

# Statement of Insolvency Practice 15 (Scotland)

Reporting and providing information on their functions to committees (and Commissioners in sequestrations) in formal insolvencies

## **1. Introduction**

**1.1** This Statement of Insolvency Practice (SIP) is one of a series 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 15 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 authorities 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 Trade and Industry)

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.

## **2. Scope**

This Statement concerns:

- Written reporting by insolvency office holders to committees in Corporate Insolvencies or to Commissioners in Sequestrations, both where there are statutory requirements to do so and in other cases.
- The provision of information to members of committees or commissioners about the rights, duties and functions of the committee or commissioners.

The Statement does not apply to members' voluntary liquidations.

The Statement applies to Scotland only. References to rules are to the Insolvency (Scotland) Rules 1986 (as amended), the Insolvency (Scotland) Amendment Rules 2003, the Insolvency Practitioner Regulations 2005, and the Bankruptcy (Scotland) Act 1985 (as amended).

### **3. Liquidations**

#### **3.1. Statutory requirements**

**3.1.1** In liquidations statutory obligations are laid on the office holder to report to the liquidation committee. The reporting requirements are set out in rules 4.44 and 4.56. In this Part of the Statement the term 'office holder' refers to the liquidator.

**3.1.2** Rule 4.44 stipulates that it is the duty of the office holder to report to the members of the committee all such matters as appear to him to be, or as they have indicated to him as being, of concern to them with respect to the winding up.

**3.1.3** The office holder need not comply with any request for information where it appears to him that the request is frivolous or unreasonable, or the cost of complying would be excessive having regard to the relative importance of the information, or there are insufficient assets or funds in the estate to enable him to comply (rule 4.44(2)).

**3.1.4** Where the committee has come into being more than 28 days after the appointment of the office holder he must report to the members in summary form what actions he has taken since his appointment and answer such questions as they may put to him regarding the conduct of the proceedings (rule 4.44(3)). A person who becomes a member of the committee at any time after its first establishment is not entitled to require a report to him by the office holder, otherwise than in summary form, of any matters previously arising (rule 4.44(4)). Nothing in rule 4.44 disentitles the committee or any member of it from having access to the office holder's records of the proceedings, or from seeking an explanation of any matter within the committee's responsibility (rule 4.44(5)).

**3.1.5** Rule 4.56(1) provides that the office holder shall, as and when directed by the committee (but not more than once every 2 months), send a written report to every member of the committee setting out the position generally as regards the progress of the winding up, and matters arising in connection with it to which he (the office holder) considers the committee's attention should be drawn. In the absence of such directions by the committee the office holder must send such a report not less than once every 6 months (rule 4.56(2)).

**3.1.6** Rule 4.32 applies the provisions of the Bankruptcy Act to the Liquidator's accounting and claim for remuneration and via this mechanism determines the basis on which a Liquidator's intromissions are audited by the Creditor Committee.

#### **3.2. Agreeing reporting intervals with committee members**

The office holder should discuss with committee members at their first meeting their requirements for reports and obtain their directions, having advised them of the statutory provisions set out in Rule 4.56(1) referred to in paragraph 3.1.5 above. These directions are likely to depend on the circumstances of the case and may change during the course of the proceedings. The directions of the committee should be recorded in the minutes of the meeting at which they are given and any changes should be similarly recorded.

#### **3.3. Consideration of matters for inclusion in reports**

The office holder should also discuss with committee members at his first meeting the type of matters which they wish to have reported to them so that matters of particular concern to them are identified. These should be recorded in the minutes of the meeting.

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It is the duty of the office holder to consider whenever he reports, what matters (in addition to those already identified) he should include in his report, exercising his professional judgement as to which aspects of the proceedings should be of concern to the committee.

The office holder should bear in mind that the requirements of rule 4.44 to report matters of concern to the committee persist notwithstanding any directions given under rule 4.56. He should therefore ensure that during the conduct of the case he considers matters for report generally so that he is able to fulfil his obligations under rule 4.44 and should ensure that such matters are reported on a timely basis.

### 4. Administrations

The rules applicable in administration depend on whether the proceedings are based on a petition presented before 15 September 2003. If they are, then the rules as they stood before the changes introduced by the Enterprise Act 2002 and its associated legislation continue to apply. Otherwise, the rules substituted by the Insolvency Scotland (Amendment) Rules 2003 will apply.

In a case subject to the old rules the following requirements apply:

- The administrator must send an account of his receipts and payments to each member of the committee (rule 2.17);
- If the administrator intends to resign and there is no continuing administrator he must give the committee at least seven days' notice of his intention to do so or to apply for the court's permission to do so (rule 2.18).

In all other cases the second of these requirements applies regardless of whether there is a continuing administrator (amendment rule 2.50). There is no longer a specific obligation to send a receipts and payments account to each committee member because there is a new requirement to send reports, including a receipts and payments account, to all creditors.

Although there are no further statutory requirements for written reports, members should ensure that any arrangements which are made for reporting to a committee in such cases are properly documented and adhered to.

### 5. Receiverships

In receiverships the following requirements apply:

- The receiver must send an account of their receipts and payments to each member of the committee (rule 3.9).
- If the receiver intends to resign, he must give the committee at least seven days' notice of his intention to do so in terms of The Receivers (Scotland) Regulations 1986(6).
- When a receiver vacates office, he must within 14 days forthwith give notice to the members of the committee (rule 3.11).

Apart from these there are no statutory requirements for written reports. However, members should ensure that any arrangements made for reporting to a committee in such cases are properly documented and adhered to.

## **6. Sequestrations**

### **6.1. Statutory requirements**

**6.1.1** In a sequestration there is no ability to form a Creditors' Committee. However, at the statutory meeting (or any subsequent meeting of Creditors), Commissioners may be elected by the creditors for the purpose of supervising the Permanent Trustee's Intromissions and advising him.

**6.1.2** Under Schedule 2 where the Interim Trustee is appointed rather than elected Permanent Trustee, Commissioners cannot exist.

**6.1.3** Where no Commissioners are elected the Accountant in Bankruptcy becomes the Commissioner.

**6.1.4** The general functions of the Commissioners are to supervise the Intromissions of the Permanent Trustee and to advise him (Section 4).

**6.1.5** Any matter may be agreed with the Commissioners without a meeting, if such agreement is unanimous and is subsequently recorded in a Minute signed by the Commissioners (Schedule 6, para 23) and therefore there is no requirement to hold Commissioners' meetings at regular intervals.

**6.1.6** The Permanent Trustee may call a Meeting of Commissioners at any time, but must call a meeting if required to do so by order of the Court, or on the request of the Accountant in Bankruptcy, or any Commissioner (Schedule 6, para 17).

**6.1.7** It is the responsibility of the Commissioners to audit the Permanent Trustee's six monthly accounts and fix his remuneration (Section 53, subsection 3).

### **6.2. Reimbursement of Commissioners**

The office of Commissioner is entirely gratuitous, even out of pocket expenses incurred cannot be recovered from the sequestration estate. Where the Commissioner acts as law Agent for the Permanent Trustee, he is not entitled to charge a fee for such legal services. (Notes for Guidance of Interim Trustees, Permanent Trustees and Agents – issued by the Accountant in Bankruptcy).

## **7. Provision of information to members of committees and Commissioners on their rights, duties and functions**

The Association of Business Recovery Professionals has produced a series of guides for members of committees and Commissioners for use in formal insolvency proceedings. The texts of the guides are appended to this Statement. In all cases where there are Commissioners or a committee is established the insolvency office holder should ensure that the guide appropriate to the type of procedure concerned, or the equivalent information in some other suitable format, is made available to the Commissioners or members of the committee, either at the meeting at which the Commissioners are elected or the committee is established or as soon as practicable thereafter.

Effective date: 1 August 2005

## Annexe A

### Guidance for Members of Creditors' Committees in Administrations (Scotland)

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## 1. General

**1.1** Where a meeting of creditors summoned to consider an administrator's proposals has approved the proposals, it may establish a creditors' committee. The function of the committee is to assist the administrator in discharging his functions, and act in relation to him in such manner as may be agreed from time to time. The committee may also require the administrator to attend before it at any reasonable time and furnish it with such information relating to the carrying out of his functions as it may reasonably require. (**Sch B1, para 57, r.2.36**)

**1.2** The purpose of the committee is to represent the interests of the creditors as a whole, not just the interests of its individual members. In addition to its statutory functions, which are set out in this guidance note, it may also serve to assist the administrator generally and act as a sounding board for him to obtain views on matters pertaining to the administration.

**1.3** The bold parenthetical references are to the Insolvency Act 1986, the Insolvency (Scotland) Rules 1986 (both as amended), the Insolvency Practitioners Regulations 2005, the Bankruptcy (Scotland) Act 1985 (as amended), Statement of Insolvency Practice 9 (Scotland) issued to all authorised insolvency practitioners, and the Corporate Provisions of the Enterprise Act 2002. The Rules noted in bold apply to administrations on or after 15 September 2003.

## 2. Membership

### 2.1. General

**2.1.1** The committee must consist of at least three, and not more than five, creditors. Any creditor of the company is eligible to be a member of the committee, so long as his claim has not been rejected for the purpose of his entitlement to vote. (**r.3.4**)

**2.1.2** It is the creditors themselves who are the members of the committee, not the individuals who represent them. Thus a company which is a creditor may be a member of the committee but can only act through a representative appointed in accordance with paragraphs 2.2.1 to 2.2.3 below. (**r.3.4**)

### 2.2. Representatives

**2.2.1** A member of the committee may be represented by another person duly authorised by him. Such representative must hold a letter of authority entitling him so to act (either generally or specially) signed by and on behalf of the committee member, and for this purpose any proxy or any authorisation under section 375 of the Companies Act 1985 in relation to any meeting of creditors of the company shall, unless it contains a statement to the contrary, be treated as such a letter of authority to act generally signed by or on behalf of the committee member. The chairman at any meeting of the committee may call on a person claiming to act as a committee member's representative to produce his letter of authority, and may exclude him if it appears that his authority is deficient. (**r.3.4(3), r.7.20**)

**2.2.2** No member may be represented by

- a body corporate,
- an undischarged bankrupt,
- a person who grants a trust deed for the benefit of creditors or makes a composition with his creditors, or
- a disqualified director. (**r.4.48(4)**)

**2.2.3** No person may act as representative of more than one committee member. (**r.4.48**)

**2.2.4** Where the representative of a committee member signs any documents on the member's behalf, the fact that he so signs must be stated below his signature.

### **2.3. Resignation and termination of membership**

**2.3.1** A member of the committee may resign by notice in writing delivered to the administrator. A person's membership of the committee is automatically terminated if:

- (a) he becomes bankrupt or grants a trust deed for the benefit of his creditors or makes a composition or arrangement with his creditors, or
- (b) at three consecutive meetings of the committee he is neither present nor represented (unless at the third of those meetings it is resolved that this rule is not to be applied in his case), or
- (c) he ceases to be, or is found never to have been, a creditor, or
- (d) he becomes disqualified to act as a director. (**r.4.49, r.4.50**)

**2.3.2** However, if the cause of termination is the member's bankruptcy, his trustee in bankruptcy replaces him as a member of the committee.

**2.3.3** A member of the committee may be removed by resolution at a meeting of creditors, provided at least 14 days' notice has been given of the intention to move that resolution.

### **2.4. Vacancies**

If there is a vacancy in the membership of the committee it need not be filled if the administrator and a majority of the remaining committee members so agree, provided the number of members does not fall below three. The administrator may appoint any creditor qualified to be a member of the committee to fill the vacancy, provided a majority of the other members of the committee agree and the creditor consents to act. (**r.4.52**)

## **3. Establishment of committee**

### **3.1. Formalities of establishment**

The committee does not come into being, and accordingly cannot act, until the administrator has issued a certificate of its due constitution. (**r.4.42(1)**)

The administrator will not issue the certificate until at least three of the persons who are to be members of the committee have agreed to act. Such agreement may be given by the creditor's proxy-holder or representative under section 375 of the Companies Act 1985 present at the meeting establishing the committee, unless the proxy or authorisation specifically precludes such agreement being given. (**r.4.42(3)**)

### **3.2. Formal defects**

The acts of the committee are valid notwithstanding any defect in the appointment, election or qualifications of any committee member or the representative of any committee member, or in the formalities of its establishment. (**r.4.59A**)

## **4. Proceedings**

### **4.1. Chairman**

Subject to paragraph 4.5.3 below, the chairman at any meeting of the committee will be the administrator, or a person nominated by him in writing to act. A person so nominated must be either:

- (a) one who is qualified to act as an insolvency practitioner in relation to the company, or
- (b) an employee of the administrator or his firm who is experienced in insolvency matters.

**(r.4.46 as applied)**

### **4.2. Quorum**

A meeting of the committee is duly constituted if due notice of it has been given to all members and at least two members are present or represented. **(r.4.47)**

### **4.3. Meetings**

#### **4.3.1. General**

The committee will meet where and when determined by the administrator, subject as follows **(r.4.45 as applied):**

#### **4.3.2. First meeting**

The administrator must call the first meeting of the committee not later than three months after its first establishment. **(r.4.45(2))**

#### **4.3.3. Subsequent meetings**

Subsequent meetings of the committee must be called by the administrator:

- (a) if so requested by a member of the committee or his representative – the meeting must then be held within 21 days of the request being received by the administrator – and
- (b) for a specified date, if the committee has previously resolved that a meeting be held on that date. **(r.4.45(2))**

### **4.4. Notice of venue**

The administrator must give seven days' notice in writing of the venue of any meeting to every member of the committee (or his representative designated for that purpose), unless this requirement has been waived by or on behalf of any member. Such waiver may be signified either at or before the meeting. **(r.4.45(3))**

### **4.5. Information from administrator**

**4.5.1** Where the committee resolves to require the attendance of the administrator under section 26(2) of the Insolvency Act 1986, he must be given at least seven days' notice. The notice to him must be in writing, signed by a majority of the current members of the committee. A member's representative may sign for him. **(Sch B1, para 57(3))**

**4.5.2** The meeting at which the administrator's attendance is required must be fixed by the committee for a business day, and shall be held at such time and place as the administrator determines.

**4.5.3** Where the administrator attends such a meeting, the members of the committee may elect any one of their number to be chairman of the meeting in place of the administrator or his nominee.

#### **4.6. Voting rights and resolutions**

At any meeting of the committee each member (whether present himself or by his representative) has one vote, and a resolution is passed when a majority of the members present or represented have voted in favour of it. **(r.4.54)**

#### **4.7. Records of meetings**

Every resolution passed must be recorded in writing, either separately or as part of the minutes of a meeting. The record must be signed by the chairman and placed in the company's minute book. **(r.4.54(4) as applied)**

#### **4.8. Postal resolutions**

**4.8.1** It is possible for resolutions to be passed by post. The administrator must send to every member (or his representative designated for the purpose) a copy of the proposed resolution on which a decision is sought, which must be set out in such a way that agreement with, or dissent from, each separate resolution may be indicated by the recipient on the copy so sent. **(r.4.55)**

**4.8.2** However, any member of the committee may, within 7 business days from the date of the administrator sending out a resolution, require the administrator to summon a meeting of the committee to consider the matters raised by the resolution. In the absence of such a request, the resolution is deemed to have been passed by the committee if and when the administrator is notified in writing by a majority of the members that they concur with it.

**4.8.3** A copy of every resolution so passed, and a note that the concurrence of the committee was obtained, must be placed in the company's minute book.

### **5. Administrator's remuneration**

**5.1** The administrator's remuneration may be determined by reference to the value of the company's property with which he has to deal. **(r.2.39, r.4.32)**

**5.2** In arriving at its determination the committee must consider the following matters:

- (a) the work which, having regard to that value, was reasonably undertaken by him;
- (b) the extent of his responsibilities in administering the company's assets.

Although not specifically stated in the rules, the normal basis for determining the remuneration will be that of the time costs properly incurred by the administrator and his staff. **(B(S)A S53(4), r.2.39, SIP 9 (Scot))**

**5.3** When seeking agreement to his fees the administrator should provide sufficient supporting information to enable the committee to form a judgement as to whether the proposed fee is reasonable having regard to all the circumstances of the case. The administrator should always make available an up to date receipts and payments account. Where the fee is to be charged on a time basis the administrator should be prepared to disclose the amount of time spent on the case and the charge-out value of the time spent, together with such additional information as may be reasonably required having regard to the size and complexity of the case. Where the fee is charged on a commission based on the value of the company, the administrator should provide details of any work which has been or is intended to be contracted out which would normally be undertaken by an administrator or his staff directly. **(SIP 9 (Scot))**

**5.4** If the committee does not make the requisite determination, the remuneration may be fixed by a resolution of a meeting of creditors on the basis set out in paragraph 5.1 above. If not fixed in any of these ways, the administrator's remuneration shall, on his application, be fixed by the court. **(r.4.33)**

**5.5** If the administrator's remuneration has been fixed by the committee and he considers it to be insufficient, he may request that it be increased by resolution of the creditors. If he considers that the remuneration fixed by the committee or the creditors is insufficient, he may apply to the court for an order increasing its amount or rate. The administrator must give at least 14 days' notice of his application to the members of the committee, and the committee may nominate one or more members to appear or be represented and to be heard on the application. The court may, if it appears to be a proper case, order the costs of the administrator's application, including the costs of any member of the committee appearing or being represented on it, to be paid as an expense of the administration. (**r.4.33, r.4.34**)

**5.6** SIP 9 (Scot) provides guidance on the recommended provision of information in support of remuneration and outlays.

**5.7** The basis (see 5.1) on which remuneration is to be drawn should be agreed at an early stage in the case. The quantum of remuneration may then be the subject of a subsequent application to creditors, the committee or the court. Applications for fees should comprise a sufficient explanation of what the insolvency practitioner has achieved, how it was achieved and why it was undertaken to enable the value of the exercise to be assessed. That assessment by the committee should have regard to the matters listed in paragraph 5.2 above. The guidance indicates that the level of detail supplied by the insolvency practitioner will depend upon the size and complexity of the case and suggests five areas of activity – administration and planning, investigation, realisation of assets, trading and creditors – as the basis for the analysis of time spent. The explanation of what has been done can be expected to include an outline of the nature of the assignment and the insolvency practitioner's own initial assessment of the assignment, including the anticipated return to creditors. To the extent applicable, having regard to the size of the case, it should also explain:

- Any significant aspects of the case, particularly those that affect the amount of time spent and the staffing and management of the assignment.
- The reasons for any change in strategy.
- The steps taken to establish the views of the creditors or their committee, particularly in relation to agreeing the strategy for the assignment, budgeting, time recording, fee drawing, or fee agreement.
- Any existing agreement about fees.
- Details of how other professionals, including subcontractors, were chosen, how they were contracted to be paid, and what steps have been taken to review their fees.
- Any further comments that the insolvency practitioner wishes to make.

Creditors should, however, be aware that the insolvency practitioner must fulfil certain statutory obligations that might be seen to bring no added value for creditors.

**5.8** Finally, it is also suggested that the insolvency practitioner should disclose all amounts paid or payable to his lawyers and the review of these fees should be evidenced. The explanation should be sufficient to support a decision (if one is necessary) to have them taxed (that is, determined by the court).

## **6. Expenses and disbursements**

### **6.1. General**

The approval of the committee is not required for the administrator to recover his expenses and disbursements. However, where the administrator makes, or proposes to make, a separate charge by way of expenses or disbursements to recover the cost of facilities provided by his own firm, he should disclose those charges to the committee when seeking approval of his fees, together with an explanation of how those charges are made up and the basis on which they are arrived at. Payments to outside parties in which the office holder or his firm or any associate has an interest should be treated in the same way as payments to his own firm. **(SIP 9 (Scot))**

### **6.2. Taxation of costs**

**6.2.1** Where any costs, charges or expenses are payable out of the company's assets (for example, agent's or legal fees), the administrator may agree them with the person entitled to payment. However, if the committee resolves that any such costs, charges or expenses should be taxed (that is, determined by the court), the administrator must require the person entitled to payment to deliver his bill of costs for taxation. **(r.4.32, B(S)A S.53(2))**

**6.2.2** Where such costs, charges or expenses are to be taxed, this does not preclude the administrator from making payments on account against an undertaking from the payee to repay any amount which proves, on taxation, to have been overpaid.

## **7. Review of administrator's security or caution**

The administrator is required to have in place security or caution for the proper performance of his functions (see Appendix). It is the duty of the committee to review the adequacy of the administrator's security or caution from time to time. **(r.7.28)**

## **8. Resignation of administrator**

If the administrator intends to resign or to apply to the Court for leave to resign and there will be no continuing administrator in office, he must give the committee at least seven days' notice of his intention to do so. **(r.2.50)**

## **9. Confidentiality of documents**

**9.1** Where the administrator considers that any document forming part of the record of the administration:

- (a) should be treated as confidential, or
- (b) is of such a nature that its disclosure would be calculated to be injurious to the interests of the creditors,

he may decline to allow it to be inspected by a person who may otherwise be entitled to inspect it. **(r.7.27)**

**9.2** A person refused inspection may apply to the court for the refusal to be overruled.

## **10. Charges for copy documents**

Where the administrator is requested by a member of the committee to supply copies of any documents, he is entitled to make a charge. **(r.7.26)**

## **11. Expenses of committee members**

**11.1** Any reasonable travelling expenses directly incurred by committee members or their representatives either in attending meetings of the committee or otherwise on the committee's business will be paid by the administrator as an expense of the administration. **(r.4.57)**

**11.2** However, such expenses will not be paid in respect of any meeting of the committee held within three months of a previous meeting, unless the meeting in question is summoned at the instance of the administrator.

## **12. Committee members' dealings with the company**

**12.1** A member of the Committee shall not enter into a transaction whereby he:

- receives out of the company assets any payment for services given or goods supplied in connection with the administration; or
- obtains a profit from the administration; or
- acquires any part of the company's assets;

unless he:

- obtains prior leave of the Court; or
- does so as a matter of urgency and then obtains leave of the Court; or
- obtains the prior sanction of the creditors' committee where the transaction is on normal commercial terms. **(r.4.58)**

**12.2** The court may, on the application of any interested party, set aside any transaction which appears to it to be contrary to the above requirement, and may give directions for compensating the company for any loss incurred in consequence.

**12.3** Circumstances may occasionally arise where a legal action or dealing involving a member of the committee or a person connected with him makes it inappropriate for him to attend discussions on the subject in the committee. In such circumstances the member may be asked not to attend a meeting, or part of a meeting, at which the matter is discussed.

## Appendix

### **Administrator's security or caution**

The administrator is required to have in place security for the proper performance of his functions. The security takes the form of a bond which provides that:

- a surety undertakes to be jointly and severally liable with the administrator for losses caused by the fraud or dishonesty of the administrator whether acting alone or in collusion with one or more persons, or the fraud or dishonesty of any person committed with the connivance of the administrator;
- the liability of the surety and the administrator is to be in both a general penalty sum and a specific penalty sum in respect of the individual case;
- any claims are to be paid first out of the specific penalty sum, then, if that is insufficient, out of the general penalty sum;
- a cover schedule containing the name of the insolvent and the value of the insolvent's assets is to be submitted to the surety within a specified period.

The general penalty sum must be £250,000 and the specific penalty sum must be at least equal to the estimated value of the company's assets, but ignoring the value of any assets charged to a third party to the extent of any amount which would be payable to that party, or held on trust to the extent that any beneficial interest in those assets does not belong to the company. (**s.390(3), reg. 12 and Sch 2, IP Regs**)

The minimum specific penalty sum is £5,000 and the maximum £5,000,000. If, at any time, the administrator forms the opinion that the value of the assets is higher than the penalty sum under the current specific penalty, he must obtain a further specific penalty to bring the penalty sum equal to that value (subject to the maximum limit of £5,000,000).

Where two or more persons are appointed jointly to act as administrator, the above provisions apply to each of them individually. (**Reg. 12(2) IP Regs**)

## Annexe B

### Guidance for Members of Creditors' Committees in Receiverships

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## 1. General

**1.1** Receivership is a remedy available to a creditor holding security created before 15 September 2003, which includes a floating charge, over all (or substantially all) the assets of a company. A receiver is appointed by the holder of the security but normally acts as agent of the company over whose assets he is appointed. The primary duty of a receiver is to his appointor. Whilst he also owes certain duties to the company and is required to provide information to the unsecured creditors, neither the creditors nor any committee appointed by them have any authority to sanction any of his actions.

**1.2** The receiver must (unless the court directs otherwise) convene a meeting of the unsecured creditors within three months of his appointment and lay before it a report on matters relating to the receivership. The meeting convened to receive the report may also establish a creditors' committee. The function of the committee is to represent to the receiver the views of the unsecured creditors, and to act in relation to him in such manner as may be agreed from time to time. The committee may also require the receiver to attend before it at any reasonable time and furnish it with such information relating to the carrying out by him of his functions as it may reasonably require. (**S.68, r.3.5**)

**1.3** The bold parenthetical references are to the Insolvency Act 1986, the Insolvency (Scotland) Rules 1986 (both as amended), the Insolvency Practitioner Regulations 2005, and the Receivers (Scotland) Regulations 1986, and Statement of Insolvency Practice 9 (Scotland) issued to all authorised insolvency practitioners.

## 2. Membership

### 2.1. General

**2.1.1** The committee must consist of at least three, and not more than five, creditors. Any creditor of the company who has lodged a claim is eligible to be a member of the committee, so long as his claim has not been rejected for the purpose of his entitlement to vote. (**r.3.4**)

**2.1.2** It is the creditors themselves who are the members of the committee, not the individuals who represent them. Thus a company or partnership which is a creditor may be a member of the committee but can only act through a representative appointed in accordance with paragraphs 2.2.1 to 2.2.3 below.

### 2.2. Representatives

**2.2.1** A member of the committee may, in relation to the business of the committee, be represented by another person duly authorised by him for that purpose. Such representative must hold a mandate entitling him so to act (either generally or specially) signed by or on behalf of the committee member, and for this purpose any proxy or any authorisation under section 375 of the Companies Act 1985 in relation to any meeting of creditors of the company shall, unless it contains a statement to the contrary, be treated as a letter of authority to act generally signed by or on behalf of the committee member. The chairman at any meeting of the committee may call on a person claiming to act as a committee member's representative to produce his mandate, and may exclude him if it appears that his mandate is deficient. (**r.4.48 as applied by r.3.6**)

**2.2.2** No member may be represented by:

- a body corporate,
- a partnership,
- an undischarged bankrupt, or
- a disqualified director.

**2.2.3** No person may act as representative of more than one committee member, or as both a member and a representative of another member, on the same committee.

**2.2.4** Where the representative of a committee member signs any document on the member's behalf, the fact that he so signs must be stated below his signature.

### **2.3. Resignation and termination of membership**

**2.3.1** A member of the committee may resign by notice in writing delivered to the receiver. A person's membership of the committee is automatically terminated if –

- (a) his estate is sequestrated or he becomes bankrupt or grants a trust deed for the benefit of or makes a composition with his creditors, or
- (b) at three consecutive meetings of the committee he is neither present nor represented (unless at the third of those meetings it is resolved that this rule is not to be applied in his case), or
- (c) he ceases to be, or is found never to have been, a creditor, or
- (d) he becomes disqualified to act as a director. **(r.4.49 and r.4.50 as applied by r.3.6)**

**2.3.2** A member of the committee may be removed by resolution at a meeting of creditors.

**(r.4.51 as applied by r.3.6)**

### **2.4. Vacancies**

**2.4.1** If there is a vacancy in the membership of the committee it need not be filled if the receiver and a majority of the remaining committee members so agree, provided the number of members does not fall below three. The receiver may appoint any creditor qualified to be a member of the committee to fill the vacancy, provided a majority of the other members of the committee agree and the creditor consents to act. **(r.4.52 as applied by r.3.6)**

**2.4.2** Alternatively, a meeting of creditors may resolve that a creditor be appointed (with his consent) to fill the vacancy. 14 days notice must have been given of the resolution to make such an appointment (whether or not of a person named in the notice). Where the vacancy is filled by an appointment made by a creditors' meeting at which the receiver is not present, the chairman of the meeting shall report to the receiver the appointment which has been made.

## **3. Establishment of committee**

### **3.1. Formalities of establishment**

**3.1.1** The committee does not come into being, and accordingly cannot act, until the receiver has issued a certificate of its due constitution. **(r.4.42 as applied by r.3.6)**

**3.1.2** The receiver will not issue the certificate until at least three of the persons who are to be members of the committee have agreed to act but he shall issue it forthwith thereafter. Such agreement may be given by the creditor's proxy-holder or representative under section 375 of the Companies Act 1985 present at the meeting establishing the committee, unless the proxy or authorisation specifically precludes such agreement being given.

**3.1.3** If the chairman of the meeting which resolves to establish the committee is not the receiver, he shall forthwith give notice of the resolution to the receiver and inform him of the names and addresses of the committee members.

### **3.2. Formal defects**

The acts of the committee are valid notwithstanding any defect in the appointment, election or qualifications of any committee member or the representative of any committee member, or in the formalities of its establishment. **(r.4.59A as applied by r.3.6)**

## 4. Proceedings

### 4.1. Chairman

Subject to paragraph 4.5.3 below, the chairman at any meeting of the committee will be the receiver, or a person nominated by him in writing to act. A person so nominated must be either:

- (a) one who is qualified to act as an insolvency practitioner in relation to the company, or
- (b) an employee of the receiver or his firm who is experienced in insolvency matters. **(r.4.46 as applied by r.3.6)**

### 4.2. Quorum

A meeting of the committee is duly constituted if due notice of it has been given to all members and at least two members are present or represented. **(r.4.47 as applied by r.3.6)**

### 4.3. Meetings

#### 4.3.1. General

The committee will meet where and when determined by the receiver, subject as follows **(r.4.45 as applied by r.3.6):**

#### 4.3.2. First meeting

The receiver must call the first meeting of the committee within three months of its establishment.

#### 4.3.3. Subsequent meetings

Subsequent meetings of the committee must be called by the receiver:

- (a) if so requested by a member of the committee or his representative – the meeting must then be held within 21 days of the request being received by the receiver – and
- (b) for a specified date, if the committee has previously resolved that a meeting be held on that date.

### 4.4. Notice of venue

The receiver must give seven days' written notice of the time and place of any meeting to every member of the committee (or his representative designated for that purpose), unless this requirement has been waived by or on behalf of any member. Such waiver may be signified either at or before the meeting. **(r.4.45 as applied by r.3.6)**

### 4.5. Information from receiver

**4.5.1** Where the committee resolves to require the attendance of the receiver under section 68(2) of the Insolvency Act 1986, he must be given at least seven days' notice. The notice to him must be in writing, signed by a majority of the current members of the committee or their representatives. **(r.3.7, s.68)**

**4.5.2** The meeting at which the receiver's attendance is required must be fixed by the committee for a business day, and held at such time and place as the receiver determines.

**4.5.3** Where the receiver so attends, the members of the committee may elect any one of their number to be chairman of the meeting in place of the receiver or his nominee.

### 4.6. Voting rights and resolutions

At any meeting of the committee each member (whether present himself or by his representative) has one vote, and a resolution is passed when a majority of the members present or represented have voted in favour of it. **(r.4.54(1) as applied by r.3.6)**

#### **4.7. Records of meetings**

Every resolution passed must be recorded in writing, either separately or as part of the minutes of the meeting. The record must be signed by the chairman and kept as part of the sederunt book. **(r.4.54(4) as applied by r.3.6)**

#### **4.8. Postal resolutions**

**4.8.1** It is possible for resolutions to be passed by post. The receiver must send to every member (or his representative designated for the purpose) a copy of the proposed resolution on which a decision is sought, which must be set out in such a way that agreement with, or dissent from, each separate resolution may be indicated by the recipient on the copy so sent. **(r.4.55 as applied by r.3.6)**

**4.8.2** However, any member of the committee may, within seven business days from the date of the receiver sending out a resolution, require the receiver to summon a meeting of the committee to consider the matters raised by the resolution. In the absence of such a request, the resolution is deemed to have been passed by the committee if and when the receiver is notified in writing by a majority of the members that they concur with it.

**4.8.3** A copy of every resolution so passed, and a note that the concurrence of the committee was obtained, must be kept in the sederunt book.

### **5. Review of receiver's security or caution**

The receiver is required to have in place security or caution for the proper performance of his functions (see Appendix). It is the duty of the committee to review from time to time the adequacy of the receiver's security or caution. **(r.7.28)**

### **6. Information to be provided to the committee**

#### **6.1. Receiver's receipts and payments account**

The receiver must send to each member of the committee an account of his receipts and payments:

- within two months after the end of 12 months from the date of his appointment, and of every subsequent period of 12 months, and
- within two months after he ceases to act as receiver. **(r.3.9)**

#### **6.2. Resignation of receiver**

If the receiver intends to resign he must give the committee at least seven days' notice of his intention to do so. **(Reg. 6)**

#### **6.3. Death of receiver**

If the receiver dies, the holder of the floating charge by which he was appointed must, as soon as he becomes aware of the death, give notice of it to the members of the committee. **(r.3.10)**

#### **6.4. Vacation of office**

When the receiver vacates office he must give notice to the members of the committee within 14 days of having done so. **(r.3.11)**

## **7. Confidentiality of documents**

**7.1** Where the receiver considers that any document forming part of the record of the receivership:

- (a) should be treated as confidential, or
- (b) is of such a nature that its disclosure would be calculated to be injurious to the interests of the creditors,

he may decline to allow it to be inspected by a person (including a member of the committee) who would otherwise be entitled to inspect it. **(r.7.27)**

**7.2** A person refused inspection may apply to the court for the refusal to be overruled.

## **8. Expenses of committee members**

**8.1** Any reasonable travelling expenses directly incurred by committee members or their representatives either in attending meetings of the committee or otherwise on the committee's business will be paid by the receiver as an expense of the receivership. **(r.4.57 as amended by r.3.6(4))**

**8.2** However, such expenses will not be paid in respect of any meeting of the committee held within three months of a previous meeting, unless the meeting in question is summoned at the instance of the receiver.

## **9. Committee members' dealings with the company**

**9.1** Membership of the committee does not prevent a person from dealing with the company while the receiver is acting, provided that any transactions in the course of such dealings are entered into on normal commercial terms. **(r.3.8)**

**9.2** The court may, on the application of any interested party, set aside any transaction which appears to it to be contrary to the above requirement, and may give directions for compensating the company for any loss incurred in consequence.

**9.3** Circumstances may occasionally arise where a legal action or dealing involving a member of the committee or a person connected with him makes it inappropriate for him to attend discussions on the subject in the committee. In such circumstances the member may be asked not to attend a meeting, or part of a meeting, at which the matter is discussed.

## Appendix

### **Receiver's security or caution**

The receiver is required to have in place security for the proper performance of his functions. The security takes the form of a bond which provides that:

- a surety undertakes to be jointly and severally liable with the receiver for losses caused by the fraud or dishonesty of the receiver whether acting alone or in collusion with one or more persons, or the fraud or dishonesty of any person committed with the connivance of the receiver;
- the liability of the surety and the receiver is to be in both a general penalty sum and a specific penalty sum in respect of the individual case;
- any claims are to be paid first out of the specific penalty sum, then, if that is insufficient, out of the general penalty sum;
- a cover schedule containing the name of the insolvent and the value of the insolvent's assets is to be submitted to the surety within a specified period.

The general penalty sum must be £250,000 and the specific penalty sum must be at least equal to the estimated value of the company's assets, but ignoring the value of any assets charged to a third party to the extent of any amount which would be payable to that party, or held on trust to the extent that any beneficial interest in those assets does not belong to the company.

The minimum specific penalty sum is £5,000 and the maximum £5,000,000. If, at any time, the receiver forms the opinion that the value of the assets is higher than the penalty sum under the current specific penalty, he must obtain a further specific penalty to bring the penalty sum equal to that value (subject to the maximum limit of £5,000,000).

Where two or more persons are appointed jointly to act as receiver, the above provisions apply to each of them individually. **(Reg. 12(2) IP Regs)**

## Annexe C

### Guidance for Commissioners in Sequestrations

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## 1. Introduction

### 1.1. General

**1.1.1** This guide has been produced to help Commissioners be aware of:

- their duties and functions
- their rights
- the procedural rules.

**1.1.2** This introduction gives a brief description of the role of the Permanent Trustee and summarises the principal functions of Commissioners and the Permanent Trustee's duties in relation to them. Detailed provisions are set out in the remaining sections of the guide.

**1.1.3** The bold parenthetical references are to the Insolvency Act 1986, the Insolvency (Scotland) Rules 1986 (both as amended), the Insolvency Practitioner Regulations 2005, the Bankruptcy (Scotland) Act 1985 (as amended), Statement of Insolvency Practice 9 (Scotland) issued to all authorised Insolvency Practitioners and Notes for Guidance of Interim Trustees, Permanent Trustees and Agents – issued by the Accountant in Bankruptcy.

### 1.2. The Permanent Trustee

Sequestration is the administration of the estate of insolvent individuals, partnerships (including dissolved and limited partnerships but not limited liability partnerships), trusts and incorporated or unincorporated bodies other than companies registered under the Companies Acts/unregistered companies by a Trustee in the interests of his creditors generally. The Permanent Trustee has wide powers which are set out in the Bankruptcy (Scotland) Act 1985 (as amended). He may use these powers at his discretion, except where the exercise of any power specifically requires sanction, as explained in paragraph 2.1.1.

### 1.3. The Commissioners

**1.3.1** A general meeting of the debtor's creditors may appoint Commissioners. Two classes of creditor are not entitled to vote at the election of commissioners:

- (a) anyone who acquires his debt, otherwise than by succession, after the date of sequestration, and
- (b) a postponed creditor.

The purpose of Commissioners is to represent the interests of the creditors as a whole, not just their own interests. The principal functions are to supervise the exercise of certain of the Trustee's powers and to fix his remuneration. In addition to their statutory functions, the Commissioners may also serve to assist the Permanent Trustee generally and act as a sounding board for him to obtain views on matters pertaining to the sequestration. (**S.30, S.24(3)**)

**1.3.2** The Permanent Trustee is to have regard to advice offered to him by the commissioners, where acting. However, the Permanent Trustee is not obliged to follow such advice. In such a case the Commissioners could obtain the Permanent Trustee's compliance only through the intervention of the court, i.e. by making an application to the Sheriff in terms of section 39(1) of the Act.

**1.3.3** Commissioners are not entitled to remuneration, and cannot be reimbursed for expenses. (**Notes for Guidance**)

**1.3.4** Although the Permanent Trustee should normally have regard to the views of the Commissioners, he may always refer matters of contention to the Accountant in Bankruptcy. (**S.1A(1)**)

## 2. Functions of the Commissioners

### 2.1. Control of Permanent Trustee's powers

**2.1.1** The Permanent Trustee may, with the consent of the Commissioners, the creditors or the Court, exercise any of the following powers if beneficial for the administration of the estate **(S.39(2)):**

- (a) Carry on any business of the debtor;
- (b) Bring, continue or defend any action or legal proceedings relating to the estate of the debtor;

**Note:** Where legal proceedings are proposed, the Commissioners should consider the probable benefit to the estate before giving permission. If permission is given, the Commissioners should ensure they are kept informed of the progress of the proceedings in case it should become necessary to consider their discontinuance.

- (c) Create a security over any part of the estate;
- (d) Where any right, option or other power forms part of the debtor's estate, make payment or incur liabilities with a view to obtaining, for the benefit of the creditors, any property which is the subject of the right, option or power;
- (e) Approve an offer of composition from the debtor under Schedule 4.

**2.1.2** The Commissioners are required to grant their consent to the Permanent Trustee before he pays the preferred debts. **(S.52(4)(b))**

**2.1.3** The Commissioners may request the Permanent Trustee to make application to the Sheriff for an order for the public examination of the debtor or of other relevant person. **(S.45(1)(b))**

If the Permanent Trustee wishes to submit any matter to arbitration or to make a compromise with regard to any claim, he must first obtain the consent of the Commissioners. **(S.65(1))**

The Commissioners may make application to the Sheriff for the removal from office of the Permanent Trustee. The Sheriff may grant the order or he may make an alternative order, in which case there is a right of appeal by the Commissioners. **(S.29(1)(b)(ii), S.29(4))**

In the event of removal from office of the Permanent Trustee, the Commissioners are required to call a meeting of the creditors for the election of a new Permanent Trustee not more than 28 days after the removal. **(S.29(5))**

### 2.2. Trustee's remuneration

**2.2.1** The basis for fixing the amount of the remuneration payable to the Permanent Trustee may be a Commission calculated by reference to the value of the debtor's estate which has been realised by the Permanent Trustee, but there shall in any event be taken into account:

- (a) the work which, having regard to that value, was reasonably undertaken by him; and
- (b) the extent of his responsibilities in administering the debtor's estate. **(S.53(4), SIP 9 (Scot))**

**2.2.2** In fixing the amount of such remuneration in respect of any accounting period, the Commissioners or, as the case may be, the Accountant in Bankruptcy may take into account any adjustment which the commissioners or the Accountant in Bankruptcy may wish to make in the amount of the remuneration fixed in respect of any earlier accounting period.

**2.2.3** When seeking agreement to his fees the Permanent Trustee must provide sufficient supporting information to enable the Commissioners to form a judgement as to whether the proposed fee is reasonable having regard to all the circumstances of the case. The Permanent Trustee must submit a six monthly receipts and payments account for audit. Where the fee is to be charged on a time basis the Permanent Trustee should disclose the amount of time spent on the case and the charge-out value of the time spent, together with such additional information as may be reasonably required having regard to the size and complexity of the case. Where the fee is charged on a percentage basis, the Trustee should provide details of any work which has been or is intended to be contracted out which would normally be undertaken by a Permanent Trustee or his staff directly. **(SIP 9 (Scot))**

**2.2.4** If the Commissioners do not make the requisite determination, the remuneration may be fixed by the Accountant in Bankruptcy. **(S.53(6))**

**2.2.5** Where the Trustee realises an asset on behalf of a secured creditor and receives remuneration out of the proceeds, he should disclose the amount of that remuneration to the Commissioners. **(SIP 9 (Scot))**

**2.2.6** If the Permanent Trustee's remuneration has been fixed by the Commissioners and he considers it to be insufficient, he may appeal against the determination to the Accountant in Bankruptcy and ultimately to the Sheriff, whose decision is final. **(S.53(6))**

**2.2.7** Applications for fees should comprise a sufficient explanation of what the Permanent Trustee has achieved. The guidance indicates that the level of detail supplied by the Insolvency Practitioner will depend upon the size and complexity of the case and suggests five areas of activity – administration and planning, investigation, realisation of assets, trading and creditors – as the basis for the analysis of time spent. The explanation of what has been done can be expected to include an outline of the nature of the assignment and the Insolvency Practitioner's own initial assessment of the assignment, including the anticipated return to creditors. To the extent applicable, having regard to the size of the case, it should also explain:

- Any significant aspects of the case, particularly those that affect the amount of time spent and the staffing and management of the assignment.
- The reasons for any change in strategy.
- The steps taken to establish the views of the creditors or the Commissioners, particularly in relation to agreeing the strategy for the assignment, budgeting, time recording, fee drawing, or fee agreement.
- Any existing agreement about fees.
- Details of how other professionals, including subcontractors, were chosen, how they were contracted to be paid, and what steps have been taken to review their fees.
- Any further comments that the insolvency practitioner wishes to make.

Commissioners should, however, be aware that the Insolvency Practitioner must fulfil certain statutory obligations that might be seen to bring no added value for creditors.

**2.2.8** Finally, it is also suggested that the Insolvency Practitioner should disclose all amounts paid or payable to his lawyers and the review of these fees should be evidenced. The explanation should be sufficient to support a decision (if one is necessary) to have them taxed (that is, determined by the Court). **(SIP 9 (Scot))**

### **2.3. Expenses and disbursements**

The approval of the Commissioners is required for the Permanent Trustee to recover his outlays. Where the Permanent Trustee makes, or proposes to make, a separate charge by way of expenses or disbursements to recover the cost of facilities provided by his own firm, he should disclose those charges to the Commissioners when seeking approval of his fees, together with an explanation of how those charges are made up and the basis on which they are arrived. Payments to outside parties in which the office holder or his firm or any associate has an interest should be treated in the same way as payments to his own firm. (**SIP 9 (Scot)**)

### **2.4. Taxation of costs**

**2.4.1** Where any costs, charges or expenses are payable out of a debtor's estate (for example agent's or legal fees), the Permanent Trustee may agree them with the person entitled to payment. However, if the Commissioner resolves that any such costs, charges or expenses should be taxed (that is, determined by the Court), the Permanent Trustee must require the person entitled to payment to deliver their account for taxation. (**S.53 (2A)**)

**2.4.2** Where such costs, charges or expenses are to be taxed, this does not preclude the Trustee from making payments on account against an undertaking from the payee to repay any amount which proves, on taxation, to have been overpaid.

### **2.5. Review of Permanent Trustee's security or caution**

The Trustee is required to have in place security or caution for the proper performance of his functions (see Appendix). (**IPR Part III(12)**)

## **3. Permanent Trustee's obligations to Commissioners**

**3.1** The Permanent Trustee need not comply with any request for information where it appears to him that the request is frivolous or unreasonable, or the cost of complying would be excessive having regard to the relative importance of the information, or there are insufficient funds in the estate to enable him to comply.

**3.2** Nothing in these provisions disentitles Commissioners from access to the Permanent Trustee's Sederunt Book, or from seeking an explanation of any matter within the Commissioners' responsibility. (**S.62**)

**3.3** The Permanent Trustee shall, as soon as possible after his confirmation in office, consult with the Commissioners regarding the exercise of his functions. This Consultation should take place at the first meeting of the Commissioners which will normally be held immediately after the meeting of creditors at which they are elected. He should also discuss with Commissioners at that meeting the types of matters which they wish to have reported to them so that matters of particular concern to them are identified. (**S.39**)

## **4. Permanent Trustee's accounts**

**4.1** The Permanent Trustee must prepare and keep financial records in relation to the sequestration, and such supporting documents as are necessary to explain the receipts and payments entered in the records, including an explanation of the source of any receipts and the destination of any payments, and must obtain and keep the bank statements relating to any local bank account in the name of the debtor. (**SIP 7 (Scot)**)

**4.2** The Commissioners may inspect the accounts of the Permanent Trustee at all reasonable times.

**4.3** If the debtor's business is carried on, the Trustee must also keep a separate trading account including, where appropriate, details of all bank account transactions. The total weekly amounts of trading receipts and payments must be incorporated into the financial records. (**SIP 7 (Scot)**)

**4.4** The Permanent Trustee must, within two weeks of the end of the accounting period, submit his six monthly receipts and payments account to the Commissioners, or if there are no Commissioners, to the Accountant in Bankruptcy. When the accounts are sent to the Commissioners, a copy must also be sent to the Accountant in Bankruptcy. (**S.53.1**)

**4.5** Vouchers for all income and expenditure should be submitted to the Commissioners when auditing the Permanent Trustee's accounts. The Commissioners should satisfy themselves that funds have been properly deposited in interest bearing accounts with a duly approved bank.

## 5. Appointments

### 5.1. General

**5.1.1** The Commissioners must consist of not less than one, and not more than five. All Commissioners must be creditors of the debtor or mandatories and any creditor (other than one whose debt is fully secured) may be appointed, so long as:

- (a) he has lodged a claim of his debt,
- (b) his claim has neither been wholly disallowed for voting purposes nor wholly rejected for the purposes of distribution or dividend, and
- (c) he has agreed to act as Commissioner. (**S.30**)

**5.1.2** The following are not qualified to act as Commissioners:

- (a) the debtor,
- (b) persons holding interests opposed to the general interests of creditors,
- (c) persons who reside outwith the jurisdiction of the Court of Session,
- (d) a person who is an associate of the debtor or of the Permanent Trustee,
- (e) disqualified directors. (**S.30(2)**)

### 5.2. Resignation and removal of Commissioners

**5.2.1** A Commissioner may resign office at any time. The resignation must be recorded in the Sederunt Book. (**S.30(3)**)

**5.2.2** A Commissioner may be removed from office in the following circumstances:

- (a) if he is a mandatory of a creditor by the creditor recalling the mandate and intimating in writing its recall to the Permanent Trustee,
- (b) by the creditors at a meeting called for the purpose, and
- (c) by the Court after a report by the Accountant in Bankruptcy. (**S.30(4), S.1A(2)**)

### 5.3. Vacancies

If a Commissioner dies, resigns or is removed from office, the Permanent Trustee may convene a meeting of the creditors to appoint a replacement. If there has only been one Commissioner and he is not replaced, the Accountant in Bankruptcy acts as Commissioner. (**S.30(1)**)

## **6. Proceedings**

### **6.1. Chairman**

The Chairman at any meeting shall be the Permanent Trustee unless the Commissioners elect one of their number to act as Chairman in his place. The Permanent Trustee shall preside over such an election. **(Sch 6, para 7(1))**

### **6.2. Quorum**

The Quorum of meeting of Commissioners shall be one Commissioner, provided seven days' notice has been given of the meeting unless the Commissioners decide that they do not require such notice. **(Sch 6 (22))**

### **6.3. Meetings**

#### **General**

The Commissioners will meet where and when determined by the Permanent Trustee. **(Sch 6 (17))**

The Permanent Trustee must call a meeting of creditors:

- (a) on being required to do so by an Order of the Court, or
- (b) on being requested to do so by the Accountant in Bankruptcy or any Commissioner.

If the Permanent Trustee fails to call a meeting of Commissioners within fourteen days of being required or requested to do so, a Commissioner may call a meeting of Commissioners. **(Sch 6 (17), Sch 6 (18))**

### **6.4. Notice of venue**

The Trustee shall give the Commissioners at least seven days' notice of a meeting called by him, unless the Commissioners decide that they do not require such notice. **(Sch 6 (19))**

### **6.5. Voting rights and resolutions**

Each Commissioner has one vote and a Resolution is passed if a majority of the Commissioners have voted in favour of it.

### **6.6. Records of meetings**

The Permanent Trustee shall act as Clerk at meetings and shall insert a Minute of the meeting in the Sederunt Book. If the Commissioners are considering the performance of the functions of the Permanent Trustee he shall withdraw from the meeting, if requested to do so by the Commissioners, and in such case a Commissioner shall act as Clerk and shall transmit a Minute to the Permanent Trustee for insertion in the Sederunt Book. **(Sch 6 (20)(21))**

### **6.7. Postal resolutions**

Any matter may be agreed by the Commissioners without a meeting, if such agreement is unanimous and is subsequently recorded in a Minute signed by the Commissioners. The Minute must be inserted in the Sederunt Book by the Permanent Trustee. **(Sch 6 (23))**

## **7. Confidentiality of documents**

The Permanent Trustee is not bound to insert in the Sederunt Book, any document of a confidential nature and is not bound to exhibit to any person other than a Commissioner or the Accountant in Bankruptcy, any such document in his possession. (**S.62(4)(5)**)

## **8. Expenses of Commissioners**

Commissioners act gratuitously and cannot recover their expenses. (**S.51 (Notes for Guidance)**)

## **9. Dealings by Commissioners**

The position of Commissioners is fiduciary and they must be careful not to expose themselves to a conflict between their duty as Commissioners and their personal interest. Accordingly, no Commissioners can enter into a transaction whereby they:

- (a) receive out of the debtor's estate any payment for services given or goods supplied in connection with the administration of the sequestration, or
- (b) obtain any profit from the administration of the sequestration, or
- (c) acquire any asset forming part of the estate.

## Appendix

### **Trustee's security or caution**

The trustee is required to have in place security for the proper performance of his functions. The security takes the form of a bond which provides that:

- a surety undertakes to be jointly and severally liable with the trustee for losses caused by the fraud or dishonesty of the trustee whether acting alone or in collusion with one or more persons, or the fraud or dishonesty of any person committed with the connivance of the trustee;
- the liability of the surety and the trustee is to be in both a general penalty sum and a specific penalty sum in respect of the individual case;
- any claims are to be paid first out of the specific penalty sum, then, if that is insufficient, out of the general penalty sum;
- a cover schedule containing the name of the insolvent and the value of the insolvent's assets is to be submitted to the surety within a specified period. (**s.390(3), reg.12 and sch.2, IP Regs**)

The general penalty sum must be £250,000 and the specific penalty sum must be at least equal to the estimated value of the bankrupt's assets, but ignoring the value of any assets charged to a third party to the extent of any amount which would be payable to that party, or held on trust to the extent that any beneficial interest in those assets does not belong to the bankrupt.

The minimum specific penalty sum is £5,000 and the maximum £5,000,000. If, at any time, the trustee forms the opinion that the value of the assets is higher than the penalty sum under the current specific penalty, he must obtain a further specific penalty to bring the penalty sum equal to that value (subject to the maximum limit of £5,000,000).

Where two or more persons are appointed jointly to act as trustee, the above provisions apply to each of them individually. (**Reg. 12(2) IP Regs**)

## Annexe D

### Guidance for Members of Liquidation Committees (Scotland)

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## **1. Introduction**

### **1.1. General**

**1.1.1** This guide has been produced to help members of liquidation committees to be aware of:

- the duties and functions of the committee
- their rights as members of the committee
- the procedural rules relating to committee business.

**1.1.2** This introduction gives a brief explanation of the liquidation procedure, and summarises the principal functions of the committee and the liquidator's main duties in relation to it. Detailed provisions are set out in the remaining sections of the guide.

**1.1.3** The bold parenthetical references are to the Insolvency Act 1986, the Insolvency (Scotland) Rules 1986 (both as amended), the Insolvency Practitioners Regulations 2005, the Bankruptcy (Scotland) Act 1985 (as amended), and Statement of Insolvency Practice 9 (Scotland) issued to all authorised insolvency practitioners.

### **1.2. Liquidation**

**1.2.1** Liquidation (also termed 'winding up') is the formal winding up of a company's affairs, entailing the realisation of its assets and the distribution of the proceeds in a prescribed order of priority. Liquidation may be either court, when it is instituted by order of the court, or voluntary, when it is instituted by resolution of the shareholders. An insolvent voluntary liquidation is known as a 'creditors' voluntary liquidation' because its conduct is primarily under the control of the creditors. A solvent voluntary liquidation is known as a 'members' voluntary liquidation', because its conduct is primarily under the control of its members. Members' voluntary liquidations are not covered further in this guidance as there is no committee in such proceedings.

**1.2.2** The guidance which follows applies to both court liquidations and creditors' voluntary liquidations unless otherwise indicated.

### **1.3. The liquidator**

The liquidator appointed to conduct the winding up has wide powers which are set out in the Insolvency Act 1986. He may use these powers at his discretion, except where the exercise of any power specifically requires sanction, as explained in paragraphs 2.2.1 and 2.2.2 below.

### **1.4. The liquidation committee**

**1.4.1** The committee in liquidations is known as the 'liquidation committee'. In most cases the liquidation committee will consist entirely of creditors of the insolvent company. Past or present members (shareholders) of the company may also be members of the committee in certain circumstances, but this is extremely rare. Appendix B sets out the special rules which apply where there are such members.

**1.4.2** The purpose of the liquidation committee is to represent the interests of the creditors as a whole, not just the interests of its individual members. The principal functions of the committee are to sanction the exercise of certain of the liquidator's powers and to fix his remuneration. In addition to its statutory functions the committee may also serve to assist the liquidator generally and act as a sounding board for him to obtain views on matters pertaining to the liquidation.

**1.4.3** The liquidator is required to report to the committee on matters relating to the liquidation and to submit copies of his accounts when required. Meetings are generally held when determined by the liquidator, and voting is by majority in number. Votes may also be taken by post.

**1.4.4** Committee members are not entitled to remuneration, but they may be reimbursed for reasonable travelling expenses incurred on committee business.

**1.4.5** Although the liquidator should normally have regard to the views of the liquidation committee, he may always refer matters of contention to a general meeting of creditors or to the court. It has been held – in England – that the court has a residual discretion not to follow the wishes of a committee where the special circumstances of the case warrant it. (**Re BCCI (No. 3), [1993] BCLC 1490**)

## 2. The functions of the committee

### 2.1. Control of directors' powers

Generally speaking, the directors' powers cease on liquidation. In creditors' voluntary liquidations, however, there is provision for them to continue to the extent that the liquidation committee (or if there is no committee, the creditors) sanction their continuance. (**S.103**)

### 2.2. Control of liquidator's powers

**2.2.1** The extent to which the exercise of the liquidator's powers requires sanction (approval) varies slightly between creditors' voluntary and court liquidation. In both types of liquidation the liquidator needs the sanction of the committee or the court to exercise any of the following powers under sch. 4:

- (a) Pay any class of creditors in full.\*
- (b) Make any compromise or arrangement with creditors or persons claiming to be creditors, or having or alleging themselves to have any claim (present or future, certain or contingent, ascertained or sounding only in damages) against the company, or whereby the company may be rendered liable.
- (c) Compromise on such terms as may be agreed:
  - all calls and liabilities to calls, all debts and liabilities capable of resulting in debts, and all claims (present or future, certain or contingent, ascertained or sounding only in damages) subsisting or supposed to subsist between the company and a contributory or alleged contributory or other debtor or person apprehending liability to the company, and
  - all questions in any way relating to or affecting the assets or the winding up of the company,

and take any security or caution for the discharge of any such call, debt, liability or claim and give a complete discharge in respect of it. (**S.165, S.167**)

**2.2.2** The following powers require sanction in a court liquidation but not in a creditors' voluntary liquidation:

- (d) Bring or defend any action or other legal proceedings in the name and on behalf of the company.

**Note:** Where legal proceedings are proposed, the committee should consider the probable benefit to the liquidation before giving permission. If permission is given, the committee should ensure that it is kept informed of the progress of the proceedings in case it should become necessary to consider their discontinuance.

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\* In this context the preferential debts do not constitute a separate class of creditor, and accordingly sanction is not required for the payment of preferential claims in full.

(e) Carry on the business of the company so far as may be necessary for its beneficial winding up.

**Note:** The company's business may only be carried on if the liquidator bona fide and reasonably forms the opinion that this is necessary (in other words, highly expedient) for a beneficial winding up, for example to achieve a higher price for the assets used in the business.

### **2.3. Acceptance of shares etc. for sale of company property**

In a creditors' voluntary liquidation, where the whole or part of the business or property of the liquidating company is proposed to be transferred or sold to another company, the liquidator may receive, in payment or part payment for the transfer, shares, policies or other like interests in the transferee company for distribution among the members (shareholders) of the transferer company, subject to the sanction of the liquidation committee or the court. **(S.110)**

### **2.4. Acts requiring notice to the committee**

Where the liquidator:

- (a) disposes of any property of the company to a person who is connected with the company, or
- (b) in the case of a court liquidation, employs a solicitor,

he must give notice to the committee of that exercise of his powers. **(S.165(6), S.167(2))**

### **2.5. Expenses of preparing statement of affairs and convening creditors' meeting**

In a creditors' voluntary liquidation, any reasonable and necessary expenses of preparing the statement of affairs and convening the creditors' meeting held under section 98 of the Insolvency Act may be paid out of the company's assets as an expense of the liquidation. Such payment may be made either before or after the commencement of the liquidation, but where it is made after the commencement the following provisions apply:

- If the liquidator appointed at the section 98 meeting intends to make such a payment, he must give the liquidation committee at least seven days' notice of his intention to do so, and
- he may not make such a payment to himself or any associate of his otherwise than with the approval of the liquidation committee, the creditors or the court. **(r.4.14A)**

### **2.6. Liquidator's remuneration**

**2.6.1** Within two weeks after the end of an accounting period, the liquidator shall submit to the liquidation committee or, if none, the court his claim for outlays reasonably incurred and for his remuneration. Where there is a liquidation committee, copies of the documents shall be sent to the court. **(SIP 9 (Scot) B(S)A S.53(1) r.4.32)**

**2.6.2** Within six weeks after the end of an accounting period, the liquidation committee or, as the case may be, the court shall issue a determination fixing the liquidator's outlays and remuneration. **(B(S)A S.53(3) r.4.32)**

**2.6.3** The basis for fixing the amount of the remuneration payable to the liquidator may be a commission calculated by reference to the value of the company's estate realised by the liquidator, but there shall in any event be taken into account **(SIP 9 (Scot)):**

- (a) the work which, having regard to that value, was reasonably undertaken by him; and
- (b) the extent of his responsibilities in administering the company's estate. **(B(S)A S.53(4) r.4.32)**

**2.6.4** When seeking agreement to his fees, the liquidator should provide sufficient supporting information to enable the committee to form a judgement as to whether the proposed fee is reasonable having regards to all the circumstances of the case. Where the fee is to be charged on a time basis, the liquidator should be prepared to disclose the amount of time spent on the case and the charge-out value of the time spent, together with such additional information as may be reasonably required having regard to the size and complexity of the case. Where the fee is charged on a percentage basis, the liquidator should provide details of any work which has been or is intended to be contracted out which would normally be undertaken by a liquidator or his staff directly. **(SIP 9 (Scot))**

**2.6.5** In fixing the amount of such remuneration in respect of any accounting period, the liquidation committee or, as the case may be, the court may take into account any adjustment which the liquidation committee or the court may wish to make in the amount of the remuneration fixed in respect of any earlier accounting period. **(B(S)A S.53(5) r.4.32)**

**2.6.6** Not later than 8 weeks after the end of an accounting period, the liquidator, the company or any creditor may appeal against a determination fixing the amount of the outlays and the remuneration payable to the liquidator:

- (a) where it is a determination of a liquidation committee, to the court and thereafter to a higher court; and
- (b) where it is a determination of the court, to a higher court. **(B(S)A S.53(6) r.4.32)**

**2.6.7** If the liquidator's remuneration has been fixed by the liquidation committee and he considers the amount to be insufficient, he may request that it be increased by resolution of the creditors. **(r.4.33)**

**2.6.8** If the liquidator considers that the remuneration fixed for him by the liquidation committee, or by resolution of the creditors, is insufficient, he may apply to the court for an order increasing its amount or rate. The liquidator shall give at least 14 days' notice of his application to the members of the liquidation committee; and the committee may nominate one or more members to appear or be represented, and to be heard, on the application. The court may, if it appears to be a proper case, order the expenses of the liquidator's application, including the costs of any member of the liquidation committee appearing or being represented on it, to be paid as an expense of the liquidation. **(r.4.34)**

**2.6.9** If the liquidator's remuneration has been fixed by the liquidation committee or by the creditors, any creditor or creditors of the company representing in value at least 25% of the creditors may apply to the court for an order that the liquidator's remuneration be reduced, on the grounds that it is, in all the circumstances, excessive. If the court considers the application to be well founded, it shall make an order fixing the remuneration at a reduced amount or rate. Unless the court orders otherwise, the expenses of the application shall be paid by the applicant, and are not payable as an expense of the liquidation. **(r.4.35)**

**2.6.10** Where the liquidator sells assets on behalf of a secured creditor, he is entitled to be remunerated out of the proceeds of sale. This is a matter between the liquidator and the secured creditor providing that it has no impact on any other creditor or class of creditor. **(SIP 9 (Scot))**

**2.6.11** Where the liquidator realises an asset on behalf of a secured creditor and receives remuneration which has an impact on the funds available to non-secured creditors, he should ensure that such fees are approved in accordance with the appropriate provisions of this guidance. **(SIP 9 (Scot))**

**2.6.12** Where there are joint liquidators, it is for them to agree between themselves as to how the remuneration payable should be apportioned. Any dispute arising between them may be referred to the court or to the liquidation committee or a meeting of creditors for settlement.

**2.6.13** Finally, it is also suggested that the insolvency practitioner should disclose all amounts paid or payable to his lawyers and the review of these fees should be evidenced. The explanation should be sufficient to support a decision (if one is necessary) to have them taxed (that is, determined by the court).

## **2.7. Expenses and disbursements**

Where the liquidator makes, or proposes to make, a separate charge by way of expenses or disbursements to recover the cost of facilities provided by his own firm, he should disclose those charges to the committee when seeking approval of his fees, together with an explanation of how those charges are made up and the basis on which they are arrived at. (**SIP 9 (Scot)**)

## **2.8. Taxation of legal accounts**

Where any account in respect of legal services incurred by the liquidator is payable as an expense of the liquidation, the liquidator shall, before payment, submit it for taxation to the appropriate auditor of court. However, if such account has been agreed with the liquidator and the payee is not an associate of his, the liquidator may pay such account without submitting it for taxation – if the liquidation committee does not determine to the contrary. (**B(S)A S.53(2) r.4.68**)

## **2.9. Review of liquidator's security or caution**

The liquidator is required to have in place security or caution for the proper performance of his functions (see Appendix A). It is the duty of the committee to review the adequacy of the liquidator's security or caution from time to time. (**r.7.28**)

## **2.10. Death of liquidator**

In a creditors' voluntary liquidation where the liquidator has died, notice of the fact and of the date of death must be given to the liquidation committee. The persons who may give the notice are:

- the liquidator's executors;
- a partner in his firm;
- any person if he produces a copy of the death certificate to the Court and registrar. (**r.4.36**)

## **3. Liquidator's obligations to committee**

**3.1** The liquidator has a duty to report to the committee all such matters as appear to him to be, or as they have indicated to him as being, of concern to them with respect to the liquidation. (**r.4.44**)

**3.2** The liquidator need not comply with any request for information where it appears to him that the request is frivolous or unreasonable, or the cost of complying would be excessive having regard to the relative importance of the information, or there are insufficient assets to enable him to comply.

**3.3** Where the committee has come into being more than 28 days after the appointment of the liquidator, he must report to the members in summary form what actions he has taken since his appointment and answer such questions as they may put to him regarding the conduct of the proceedings. A person who becomes a member of the committee at any time after its first establishment is not entitled to require a report to him by the liquidator, otherwise than in summary form, of any matters previously arising.

**3.4** Nothing in these provisions disentitles the committee or any member of it from access to the liquidator's cash book and sederunt book, or from seeking an explanation of any matter within the committee's responsibility.

**3.5** However, documents passing between the liquidator and the Department of Trade and Industry concerning possible disqualification of directors are not documents which are within any of the statutory rights of the liquidation committee to inspect, or in respect of which the committee can put questions to the liquidator and ask him to report to them. (Note – English Decision). **(Re W&A Glaser Ltd, [1994] BCC 199)**

**3.6** The liquidator must, as and when directed by the committee (but not more than once every two months), send a written report to every member of the committee setting out the position generally as regards the progress of the liquidation, and matters arising in connection with it, to which the liquidator considers the committee's attention should be drawn. In the absence of such directions by the committee the liquidator must send such a report not less than once every six months. **(r.4.56)**

**3.7** The liquidator should, at their first meeting with him, discuss with committee members their requirements for reports and obtain their directions. He should also discuss with committee members at that meeting the types of matters which they wish to have reported to them so that matters of particular concern to them are identified.

## **4. Liquidator's accounts**

**4.1** Within two weeks after the end of an accounting period, the liquidator shall submit to the liquidation committee or, if there is no liquidation committee, to the court his accounts of his intromissions and a claim for outlays and remuneration. Where there is a liquidation committee, copies of the documents shall be sent to the court. **(B(S)A S.53(1) r.4.68)**

**4.2** Within six weeks after the end of an accounting period, the liquidation committee or, as the case may be, the court shall audit the accounts. **(B(S)A S.53(3))**

## **5. Establishment of the committee**

### **5.1. Court liquidation**

**5.1.1** In a court liquidation not preceded by an administration the committee will be established by general meetings of the company's creditors and contributories\*. The committee must consist of at least three, and not more than five, creditors, and in cases where the winding up is on grounds other than insolvency it may also have up to three contributory members. **(S.142, r.4.41)**

**5.1.2** Where the winding-up order is made immediately on the discharge of an administration order and the court orders that the person acting as administrator be appointed liquidator, then any committee established for the purposes of the administration continues in being as the liquidation committee and there is no need to establish another committee. However, this provision does not apply if the number of members at the date of the winding-up order is less than three. Furthermore, any creditor who was a member of the committee immediately before the winding-up order ceases to be a member if his debt is fully secured. Where the winding-up order is made on grounds other than insolvency, the liquidator must convene a meeting of contributories to give them the opportunity to appoint contributory members of the committee. **(r.4.61, r.4.62)**

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\* A contributory is a past or present member of the company who is liable to contribute to the assets of the company in its winding up.

## **5.2. Creditors' voluntary liquidation**

In a creditors' voluntary liquidation the creditors in a general meeting may appoint a committee of not more than five persons. If such a committee is appointed, the shareholders of the company may in a general meeting appoint up to a further five persons to the committee. The creditors may, however, resolve to exclude any of the shareholders' nominees from the committee unless the court directs otherwise. The court may appoint someone other than the rejected nominee to the committee in his stead. The minimum number of members of the committee is three. (**S.101, r.4.41**)

## **5.3. Formalities of establishment**

**5.3.1** The committee does not come into being, and accordingly cannot act, until the liquidator has issued a certificate of its due constitution. (**r.4.42**)

**5.3.2** The liquidator will not issue the certificate until the minimum number of persons required to be members of the committee have agreed to act. Such agreement may be given by the creditor's proxy-holder or representative under section 375 of the Companies Act 1985 present at the meeting establishing the committee, unless the proxy or authorisation specifically precludes such agreement being given.

## **5.4. Formal defects**

The acts of the committee are valid notwithstanding any defect in the appointment, election or qualifications of any committee member or the representative of any committee member, or in the formalities of its establishment. (**r.4.59A**)

# **6. Membership**

## **6.1. General**

**6.1.1** It is the creditors or contributories themselves who are the members of the committee, not the individuals who represent them. Thus a company which is a creditor may be a member of the committee but can only act through a representative appointed in accordance with paragraphs 6.2.1 to 6.2.3 below. (**r.4.41**)

**6.1.2** Any creditor (other than one whose debt is fully secured) may be a member of the committee, so long as:

- (a) he has lodged a proof of his debt,
- (b) his proof has neither been wholly disallowed for voting purposes nor wholly rejected for the purposes of distribution or dividend, and
- (c) he has agreed to act as a member of the committee.

No person may be a member as both a creditor and a contributory. (**r.4.41, r.4.42(3)**)

If the company being wound up is a recognised bank, a representative of the Deposit Protection Board can exercise the right to be a member of the committee and, if he does so, the Board is to be regarded as an additional creditor member of the committee. (**r.4.41(6)**)

## **6.2. Representatives**

**6.2.1** A member of the committee may be represented by another person duly authorised by him. Such representative must hold a letter of authority entitling him so to act (either generally or specially) signed by or on behalf of the committee member, and for this purpose any proxy or any authorisation under section 375 of the Companies Act 1985 in relation to any meeting

of creditors of the company shall, unless it contains a statement to the contrary, be treated as such a letter of authority to act generally signed by or on behalf of the committee member. The chairman at any meeting of the committee may call on a person claiming to act as a committee member's representative to produce his letter of authority, and may exclude him if it appears that his authority is deficient. **(r.4.48)**

**6.2.2** No member may be represented by:

- a body corporate,
- a partnership,
- an undischarged bankrupt, or
- a disqualified director.

**6.2.3** No person may act as representative of more than one committee member, or both as a member and as a representative of another member, on the same committee.

**6.2.4** Where the representative of a committee member signs any document on the member's behalf, the fact that he so signs must be stated below his signature.

**6.3. Resignation and termination of membership**

**6.3.1** A member of the liquidation committee may resign by notice in writing delivered to the liquidator. A person's membership of the committee is automatically terminated if:

- (a) his estate is sequestrated or he becomes bankrupt or grants a trust deed for the benefit of or makes a composition with his creditors, or
- (b) at three consecutive meetings of the committee he is neither present nor represented (unless at the third of those meetings it is resolved that this rule is not to be applied in his case), or
- (c) he ceases to be, or is found never to have been, a creditor, or
- (d) he becomes disqualified to act as a director. **(r.4.49)**

**6.3.2** A creditor member of the committee may be removed by resolution at a meeting of creditors; 21 days' notice must be given of the meeting called to consider the intention to move the resolution. **(r.4.51)**

**6.4. Vacancies**

If there is a vacancy among the members of the committee, it need not be filled if the liquidator and a majority of the remaining members so agree, provided the number of members does not fall below three. If another creditor is to be appointed, he can be appointed either by the liquidator (provided the majority of the remaining committee members agree to the appointment and the creditor consents to act) or by a resolution passed at a duly convened meeting of creditors, after at least 14 days' notice of the resolution has been given. **(r.4.52)**

**6.5. Composition of committee when creditors paid in full**

If the liquidator issues a certificate that the creditors of the company have been paid in full with interest, the creditor members of the committee cease to be members of the committee. **(r.4.59)**

## **7. Proceedings**

### **7.1. Chairman**

The chairman at any meeting of the committee will be the liquidator, or a person nominated by him to act. A person so nominated must be either:

- (a) one who is qualified to act as an insolvency practitioner in relation to the company, or
- (b) an employee of the liquidator or his firm who is experienced in insolvency matters **(r.4.46)**

### **7.2. Quorum**

A meeting of the committee is duly constituted if due notice of it has been given to all members and, in the case of a creditors' voluntary liquidation, at least two members are present or represented, and, in the case of a court liquidation, at least two creditor members are present or represented. **(r.4.47)**

### **7.3. Meetings**

#### **7.3.1. General**

The committee will meet where and when determined by the liquidator, subject as follows **(r.4.45):**

#### **7.3.2. First meeting**

The liquidator must call the first meeting to take place within 3 months of his appointment or of the committee's establishment (whichever is the later). **(r.4.45)**

#### **7.3.3. Subsequent meetings**

Subsequent meetings of the committee must be called by the liquidator:

- (a) if so requested by a creditor member of the committee or his representative – the meeting must then be held within 21 days of the request being received by the liquidator – and
- (b) for a specified date, if the committee has previously resolved that a meeting be held on that date. **(r.4.45)**

### **7.4. Notice of venue**

The liquidator must give seven days' notice in writing of the venue of any meeting to every member of the committee (or his representative, if designated for that purpose), unless this requirement has been waived by or on behalf of any member. Such waiver may be signified either at or before the meeting. **(r.4.45)**

### **7.5. Voting rights and resolutions**

At any meeting of the committee each member (whether present himself or by his representative) has one vote, and a resolution is passed when a majority of the members present or represented have voted in favour of it. **(r.4.54)**

### **7.6. Records of meetings**

Every resolution passed must be recorded in writing, either separately or as part of the minutes of the meeting. The record must be signed by the chairman and kept as part of the sederunt book. **(r.4.54)**

### **7.7. Postal resolutions**

**7.7.1** It is possible for resolutions to be passed by post. The liquidator must send to every member (or his representative designated for the purpose) a copy of any proposed resolution on which a decision is sought, which must be set out in such a way that agreement with, or dissent from, each separate resolution may be indicated by the recipient on the copy so sent. **(r.4.55)**

**7.7.2** However, any member of the committee may, within seven business days from the date of the liquidator sending out a resolution, require the liquidator to summon a meeting of the committee to consider the matters raised by the resolution. In the absence of such a request, the resolution is deemed to have been passed by the committee if and when the liquidator is notified in writing by a majority of the members (creditor members, in the case of a court liquidation) that they concur with it.

**7.7.3** A copy of every resolution so passed, and a note that the concurrence of the committee was obtained, must be kept in the sederunt book.

## **8. Confidentiality of documents**

**8.1** Where the liquidator considers that any document forming part of the record of the liquidation:

- (a) should be treated as confidential, or
- (b) is of such a nature that its disclosure would be calculated to be injurious to the interests of the creditors,

he may decline to allow it to be inspected by a person (including a member of the committee) who would otherwise be entitled to inspect it. (**r.7.27**)

**8.2** A person refused inspection may apply to the court for the refusal to be overruled.

## **9. Charges for copy documents**

Where a liquidator is requested by a member of the committee to supply copies of any documents, he is entitled to make a charge. (**r.7.26**)

## **10. Expenses of committee members**

Any reasonable travelling expenses directly incurred by committee members or their representatives either in attending meetings of the committee or otherwise on the committee's business will be paid by the liquidator as an expense of the liquidation. (**r.4.57**)

## **11. Dealings by committee members and others**

**11.1** The position of all committee members is fiduciary and they must be careful not to expose themselves to a conflict between their duty as members of the committee and their personal interest. Accordingly, no member of the committee, or his representative, or any person who is an associate of a committee member or his representative, or any person who has been a committee member at any time in the previous twelve months, can enter into a transaction whereby he:

- (a) receives out of the company's assets any payment for services given or goods supplied in connection with the administration of the liquidation, or
- (b) obtains any profit from the administration of the liquidation, or
- (c) acquires any asset forming part of the estate,

unless:

- (a) he first obtains the leave of the court to the transaction, or
- (b) he enters into the transaction as a matter of urgency or by way of performance of a contract in force before the date of the winding-up order or resolution to wind up and he obtains the leave of the court, having applied for such leave without undue delay, or

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- (c) he enters into the transaction with the prior sanction of the committee where the committee is satisfied (after full disclosure of the circumstances) that the transaction will be on normal commercial terms. **(r.4.58)**

**11.2** Where a resolution is proposed in the committee that sanction be given to such a transaction, no member of the committee, and no representative of a member, can vote on the resolution if he is to participate directly or indirectly in the transaction.

**11.3** The costs of obtaining the leave of the court are not payable as an expense of the liquidation unless the court so orders.

**11.4** Circumstances may occasionally arise where a legal action or dealing involving a member of the committee or a person connected with him makes it inappropriate for him to attend discussions on the subject in the committee. In such circumstances the member may be asked not to attend a meeting, or part of a meeting, at which the matter is discussed.

## Appendix A

### **Liquidator's security or caution**

The liquidator is required to have in place security for the proper performance of his functions. The security takes the form of a bond which provides that:

- a surety undertakes to be jointly and severally liable with the liquidator for losses caused by the fraud or dishonesty of the liquidator whether acting alone or in collusion with one or more persons, or the fraud or dishonesty of any person committed with the connivance of the liquidator;
- the liability of the surety and the liquidator is to be in both a general penalty sum and a specific penalty sum in respect of the individual case;
- any claims are to be paid first out of the specific penalty sum, then, if that is insufficient, out of the general penalty sum;
- a cover schedule containing the name of the insolvent and the value of the insolvent's assets is to be submitted to the surety within a specified period.

The general penalty sum must be £250,000 and the specific penalty sum must be at least equal to the estimated value of the company's assets, but ignoring the value of any assets charged to a third party to the extent of any amount which would be payable to that party, or held on trust to the extent that any beneficial interest in those assets does not belong to the company.

The minimum specific penalty sum is £5,000 and the maximum £5,000,000. If, at any time, the liquidator forms the opinion that the value of the assets is higher than the penalty sum under the current specific penalty, he must obtain a further specific penalty to bring the penalty sum equal to that value (subject to the maximum limit of £5,000,000). **(s.390(3), reg.12 and sch.2, IP Regs)**

## Appendix B

### **Shareholder and contributory members of the committee**

Where there are shareholder or contributory members of the committee, the following special rules apply. References are to the section headings of the guide. The term 'contributory' is used to refer to any contributory or shareholder member of the committee.

### **Resignation and termination of membership**

A contributory member of the committee may be removed by a resolution of a meeting of contributories; 21 days' notice must be given of the meeting called to consider the intention to move the resolution. **(r.4.51)**

### **Vacancies**

If there is a vacancy among the contributory members of the committee, it need not be filled if the liquidator and a majority of the remaining contributory members so agree, provided that, in the case of a committee of contributory members only, the total number of members does not fall below three. The liquidator may appoint any contributory to fill the vacancy if the other contributory members agree and the contributory concerned consents to act.

Alternatively, a meeting of contributories may resolve that a contributory be appointed (with his consent) to fill the vacancy. In this case at least 14 days' notice must have been given of the resolution to make such an appointment.

Where a meeting of contributories makes such an appointment in a creditors' voluntary liquidation, the creditor members of the committee may, if they think it fit, resolve that the person appointed ought not to be a member of the committee. If so –

- that person is not qualified to be a member of the committee unless the court directs otherwise, and
- on any application to the court for directions the court may appoint another contributory to fill the vacancy. **(r.4.53)**

### **Composition of committee when creditors paid in full**

If there are at least two contributory members, the committee continues in being until a meeting of contributories decides to abolish it.

If the number of contributory members is below two, the committee will cease to exist 28 days after the issue of the liquidator's certificate of payment in full; but at any time when the committee consists of less than two contributory members, it is suspended and cannot act.

Contributories may be co-opted by the liquidator, or appointed by a contributories' meeting, to be members of the committee, up to a maximum of five members.

All the other rules relating to the functioning of the liquidation committee continue to apply (with necessary modifications) as if all the members of the committee were creditor members. **(r.4.59)**

## **Voting rights and resolutions**

In a court liquidation, where a committee consists of both creditor and contributory members, the votes of the contributory members do not count towards the number required for passing a resolution, but the way in which they vote on any resolution must be recorded.

However, where the only members of the committee are contributories, the committee is treated for voting purposes as if all its members were creditors. **(r.4.54)**

## Annexe E

### Guidance for Members of Committees in Voluntary Arrangements (Scotland)

#### **1. Legislation**

**1.1** The bold parenthetical references in this guide are to the Insolvency Act 1986, the Insolvency (Scotland) Rules 1986 (both as amended), the Insolvency Practitioners Regulations 2005, and the Statement of Insolvency Practice 9 (Scotland) issued to all authorised insolvency practitioners.

#### **2. Moratorium committee for eligible companies**

**2.1** A company in financial difficulties may, if it meets certain eligibility criteria, obtain a moratorium on creditor action while the directors put forward a proposal for a voluntary arrangement. The person proposed as supervisor of the arrangement is called the nominee, and he has a responsibility to monitor the company's affairs during the moratorium. **(r7.28(2)(c))**

**2.2** Initially the maximum period for a moratorium is 28 days, during which time meetings of creditors and shareholders must be held to consider the proposal. These meetings (or the creditors' meeting if the two meetings cannot agree) may resolve to extend the moratorium for a maximum of a further two months. Where this happens the meetings may also establish a committee with the nominee's consent. Apart from the duty to review the nominee's security mentioned below, there are no statutory rules about the functions of the committee, which will depend entirely on what functions are conferred on it by the meeting at which it was set up. The committee will cease to exist when the moratorium comes to an end. **(r7.28(2)(c))**

#### **3. Committee in approved arrangements**

**3.1** A committee of creditors may be established under an agreed proposal for a company. However, the insolvency legislation makes no provision for the establishment of such a committee, nor (save for the duty to review the supervisor's security mentioned below) for its functions. The rules pertaining to its establishment, membership, functions, powers and procedures will therefore derive wholly from the terms of the arrangement itself.

#### **4. Review of nominee's or supervisor's security**

**4.1** The one statutory obligation laid on a committee in a voluntary arrangement is the duty to review, from time to time, the adequacy of the nominee's or supervisor's security. **(r7.28(2)(c))**

**4.2** The nominee or supervisor is required to have in place security for the proper performance of his functions. The security takes the form of a bond which provides that:

- a surety undertakes to be jointly and severally liable with the nominee or supervisor for losses caused by the fraud or dishonesty of the nominee or supervisor whether acting alone or in collusion with one or more persons, or the fraud or dishonesty of any person committed with the connivance of the nominee or supervisor;
- the liability of the surety and the nominee or supervisor is to be in both a general penalty sum and a specific penalty sum in respect of the individual case;

- any claims are to be paid first out of the specific penalty sum, then, if that is insufficient, out of the general penalty sum;
- a cover schedule containing the name of the insolvent and the value of the insolvent's assets is to be submitted to the surety within a specified period.

The general penalty sum must be £250,000 and the specific penalty sum must be at least equal to the estimated value of the company's assets, but ignoring the value of any assets charged to a third party to the extent of any amount which would be payable to that party, or held on trust to the extent that any beneficial interest in those assets does not belong to the company.

The minimum specific penalty sum is £5,000 and the maximum £5 million. If at any time the nominee or supervisor forms the opinion that the value of the assets is higher than the penalty sum under the current specific penalty, he must obtain a further specific penalty to bring the penalty sum equal to that value (subject to the maximum limit of £5m). (**s.390(3), Sch. 2 IP Regs**)

Where two or more persons are appointed jointly to act as nominee or supervisor, the above provisions apply to each of them individually. (**Reg. 12(2) IP Regs**)

If the terms of the arrangement give the committee power to approve the supervisor's remuneration, reference should be made to the explanatory note, 'Voluntary Arrangements – a Creditors' Guide to Insolvency Practitioners' Fees', which is appended to Statement of Insolvency Practice 9 (Scotland) (Remuneration and Disbursements) and should be provided by the supervisor. (**SIP 9 (Scot)**)