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# Legal Q&A

## Determining expenses and remuneration priorities.

**Q** I am the administrator of a packaging company. I appointed a firm of valuers to provide a report on part of the business. The valuers have produced their report and are seeking payment under the contract. However, I am now unsure whether there are sufficient funds in the estate to pay their fees. Who has to pay?

**A** The first thing to check is whether the valuers were engaged by the company or by you personally. As an administrator, you are the company's agent and, generally, are not personally liable for contracts made by the company in the course of its administration. Check the contract to see whether there are any clauses about whether you or the company are liable for the valuers' fees.

Assuming the company is liable, it will

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be important to determine the priority attaching to the fees. It is likely that the valuers' fees will have a 'super-priority' over a number of other expenses of the administration under paragraph 99(4) of schedule B1 of the Insolvency Act 1986. Paragraph 99(4) gives priority to 'any amount payable in respect of a debt or liability arising out of a contract entered into by the administrator'. This means that the valuers' fees will be payable in priority to 'the administrator's remuneration and expenses' (which are those expenses listed in rule 2.67 of the insolvency rules 1986). Note that rules 2.67(2) and (3) allow the court to re-order the priorities in rule 2.67 where the company has insufficient assets; however, it cannot amend the paragraph 99(4) priority which will likely apply to the valuers' fees.

Usually, expenses incurred by an

administrator can be paid during the course of the administration. However, as you are concerned about insufficient funds, you should be careful making any payments. If you continue making payments, there is a risk that you may end up with insufficient funds to pay expense claims of equal or greater priority. At the least, you should ensure that you can also pay any other 'debts or liabilities arising out of a contract entered into by the administrator', which would rank equally to the valuers' fees. The safest approach is to refuse to pay expenses where you are unsure, or seek the court's permission before making payment. Of course, the valuers' might also decide to apply to the court for payment.

There is also a risk that, where the assets of the company in administration are insufficient to meet the expenses of the

administration, an administrator may face liability for a breach of his duty to creditors or misfeasance. In practice, it is very rare for this to arise. Under paragraph 74(1)(a) of schedule B1, a creditor or member of the company may apply to court claiming that the administrator has acted to unfairly to harm his interests. Alternatively, a creditor or member may allege that incurring expenses that the company cannot pay amounts to misfeasance under paragraph 75. The court will examine the administrator's conduct and may order him to contribute a sum to the company's property by way of compensation. This means you might end up having to contribute to the company due to the valuers' fees.





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**Failing to meet a statutory deadline is a serious breach of the rules and in your case the court will carefully consider whether there was a good reason for this breach.”**

**Q** I was appointed the administrator of a property investment company in September 2015. I published progress reports on 15 March 2016 (first report) and on 15 September 2016 (second report) with details of my remuneration and the expenses I incurred in the period covered by each report. On 30 September 2016, a creditor issued an application challenging the remuneration and expenses for both periods on the ground that they are excessive. Given it is more than six months since the date of my first report, is the creditor time barred from challenging the remuneration and expenses incurred in this period? How will the outcome of this application affect my future remuneration and expenses?

**A** An application of this nature must be made no later than eight weeks after receipt by the creditor of the progress report in which you first reported the charging of the remuneration/expenses in question (rule 2.109(1B) of the IA 1986). Administration provides a short-term moratorium protecting the company against enforcement by creditors with an objective of rescuing the company as a going concern. In order to pursue this

purpose, administrators need to know the financial position of the company, and the process of determining the quantum of remuneration and expenses needs to be resolved quickly. The policy behind the time limit is to achieve certainty as to the company's liability in this respect, subject to the limited right of challenge.

In your case, the creditor's application challenging the remuneration/expenses covered by your first report was made out of time and the challenge in respect of your second report was made in time. This then leads us to the next issue: can time be extended?

In principle, the answer is yes. The court has discretion to apply its general powers of case management so as to extend time for compliance with anything required to be done by the rules of the IA 1986 (rule 12A.55(2)). Therefore the eight-week time limit is not absolute and can be departed from depending on the facts in your particular case.

In *Re Calibre Solicitors Ltd (in administration)* [2015] BPIR 435 the court did allow an extension of time on the basis that a separate application to challenge the administrators' remuneration and expenses in respect of an earlier progress report had already been issued in time. The grounds of challenge were the same in both applications

and it was decided that allowing a second application was unlikely to materially delay the resolution of the amount of the office-holder's remuneration and expenses.

That is not to say that an extension of time will always be granted where there is a separate application afoot which was issued in time. The creditor in *Re Calibre Solicitors Ltd* always intended to challenge the remuneration and expenses in the second progress report; however, it was wrongly assumed that the amounts charged in the second report could be challenged as part of its first application. The key distinction in your case is that the creditor is seeking an extension in respect of an *earlier*

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progress report. Failing to meet a statutory deadline is a serious breach of the rules and in your case the court will carefully consider whether there was a good reason for this breach in deciding whether to grant an extension.

As regards your future remuneration and expenses, it should not be assumed that because remuneration/expenses in one progress report are challenged, the remuneration/expenses in later progress reports will also be challengeable. A separate application is required in respect of each progress report and the amounts claimed in later periods will need to be examined separately. However, any reasoning behind the decision of the court in respect of your first or second progress reports, which has the effect of reducing the amount you are allowed to charge, will be applied to the remuneration/expenses you are entitled to charge in later reports. □



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