?

Companies are only placed in administration where they are in financial difficulties. They must be insolvent, which means that either the value of the debts they owe is more than the value of the assets they own, or that they have insufficient available funds to pay the debts they owe as they become due for payment.

Administration is an insolvency procedure where insolvency practitioners are placed in control of the company, in place of its directors. This means that, during the period for which it is in administration, the affairs, business and property of the company will be managed by them. There are usually at least two insolvency practitioners appointed, and referred to as Joint Administrators.

A company may be placed into administration by an order of the court, following an application by, amongst others, the company, its directors, one or more creditors, or, if it is in liquidation, its liquidator.

Alternatively, and more frequently, the company will enter administration via an out of court route, the Joint Administrators being appointed by the company, acting by its shareholders, by its directors or by a secured creditor, if they have security that includes enough of the company's assets to entitle them to appoint the Joint Administrators.

3. What do the Joint Administrators do?

The Joint Administrators have a legal duty to work to achieve one of three possible objectives, either:

- to achieve a rescue of the company as a going concern;
- to achieve a better result for the company's creditors as a whole than would be likely if the company had been placed in liquidation, rather than administration; or
- to sell assets of the company and pay the net proceeds to one or more secured or preferential creditors.

The Joint Administrators must try and achieve the first of these objectives unless they think either that it is not reasonably practicable to rescue the company as a going concern, or that pursuing the second objective would achieve a better result for the company's creditors as a whole. In practice, achievement of the first objective will not happen often; as explained above Joint Administrators are appointed as a result of a company's insolvency, so restoring the company to solvency will be unlikely unless the company receives an unexpected gain, or its creditors agree to write off some of their debts.

The Joint Administrators may pursue the third objective only if they think that it is not reasonably practicable to achieve either of the first two objectives, and they do not unnecessarily harm the interests of the creditors of the company as a whole.

The Joint Administrators will set out how they intend to achieve their chosen objective in a statement of their proposals which will be sent out to creditors, further details about this are set out below.

The powers given to the Joint Administrators to pursue their objective are very broad. They include powers to carry on the company's business and to realise its assets. The company's board of directors lose their powers, unless directed otherwise by the Joint Administrators.

To achieve their objective, the Joint Administrators may have to take difficult decisions regarding the company's trading, if it is continuing. The Joint Administrators may find it impractical or uneconomic to have the company perform certain contracts entered into prior to their appointment, or need to discontinue trading at some or all of the company's locations.

The Joint Administrators act as the agent of the company, and are not personally liable for contracts entered into as administrator. However, goods and services supplied to a company in administration, at the request of the Joint Administrators will be paid for as an expense of the administration.

4. What will happen to my debt?

Debts due to unsecured creditors are frozen at the date of the Joint Administrators' appointment. Unsecured creditors are those owed money by the company whose debts are not given priority by having registered security – most trade suppliers will be in this category.

If the Joint Administrators are able to achieve a survival of the company, the management of the business and assets can be returned to the directors on the conclusion of the administration. The directors and staff of the company will then deal with unsecured creditors' pre-appointment claims.

As explained earlier, restoring the company to solvency may require its creditors to write off some of their debts. This would usually be done as part of a procedure called a Company Voluntary Arrangement (**CVA**), in which the creditors agree to accept a proportion of their debt to enable the company to survive. In this case agreement and payment of the creditors' claims will be dealt with within the CVA.

If survival of the company is not possible, but sufficient sums are generated from the sale of the company's business and assets to enable funds to be distributed to unsecured creditors, the Joint Administrators may be able to deal with their claims and pay them a dividend, but require the permission of the court to do so.

Alternatively, after payment of the costs and expenses of the administration, any funds for unsecured creditors may be passed to a liquidator, who will agree creditors' claims and distribute the surplus to them as a dividend. The Joint Administrators may become the liquidators.

Funds may become available for distribution to unsecured creditors either because the secured creditors who rank ahead of them have been paid in full, or from the Unsecured Creditors' Fund, which is also referred to as the 'prescribed part'. The Unsecured Creditors' Fund is generated as a proportion (effectively 20%) of net realisations from the floating charge assets of the Company (typically stock, plant and machinery and in some cases book debts) up to a maximum of £600,000, which will be shared by the unsecured creditors unless one or more of the following criteria applies:

- the floating charge was created prior to 15 September 2003;
- the net realisations from floating charge assets are less than £10,000, and the Joint Administrators think the cost of making a distribution to unsecured creditors would be disproportionate to the benefits; and
- the court makes an order following an application by the Joint Administrators that the cost of making a distribution to unsecured creditors would be disproportionate to the benefits.

Funds that are distributed to unsecured creditors are paid as a proportion of each creditor's debt. The process of realising the assets and verifying what each creditor is owed will take time. As the Company may owe far more than value of their assets, the amount received by unsecured creditors may only receive a fraction of what they are owed, in some cases they will receive nothing. The Joint Administrators will provide information on the amount they estimate is likely to become available to creditors in their reports (see section five).

If you believe that you own something in the company's possession, you should contact the Joint Administrators without delay with full proof of ownership and be prepared to identify what you are claiming. The Joint Administrators will examine your claim carefully before deciding whether to release goods in question, pay you for them or otherwise.

5. What information will I receive?

The Joint Administrators will notify all known creditors of their appointment as soon as reasonably practicable.

Where a sale of the company's business or assets takes place on or after the appointment of the Joint Administrators, and the sale process has begun prior to their appointment (this is commonly known as a 'pre-packaged sale') the Joint Administrators are required to write to all known creditors as soon as is reasonably practicable, setting out details relating to the sale and explaining why in their opinion the sale was the best option available to creditors.

A copy of the Joint Administrators' proposals setting out how they intend to achieve the purpose of administration must be sent to all creditors within eight weeks of their appointment. This will include details of what has been done in the period, which of the objectives the Joint Administrators believe is achievable, what outcome the Joint Administrators believe might be achieved for creditors, and how the administration will end.

The Joint Administrators are also required to hold a meeting of creditors within ten weeks of the date the company went into administration in order to consider the administrator's proposals. However, the requirement does not apply if the Joint Administrators think, and state in their proposals, that either:

- the company has sufficient property to enable all creditors to be paid in full;
- the company has insufficient property to enable a distribution to be made to unsecured creditors except out of the Unsecured Creditors' Fund which may have to be set aside out of floating charge assets (see section four); or
- neither of the first two purposes of administration can be achieved (see section three).

However, the Joint Administrators must hold a meeting if requested by creditors whose debts amount to at least 10% of the total debts of the company.

After approval of the Joint Administrators' proposals, a progress report on the progress of the administration will be sent to all creditors every six months and a final progress report will be sent at the end of the administration.

It is AlixPartners' policy to upload the reports to creditors onto the firm's creditor information portal, at <https://www.alixpartnersinfoportal.com/>, in accordance with the Insolvency Rules 1986 and in order to save costs to the insolvent estate. Notification of reports and other information posted to the portal will be sent to creditors, with a password required to access them. Reports posted to the portal will be provided in hard copy if requested by a creditor.

6. What will happen after the administration is finished?

An administration is an insolvency process that is designed to last for a limited time only. The administration will end automatically after one year, but this period may be extended for a period of up to six months with the agreement of the creditors, or with the permission of the court if more time is needed to achieve the purpose of administration.

The exit route that is chosen by the joint Administrators will depend upon the circumstances of the case, and to a large extent upon the objective that can be achieved in the administration. The following exit routes are possible:

- Return of the company to the control of its directors, and management, if the company has been rescued and returned to solvency. As stated above, this is not a common exit route, and may be used in conjunction with a CVA in which the company's creditors agree to waive some of their debts to help the company return to solvency.
- Creditors Voluntary Liquidation (**CVL**) – this option may be used to distribute the funds generated by selling the business and assets of the company to the unsecured creditors if secured creditors have been paid in full.
- Court Liquidation – if a distribution is to be made to the unsecured creditors, by virtue of the Unsecured Creditors' Fund, and due to time constraints it is not appropriate to apply to the court to make the distribution from the Administration, an application may be made to the court seeking the appointment of the Joint Administrators as Joint Interim Liquidators for that purpose. Alternatively, if the Joint Administrators become aware of transactions requiring further investigation and potential action by a liquidator, they may request a court liquidation, as CVL is not available as an exit route unless funds are available for distribution to unsecured creditors, and this may not be the case.
- Dissolution – if all the assets have been sold and the proceeds distributed and there are no outstanding matters, the administration will be ended and the company dissolved shortly afterwards.

7. What rights do I have as a creditor?

The appointment of the Joint Administrators prevents creditors from initiating or continuing legal actions against a company in administration. Any petition for the winding up of the company must be dismissed or suspended. In addition, except with the consent of the administrator or the permission of the court:

- no steps may be taken to enforce security over the company's property or to repossess goods in the company's possession under any sale or hire agreement;
- no other proceedings, execution, or legal process may be commenced or continued, and no distress may be levied, against the company or its property; and
- a landlord may not exercise a right of termination in relation to premises let to the company.

If a meeting of creditors is held, a creditors' committee may be appointed which must consist of at least three and not more than five creditors. The creditors' committee receives reports from the Joint Administrator and may meet periodically.

If a creditor wishes to receive further information to that provided in the progress reports provided by the Joint Administrators, they may request it, further details of what information they may request is provided in the appendix to this report, and in each progress report sent to creditors by the Joint Administrators.

If you are unhappy with the Joint Administrator's handling of the case, either in respect of your claim or otherwise, you should first contact the Joint Administrators to try to resolve the problem. A creditor who believes they have been prejudiced by the Joint Administrators' conduct and is not satisfied by the explanations he receives may be able to make an application to court.

The Joint Administrators are insolvency practitioners licensed in the UK, should your complaint be unresolved after you have raised it with them and you think that the Joint Administrators are guilty of professional misconduct, you have the right to refer the matter to the Insolvency Service via their [online Complaints Gateway](#). AlixPartners is regulated by The Insolvency Practitioners Association (IPA), The Institute of Chartered Accountants in Scotland (ICAS) and The Institute of Chartered Accountants in England and Wales (ICAEW).

8. A guide to the remuneration of the Joint Administrators

The Joint Administrators' remuneration will be paid out of the funds which are realised from the sale of company business and assets. The basis on which they may be charged can be on the basis of their time costs, as a percentage of the value of funds realised, or as a fixed fee. A combination of these bases may also be used.

If a creditors' committee is formed, it will be responsible for agreeing the Joint Administrators' remuneration. If no committee is formed, it can be fixed by the creditors who effectively bear the cost of the remuneration.

If the company's secured creditors will not be paid in full they will be responsible for approving the Joint Administrators' remuneration, together with the preferential creditors. If the secured creditors are being paid in full, it is the unsecured creditors who are responsible for approving the Joint Administrators' remuneration.

If either the Joint Administrators or the creditors are dissatisfied with the basis or level of remuneration approved or charged, or cannot agree on an appropriate basis, they may apply to the court to set the remuneration.

Further guidance for creditors on the Joint Administrators' remuneration is attached as an appendix to this guide.

Appendix A. A creditor's guide to administrators' remuneration – Scotland

This guide applies to all appointments on or after 6 April 2006. Any creditor requiring guidance on a case where the Insolvency Practitioner was appointed prior to 6 April 2006 should refer to the previous guide, which should have been issued to all creditors at the time of appointment.

1. Introduction

- 1.1. When a company goes into administration the costs of the proceedings are paid out of the company's assets in priority to creditors' claims. The creditors, who hope eventually to recover some of their debts out of the assets, therefore have a direct interest in the level of costs, and in particular the remuneration of the insolvency practitioner appointed to act as administrator. The insolvency legislation recognises this interest by providing mechanisms for creditors to determine the basis of the administrator's remuneration. This guide is intended to help creditors be aware of their rights under the legislation to approve and monitor remuneration and outlays and explain the basis on which remuneration and outlays are fixed.

2. The Nature of Administration

- 2.1. Administration is a procedure which places a company under the control of an insolvency practitioner and the protection of the court with the objective of:
 - a. rescuing the company as a going concern, or
 - b. achieving a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration), or
 - c. realising property in order to make a distribution to one or more secured or preferential creditors

Administration may be followed by a company voluntary arrangement or liquidation.

3. The Creditors' Committee

- 3.1. Where a meeting is held by the Administrator the creditors have the right to appoint a committee with a minimum of 3 and a maximum of 5 members. One of the functions of the committee is to determine the basis of the administrator's remuneration. The committee is established at the meeting of creditors which the administrator is required to hold within 10 weeks of the administration order (or longer with the consent of the court) to consider his proposals. The administrator must call the first meeting of the committee within 3 months of its establishment, and subsequent meetings must be held either at specified dates agreed by the committee, or when a member of the committee asks for one, or when the administrator decides he needs to hold one. The committee has power to summon the administrator to attend before it and provide such information as it may require.

4. Fixing the Administrator's Fees

- 4.1. The basis for fixing the administrator's remuneration is set out in Rule 2.39 of the Insolvency (Scotland) Rules 1986 which states that it may be a commission calculated by reference to the value of the company's property with which he has to deal.

It is for the creditors' committee (if there is one) to fix the remuneration and Rule 2.39 says that in arriving at its decision the committee shall take into account:

- the work which, having regard to the value of the company's property, was reasonably undertaken by the administrator; and
- the extent of his responsibilities in administering the company's assets.

Although not specifically stated in the rules, the normal basis for determining the remuneration will be that of the time costs properly incurred by the administrator and his staff.

- 4.2. If there is no creditors' committee, or the committee does not make the requisite determination, the administrator's remuneration will be fixed by the creditors.
- 4.3. Where no meeting is held, the administrator's remuneration is approved by each secured creditor of the company or where a distribution to the preferential creditors is proposed by each secured creditor and 50% in value of the preferential creditors disregarding those who do not respond or withhold approval

5. What Information should be Provided by the Administrator?

- 5.1. Claims by the administrator for the outlays reasonably incurred by him and for his remuneration shall be made in accordance with Rule 2.39 of the Insolvency (Scotland) Rules 1986 which provides that within two weeks after the end of an accounting period, the administrator shall submit to the creditors' committee or if there is no creditors' committee, to a meeting of creditors:
- his accounts of intromissions for audit;
 - a claim for the outlays reasonably incurred by him and for his remuneration, broken down into category 1 disbursements, being those costs where there is specific expenditure relating to the administration of the insolvent's affairs and referable to payment to an independent third party, and category 2 disbursements, which are costs which include elements of shared or allocated costs, and are supplied internally by the administrator's own firm
- 5.2. The administrator may at any time before the end of an accounting period submit to the creditors' committee or a meeting of creditors an interim claim for category 1 and 2 disbursements reasonably incurred by him and for his remuneration.
- 5.3. When seeking agreement to his fees and disbursements, the administrator should provide sufficient supporting information to enable the committee or the creditors to form a judgement as to whether the proposed fee and disbursements are reasonable having regard to all circumstances of the case. The nature and extent of the supporting information which should be provided will depend on:
- the nature of the approval being sought;
 - the stage during the administration of the case at which it is being sought; and
 - the size and complexity of the case.

- 5.4. Where, at any creditors' committee meeting or meeting of creditors, the administrator seeks agreement to the terms on which he is to be remunerated, he should provide the meeting with details of the charge-out rates of all grades of staff, including principals, which are likely to be involved on the case.
- 5.5. Where the administrator seeks agreement to his remuneration during the course of the administration, he should always provide an up to date receipts and payments account. Where the proposed remuneration is based on time costs the administrator should disclose to the committee or the creditors the time spent and the charge-out value in the particular case, together with, where appropriate, such additional information as may reasonably be required having regard to the size and complexity of the case. The additional information should comprise a sufficient explanation of what the administrator has achieved and how it was achieved to enable the value of the exercise to be assessed (whilst recognising that the administrator must fulfil certain statutory obligations that might be seen to bring no added value for creditors) and to establish that the time has been properly spent on the case. That assessment will need to be made having regard to the time spent and the rates at which that time was charged, bearing in mind the factors set out in paragraph 4.1 above. To enable this assessment to be carried out it may be necessary for the administrator to provide an analysis of the time spent on the case by type of activity and grade of staff. The degree of detail will depend on the circumstances of the case, but it will be helpful to be aware of the professional guidance which has been given to insolvency practitioners on this subject.

The guidance suggests the following areas of activity as a basis for the analysis of time spent:

- Administration and planning
- Investigations
- Realisation of assets
- Trading
- Creditors
- Any other case specific matters

The following categories are suggested as a basis for analysis by grade of staff:

- Partner
- Manager
- Other senior professionals
- Assistants and support staff

The explanation of what has been done can be expected to include an outline of the nature of the assignment and the administrator's own initial assessment, including the anticipated return to creditors. To the extent applicable it should also explain:

- Any significant aspects of the case, particularly those that affect the amount of time spent.
- The reasons for subsequent changes in strategy.
- Any comments on any figures in the summary of time spent accompanying the request the administrator wishes to make.
- The steps taken to establish the views of creditors, particularly in relation to agreeing the strategy for the assignment, budgeting, time recording, or the drawing, or agreement of remuneration.
- Any existing agreement about remuneration.
- In cases where there are distributable funds available to unsecured creditors by means of the creditors' prescribed part, how the administrator has allocated remuneration and costs with regard to dealing with the administration of and agreeing of unsecured creditors' claims. Remuneration in respect of time spent dealing with issues specific to the funds for ordinary creditors will be applied against the creditors prescribed part, prior to the funds being distributed, and will not be applied against the total funds available to all creditors, including those available to the floating charge holder.
- Details of how other professionals, including subcontractors, were chosen, how they were contracted to be paid, and what steps have been taken to review their fees.

It should be borne in mind that the degree of analysis and form of presentation should be proportionate to the size and complexity of the case. In smaller cases not all categories of activity will be relevant, whilst further analysis may be necessary in larger cases.

- 5.6. Where the remuneration is charged as a commission based on the value of the company's property with which the administrator has had to deal, the administrator should provide details of any work which has been or is intended to be contracted out which would normally be undertaken directly by the administrator or his staff.
- 5.7. As noted in 5.1, any claim for outlays must be approved in the same way as remuneration. Professional guidance issued to Insolvency Practitioners requires that where the administrator proposes to recover costs which, whilst being in the nature of expenses or disbursements may include an element of shared or allocated costs (such as room hire, document storage or communication facilities) they must be approved as if they were remuneration. Such disbursements must be directly incurred on the case and subject to a reasonable method of calculation and allocation. A charge for disbursements calculated as a percentage of the amount charged for remuneration is not allowed.
- 5.8. Payments to outside parties in which the office holder or his firm or any associate has an interest should be disclosed to the body approving remuneration and should be treated in the same way as payments to himself. They therefore require specific approval as remuneration prior to being paid.

6. What If a Creditor is Dissatisfied?

- 6.1. If the administrator's remuneration has been fixed by the creditors' committee or by the creditors, by virtue of Rule 2.39A of the Insolvency (Scotland) Rules 1986, any creditor or creditors of the company representing in value at least 25 percent of the creditors may apply to the court not later than eight weeks after the end of an accounting period for an order that the administrator's remuneration be reduced, on the grounds that it is, in all the circumstances excessive.
- 6.2. Notwithstanding the fact that the statutory time limit for appealing expires eight weeks from the end of the accounting period concerned, it is normal practice to advise the creditors that they may appeal within 14 days of being notified of the determination in cases where this extends beyond the statutory appeal period.

7. What if the Administrator is Dissatisfied?

- 7.1. If the administrator considers that the remuneration fixed by the creditors' committee or by resolution of the creditors is insufficient he may apply to the court for an order increasing its amount or rate. If he decides to apply to the court he must give at least 14 days' notice to the members of the creditors' committee and the committee may nominate one or more of its members to appear or be represented on the application. If there is no committee, the administrator's notice of his application must be sent to such of the company's creditors as the court may direct, and they may nominate one or more of their number to appear or be represented. The court may order the costs to be paid as an expense of the administration.

8. Other Matters Relating to Fees

- 8.1. Where there are joint administrators it is for them to agree between themselves how remuneration payable should be apportioned. Any dispute arising between them may be referred to the court, the creditors' committee or a meeting of creditors.

AlixPartners

6 New Street Square
London EC4A 3BF

t: +44 (0) 20 7098 7400 f: +44 (0) 20 7098 7401

© AlixPartners 2016. All rights reserved.

alixpartners.com