

Statement of Insolvency Practice 1

An Administrative Receiver's responsibility for the company's records

Introduction

1. This statement of insolvency practice is one of a series issued by the Council of the Society with a view to harmonising the approach of members to questions of insolvency practice. It should be read in conjunction with the Explanatory Foreword to the Statements of Insolvency Practice. The statement has been prepared for the sole use of members in dealing with administrative receiverships in England and Wales. Members are reminded that SPI Statements of Insolvency Practice are for the purpose of guidance only and may not be relied upon as definitive statements. No liability attaches to the Council or anyone involved in the preparation or publication of statements of insolvency practice.

2. This statement has been prepared to summarise what is considered to be the best practice in circumstances where Administrative 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 an administrative receiver and with regard to those records prepared after the administrative receiver's appointment.

Company records maintained prior to appointment of an Administrative Receiver

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

4. 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 (e.g. of members) and minute books (e.g. of directors' meetings).

5. The second category of records maintained by a company prior to the appointment of an administrative 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:

Statutory records

6. The company's statutory records should be kept at its registered office (see paragraph 11 below) having regard to the provisions of the Companies Act 1985, Sections 288, 353, 383 and 407 (registers of directors, members, minute books and charges). Note that Section 407 of the Companies Act 1985 will become Section 411 once the provisions of Part IV of the Companies Act 1989 come into force. These are the new provisions on registration of charges and are expected to come into force in December 1992.

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

8. An administrative 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 (c.f.

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schedule 1, 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.

9. 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 administrative receiver to take possession of it.

10. On appointment, an administrative receiver has two possible options:

- (a) 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.
- (b) To take possession of the statutory records for safe keeping. In such circumstances, the administrative 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 administrative 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.

11. The administrative 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 10 (b) above followed.

12. Any statutory records (and if applicable any seals) taken into an administrative receiver's possession (see paragraphs 8 and 9 above) should be returned to the directors (or liquidator) on the receiver's ceasing to act.

Statutory accounting and non-statutory records

13. All such records as are necessary for the purposes of a receivership should be taken into the administrative receiver's possession and/or control and any which he will definitely not require may be left with the directors. If the administrative 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 an administrative 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 administrative 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.

14. An administrative 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.

15. If an administrative 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.

16. When making sales of certain assets (e.g. book debts or plant and machinery) it may be necessary for the administrative receiver to hand over to the purchaser company records

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(e.g. debtors' ledgers or plant registers) relating to those assets. In such circumstances, the administrative receiver should ensure that the relevant asset sale agreement specifies the need for those records to be made available to the company on request. Although this will invariably be a matter of negotiation between the administrative 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.

17. If an administrative receiver transfers the business of a company to a third party as a going concern, Section 33 and paragraph 7 of Schedule 7 to the Value Added Tax Act 1983 place the obligation of preserving any records relating to the business upon the transferee. This applies unless the Commissioners of Customs and Excise, at the request of the transferor, otherwise direct.

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

19. The categories of records covered by Schedule 7 paragraph 7 are wide-ranging. They include orders and delivery notes, purchase and sales records, annual accounts, VAT accounts and credit and debit notes.

Entitlement of liquidator to records

20. The case of *Engel v South Metropolitan Brewing & Bottling Company* [1892] 1 Ch 442 is authority 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 an administrative receiver, 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*, paragraph 11-20).

21. An administrative 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.

Post-Appointment records

Statutory accounting records

(i) Relating to the period prior to the appointment of a liquidator

22. The administrative receiver should establish appropriate accounting records as from the date of his appointment. The case of *Smiths Limited v Middleton* [1979] 3 All 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).

23. An administrative receiver is also under obligation to make returns of his receipts and payments pursuant to Rule 3.32 of the Insolvency Rules 1986. The statutory requirements

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and the best practice to be followed in the preparation of insolvency office holders' receipts and payments accounts are summarised in the statement of insolvency practice entitled "Preparation of Insolvency Office Holders' Receipts and Payments Accounts", to which members are referred for further information.

24. When a liquidator is appointed, the *Engel* case would seem to apply so that the liquidator becomes entitled to possession of records (see paragraph 20 above).

25. Administrative 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.

(ii) Relating to the period after the appointment of a liquidator

26. As from the commencement of liquidation, the administrative receiver loses his status as agent of the company (Section 44(1)(a) Insolvency Act 1986). The administrative receiver's obligation to make returns of receipts and payments and to maintain accounting records (paragraph 23 above) remains in force.

27. Section 41 Insolvency Act 1986 allows any member, creditor, the Registrar of Companies or the liquidator to enforce these duties.

Other records

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

(a) Company records

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 13-21 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.

In the case of *Gomba Holdings UK Limited v Minorities 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.

(b) Chargeholder's records

As explained above, in the *Gomba* case quoted in paragraph 28(a) above it was held that documents containing advice and information to the appointor and "notes, calculations and memoranda" prepared to enable the administrative 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 administrative receiver. They do not belong to the company.

(c) Administrative Receiver's personal records

An administrative 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 records which he is required to maintain by Regulation 17

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of the Insolvency Practitioners' Regulations 1990 ("the Regulations"). The records must take the form set out in Schedule 3 of the Regulations. They will include the administrative receiver's name, appointor, and details of the progress of the receivership.

Best practice

29. It is considered best practice that all records mentioned above, with the exception of a Receiver's personal records (paragraph 28(c) above) and the appointor's records (see paragraph 28(b) above) should be made available on request to the company acting by its directors or if it is in liquidation, its liquidator unless the administrative 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] All ER 94). Subject to the interests of the appointor, 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.

30. Disclosure of the administrative receiver's personal records is a matter for his discretion, although in any legal action brought against him it could be that if such records have not been disclosed they may be held to be discoverable.

31. Where there is no liquidator and the directors cannot be traced (or the administrative 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 1 of the Insolvency Act 1986. If a liquidator is appointed, the administrative 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). If he does so without the authority of the company or the liquidator, he does so at his peril. Note also that the records an administrative receiver is required to keep by the Regulations must be preserved for a period of 10 years from the later of the dates upon which the administrative receiver resigns or any security or caution maintained in respect of the company ceases to have effect (Regulation 20).

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