

Note for administrators & liquidators of UK archaeological organisations

Summary

If an archaeological organisation goes into administration or becomes insolvent, some very particular considerations will arise for the administrator or liquidator. These relate to the nature of work undertaken, the nature (and ownership) of the products of this work, and the legal liabilities which relate to it (arising from the legal requirements of planning processes). This note seeks to explain, for administrators and liquidators who may have to deal with such an organisation, some of the issues.

Background

Since about 1990 a substantial commercial archaeological sector has developed in the United Kingdom. This has happened primarily as a result of government policy for archaeology, under which developers, rather than the state, are required to pay for archaeological work which is made necessary by new development schemes.

This sector employs around 5000 people in the UK and was worth approximately £239m in 2018/19. The organisations which make up this sector are very diverse in size and character. They include sole traders, partnerships, limited companies, some operating on a fully commercial basis and others as charitable trusts. Staff numbers range from one to several hundred, and annual turnover from a few thousand pounds to over £10m.

Much of the work of these organisations consists of carrying out archaeological excavations and other forms of archaeological site investigations in advance of new development. The work is carried out for property developers, landowners, government bodies, construction companies and so on. Individual contracts typically range in size from a few hundred pounds to hundreds of thousands, with durations ranging from a few days to over a year.

Much of this work is secured by conditions placed on the planning permissions for the developments in question, or through 'planning obligations' (eg Section 106' agreements in England and Wales, Section 75 or Section 246 agreements in Scotland, agreements within the meaning of Article 40 of the Planning (Northern Ireland) Order 1991 in Northern Ireland) linked to planning permissions. These conditions are normally imposed by local authorities and are legally enforceable under the town and country planning legislation. This work is almost always required to result on the production of a report, and there may be a requirement for this report to be published. It is important to note that planning processes differ across the UK.

The mechanism under which archaeological organisations operate in regard to this work is as follows. A local planning authority places a condition on a planning permission, or enters into an agreement (eg s.106) related to the development. The person or company which implements

the permission then enters into a commercial contract with an archaeological organisation to carry out the works specified by the condition. The local authority will confirm the discharge of the condition once the specified works have been completed to the satisfaction of the local authority.

Obligations or conditions may also arise from other processes, for example Development Control Orders (DCOs) for developments categorised as Nationally Significant Infrastructure Projects (NSIPs) in England.

This work is directly related to the construction industry. The expected downturn in construction as a result of COVID-19 impacts may place some archaeological organisations in considerable difficulty, and it is not impossible that one or more of them will cease trading, including potentially through insolvency.

In the event of administration or insolvency of an archaeological organisation

Because of the nature of the work undertaken by archaeological organisations, the 'products' which arise from it and the liabilities which attach this work, some particular considerations arise in the event of an archaeological organisation going into administration or becoming insolvent.

In addition to such things as equipment, and business and employment records, the following classes of material are likely to be held at the premises of archaeological organisations:

- (1) the original site records (notes, drawings, photographs) made during archaeological investigations on site.
- (2) artefacts and samples recovered during archaeological investigations on site.
- (3) records and reports produced, after the on-site work has been completed, from the analysis of the site records, artefacts and samples. These may include drafts or final versions of the report on the site investigation which is required to be produced.

Classes (1) and (3) may exist as hard copy records, as digital information, or a combination of the two.

Classes (1) and (2) will very often derive from archaeological sites which have since been destroyed by development, making them – literally – irreplaceable.

In principle, an archaeological organisation will only hold material from site investigations for as long as is necessary to complete the analysis and report analysis on the investigation. After the completion of the report, the material should be transferred elsewhere (e.g. to a museum) for long-term storage. In practice, however, for a variety of reasons, this does not always happen (or happen as quickly as it should).

A number of special considerations apply when planning how to deal with this aspect of the overall body of 'chattels' held by an archaeological organisation.

Some of these may be briefly outlined.

- (A) The artefacts and samples are **unlikely to be the property** of the archaeological organisation. In England and Wales the general rule is that archaeological artefacts belong to the owner of the land on which they were found. In Scotland, the Crown has rights over all archaeological objects (including those discovered in development-led archaeological excavations) and may lay claim to such objects. In Northern Ireland archaeological objects

must be reported and deposited within 14 days to the relevant authority. It must be accompanied by information on (i) the circumstances of the finding, (ii) the nature of the object found, (iii) the name (if known) of the owner or occupier of the land on which the object was found. The relevant authority includes one of the following: the Department for Communities, the Director of the Ulster Museum or a police station. Thus, it is not permissible to dispose of or disperse such material. (Most such material is of little or no financial value, although there may be exceptions to this. In any event, it will generally be someone else's property).

- (B) The intellectual property and copyright in the records and reports may not belong to the archaeological organisation. The work will have been commissioned and paid for by a range of different clients, and the position over intellectual property and copyright for any individual piece of work will depend on the contract under which the work was done (and on the general law). The records and reports cannot automatically be regarded as the property (or as an asset of) the organisation.
- (C) As stated above, many of the contracts undertaken will have been aimed at enabling a legally enforceable planning condition or obligation to be discharged. The condition or obligation may well require the production of a report. That report can only be produced by reference to the material contained in Classes (1) and (2) above. Thus, if that material is not safeguarded (if it is disposed of or dispersed, for example) this could produce a situation in which it was impossible to complete the work necessary to discharge the planning condition or obligation. This in turn could lead to problems for the developer in disposing of the property which had been built, leading potentially to issues of legal liability for the archaeological organisation.

In Northern Ireland, archaeological excavation is a licensed activity regulated by the Historic Environment Division of the Department for Communities. There are conditions within the licence on preparation of a report.

It will be important in any case to determine what specific conditions or obligations may apply and ensure that processes and responsibilities to discharge these conditions or obligations are understood.

- (D) Material of Class 3, while in theory replaceable (sometimes, at least), may represent the investment of large sums of money in terms of the labour which has gone into producing it. It represents work done towards complying with the planning condition or obligation placed on the developer.
- (E) As stated above, material in Classes 1 and 3 above may be held in digital form. There may or may not be paper copies of it also, but the trend is for large amounts of such material to be held in digital form only. The material may be held on a range of pieces of hardware, potentially as part of a complex networked system or on the 'cloud' in accounts registered in the company's name. Some of the material may be held in non-standard formats or programs. For all of these reasons, disposal of the computer hardware owned by an archaeological organisation **should not be contemplated** until all the material in Classes 1 and 3 has been safeguarded in such a way that it remains fully usable (including by people other than those who originated it). This may require specialist IT input.
- (F) Materials (of all Classes) produced from a site investigation should all be clearly labelled so that it is clear which investigation it relates to. Nonetheless, the material from a single investigation is unlikely all to be held in a single place while the work of analysing and reporting on it is taking place. Different categories of records and materials will be passed to

different specialist staff to work on. Some of the material may be sent to specialists who are external to the organisation, so may not even be on the premises.

Archaeologists are generally careful to keep the material from site investigations in good order (properly labelled and indexed, and appropriately stored). It is however possible that, if an organisation has been struggling in business terms, these aspects of its work will have been neglected. It is therefore possible that work will be needed to catalogue and put in order the body of material of Classes (1) to (3). It is essential that all the material relating to each individual investigation is located and accounted for, for the reasons stated above (items (A) to (D))

Immediate advice and contact points

If an administrator or liquidator has to deal with an archaeological organisation, they will be well-advised to seek specialist advice from local and national government bodies concerned with archaeology and from the professional and trade bodies for archaeology. Contact details are given below.

The key piece of immediate advice is: in the event of having to deal with such an organisation, do not start to clear up (or clear out) offices, or to dispose of materials or computers, until you have gained a clear view of what is involved. By its nature much of this material is irreplaceable. Some of the potential consequences of its loss or premature (or disorderly) dispersal are outlined above.

- Association of Local Government Archaeological Officers (ALGAO) UK, <http://www.algao.org.uk/>
- Historic England - <http://www.historicengland.org.uk/>
- Cadw - <http://www.cadw.gov.wales/>
- Historic Environment Scotland - <http://www.historicenvironment.scot>
- Historic Environment Division, Department for Communities, Northern Ireland – www.communities-ni.gov.uk
- Chartered Institute for Archaeologists (CIfA) – <http://www.archaeologists.net>
- Federation of Archaeological Managers and Employers (FAME) – <http://www.famearchaeology.co.uk>
- Treasure Trove Unit Scotland - <https://treasuretrovescotland.co.uk/>

These bodies will be ready to help with advice, in order to safeguard the archaeological interest and to assist in dealing with any issues such as those relating to planning permissions and obligations.

For further information about CIfA policies and for advice on other subjects, visit www.archaeologists.net or email admin@archaeologists.net.

