
Obtaining The Consent Of Unsecured Creditors To Administration Extensions

SUMMARY

Administrators may obtain the consent of a company's unsecured and preferential creditors to an extension of their term of office by using the deemed consent procedure. Two commentaries in the leading practitioners' textbook on the insolvency legislation, *Sealy and Milman: Annotated Guide to the Insolvency Legislation 2023 Volume 1* ("Sealy and Milman"), which say otherwise are inconsistent with the decision in *Re Biomethane (Castle Easton) Ltd; Baker v Biomethane (Castle Easton) Ltd* [2019] EWHC 3298 (Ch); [2020] B.C.C. 111 ("*Biomethane*").

BACKGROUND

1. This was an application by the administrators of a company to extend their term of office, by 24 months (the "**Application**"). The Application was made under paragraph 76(2)(a) of Schedule B1 to the Insolvency Act ("IA") 1986. The administrators' current term was due to expire on 16.06.2023. I acted for the administrators.
2. The administrators were first appointed on 17.06.2021. In May 2022, they sought an extension of their term. By paragraph 76(2)(b) of Sch. B1 to the IA 1986, the term could be extended by consent for one year. Pursuant to paragraph 78(1) of Sch. B1 to the IA 1986, the consent required is that of the company's secured creditors and, if it has unsecured debts, the unsecured creditors.
3. The administrators obtained the actual consent of each of the company's secured creditors. For the unsecured creditors, the administrators used the deemed consent procedure. The relevant notices were sent to them. None of them responded with an objection within the time set for doing so. Consequently, the administrators treated their silence as approval of the proposed decision to extend the administration.
4. In May 2023, the administration was not complete, so the Application was issued for a further extension by the Court.

THE LEGAL PRINCIPLES

Statutory Framework

5. Paragraph 76 of Sch. B1 to the IA 1986 provides:

“(1) The appointment of an administrator shall cease to have effect at the end of the period of one year beginning with the date on which it takes effect.

(2) But—

(a) on the application of an administrator the court may by order extend his term of office for a specified period, and

(b) an administrator's term of office may be extended for a specified period not exceeding [one year] by consent.”

6. As far as relevant, paragraph 78 of Sch. B1 to the IA 1986 states:

“(1) In paragraph 76(2)(b) “consent” means consent of—

(a) each secured creditor of the company, and

(b) if the company has unsecured debts, the unsecured creditors of the company.

(2) But where the administrator has made a statement under paragraph 52(1)(b) “consent” means—

(a) consent of each secured creditor of the company, or

(b) if the administrator thinks that a distribution may be made to preferential creditors, consent of—

(i) each secured creditor of the company, and

(ii) the preferential creditors of the company.

(2A) Whether the company's unsecured creditors or preferential creditors consent is to be determined by the administrator seeking a decision from those creditors as to whether they consent.

[...]” (Emphasis added)

7. As far as relevant, S.246ZE of the IA 1986, which provides for decisions by creditors, states:

“246ZE Decisions by creditors and contributories: general

(1) [...] This section applies where, for the purposes of this Group of Parts, a person (“P”) seeks a decision about any matter from a company's creditors or contributories.

(2) The decision may be made by any qualifying decision procedure P thinks fit, except that it may not be made by a creditors' meeting or (as the case may be) a contributories' meeting unless subsection (3) applies. [...]

(6) Section 246ZF provides that in certain cases the deemed consent procedure may be used instead of a qualifying decision procedure. [...]” (Emphasis added)

8. S.246ZF explains the deemed consent procedure. In short, the procedure permits a decision to be treated as approved by the creditors if, upon being given notice of the decision and the procedure for objecting to it, less than 10 percent in value of the creditors object.

The cases

9. In *Biomethane*, the Court was dealing with an application for a retrospective administration order to replace a flawed extension by consent and for a further extension by Court order. The prior extension by consent was flawed because the administrators used the deemed

consent procedure to obtain the consent of both the secured and unsecured creditors. They overlooked the fact that that procedure was not available for secured creditors and purported to obtain that consent in that way.

10. Paragraph 5 of Norris J's decision in *Biomethane* recognised that the administrators could use the deemed consent procedure for unsecured creditors, and expressly stated that what was required for secured creditors was their actual consent.

“5. Under para.78(2)(a), it is explained that where the consent of the company’s unsecured creditors is to be obtained, then the administrators must do so by “[s]eeking a decision from those creditors as to whether they consent”. The administrators decided to obtain a decision about extending the administration by utilising the provisions of s.246ZF of the 1986 Act, namely a deemed consent procedure. In doing so, they overlooked that although they were to obtain the consent of the unsecured creditors by “seeking a decision” from those creditors, and had used the deemed consent procedure for that purpose, they also had to obtain the consent of each secured creditor. That consent had to be actual consent and the deemed consent procedure was not available to secure it.” (Emphasis added)

11. Further, paragraph 8 of Norris J's decision implied that, although it was incorrect to use the deemed consent procedure for secured creditors, it was not wrong to use it for unsecured creditors.

“It was at this point that it became apparent that the original extension, procured as it had been by using the deemed consent procedure, had not been effective to obtain the consent of the secured creditors.”

IN THE COUNTY COURT

12. The Application was heard by an experienced Business and Property District Judge in the County Court at Central London (the “CLCC”).
13. Where there has been a previous extension of an administration by creditors' consent, the judges of the CLCC have developed the practice of directing that the applicant should, if it has not already been provided, file further and sufficient evidence to satisfy the Court that those consents were validly obtained. The required evidence was filed, and the issue was considered by the District Judge.
14. The District Judge took the view that the deemed consent procedure could not be used to obtain the consent of the creditors, whether secured or unsecured. Paragraph 78(1) to (2A) of Sch. B1 to the IA 1986 required their actual consent. The Judge relied on two

commentaries in Sealy and Milman for this proposition. The first is on page 772 where commentary on paragraph 76 of Sch. B1 to the IA 1986 appears and an extract reads:

“The court used its unfettered discretion to extend in Re Biomethane (Castle Easton) Ltd; Baker v Biomethane (Castle Easton) Ltd [2019] EWHC 3298 (Ch); [2020] B.C.C. 111 where the ultimate objective of the administration was reasonably likely to be achieved, the extension would not cause prejudice to the creditors, unsecured creditors were gradually being repaid within the administration and the secured creditors consented to the application (note that court approval was necessary as the creditors’ deemed consent procedure under s.246ZF could not be used since para.78 required actual consent which the administrators had not obtained).” (Emphasis added)

15. In the second commentary, which relates to paragraph 78(1) to (2A) of Sch. B1 to the IA 1986 and appears on page 774, the editors are more definite:

“Paragraph 78 defines “consent” in various ways for the purposes of the one-off extension of an administration which can be made out of court under para.76(2)(b). The alternatives depend on whether the administrator has included in his proposals a statement under para.52(1)(b) that he thinks that the company has insufficient property to enable a distribution to be made to unsecured creditors (other than what they might be entitled to under the “prescribed part” provisions of s.176A). If he has not, and the company has unsecured creditors, the consent must be that of each secured creditor of the company and over 50% in value of the company’s unsecured creditors. If he has made such a statement, the consent must be either that of each secured creditor of the company or, if the administrator thinks that a distribution may be made to the company’s preferential creditors, the consent of each secured creditor and over 50% in value of the preferential creditors. There are thus three possible scenarios. In any event, the paragraph requires actual consent: the deemed consent procedure in s.246ZF is not available (Re Biomethane (Castle Easton) Ltd; Baker v Biomethane (Castle Easton) Ltd [2019] EWHC 3298 (Ch); [2020] B.C.C. 111).” (Emphasis added)

16. In the present case, no issue arose vis-à-vis the consent of the secured creditors. However, the District Judge did not accept the deemed consent of the unsecured creditors as valid. It was submitted that not only were the referenced commentaries inconsistent with the statutory framework, but the *Biomethane* case they rely on as authority for the proposition they expound also did not support it.
17. It was submitted that *Biomethane* is authority for the inverse proposition. Not only is it more authoritative than Sealy and Milman, but it was also a binding precedent. The District Judge accepted that the commentary is not more authoritative and read the case but was not persuaded that *Biomethane* provided support for the proposition that it is permissible for administrators to obtain the consent of unsecured creditors by the deemed consent procedure.

18. Concerned that the extension by creditors' consent was defective and, resultantly, that the administrators' term of office had expired on 16.06.2022, the District Judge made an order an extract from which follows:

“AND UPON the Court being concerned as to the validity of the extension of the administration by creditors consent and knowing that a district judge does not have the jurisdiction to waive any defects.

IT IS ORDERED THAT:

- 1. The Application be transferred forthwith as a matter of urgency to the ICC to be heard before close of business on [...]’¹ for them to urgently consider the matter both in terms of any possible retrospective approval of the extension by consent and then determination of the application.”*

IN THE INSOLVENCY AND COMPANIES COURT (“ICC”)

19. The Application was urgently listed in the ICC’s Interim Applications List before ICC Judge Barber to consider whether the extension by consent was defective and, if so, whether that defect could be fixed (by making a retrospective administration order), and to rehear the application to extend by Court order.
20. At the hearing, having read and heard submissions on paragraphs 76 and 78 of Sch. B1 and sections 246ZE and 246ZF of the IA 1986, the ICC Judge agreed that the statutory framework permitted the use of the deemed consent procedure to obtain the consent of unsecured creditors. Even so, the ICC Judge did not consider it to be the most appropriate way of obtaining their consent to an extension. The ICC Judge also read the commentaries in Sealy and Milman concerned and agreed that they were inconsistent with Norris J’s decision in *Biomethane*.
21. The ICC Judge considered the *Biomethane* case to be sufficiently clear. Despite the commentary, she saw no reason for it to cause difficulty. As such, the ICC Judge declined the opportunity to provide a further judicial statement supporting the practice of using the deemed consent procedure to obtain the consent of unsecured creditors.

COMMENT

22. Although the ICC Judge did not think a deemed consent procedure to be the most appropriate for obtaining the consent of unsecured creditors to an administration extension,

¹ Date removed.

she found the extension to be valid. By so doing, the ICC Judge affirmed the established practice adopted by Insolvency Practitioners.

23. The ICC Judge's decision also means that the commentaries in Sealy and Milman referenced in this note misinterpret the effect of Norris J's decision in *Biomethane*. Further, this case should remind practitioners of the risks involved in accepting commentaries, however learned, without also examining the underlying cases referenced to support them. The editors of Sealy and Milman have been sent a copy of this note.
24. Finally, given that paragraph 78(2A) permits the consent of preferential creditors to be obtained by seeking a decision, it is probably safe to conclude that the deemed consent procedure can also be used to obtain their consent to an extension.

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