

ENTERPRISE ACT 2002

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 10: Insolvency

Companies etc.

640. Changes to the existing corporate insolvency regime focus on restricting the use of administrative receivership and streamlining administration. The White Paper *'Productivity and Enterprise: Insolvency – A Second Chance'* recognised that the administration procedure introduced by the Insolvency Act 1986 was seen as an important tool in providing companies in financial difficulties with a breathing space in which to put a rescue plan to creditors. However, it also recognised that the procedure could be improved.
641. The existing provisions contained in Part II of the Insolvency Act 1986 allow the court to make an administration order in respect of a company that is in financial difficulties. Broadly speaking, the effect of such an order is to afford the company protection from its creditors whilst attempts are made to save the company or achieve a better result for creditors than would be achieved in a winding-up. However, in practice, in many cases where a company gets into financial difficulties, this will lead to the appointment of an administrative receiver by those providing financial support for the company (typically the company's bank), since they usually will have taken a floating charge over all the company's assets. The holder of a floating charge has an effective veto over the appointment of an administrator. Such a person must be given notice of any application for an administration order, and if he or she appoints an administrative receiver, the court must dismiss the application unless the appointor of the administrative receiver consents to the making of an administration order (see section 9(2)(a) and section 9(3) Insolvency Act 1986).
642. An administrative receiver primarily owes duties to his or her appointor rather than the company's creditors as a whole (as to the duties owed by an administrative receiver see *Medforth v Blake* [1999] 2 BCLC 221). His or her primary function is to seek repayment of the debt owed to his or her appointor. An administrative receiver has no powers or duty to seek to put together a company rescue in the same way that an administrator has (an administrator, both under the old procedure and as amended by this Act, may put proposals to creditors for a Company Voluntary Arrangement (CVA) pursuant to Part I of the Insolvency Act 1986 or a scheme of arrangement pursuant to section 425 Companies Act 1985) (see sections 8(3) and 23 of the Insolvency Act 1986).
643. The sections will alter the above provisions in the following way. First, the appointment of administrative receivers will be restricted to certain exceptions (existing arrangements and capital markets) and the Act seeks to provide that administrators will in future be appointed in situations that would have been dealt with through administrative receivership. Second, the procedure has been amended to streamline the process both in the provisions of the Act and the Rules made under section 411 Insolvency Act 1986 that seek to give effect to the provisions of the Act. Perhaps

*These notes refer to the Enterprise Act 2002 (c.40)
which received Royal Assent on 7 November 2002*

the most obvious of the measures is the introduction of the non-court routes into administration. The procedure has been amended to provide a single purpose made up of a hierarchy of three objectives and expressly to provide that the administrator must carry out his or her functions in the interests of all the creditors. It was recognised that the administration procedure as it stood prior to commencement of the relevant parts of this Act was to a degree cumbersome.

644. Administration will continue to have many of the features of the current system. At Annex E there is a table of correspondence that will assist readers in identifying to what extent the provisions of the Insolvency Act 1986 are reflected in new Schedule B1.

Section 248 & Schedule 16: Replacement of Part II of Insolvency Act 1986

645. In order to provide for the streamlining of administration, section 248 replaces Part II of the Insolvency Act 1986 with a new Schedule B1 - as set out in Schedule 16 of this Act. This will be inserted after Schedule A1 to the Insolvency Act 1986. The paragraphs referred to below are paragraphs in Schedule B1.