Statement of Insolvency Practice 17 Scotland

AN ADMINISTRATIVE RECEIVER'S RESPONSIBILITY FOR THE COMPANY'S RECORDS

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1 Introduction

1.1 This statement of Insolvency Practice is to be read in conjunction with the Explanatory Foreword

1.2 This statement has been prepared to summarise what is considered to be the best practice in circumstances where receivers are approached by liquidators or directors seeking access to or custody of a company's books and records. The best practice is considered below both with regard to company records maintained prior to the appointment of a receiver and with regard to those records prepared after the receiver's appointment.

2 Company records maintained prior to appointment of a receiver

2.1 The records which a company maintains prior to the appointment of a receiver may be classified under two main headings.

2.2 The first comprises the non-accounting records which the directors are required to maintain by the Companies Act 1985 (as amended) (the statutory records). These consist of various registers (eg of members) and minute books (e.g. of directors' meetings).

2.3 The second category of records maintained by a company prior to the appointment of a receiver includes accounting records required by statute and all other non-statutory records of the company (statutory accounting and other non-statutory records). Taking each in turn:-

3 Statutory records

3.1 The company's statutory records should be kept at its registered office or other permitted place (see paragraph 3.6 below) having regard to the provisions of the Companies Act 1985, Sections 288, 353, 383 and 411 (registers of directors, members, minute books and charges).

3.2 Directors' powers to cause entries to be made in these statutory records do not cease on the appointment of a receiver. Indeed, the directors' statutory duties to maintain them are unaffected by his appointment.

3.3 A receiver would have the power to inspect the statutory records as part of his right to take possession of, collect and get in the property of the company (cf. schedule 2,

paragraph 1 of the Insolvency Act 1986). He is not, however, placed under an obligation to maintain those records after his appointment and should not normally do so.

3.4 The abolition by Section 130 of the Companies Act 1989 of the requirement for a company formed under the Companies Acts to have a common seal means that in many cases the company in receivership will have no common seal. Provided that an appropriately worded attestation clause is used, deeds can be executed without the use of the common seal. Given that the common seal may still be used for the execution of deeds by the company, however, it is considered best practice for the receiver to take possession of it.

3.5 On appointment, a receiver has two possible options:-

i) To leave the statutory records in the custody of the directors so that they are in a position to continue to carry out their statutory duties to maintain them.

ii) To take possession of the statutory records for safe keeping. In such circumstances, the receiver should remind the directors of their statutory responsibilities to maintain the records and allow them free access for this purpose. It would also be advisable for the receiver to prepare a detailed receipt for all the records taken into his possession. This should be signed by a director or other responsible official of the company in receivership.

3.6 The receiver may change the company's registered office to that of his own firm, in which case, the statutory records should also be transferred to the new registered office and the procedure outlined in paragraph 3.5. (ii) above followed.

3.7 Any statutory records (and if applicable any seals) taken into a receiver's possession (see paragraphs 3.3 and 3.4) should be returned to the directors (or liquidator) on the receiver's ceasing to act.

4 Statutory accounting and non-statutory records

4.1 All such records as are necessary for the purposes of a receivership should be taken into the receiver's possession and/or control and any which he will definitely not require may be left with the directors. If the receiver encounters difficulty in obtaining possession of the records, the provisions of Sections 234 - 236 of the Insolvency Act 1986 may be of assistance. These are the provisions allowing a receiver to apply to the court for an order for property in the control of any party to be handed to him, placing officers and others under a statutory obligation to co-operate with the receiver and allowing him to apply to the court for an order summoning officers of the company in receivership and others before it for questioning.

4.2 A receiver is under no statutory duty to bring these records up to date to the date of his appointment although for practical purposes (such as to give prospective purchasers some indication of the financial state of the business) it may be necessary for him to do so.

4.3 If a receiver does not take possession of all the records it would be advisable for him to make a list of all those not taken into his custody with a note of their whereabouts.

4.4 When making sales of certain assets (e.g. book debts or plant and machinery) it may be necessary for the receiver to hand over to the purchaser company records (e.g. debtors' ledger or plant registers) relating to those assets. In such circumstances, the

receiver should ensure that the relevant asset sale agreement specifies the need for these records to be made available to the company on request. Although this will invariably be a matter of negotiation between the receiver and his purchaser, it would be preferable for him to retain the originals of such records. He may make copies available to the purchaser or allow the purchaser to retain them for a short time for the purpose of making copies. Once again, appropriate provision should be made in the asset sale agreement as to the particular circumstances and as to whom is to bear the costs.

4.5 If a receiver transfers the business of the company to a third party as a going concern, Section 49 and paragraph 6 of Schedule 11 to the Value Added Tax Act 1994 place the obligation of preserving any records relating to the business upon the transferee. This applies unless the Commissioners of Customs & Excise, at the request of the transferor, otherwise direct.

4.6 This is a wide-ranging obligation. It applies regardless of whether the VAT registration is itself transferred or whether the transfer is treated as supply of neither goods nor services.

4.7 The categories of records covered by Schedule 11 paragraph 6 are wide-ranging. They include orders and delivery notes, purchase and sale records, annual accounts, VAT accounts and credit and debit notes.

5 Entitlement of liquidator to records

5.1 The case of *Engel -v- South Metropolitan Brewing & Bottling Company [1892] 1 Ch 442* is authority under English law to the effect that a liquidator becomes entitled to possession of all books and records relating to the "management and business" of the company which are not necessary to support the title of the chargeholder as against a court-appointed receiver. The court held that a court-appointed receiver can be compelled to deliver such documents to the liquidator against the liquidator's undertaking to produce them to the receiver on request. While there is no equivalent authority with respect to a receiver appointed by the holder of a floating charge, general practice supports the proposition that delivery up of records in return for an undertaking and subsequent production on request should occur (Lightman & Moss, *Law of Receivers of Companies, 2nd Edition* paragraph 11 - 17).

5.2 A receiver has no statutory authority to destroy pre-appointment records and in due course these must be returned to the company's directors or, if the company is in liquidation, to its liquidator.

6 Post appointment records

6.1 Statutory Accounting Records

Relating to the period prior to the appointment of a liquidator

6.1.1 The receiver should establish appropriate accounting records as from the date of his appointment. The English case of *Smiths Limited -v- Middleton [1979] 3 A11 ER 842* shows that he has a duty to render full and proper records to the company in order that the company (and its directors) may comply with the duties imposed by Sections 221, 226, 227 and 241 Companies Act 1985 (preparation and approval of accounts).

6.1.2 A receiver is also under obligation to make returns of his receipts and payments pursuant to Rule 3.9 of the Insolvency (Scotland) Rules 1986. The statutory requirements and the best practice to be followed in the preparation of insolvency practice entitled "Preparation of Insolvency Office Holders' Receipts and Payments Accounts", to which members are referred to further information.

6.1.3 When a liquidator is appointed, the *Engel* case would seem to apply so that the liquidator becomes entitled to possession of records (see paragraph 5.1. above).

6.1.4 Receivers have no statutory authority to destroy such records and on ceasing to act must hand these over to the company's directors or, if it is in liquidation, to the liquidator.

Relating to the period after the appointment of a liquidator

6.1.5 The receiver's obligation to make returns of receipts and payments and to maintain accounting records (paragraph 6.1.2. above) remains in force after the appointment of a liquidator.

6.1.6 Section 69 Insolvency Act 1986 allows any member, creditor, the Registrar of Companies or the liquidator to enforce these duties.

7 Other records

7.1 The remaining records, books and papers relating to a receivership may be subdivided between "company records", "chargeholder's records" and "receiver's personal records"

7.2 Company Records

7.2.1 Company records will include as a minimum all those records which exist as a result of carrying on the company's business and dealing with the assets. These records fall in the same category as the non-statutory records mentioned in paragraphs 4.1 to 5.2 above. They should be treated in the same way, being returned to the company's directors or if it is in liquidation, to its liquidator when the receiver ceases to act.

7.2.2 In the English case of *Gomba Holdings UK Limited -v- Minories Finance Limited [1989] 5BCC 27* consideration was given to precisely which records fall within the definition of "company records". It was held that an administrative receiver acts in several capacities during the course of a receivership. In addition to being agent of the company, he owes fiduciary obligations to his appointor and to the company. It is only documents generated or received pursuant to his duty to manage the company's business or dispose of its assets which belong to the company.

7.3 Chargeholder's Records

7.3.1 As explained above, in the *Gomba* case quoted in paragraph 7.2.2. above it was held that documents containing advice and information to the appointor and "notes, calculations and memoranda" prepared to enable the receiver to discharge his professional duty to his appointor or to the company belong either to the appointor (if he wishes to claim them) or to the receiver. They do not belong to the company.

7.4 Receiver's Personal Records

A receiver's personal records are those prepared by him for the purpose of better enabling him to discharge his professional duties. They will include, for instance, his statutory record which he is required to maintain by Regulation 17 of the Insolvency Practitioners' Regulations 1990 ("the Regulations"). The record must take the form set out in Schedule 3 to the Regulations.

8 Best practice

8.1 It is considered best practice that all records mentioned above, with the exception of the chargeholder's records (paragraph 7.3. above) and a receiver's personal records (paragraph 7.4. above) should be made available on request to the company acting by its directors or, if it is in liquidation, its liquidator, unless the receiver is of the opinion that disclosure at that time would be contrary to the interests of the appointor, for instance because of current negotiations for the sale of assets (*Gomba Holdings UK Limited -v- Homan [1986] 3 All ER 94*). Subject to the interests of the chargeholder, it appears from this case that directors are entitled to such information as they need to enable them to exercise their residual powers and to perform their residual statutory duties considered above.

8.2 Disclosure of the receiver's personal records is a matter for his discretion, although in any legal action brought against him productions may be ordered by the Court.

8.3 Where there is no liquidator and the directors cannot be traced (or the receiver has reason to suppose that they are not reliable) he will need to consider whether he feels it necessary to present a petition for the company to be wound up using his powers under Schedule 2 to the Insolvency Act 1986. Whether or not a liquidator is appointed, the receiver has no statutory power to destroy a company's records even after the expiry of the statutory period for which the company would need to retain them (usually 6 years). Thus, if he does so without the authority of the company or the liquidator, he does so at his peril. Note also that the record a receiver is required to keep by the Regulations must be preserved for a period of 10 years from the later of the date upon which the receiver ceases to hold office or any security or caution maintained in respect of the company ceases to have effect (Regulation 20).

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