Insolvency Guidance Paper: Succession Planning

Insolvency Guidance Papers (IGPs) provide guidance on certain matters in the practice of insolvency. Insolvency practitioners may however develop different approaches to the areas covered by the IGPs.

IGPs should be read in the context of applicable statute, Statements of Insolvency Practice (SIPs), and the Code of Ethics of the insolvency practitioner's authorising body. The Rules and Regulations of an insolvency practitioner's authorising body may impose regulatory requirements additional to, or in precedence to this guidance.

IGPs are developed and approved by the Joint Insolvency Committee and adopted by each of the authorising bodies.

CONTENTS

1. INTRODUCTION TO SUCCESSION PLANNING

Insolvency appointments are personal to an insolvency practitioner, who has an obligation to ensure that cases are properly managed at all times, and to have appropriate contingency arrangements in place to cover a change in the insolvency practitioner's circumstances. The over-riding principle is that the interests of creditors and other stakeholders should not be prejudiced.

Guidance on succession planning may also be available from the insolvency practitioner's authorising body. The authorising body may also impose formal requirements beyond those set out in this guidance paper.

2. GENERAL PRINCIPLES

Planning for what will happen to an insolvency practitioner's cases if they are unable to act should be considered an integral part of the insolvency practitioner's role. Insolvency practitioners must maintain control over their cases and this guidance should be read in conjunction with the control of cases guidance paper. Appropriate arrangements should be put in place to ensure continuity of case management in the event of death, serious illness, retirement or loss of licence, with a particular focus on minimising disruption and ensuring a timely transfer of cases to a successor insolvency practitioner.

The arrangements should be reviewed on an annual basis, at the very least, to ensure that they remain adequate to the specific circumstances of both the office holder and the proposed alternate. Events such as insolvency practitioners joining or leaving a firm, a practitioner's health, or regulatory action, should all lead to a review of the existing arrangements.

Whatever arrangements are put in place, except where there is a joint appointment, or the case is a compulsory liquidation and bankruptcy (see below), there will need to be a formal transfer of the insolvency appointments either via the court or by a decision procedure.

It should be recognised that succession planning is not a quick process, and that effective continuity arrangements require advance planning. For example, when considering retirement, an office holder should recognise that court lead times can be long and therefore plan for the transfer of cases in sufficient time to ensure that the cases are transferred before they retire. Otherwise, the most sensible course of action will be to delay retiring completely until arrangements can be made.

It is recommended that an adequate written record of any continuity arrangements is kept so that there is as little uncertainty as possible in respect of their provisions. As any arrangements are likely to be actioned in situations of pressure or distress, a clear, structured record of the insolvency practitioner's wishes may be of great assistance. The insolvency practitioner's authorising body may wish to have sight of the succession plan and may make a request to review it periodically.

When considering appropriate arrangements to ensure continuity of case arrangement, insolvency practitioners must be aware that the Official Receiver (England, Wales and Northern Ireland) becomes office holder ex-officio when an office is vacated in bankruptcies and compulsory liquidations. As there is no intervening period before the Official Receiver fills the vacancy, it is essential that insolvency practitioners consider putting appropriate arrangements in place to ensure that the Official Receiver receives prompt notification of the vacancy. If possible, measures should be put in place for any relevant paperwork or communications to be passed to the Official Receiver until alternative arrangements are put in place.

3. FIRMS

Every insolvency practitioner in a firm (whether a principal or an employee) should consider:

- Contractual arrangements in relation to the cases which they are appointed on, and the rights of the firm in respect of those cases, were the insolvency practitioner to vacate office, whether there is capacity within the firm for another insolvency practitioner to take on appointments, if required at short notice, and if not, arrangements for an alternate, or other arrangements which will enable the appointment of an alternative insolvency practitioner.
- The firm's awareness and acknowledgement of the arrangement, and how it will be dealt with commercially in the event of a transfer (see appendix).

Firms with other insolvency practitioners

In a firm with other insolvency practitioners, it is likely that the arrangements would include joint appointments. At the very least, there should be an understanding that another insolvency practitioner will be appointed on open cases and make the required application to Court for the transfer of those cases if the office holder is unable to do so. It will be the professional responsibility of the remaining partners or directors (as insolvency practitioners) to take immediate action to safeguard the interests of creditors and other stakeholders by appointing an office holder.

Potential issues arising from an office holder's incapacity or death can be avoided by seeking joint appointments whenever practicable. Should one of the joint office holders die or be incapacitated, it would then fall to the remaining office holder to consider appointing a successor or continuing with the appointment as a sole appointee.

When an office holder retires from a firm, it may be acceptable for the office holder to remain in office for a short period, with another insolvency practitioner in the firm dealing with the administration of cases. The office holder will need to receive appropriate information on the progress of cases and be consulted when decisions are to be made. The office holder is also likely to require unrestricted access to case files. Such an arrangement, however, is unlikely to be appropriate other than for cases that are clearly in their closing stages. In normal circumstances, the retiring office holder should be replaced as soon as reasonably practicable, based on the circumstances of the cases, or in line with the relevant rules and regulations of the insolvency practitioner's authorising body.

Firm with no other insolvency practitioners

Where there are no other insolvency practitioners in a firm, and in the absence of any contractual arrangements, the partners or directors will need to consider their own professional obligations to ensure the proper management of the practice.

It will be helpful to share a copy of this guidance paper with others in the practice, so they are aware of what needs to be done and why.

Arrangements should be made to employ another insolvency practitioner to step in as office holder to whom the appointments could be transferred, or to arrange for the cases to be transferred to an alternative insolvency practitioner from another firm. This will require an application to Court for the transfer of cases and the onus is upon the outgoing insolvency practitioner or their firm to ensure that the relevant application is drafted and submitted as soon as possible after the office holder vacating office. It is expected that the outgoing office holder's firm should provide its full support to the successor to facilitate the process.

If no arrangements are made, there is the possibility that the outgoing insolvency practitioner's authorising body will make an application to Court for the transfer of the cases to another

insolvency practitioner, which could impact the commercial value of the portfolio to the practice.

4. SOLE PRACTITIONERS

A sole practitioner should consider the steps necessary to put a workable continuity agreement in place including the appointment of an alternate. It may take longer to secure an alternate as a sole practitioner so insolvency practitioners should plan, review the agreement regularly and consider whether a mutual agreement might be beneficial.

Insolvency practitioners should consider whether in the absence of a formal alternate office holder arrangement they can reach an agreement with another firm to action work on cases for the office holder until the cases are transferred to a new insolvency practitioner.

Sole insolvency practitioners should:

- Ensure their authorising body is fully aware of their arrangement(s).
- Include details of their arrangement(s) and their effect in their will.
- Ensure their alternate has a copy of the arrangement(s), and agree a timeframe within which it is regularly reviewed between parties.
- Inform the alternate of significant/material changes to their practice as soon as possible as this may affect the alternate's capability or willingness to continue with the arrangement.

Power of attorney

Insolvency practitioners should consider whether drawing up a power of attorney might be appropriate to give specific parties authority to carry out certain actions in relation to their case portfolio. This could be the alternate. Careful consideration should be given as to the powers given to the alternate and whether any matters should be excluded, and what events are required for a power of attorney to become valid and enforceable. Legal advice should always be sought when drawing up a power of attorney.

Selling the practice as a going concern

The sale of the practice could be considered as part of the succession plan as in certain circumstances it may be a more fitting alternative/solution.

When drafting any agreements in relation to the sale of the practice, insolvency practitioners may wish to include among the relevant clauses, considerations on aspects such as value calculations or the handling of the sale. It may be advisable to include a clause that records the fact that the decision to sell will remain at the discretion of the insolvency practitioner or their representatives. It is recommended that the parties to the sale are independently advised.

Loss of licence – compliance with regulator

If an insolvency practitioner loses their ability to hold office because they have had their licence removed by their authorising body, some of the provisions of succession planning above may be appropriate.

A transfer of cases will need to be arranged and this should be done at the expense of the outgoing insolvency practitioner, regardless of whether they make the application, or the authorising body does this on their behalf. This application should be made expeditiously.

Death/will/executors - does it fall into the estate intestate or will

It is recommended that every appointment taking insolvency practitioner should make a will and if possible, appoint executors capable of protecting and administering the estate comprised of formal appointments. If the alternate is willing to act, provision could be made for the appointment of the

alternate as a special executor in the will (other executors may be appointed in respect of the rest of the estate). At the very least, the insolvency practitioner should ensure that there is a written record listing essential matters they would want others to be aware of. It is advisable that insolvency practitioners inform their executors and/or family of the existence and location of such a written record.

5. PUTTING IN PLACE AN AGREEMENT/ARRANGEMENTS

Insolvency practitioners will also need to consider the nature of the agreement that is in place. The recommendation in this guidance paper is that a formal legal agreement is put in place. This can take a variety of forms.

A simple agreement between the two insolvency practitioners may be helpful in respect of holiday absences or for short term illnesses, other than mental incapacity. However, in the event of death, serious ill health, or loss of licence, insolvency practitioners should be aware that they might be acting without proper authority and would risk incurring liability for acts that were not properly authorised.

The principal matters that might routinely be dealt with in an insolvency practice agreement (or a partnership agreement) are set out in the Appendix.

A formal legally binding agreement should include at least the following:

- Property and Affairs Lasting Power of Attorney (LPA) for the alternate to act during any periods of incapacity.
- Provision for the appointment of the alternate as a special executor in the insolvency practitioner's will (other executors may be appointed in respect of the rest of the estate).
- An acknowledgement of the arrangement appointing the alternate and specifying the terms and conditions including ensuring a note is kept for those who will need to be aware of these arrangements.

6. GUIDANCE FOR ALTERNATES/POTENTIAL ALTERNATES

Insolvency practitioners considering becoming an alternate should consider carefully the weight of responsibility they wish to assume and take steps to assess whether they are an appropriate candidate for an alternate in the specific circumstances, as well as put adequate safeguards in place to ensure that any impact on their own practice is addressed.

This guidance includes recommendations that the alternate be granted power of attorney and be appointed as a special executor in the insolvency practitioner's will. This is a great deal of responsibility to take on, and anyone considering becoming an alternate, should think seriously about the responsibility. To achieve continuity and safeguard the interests of creditors and other stakeholders, the insolvency practitioner and the nominated successor/alternate should consider the following:

Type of appointments

- Familiarity/compatibility with the type of work and the client base of the insolvency practitioner's practice.
- Whether the other insolvency practitioner's portfolio is a good fit with the alternate's practice.
- Existence of any potential conflicts of interest and the alternate's ability to put suitable mitigations in place.

Capacity

- Sufficient capacity and resource to absorb additional work.

Practicalities

- Access to and subsequent transfer of information and physical/electronic files, including any relevant cloud or database specific access.
- Access to the estate, office and/or client money accounts.
- Consideration whether the terms and cover level of the alternate's PII policy will be sufficient if they take up office as alternate.
- The availability of appropriate bond cover and the alternate's preferred surety.

7. DISPUTES

There can be disputes between firms and partners (and employees who are office holders) who leave the firm, principally arising from the personal nature of insolvency appointments. However, commercial disputes should not be allowed to obscure the over-riding principle that the interests of creditors and other stakeholders should not be prejudiced.

It is important, therefore, that the contractual arrangements referred to above should provide for the practical and financial consequences of an office holder leaving the firm (or upon incapacity to act). There will be similar considerations when an office holder (either partner or employee) is suspended by a firm or is otherwise excluded from the firm's offices.

Where there are no contractual arrangements, or where a dispute arises, both parties should consider their professional obligations, and the standard of conduct required by their professional bodies. Further, an office holder must have regard to the statutory obligations of the office held.

If there is a dispute, it is for the office holder to decide how best to ensure that the obligations of office can be discharged; an application to Court may be the only means of finding a solution. It is always open to an office holder to consult with their authorising body for support in bringing any dispute to an end amicably.

As noted above, there may be professional obligations on remaining partners to arrange for the proper management of their practice, and so ensure that they do not bring their own professional bodies into disrepute.

8. APPENDIX

Principal matters that might be dealt with in a continuity agreement:

1. A clear statement of the circumstances upon which the agreement would become operative, and the circumstances in which the nominated successor can decline to act.
2. The extent and frequency of disclosure to the nominated successor of case details and financial information.
3. Detailed provisions to provide for:
    - The steps to be taken by the nominated successor when the agreement becomes operative.
    - Ownership of, or access to, case working papers.
    - Access to practice records.
    - Financial arrangements.

Principal matters that might be dealt with in an insolvency practice agreement (or in a partnership agreement):

1. Clear statements of what happens in the event of an insolvency practitioner (whether partner or employee):
    - Dying, or being otherwise incapable of acting as an insolvency practitioner.
    - Retiring from practice.
    - Being suspended or otherwise excluded from the firm's offices.
    - Losing or having the licence restricted.
    - Leaving the firm.
2. Where the agreement provides for another insolvency practitioner (whether in the firm or in another firm) to take over appointments:
    - The time within which transfer of cases will take place, and the arrangements for the interim period, including provisions for access to information and files.
    - The obligations placed on the practitioner, the firm and the successor practitioner, both in the interim period and thereafter.
    - Professional indemnity insurance arrangements.
    - Financial arrangements.
3. Where the insolvency practitioner is to remain as office holder following retirement or leaving the firm:
    - Ownership of, or access to, case working papers.
    - Access to practice records.
    - Professional indemnity insurance arrangements.
    - Financial arrangements.

Effective date: 1 August 2024