




Portland
Business Support & Advice

The process of Administration explained



A Guidance Paper by  Portland Business Support & Advice
The way forward, **made brighter**

The process of Administration explained

An overview

Administration can be a simple way for a company to obtain a breathing space from financial pressure. It involves the appointment of an insolvency practitioner, called an Administrator, who works with the company's directors', to put together proposals as to how the company will move forward.

The obtaining of an administration order was made considerably simpler under the Enterprise Act 2002, which reflected the Government's desire to encourage a 'rescue culture' to help companies of all shapes and sizes deal with financial distress.

Who can appoint an Administrator?

An Administrator can be appointed through a simple out-of-court procedure by the directors, the company or a secured creditor or by an application to the court by an unsecured creditor.

Those parties that principally can initiate the appointment are set out in this table.

	Out-of-court appointment (ie without a court hearing)	Appointment by court following petition
Company acting either through its directors or shareholders, in both cases by passing a valid resolution in accordance with the company's articles	If the company is close to insolvency, but is not already subject to a winding up petition or in liquidation and has not already been in administration or a company voluntary arrangement (CVA) within the previous 12 months. Five day's prior notice is given to any qualifying floating charge holder (*) and others so entitled.	Only if the company is insolvent and five day's notice is given to any qualifying floating charge holder (*) and others so entitled.
Qualifying floating charge holder (*)	Only if two day's prior notice is given to any holder of prior qualifying floating charge. It is not necessary to show that the company is close to insolvency but the company must be in default of the terms of the charge.	Only if the company is close to insolvency and notice is given to the company, other qualifying floating charge holders and others so entitled.
Any other creditor	Not available	
Liquidator	Not available	To replace liquidation with administration

(*) A qualifying floating charge holder is any creditor holding a floating charge over substantially all of the company's assets purporting to allow it to appoint an administrative receiver or where the charge specifically states that it is a qualifying floating charge entitling the holder to appoint administrators.

To obtain the protection of administration:

- **Without a court hearing;** a simple notice of appointment and statement of opinion by the proposed Administrator needs to be filed at court.
- **By court order;** an affidavit is required from the party requesting the order, setting out details about the company, with an outline of what is proposed, together with a statement of opinion from the proposed Administrator that the purpose of administration is likely to be achieved.

In either case:

- Once a court is notified, by the filing of forms in an out of court procedure, or the filing of the application where a hearing is required, the company is immediately protected from any action against the company by creditors.
- In the out of court procedure, this initial protection ends automatically after ten business days, but it continues if the proposed Administrator files with the court a notice to say he has complied with the appointment procedure and is willing to be appointed.
- The appointment of an Administrator protects the company from other insolvency procedures and stops creditors taking action against assets, including finance creditors, landlords and retention of title creditors.

Key fact:

Where urgent protection from hostile action against the company is required, the administration procedure can provide that protection in the very short time it takes to lodge the papers with the court.

The role of an Administrator

The legal 'purpose' of administration is to achieve any one of three objectives, which need to be addressed in this order of priority:

1. Rescuing the company as a going concern.
 2. Achieving a better result for the company's creditors as a whole than would be likely if the company were in liquidation.
 3. Realising property in order to make a distribution to one or more secured or preferential creditors.
- An Administrator will always consider the first objective first and can only follow the second objective once he is satisfied either that first objective is no longer practical or possible. Overall, an Administrator is required by law to carry out his function in the interests of the creditors as a whole and to carry out his duties as quickly and efficiently as reasonably practical. Ultimately, an Administrator is an officer of the court.
 - Administration is a very flexible process and the Administrator has wide powers to deal with the many different situations where administration can be used. The company can continue to trade whilst in administration.
 - The Administrator will prepare his formal proposals for achieving the purpose of the administration within eight weeks and has a further two weeks to convene a meeting of creditors to consider them. It is possible to dispense with a creditors' meeting and instead pass resolutions by correspondence, if creditors agree. The proposals are approved if a majority in value vote in favour. Subsequent significant variations require further formal approval by creditors.
 - Where the Administrator believes there will be no funds for unsecured creditors, the preferential and secured creditors only approve his proposals. There is no creditor meeting if there is not going to be a dividend paid to the unsecured creditors.

- The law encourages the Administrator to act promptly and the procedure automatically ends after twelve months, unless extended by the court or creditors. An administration will end either with the company being restored to solvency, perhaps through a CVA; the company being placed into liquidation normally with the Administrator acting as liquidator; or, if the Administrator finds he is only able to distribute funds to secured and/or preferential creditors, he can arrange for the company to be dissolved.

The 'Pre-Pack'

In recent years, administration has been used as a mechanism to achieve the sale of a company's business and assets as a going concern, with the sale having been negotiated prior to the administration and executed by the Administrator immediately on his appointment. Where this takes place, it is often referred to as a 'Pre-pack'. Whilst this is a legitimate use of the administration procedure, creditors are often taken by surprise and can feel disenfranchised and if the directors of the company are connected to the purchasing party, the creditors are often unhappy with the outcome.

To address creditor concerns, the insolvency regulators issued SIP16, a requirement placed upon Administrators to report the full facts of the 'Pre-Pack' transaction to creditors within 7 days of the transaction taking place.

Whilst a Pre-pack can be an effective tool, it is easy to 'jump out of the frying pan and into the fire'. The new company will be tainted by the process, customers and suppliers may be nervous of dealing with the purchasing company. In addition the new company will need funding to purchase the assets and working capital to run the business.

If a person who is or has been a director is involved with the purchaser, there are prohibitions on directors being involved in the purchasing company post insolvency, if it has a similar name or trading style. There are exceptions to this prohibition, where there is a bona fide sale of the business, but it is important to ensure that the criteria are met and the required processes are complied with fully. It is a criminal offence to breach the prohibition and there can also be significant financial penalties.

Key fact:

A Pre-Pack can be an effective way to save a business, but care must be taken to deal with creditor concerns.

Distressed funding

To achieve the best outcome in an insolvent situation may require new funding to be made available. We have immediate access to funds, which we can apply to an insolvent situation as part of a strategic plan.

Our experience tells us that management are often in the best place to help achieve a recovery in insolvency, but to achieve this they need to work with an insolvency professional that recognises the skill and expertise that they can add to the mix.

Where appropriate, we are willing to work with management, introduce our own funds to support ongoing trading and work together to achieve the best outcome possible.

This constructive approach has already been proven to work. We have utilised this funding to provide working capital to a company which we traded in administration with the support of the existing management, whilst marketing the business for sale over an extended period. The end result in that case was that the existing management were able to match the return to creditors based on the offers received and therefore were able to retain the business. In addition, the period of trading in administration provided the opportunity to improve the business model and the company is now profitable and trading successfully. We have also used these funds to facilitate the transfer of a complex manufacturing business post sale to a third party, which successfully resulted in trade creditors being paid in full with management moving across to the purchaser as part of the deal.

Achieving the best outcome is our aim and we reject the notion that it is not possible to trade in administration on the basis of a lack of funding. Our private equity business funding is available, where we believe it will be used productively and enables us to maximize value, facilitate a constructive strategy, or be used to rescue a company or its business.

Key fact:

New funding can be introduced in distressed situations as part of an agreed strategy.

Advantages and disadvantages of administration

Advantages	Disadvantages
<ul style="list-style-type: none"> • Quick to initiate, particularly through the out of court procedure. • Very wide protection from creditor action including finance companies and landlords. • Whilst in practice, an Administrator will wish to work closely with directors; the effect of his appointment is that he takes the responsibility for an insolvent company and its creditors away from the directors. It therefore protects the directors from further risk of wrongful trading and potential personal liability for the company's debts. • It is possible to save the company, which is one of the purposes, possibly by affording a realistic period to devise CVA proposals. • An Administrator has wide powers to trade on or sell the business as a going concern without the liabilities. It can be used to complete sale negotiations begun by the directors or the proposed administrator prior to the administration. • Subject to the agreement of creditors, this procedure allows for a restructuring of the company, including addressing onerous liabilities by negotiation or binding them into the creditors' proposals. 	<ul style="list-style-type: none"> • The court petition process is subject to the court timetable. • Floating charge holders have a right to appoint their choice of Administrator. • The process can result in a discount on asset values, although not normally as large as in liquidation. • Trading in administration will involve additional professional costs, although in practice it is a short term strategy and an Administrator may delegate day to day control to the directors.

The Portland approach

- ✓ We provide help and advice for businesses and individuals.
- ✓ Whatever your needs, we will represent your interests with professionalism and sensitivity, independent of vested interest, and with the personal attention of our senior people.
- ✓ We have tried to provide a concise summary of a potentially complex area in this guide, for more detailed information and advice specifically tailored for you; we encourage you to contact us to discuss your individual needs. It's up to us as trusted professionals and experts, with many years' experience to provide a clear picture and explanation of the options available to you.
- ✓ For a no obligation discussion, please contact one of our senior people by telephone or email for an immediate response.



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This document explains the relevant position only in general terms and omits details less commonly experienced for the sake of brevity. It is not intended to be used as formal advice about your actual situation, for which you should consult us specifically and not rely upon this document.

Portland would be pleased to advise you formally and you should contact one of the directors listed on the website at www.portfbs.co.uk to arrange this or telephone our main switchboard on 01489 550440.

Portland regrets it is unable to accept any responsibility to anybody who seeks to rely on this document.

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