

STATEMENT OF INSOLVENCY PRACTICE 3A (SCOTLAND)

Trust deeds

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Effective from 7 December 2009

1 Introduction

1.1 This Statement of Insolvency Practice (SIP) is one of a series of guidance notes issued to licensed insolvency practitioners with a view to maintaining standards by setting out required practice and harmonising practitioners' approach to particular aspects of insolvency.

SIP 3A (Scotland) 2009 is issued under procedures agreed between the insolvency regulatory authorities acting through the Joint Insolvency Committee (JIC). It was commissioned by the JIC, produced by the Association of Business Recovery Professionals, and has been approved by the JIC and adopted by each of the regulatory bodies listed below:

Recognised Professional Bodies:

- The Association of Chartered Certified Accountants
- The Insolvency Practitioners Association
- The Institute of Chartered Accountants in England and Wales
- The Institute of Chartered Accountants in Ireland
- The Institute of Chartered Accountants of Scotland
- The Law Society
- The Law Society of Scotland

Competent Authority:

- The Insolvency Service (for the Secretary of State for Business, Innovation and Skills)

The purpose of SIPs is to set out basic principles and essential procedures with which insolvency practitioners are required to comply. Departure from the standard(s) set out in the SIP(s) is a matter that may be considered by a practitioner's regulatory authority for the purposes of possible disciplinary or regulatory action.

SIPs should not be relied upon as definitive statements of the law. No liability attaches to any body or person involved in the preparation or promulgation of SIPs.

- 1.2 The Statement has been prepared for the sole use of insolvency practitioners in dealing with trust deeds in Scotland.
- 1.3 The objective of this statement is to provide practical guidance in relation to issues commonly arising on which current legislative provisions are either silent or ambiguous. The statement which follows assumes that practitioners are familiar with the trust deed procedure and legislative framework.
- 1.4 The revised SIP 3A (Scotland) 2009 applies only to trust deeds signed on or after 1 April 2008 and is not retrospective. Guidance for trust deeds signed prior to 1 April 2008, should be taken from the earlier versions of SIP 3A(Scotland).
- 1.5 The Protected Trust Deed (Scotland) Regulations 2008 are referred to in the SIP as "the Regulations".
- 1.6 The SIP sets out the principles and procedures which should apply where it is intended that a trust deed achieve protected status and subsequently does so. The SIP also sets out the principles and procedures which should apply where it is intended that a trust deed achieve protected status but it does not. In these circumstances the trustee should consider the options with the debtor. If the trust deed continues unprotected then the trustee should exercise his judgement and consider which procedures apply. Finally, the SIP sets out what procedures are open to the debtor and trustee where the trust deed fails after protection is achieved.

- 1.7 The insolvency practitioner should exercise his judgement and consider the extent to which these principles and procedures should apply in the limited number of cases where there is no intention that the trust deed becomes protected.

2 Nature of trust deeds

- 2.1 The trust deed is a voluntary act by a debtor for the benefit of creditors albeit that the debtor retains a radical right in the assets transferred. It is a deed granted by the debtor in favour of a trustee or trustees under which the estate is conveyed, to be administered for the benefit of creditors and to effect the payment of debts in whole or in part. The creditors may agree or accede to this procedure, or alternatively may object to the procedure. A trust deed may become protected under the statutory provisions, in which case creditors are bound by the terms laid down in the statutory provisions.
- 2.2 Where assets which would vest in a trustee in sequestration are excluded from the trust deed, that trust deed will not satisfy the requirements for protection. If the insolvency practitioner is aware that there is no prospect of the trust deed, when signed, becoming protected, he should advise the debtor in writing of the implications of not gaining protected status and wherever possible, of alternative solutions.
- 2.3 Practitioners are reminded that it is not competent to have a conjoined trust deed, which complies with the Act, signed by more than one party and purporting to deal with the combined estates of more than one person. If all the estates are insolvent individual trust deeds are required for each separate legal person, so that for example with a partnership of three people each individual and the partnership would sign a trust deed, totalling four deeds.

3 Ethical considerations and acceptance

- 3.1 In dealing with a trust deed the insolvency practitioner should bear in mind an overriding duty to ensure a fair balance between the interests of the debtor, the creditors and any other parties involved. In considering whether to accept appointment as trustee the practitioner should have regard to the ethical guidelines of the authorising body. The practitioner should not accept appointment if objectivity and independence are likely to be impaired or be seen to be impaired.
- 3.2 Insolvency practitioners may advertise their professional services provided the advertisements comply with the law; with the Advertising Standards Authority rules and their authorising body's Ethics Code.
- 3.3 Insolvency practitioners are reminded that no payment can be made to third parties for the introduction of insolvency work. Such payments breach the Ethics Code.
- 3.4 In accordance with statutory requirements a payment can be made to an agent of the trustee for work done prior to signing the trust deed in order to ascertain the financial position of the debtor; however, the insolvency practitioner still has a responsibility to verify all information received.

Such a payment can be an expense of the trust deed provided that there is a specific provision in the trust deed to that effect, the work is appropriate and necessary for the preparation of the trust deed and full details i.e. name and address of the agent, whether associated to the trustee or the trustee's firm in terms of either S74 of the Bankruptcy (Scotland) Act 1985 or S435 of the Insolvency Act 1986, amount of fee and work undertaken, are disclosed to creditors at the earliest possible opportunity.

There should be no extra cost incurred in having a third party carry out the work instead of the insolvency practitioner. The practitioner must ensure that any payment made is reasonable having regard to the work done and the rates charged.

- 3.5 In addition to the statutory requirements to provide documentation to creditors and the Accountant in Bankruptcy the trustee should provide details in the first circular to all known creditors and to the Accountant in Bankruptcy of the following matters:-
- 1 Where a payment to an agent of the insolvency practitioner has been made or is due to be made for work done prior to the signing of the trust deed, the name and address of the party carrying out the work and the amount of the payment.
 - 2 The likely cost to the estate of the trustee's fee for the period of the trust deed together with a statement of the assumptions made in producing the estimate. Trustees are reminded that all fees must be approved.
- 3.6 Insolvency practitioners' attention is drawn specifically to the terms of Regulation 18.

4 EC regulation

- 4.1 In order to determine whether and in what respects the EC Regulation on Insolvency Proceedings applies to it and to supply the information required under Part B of Appendix 2 of the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2008 (Register of Insolvencies), the Trust Deed must contain the following information:-
- i. the location of the debtor's "centre of main interests";
 - ii. the location of any other "establishment" of the debtor (or that he or she has none);
 - iii. the nature and location of, and court in which any other "insolvency proceedings" have been opened (or that none have been opened); and,
 - iv. whether the Trust Deed constitutes "main" or "territorial" proceedings.

5 Initial contact with the debtor

- 5.1 The insolvency practitioner, (whom failing, a suitably experienced member of staff) prior to the signing of the trust deed, should always offer to meet the debtor personally. However the practitioner, or suitably experienced member of staff, may conduct the initial interview on the telephone. If the interviewer forms the opinion that either the debtor does not fully understand the matters described in sections 5.2 – 5.13 of this SIP or that the debtor has not adequately disclosed his financial circumstances, the practitioner should insist that a meeting in person be conducted. If the debtor is carrying on a business the practitioner, or a suitably experienced member of staff, must visit the business premises as part of the information gathering and planning exercise.
- 5.2 Whether the debtor is interviewed in person or by telephone, the practitioner must satisfy himself that appropriate client identification and money laundering procedures have been completed.
- 5.3 It is recommended that the debtor be interviewed using a similar style of questionnaire as is used in sequestration proceedings under the Bankruptcy (Scotland) Act 1985 as amended. The questionnaire and appendices should then be signed and dated by the debtor.
- 5.4 The debtor should be advised that it is an offence to make false representations or to conceal assets or to commit any other fraud for the purposes of obtaining creditor approval to the trust deed.
- 5.5 The debtor should be advised at the initial interview of the insolvency practitioner's requirement to maintain independence. The practitioner should make it clear to the debtor that his duties as trustee, once the trust deed is signed, cannot be influenced by the wishes of the debtor. It should be remembered that although a trustee under the trust deed acts

primarily for the benefit of creditors, he has a residual obligation to act in the interests of the debtor.

- 5.6 A full file note of the initial meeting or telephone interview should be prepared and retained on the case file and copied to the debtor. Any subsequent meetings or telephone interviews dealing with substantive issues should be prepared and retained on the case file and copied to the debtor.
- 5.7 The insolvency practitioner should carry out an independent assessment of the financial circumstances of the debtor and should consider carefully whether a trust deed is the most appropriate means for dealing with the debtor's problems. Such consideration should be recorded by the practitioner and explained to the debtor in a letter immediately after the initial meeting or telephone interview. A full Statement of Affairs and Statement of Income and Expenditure must be prepared by the insolvency practitioner or, if prepared by a third party, checked by the practitioner. These statements must be agreed by the debtor who should be asked to sign them as evidence of such agreement.
- 5.8 The debtor must be advised, in writing of the consequences of signing a trust deed and, that apparent insolvency is constituted by the signing of the trust deed. The debtor should also be advised of the effects of a trust deed not becoming protected, in particular that a creditor could petition for sequestration. The practitioner must obtain, in writing, confirmation from the debtor that in the light of the advice the debtor has received, that the debtor has considered the position carefully prior to signing the trust deed.
- 5.9 The practitioner should be satisfied that a debtor has had adequate time to think about the consequences and alternatives before signing a trust deed. Practitioners are reminded that once signed, a trust deed is a binding obligation between debtor and trustee.
- 5.10 Where the insolvency practitioner is consulted by two individuals who are either married, in a civil partnership, cohabiting or otherwise have a relationship which could give rise to a conflict of interest, the practitioner should ensure that each is assessed individually and then offer advice based on that individual's own circumstances. If the practitioner considers there is a conflict of interest in the practitioner advising both parties, the practitioner should consider whether it is appropriate to accept both appointments.

Heritable property

- 5.11 At the interview the insolvency practitioner must ensure that the debtor is clearly advised that all heritable property, including the debtor's home, is covered by the trust deed and that any equity therein at the start of the trust deed, or arising during the period of the trust deed, may require to be realised for the benefit of the creditors.
- 5.12 Where the terms of the trust deed for creditors are based entirely on equity in the debtor's property, the practitioner should quantify the equity per section 6.6 before the debtor signs the trust deed.

Existing debt payment arrangements

- 5.13 The practitioner should establish whether or not the debtor has been making regular payments to debt advisors or their equivalent. If so, it must be explained to the debtor that once the trust deed is signed the debtor must not continue to make payments to that party in respect of an arrangement entered into before the trust deed was signed.

6 Dealing with assets and contributions

General guidance

- 6.1 The trustee should follow the Accountant in Bankruptcy guidance notes on sequestrations when dealing with assets. The trustee should ensure that a comprehensive schedule of

assets in which the debtor has an interest has been prepared together with explanatory notes. The trustee should take steps to satisfy himself as to the value of the assets.

- 6.2 The trustee should be aware that in order to achieve protected status, the trust deed must convey all of the debtor's estate to the trustee with the exception of property which would be excluded from vesting in a sequestration.
- 6.3 Under the Regulations, the Accountant in Bankruptcy may give directions to the trustee under a protected trust deed as to how the trustee should conduct the administration of the trust deed but it remains the duty of the trustee to ensure that he complies with all statutory obligations in priority to any such directions. The trustee is reminded that such direction by the Accountant in Bankruptcy can be requested and/or appealed by the trustee.

Heritable property

- 6.4 The insolvency practitioner should obtain evidence of the ownership of any heritable property. If the debtor advises that he or she owns the property, either in whole or in part, a property search should be obtained to confirm the position. If the property is rented, evidence should be provided e.g. by means of production of a rent book or written confirmation from the landlord.
- 6.5 In the event that the debtor owns the heritable property, in whole or in part, the practitioner should obtain a professional valuation except that where there is already a valuation from a reputable valuer, which the practitioner is satisfied remains current, the practitioner may accept such a valuation in lieu of obtaining a fresh valuation.
- 6.6 The trustee's attention is drawn to the provisions in the Accountant in Bankruptcy's guidance notes relating to heritable property. If not established pre-signing, equity in property, including the matrimonial home, must be established as soon as practicable, and in any event prior to the trust deed being presented to creditors, by obtaining a professional valuation, the surrender value of any assigned policy and confirmation of the secured liability. Where possible the trustee should seek to reach agreement regarding how the equity in a property will be realised, as soon as possible in the circumstances, and should realise the highest amount for the equity which the trustee thinks is obtainable in the circumstances of the case. The trustee should record on the file his reasons for reaching this agreement.
- 6.7 The trustee should note that the trustee can only accept income contributions from the debtor during the period prior to the debtor's discharge. These contributions must not be applied to heritable property. Where however it does not prove possible for a third party to buy the property, in accordance with the Accountant in Bankruptcy's guidance notes, the trustee should give consideration to accepting payment from a debtor's surplus income beyond the agreed term of the contribution payments allowing the subsequent payments to be treated as payments for the heritage.
- 6.8 The trustee should consider seeking legal advice when dealing with an unequal split of a jointly owned property.
- 6.9 If the trustee disposes of or abandons his interest in a property, where no formal disposition has been prepared, he should issue a formal letter confirming this.

Trading

- 6.10 If there is a business, the trustee should consider the manner in which he will deal with that business. The trustee should consider whether trading should continue and if so, on what terms. If the trustee decides to continue trading, such a decision should be supported by cash flow and trading forecasts. The trustee must be able to demonstrate the matters considered and that his action is in the best interests of creditors.

- 6.11 The trustee will be responsible for any ongoing trading activity of the existing business, and will require to introduce appropriate controls. The trustee should be aware that he may have personal liability for loss if he elects to continue trading activities after the trust deed has been signed and as a result diminishes the value of the estate available to creditors.

7 Meeting of creditors

- 7.1 There is no mandatory or statutory requirement to call a meeting of creditors. If however the trustee considers it is in the interest of the general body of creditors such a meeting can be called.
- 7.2 The trustee should record in the Sederunt Book all requests by creditors to hold a creditors meeting. If the trustee considers that a meeting would be in the general interests of all creditors a meeting should be convened. If a meeting is not convened the trustee must record in writing in the sederunt book the reason for the decision.

8 Accounting, reporting and remuneration

- 8.1 As a minimum requirement, accounts should be prepared to each anniversary of the signing of the trust deed and be sent to the debtor, each creditor and the Accountant in Bankruptcy promptly.
- 8.2 Fees must be taken in accordance with the provisions of the trust deed. Where there is a committee of creditors the accounts should be submitted to the members of the committee for approval together with a claim for remuneration supported by evidence of the hours spent and a résumé of the tasks undertaken.
- 8.3 The trustee must ensure that in the first circular to creditors full disclosure is made of any fee paid or due to be paid to a third party for work done prior to the signing of the trust deed. Any payment to an agent of the insolvency practitioner must be disclosed as an outlay in the trust deed and cannot be claimed as remuneration of the trustee. Practitioners are reminded of the terms of SIP9 in relation to payments to their firms, or to any associate, and that such payments should be treated in the same way as remuneration payments to the trustee and subject to the same approval requirements.
- 8.4 A copy of the accounts should be sent to creditors with a brief report on progress and stating the amount if any of previously notified fees which have been taken during the year.
- 8.5 The trustee is reminded that the notification of the trustee's estimated fee as referred to in paragraph 3.5 above does not amount to approval of the fee, and that all fees must be properly approved in the course of the trust deed and in advance of being drawn down.
- 8.6 Where the creditors were initially informed that the debtor had undertaken to pay regular contributions from income and payment of an amount equivalent to contributions for a period of three months in a year have not been received, the creditors must be informed of this in the next annual report. The creditors should also be advised of the reasons for non payment and what further action the trustee has taken in respect of the missed contributions.
- 8.7 Where the trustee's fees have not been fixed by the Accountant in Bankruptcy the circular should advise creditors of their right to have the accounts audited and the fees fixed by the Accountant in Bankruptcy. The trustee should delay taking credit for the trustee's fee until a minimum of 14 days have elapsed since the issue of the circular.
- 8.8 Where it becomes clear to the trustee that the total fee payable will exceed the estimate provided in accordance with paragraph 3.5 above by 25% or more the trustee must advise the creditors and the debtor of this in the next annual report, providing a revised estimate, of

the fee and, the dividend for unsecured creditors and providing an explanation for the variation.

- 8.9 Copies of all circulars must be sent to the debtor.
- 8.10 At the conclusion of the trust deed, a final statement of intromissions must be sent to creditors and to the debtor, and in the case of a protected trust deed to the Accountant in Bankruptcy.
- 8.11 During a trust deed, accepting referral fees or commissions represents a significant threat to objectivity. Such fees or commissions should only be accepted for the benefit of the trust deed estate, not for the benefit of the insolvency practitioner or his practice.

9 Other trust deeds

- 9.1 As well as individual trust deeds, practitioners should be aware that partnerships, trusts and corporate and unincorporated bodies may enter into trust deeds.

Partnership trust deeds

- 9.2 Although there should be little difference in the approach of trustees, it must be borne in mind that a partnership trust deed is not a joint and several version of an individual trust deed entered into by a sole trader.
- 9.3 The deed is entered into by a firm and by the partners in the said firm. As such, the estate conveyed is that of the firm, not of the partners as individual debtors, and does not extend to the partners' personal assets. Similarly, only the firm's liabilities are included.
- 9.4 The granting of a partnership trust deed allows a trustee to take swift control of the firm's assets, thus giving the opportunity to preserve the business and perhaps achieve a going-concern solution.
- 9.5 It is open, in appropriate circumstances, for some or all of the partners in the firm to sign individual trust deeds. If the insolvency practitioner considers there is a possible conflict of interest, the practitioner should consider whether it is appropriate to accept appointment on all or any of the individual partners.

10 Ending of trust deed

Protected trust deed achieving its purpose

- 10.1 The debtor should be discharged if he has met his obligations under the trust deed and specifically if all assets have been realised and contributions paid. Once the trustee has established that the debtor should be discharged, and any unexpired inhibition has been recalled, he should send notification of the discharge to both the debtor and the Accountant in Bankruptcy.
- 10.2 The procedure to bring a protected trust deed to a close is detailed in the Regulations. Not more than 28 days after the final distribution of the estate among the creditors, the trustee must seek his discharge from the creditors in the manner set out in the Regulations. Where a majority of creditors have consented or are deemed to have consented, the trustee is discharged. Immediately thereafter the trustee must send to the Accountant in Bankruptcy, for registration in the register of insolvencies, a statement which indicates how the estate was realised and distributed.
- 10.3 The trust deed itself may contain provisions on bringing the trust deed to a close, in which case these should be followed in so far as they do not conflict with statutory procedure

Protected trust deed not achieving its purpose

- 10.4 When considering whether a debtor should be discharged, notwithstanding the original terms of the trust deed have not been obtempered, the trustee should take into consideration all and any exceptional circumstances which have led to the debtor being unable to fulfil his obligation.
- 10.5 If the trustee considers that the trust deed is not achieving its purpose the trustee must consider appropriate alternatives given the circumstances of the case and bearing in mind the interests of creditors.
- 10.6 In the event that the trustee decides not to grant the debtor's discharge in terms of Regulation 19(5), he must confirm this and the reasons for his decision to the debtor in writing, advising the debtor of the implications of discharge not being granted. He should also notify the creditors in writing of his decision.

Trust deed

- 10.7 In a trust deed which has not become protected, there is no statutory procedure for bringing the trust deed to a close. It is normal practice for a receipt for the final dividend to incorporate a discharge of the trustee and a discharge of the debtor. Creditors who have not acceded to the trust deed have no requirement to grant a discharge to the debtor.

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