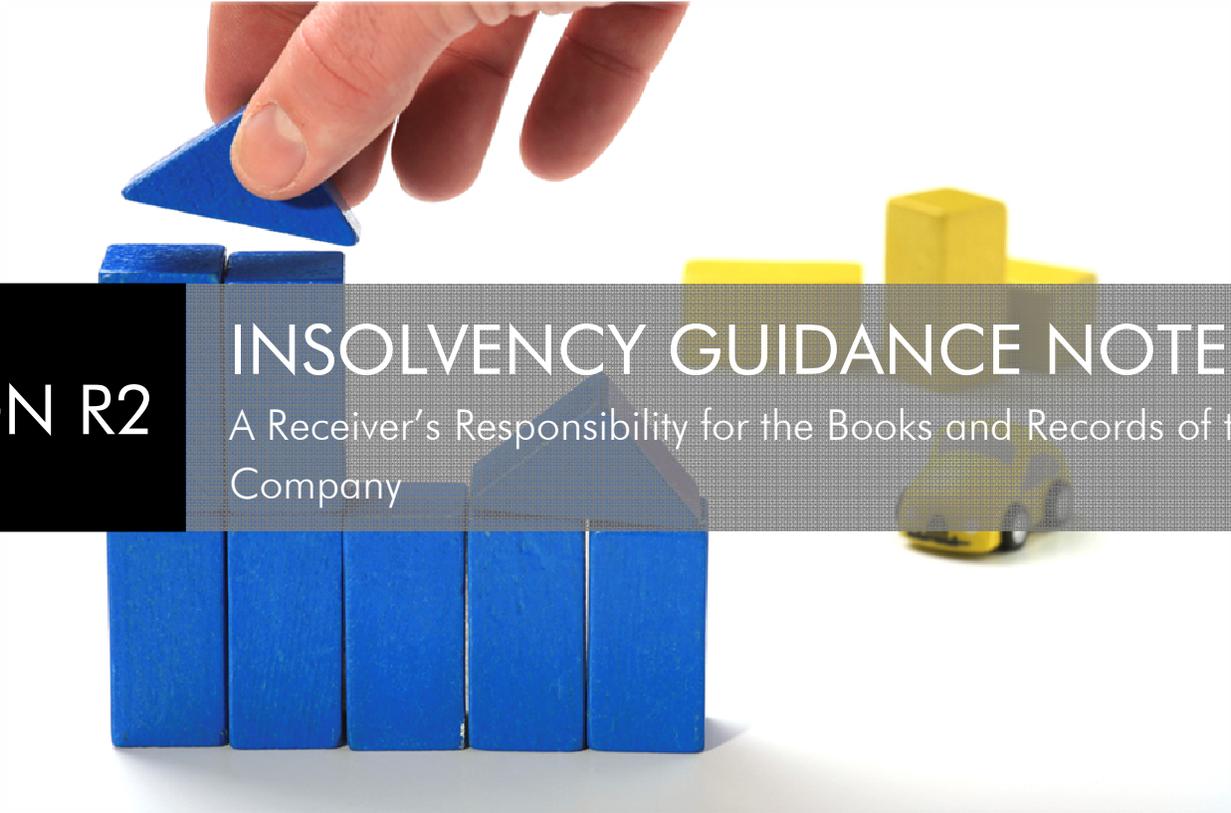




MALAYSIAN INSTITUTE
OF ACCOUNTANTS
ACCOUNTANTS: MANAGERS OF VALUE



IGN R2

INSOLVENCY GUIDANCE NOTE

A Receiver's Responsibility for the Books and Records of the Company

November 2009

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FOREWORD

This foreword has been approved by the Council of the Malaysian Institute of Accountants for publication. The Guidance Notes represent what constitutes good practice in stated areas of insolvency.

The Guidance Notes are issued with the view to harmonising the approach of members to questions of insolvency practice. However, the Institute recognises that there may be instances where the circumstances encountered by a practitioner render it inappropriate for the guidance given in a particular Note to be followed.

The Guidance Notes are prepared from the perspective of an insolvency practitioner operating under the laws of and practices in Malaysia. Nevertheless, the Notes are not intended as a definite interpretation of the law, and the Institute disclaims liability for any loss or penalty suffered, or claims sustained, by any member as a consequence of his following the procedures set out in the Guidance Notes.

The Guidance Notes do not form part of the Institute's By-Laws (On Professional Conduct and Ethics) [Revised 1 January 2007].

It is believed that the issuance of the notes will help to improve the quality of insolvency practices. They are not prescriptive in nature. The notes are for guidance only. However, in determining the acts of members in the performance of their respective duties, the Council may take into consideration the recommended practices as contain in these IGNs.

EFFECTIVE DATE

These IGNs are effective for members to observe from the date of issuance and these are set out in each of the IGN proper.

Introduction

1. Disagreements have arisen where receivers appointed out of Court have been approached by directors or liquidators of the company on the question of access to and custody of the company's books and records. This Guidance Note summarises a Receiver's responsibility in relation to the books and records of the company and sets out what is considered to be best practice in these circumstances.

Definitions

2. Except where otherwise stated or indicated by the context in which they appear, the following terms have the respective meanings shown for the purposes of this Guidance Note:

"Act" means the Companies Act 1965.

"Books and Records" means any registers, indices, minute books, books of account, documents, papers and any other record of information of any kind, including books within the meaning of Section 4 of the Act.

"Court" means the Courts in Malaysia.

"Debenture" means any debenture within the meaning of Section 4 of the Act.

"Guidance Note" means the Insolvency Guidance Note ("IGN") as approved by the Council of the Malaysian Institute of Accountants.

"Receiver" means a Receiver or a Receiver and Manager of any part or all of a company's property and undertakings appointed under any instrument and includes a Receiver or a Receiver and Manager appointed by the Court;

"Registered Office" means the registered office of a company within the meaning of Section 4 of the Act.

"Section" means the Section or Sections of the Act.

"SSM" means the Companies Commission of Malaysia and includes the Registrar of Companies designated under Section 7 of the Act.

Pre-appointment Books and Records

3. The Books and Records which a company maintains prior to the appointment of a Receiver may be classified under three main headings:

- a. Statutory books and records which the company is required to maintain by the relevant provisions of the Act, inter alia, Sections 69L, 70, 115, 134, 141, 156 and 158. These books and records, consisting of various registers (e.g. of charges), indices (e.g. of members), minute books (e.g. of directors' meetings) and copies of instruments (e.g. charging instruments) are hereafter referred to as "Statutory Records".
- b. Accounting books and records which the company is required to maintain by statute, e.g. under Section 167 of the Act, which are hereafter referred to as "Accounting Records"; and
- c. All other non-statutory books and records, hereafter referred to as "Non-Statutory Records".

Statutory Records

4. All Statutory Records of the company should be kept at its registered office, having regard in particular to Sections 69L, 115, 119, 134, 141 and 156 of the Act except for the company's register of debenture holders and its register and index of members which may be kept at places other than its registered office as provided in Sections 70 and 159 of the Act. The Statutory Records are to be kept in the form and manner prescribed by Section 358 of the Act.
5. The directors' powers and duties to cause entries to be made in the Statutory Records do not cease on the appointment of a Receiver. The Statutory Records should therefore be left in the custody and control of the directors so that they are in a position to carry out their duties to maintain them. The Receiver should advise the directors clearly of their continuing responsibility to maintain the Statutory Records.
6. On appointment, a Receiver may choose to take into his possession Statutory Records which in his opinion should not be left in the custody or control of the directors for various reasons, e.g. for the purposes of safekeeping or to support the title of the debenture holders. In such circumstances, the Receiver should remind the directors in writing of their statutory responsibilities and allow them free access to the records so that they can maintain them. It would be advisable for the Receiver to prepare a detailed receipt for all the Statutory Records taken into his possession, which should be signed by a director of the company and to notify the SSM of the same.
7. It is considered that the Receiver has a right to inspect the Statutory Records upon his appointment, but he should not normally become involved in maintaining them after his appointment. The Receiver should, however, take custody and control of the company seals.
8. If there is a need to change the company's Registered Office to that of the Receiver's or any other firm, the directors should be advised to transfer the Statutory Records required under the Act to be kept at the company's Registered Office to the new Registered Office and the procedures described in paragraph 10 above should be followed. The Receiver should also advise the directors to give proper notice of the change in the company's Registered Office in accordance with Section 120 of the Act.

9. On ceasing to act, the company seals and all Statutory Records taken into the Receiver's possession should be returned to the directors of the company or, if the company is in liquidation, to the liquidator. If the Registered Office of the company was changed during the receivership, the Receiver should, upon ceasing to act, advise the directors or liquidator to change the address again, either to the pre-appointment address or, if the company is in liquidation, to the address of the liquidator. The receiver should also advise the directors to give proper notice of the change in accordance with Section 120 of the Act. Where the directors cannot be traced and there is no liquidator, the steps recommended in paragraph 34 should be followed.

Accounting Records and Non-Statutory Records

10. The Accounting Records of the company should be kept at its Registered Office or such other place as provided by Section 167 of the Act and are to be kept in the form and manner prescribed by Sections 303 and 358 insofar as books of account are concerned of that Act.
11. All Accounting Records and Non-Statutory Records as are necessary for the purposes of the receivership should be taken into the Receiver's possession and / or control and any which he considers he will not require may be left with the directors. The directors should be reminded of their responsibility to maintain the Accounting Records and allowed free access to such records taken into the possession of the Receiver so that they may discharge their statutory duties under Part V Division 5 and Part VI of the Act.
12. The Receiver has no duty to bring pre-appointment Accounting Records up to date to the date of his appointment, although for the purposes of the receivership it may be necessary for him to do so.
13. If the Receiver does not take possession of all the Accounting Records and Non-Statutory Records of the company, it may be advisable for future reference and retrieval for the purpose of his administration, for him to prepare a list of all those records not taken into his custody, with a note of their whereabouts.
14. On the appointment of a liquidator, the liquidator is entitled to possession of all books and records relating to the "management and business" of the company which are not necessary to support the title of the debenture holder (*Engel v. South Metropolitan Brewing and Bottling Co.* (1892) 1 Ch.442). Section 233 of the Act in fact provides that a liquidator appointed in a compulsory winding-up shall take custody or control of all property to which the company is or appears to be entitled, and Section 277(5) (applicable to every mode of winding-up) empowers the Court to require a Receiver to deliver to the liquidator books and papers to which the company is prima facie entitled. The Receiver is, however, entitled to retain possession of documents necessary to support the debenture holder's title (*Fenton Textile Association v. Lodge* (1928) K.B. 1, *Re Landmark Corporation Ltd. (In Liq.)* and the Companies Act (1968) 88 W.N. (Pt 1) (N.S.W.) 195). The Receiver should deliver possession of all other books and records to the liquidator, who must produce them to the Receiver when required. In practice, liquidators

almost invariably allow Receiver to retain possession of all books and records against an undertaking for access and eventual return.

15. The Receiver has no statutory authority to destroy the company's pre-appointment Accounting Records and Non-Statutory Records and in due course, these must be returned to the company's directors or, if the company is in liquidation, to the liquidator. Where the directors cannot be traced and there is no liquidator, the steps recommended in paragraph 34 should be followed.

Post-Appointment Records

Accounting Records relating to the Period Prior to the Appointment of a Liquidator

16. A Receiver is answerable to the company for the conduct of its affairs. The Receiver is treated as an accounting party to the company and has a duty to keep full and proper accounts of his dealings with its assets (*Smiths Ltd. v. Middleton* (1979) 3 A.E.R. 842). The Receiver may also be considered an accounting party even after the debenture holder's debt is discharged (but before the termination of the receivership) as he must account for residual assets in his hands as well as for the conduct of the administration (*Smiths Ltd. v. Middleton*; *Expo International Ltd. v. Chant* (1979) 2 N.S.W.L.R. 820; *Re Otway Coal Co. Ltd.* (1953) V.L.R. 557).
17. The Receiver should establish and maintain new and proper Accounting Records as from the date of his appointment. He is under a duty to render proper records to the company and to produce them so that the directors may comply with their statutory duties (*Smiths Ltd. v. Middleton*). Receiver specifically, should have particular regard to the provisions of Sections 167(7), 303(1) and 370(3) of the Act.
18. The Receiver is under an obligation to lodge detailed accounts of his receipts and payments as required by Section 190 of the Act.

Records

19. The Receiver has no statutory authority to destroy such records and, on ceasing to act, must hand these over to the company's directors or, if the company is in liquidation, to the liquidator. Where the directors cannot be traced and there is no liquidator, the steps recommended in paragraph 33 should be followed.

Accounting Records relating to the Period after the Appointment of a Liquidator

20. The Receiver, if appointed as an agent of the company, loses his status as an agent from date of the commencement of a winding-up and thereafter acts either as a principal or, less commonly, as an agent of the debenture holder. It would appear that the duty to maintain Accounting Records then devolves upon the liquidator, having regard to Section 277 of the Act. However, the Receiver clearly should continue to maintain records of his dealings sufficient for him to be able to supply the liquidator with information necessary to comply with the provisions of the Act.

Other Books and Records

21. The remaining books and records relating to a receivership may be subdivided between "Company Records" and "Receiver's Records".

Company Records

22. Company Records will include as a minimum all those records which exist as a result of carrying on the company's business or dealing with the company's assets, including those held by the Receiver in his capacity as an agent of the company. Only documents generated or received pursuant to the Receiver's duty to manage the company's business or dispose of its assets belong to the company (*Gomba Holding U.K. Ltd. v Minorities Finance Ltd.* [1988] B.C.L.C 60).
23. These records fall in the same category as the Non-Statutory Records mentioned in the paragraph 4(c) above and should be treated in the same way, being returned on ceasing to act, to the company's directors or if the company is in liquidation, to the liquidator (see paragraph 15 to 19 above). Where the directors cannot be traced and there is no liquidator, the steps recommended in paragraph 33 should be followed.

Receiver's Records

24. Receiver's Records are those books and records relating to the Receiver in his personal capacity, which are prepared for the purpose of enabling him to discharge his professional duties. Such records will include information on the progress of the administration and the filing of returns required of the Receiver under the Act.
25. Documents containing advice to and information for the debenture holder and "notes, calculations and memoranda" prepared to enable the Receiver to discharge his professional duty to the debenture holder if he chooses to claim them. They do not belong to the company (*Gomba Holdings U.K. Ltd. v. Minorities Finance Ltd.*).
26. Receiver's Records are personal to the Receiver and should be retained at his discretion.

Best Practice

27. It is considered best practice that all the books and records mentioned above, with the exception of a Receiver's Records (see paragraph 28 to 30) should be made available on request to the company, acting by its directors or, if the company is in liquidation, by its liquidators, unless the Receiver is of the opinion that disclosure at that time would be contrary to the interests of the debenture holder, e.g. because of current negotiations for the sale of assets (*Gomba Holdings U.K. Ltd. v. Homan* (1986) 3 A.E.R. 94). Subject to the interests of the debenture holder, it would seem that the directors are entitled to such information as is needed for them to exercise their residual powers and perform their duties.

28. The disclosure of the Receiver's records is a matter for his personal discretion although in any legal action brought against him, it could be that if such records are not disclosed, they could be held to be discoverable.
29. Where there is no liquidation and directors cannot be traced, the Receiver will need to consider if it is necessary to submit an application under Section 183(3) of the Act for directions of the Court on the disposal of the company's books and records.
30. A Receiver has no statutory power to destroy the company's books and records, even after the expiry of the statutory period for which the company would have been required to keep them. If there is no liquidator and the directors cannot be traced, the Receiver should retain the books and records after ceasing to act and should not destroy them without the authority of the directors or the liquidator. Where an application to the Court under Section 183(3) of the Act has been made (refer to paragraph 33), the books and records should be dealt with in strict compliance with the order of the Court.

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