Think Ahead ACCA

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Succession Planning for Insolvency Practitioners

This publication has been jointly developed by the member bodies of the Consultative Committee of Accountancy Bodies – Ireland (CCAB-I), being the Institute of Chartered Accountants in Ireland and The Association of Chartered Certified Accountants.

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1. Introduction

Insolvency appointments are taken in a personal capacity by 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.

There are various considerations in mapping out a succession plan for an Insolvency Practitioner. This Technical Alert covers some of the high-level considerations and discussion points to be considered by Insolvency Practitioners.

2. General Principles

Planning for what will happen to an Insolvency Practitioner's cases if they are unable to act should be considered a fundamental part of the Insolvency Practitioner's role. Insolvency Practitioners must maintain control over their cases for which they retain personal responsibility. Appropriate contingency arrangements should be put in place to ensure continuity of case management in the event of death, serious illness, retirement or loss of practicing certificate, with a particular focus on minimising disruption and ensuring a timely transfer of cases to a successor Insolvency Practitioner.

The contingency arrangements should be reviewed on an annual basis, at least, to ensure that they remain adequate to the specific circumstances of both the office holder and the proposed continuity provider. 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 contingency arrangements.

There will need to be a formal transfer of the insolvency appointment, as follows, except where there is a joint appointment:

Creditors Voluntary Liquidation	via the Committee of inspection or Creditors Meeting if no Committee of Inspection
Members Voluntary Liquidation	via a meeting of the Members
Court liquidation / Examinership	via the Court
Receivership	via the secured creditor

It should be recognised that succession planning may be a lengthy process, and that effective contingency arrangements require advance planning. For example, when considering retirement, an office holder should recognise that Court and procedures lead times can be lengthy and therefore plan for the transfer of cases in sufficient time to ensure that the cases are transferred before they retire. Otherwise, the most advisable 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. As any arrangements are likely to be actioned in situations of pressure or distress, a clear, structured record of the Insolvency Practitioner's plans will be of

great assistance. The Insolvency Practitioner's professional body may wish to have sight of the succession plan and may make a request to review it periodically.

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, 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 a continuity provider, or other arrangements which will enable the appointment of an alternative Insolvency Practitioner.
- the firm's awareness and acknowledgement of the contingency arrangement, and how it will be dealt with commercially (for example, in relation to work in progress; future fees and no funds cases) in the event of a transfer.

Firms with other Insolvency Practitioners

In a firm with other Insolvency Practitioners, it is likely that certain appointments may include joint appointments. Joint appointments are recommended where possible for this and other practical reasons. 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 or Committee of Inspection / creditors for the transfer of those cases if the office holder is unable to do so. It will be the professional responsibility of the remaining Insolvency Practitioners within the firm 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.

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.

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 block 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. As noted above, agreement of the commercial issues in respect of the transferred cases needs careful consideration.

4. Sole Practitioners

A sole practitioner should consider the steps necessary to put a workable continuity agreement in place including the appointment of a continuity provider. It may take longer to secure a continuity provider 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 continuity provider 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:

- include details of their contingency arrangement(s) and their effect in their will [subject to legal advice],
- ensure their continuity provider has a copy of the contingency arrangement(s), and agree a timeframe within which it is regularly reviewed between parties,
- inform the continuity provider of significant/material changes to their practice as soon as possible as this may affect the continuity provider's capability or willingness to continue with the contingency arrangement.

Power of Attorney

Insolvency practitioners should consider whether drawing up a power of attorney might be appropriate to give specific parties, such as a continuity provider, authority to carry out certain actions in relation to their appointments. Careful consideration should be given as to the powers given to the continuity provider 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 considering 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 solution.

In order to maximise the value of the practice, the planning phase could commence well in advance of the expected sale date. During that time, sole Insolvency Practitioners may address any weaknesses in the firm, consider the market and plan the sale process.

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.

Death and will

It is recommended that every appointment-taking Insolvency Practitioner should make a will and, if possible, appoint executors capable of protecting and administering an estate comprised of formal appointments. It should be noted that legal advice should be sought in this regard.

If the continuity provider is willing to act, provision could be made for the appointment of the continuity provider 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 into place a contingency arrangement

Insolvency Practitioners will also need to consider the nature of the arrangement 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 or serious ill health, Insolvency Practitioners should be aware that they might be acting without proper authority and may 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.

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

- Power of Attorney for the continuity provider to act during any periods of incapacity, and
- Provision for the appointment of the continuity provider as a special executor in the Insolvency Practitioner's will (other executors may be appointed in respect of the rest of the estate), and
- An acknowledgement of the contingency arrangement appointing the continuity provider 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 continuity providers / potential continuity providers

Insolvency Practitioners considering becoming a continuity provider should carefully consider the weight of responsibility they wish to assume and take steps to assess whether they are an appropriate candidate for a continuity provider 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 continuity provider be granted power of attorney and be appointed as a special executor in the insolvency practitioner's will which is

subject to legal advice. This is a significant responsibility, and anyone considering becoming a continuity provider, 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/ continuity provider 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 continuity provider's practice,
- existence of any potential conflicts of interest and the continuity provider'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 continuity provider's PII policy will be sufficient if they take up office as continuity provider.

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.

Partnership agreement provisions should be reviewed to ensure that any conflicts between the above guidance and the partnership agreement regarding a partners exit are minimised.

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.

Appendix A

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

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.

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, and
    - 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,
    - 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, and
    - 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, and
    - financial arrangements.