

BANKRUPTCY- A CREDITORS' GUIDE TO INSOLVENCY PRACTITIONER FEES

ENGLAND AND WALES

1 Introduction

- 1.1 When an individual becomes bankrupt the costs of the bankruptcy proceedings are paid out of his or her assets. The creditors, who hope to recover some of their debts out of the assets, therefore have a direct interest in the level of costs, and in particular the remuneration of the insolvency practitioner appointed to act as trustee. The insolvency legislation recognises this interest by providing mechanisms for creditors to determine the basis of the trustee's fees (also referred to as remuneration). This guide is intended to help creditors be aware of their rights to approve and monitor fees, explains the basis on which fees are fixed and how creditors can seek information about expenses incurred by the trustee and challenge those they consider to be excessive.

2 Bankruptcy procedure

- 2.1 Bankruptcy is the administration of the affairs of an insolvent individual by a trustee in the interests of his creditors generally. The trustee's function is to realise the assets and distribute them among the creditors in a prescribed order of priority. Bankruptcy proceedings commence with the making of a bankruptcy order. On the making of the order an official called the official receiver becomes trustee of the bankrupt's estate (unless an individual voluntary arrangement is in force in which case the court may, on the making of the order, appoint the supervisor of the arrangement as trustee). The official receiver is an officer of the court and an official belonging to The Insolvency Service. The official receiver will remain as trustee unless:

- The majority of creditors, by value, seek the appointment of an insolvency practitioner ("IP") to replace the official receiver as trustee.
- 25% of creditors requisition a decision making procedure and the official receiver is replaced as trustee.
- The official receiver considers that the skills of an IP are required.

- 2.2 Where no insolvency practitioner is appointed, or where there is a vacancy in the office of trustee, the official receiver acts as trustee.

3 The creditors' committee

- 3.1 Where the official receiver is not acting as trustee the creditors have the right to appoint a committee, with a minimum of 3 and a maximum of 5 members, to monitor the conduct of the bankruptcy and approve the trustee's fees. Creditors will be invited to form a committee when a decision is sought re the appointment of an IP as trustee by a decision procedure.

- 3.2 The trustee must call the first meeting of the committee within 6 weeks of its establishment and subsequent meetings must be held either at dates agreed by the committee, or when a member of the committee asks for one, or when the trustee decides he needs to hold one. The trustee is required to report to the committee at least every 6 months on the progress of the bankruptcy, unless the committee directs otherwise. This provides an opportunity for the committee to monitor and discuss the progress of the insolvency and the level of the trustee's fees.

4 Fixing the trustee's remuneration

4.1 Basis

- 4.1.1 The basis for fixing the trustee's remuneration is set out in Rule 18.16 of the Insolvency (England and Wales) Rules 2016. The Rule states that the basis of remuneration must be fixed:

- As a percentage of the value of the assets which are realised or distributed or both, by the trustee
- By reference to the time properly given by the trustee and his staff in attending to matters arising in the bankruptcy, or

- As a set amount.

4.1.2 Any combination of these bases may be used to fix the remuneration and different bases may be used for different things done by the trustee. Where the remuneration is fixed as a percentage, different percentages may be used for different things done by the trustee.

4.2 Advance information where remuneration not based on time costs

4.2.1 Prior to the determination of the basis of remuneration, the trustee must give the creditors details of the work the trustee proposes to undertake and the expenses he considers will be, or are likely to be, incurred.

4.3 Fees estimates where remuneration to be based on time costs

4.3.1 Where the trustee proposes to take remuneration based on time costs, he must first provide the creditors with detailed information in the form of a 'fees estimate'. A fees estimate is a written estimate that specifies:

- Details of the work the trustee and his staff propose to undertake;
- The hourly rate or rates the trustee and his staff propose to charge for each part of that work;
- The time the trustee anticipates each part of that work will take;
- Whether the trustee anticipates it will be necessary to seek approval or further approval under the Rules; and
- The reasons it will be necessary to seek such approval.

4.3.2 In addition, the trustee must give the creditors details of the expenses he considers will be, or are likely to be, incurred.

4.4 Who fixes the remuneration?

4.4.1 It is for the committee (if there is one) to determine on which of these bases, or combination of bases, the remuneration is to be fixed. Where it is fixed as a set amount or a percentage, it is for the committee to determine the amount, percentage or percentages to be applied. Rule 18.16 says that in arriving at its decision the committee shall have regard to:

- The complexity (or otherwise) of the case;
- Any responsibility of an exceptional kind or degree which falls on the trustee in connection with the bankruptcy;
- The effectiveness with which the trustee appears to be carrying out, or to have carried out, his duties;
- The value and nature of the assets which the trustee has to deal.

4.4.2 If there is no committee, or the committee does not make the requisite determination, the trustee's remuneration may be fixed by a decision of the creditors. The creditors must take account of the same matters as apply in the case of the committee. If the remuneration is not fixed in any of these ways within 18 months of the trustee's appointment, it will be fixed in accordance with a scale set out in Schedule 11 to the Rules.

5. Review of remuneration

5.1 Where there has been a material and substantial change in circumstances since the basis of the trustee's remuneration was fixed, the trustee may request that it be changed. The request must be made to the same body as initially approved the remuneration, and the same rules apply as to the original approval.

6 What information should be provided by the trustee?

6.1 General principles

6.1.1 The trustee should provide those responsible for approving his remuneration with sufficient

information to enable them to make an informed judgement about the reasonableness of the trustee's request. The information should be presented in a manner which is transparent, consistent throughout the life of the case and useful to creditors, while being proportionate to the circumstances of the case.

6.1.2 The trustee should disclose:

- Payments, remuneration and expenses arising from the administration paid to the trustee or his or her associates;
- Any business or personal relationships with parties responsible for approving the trustee's remuneration or who provide services to the trustee in respect of the insolvency appointment where the relationship could give rise to a conflict of interest.

6.1.3 The trustee should inform creditors of their rights under insolvency legislation, and should advise them how they may access suitable information setting out their rights within the first communication with them and in each subsequent report.

6.1.4 Where the trustee sub-contracts out work that could otherwise be carried out by the trustee or his or her staff, this should be drawn to the attention of creditors with an explanation of why it is being done.

6.2 Key issues

6.2.1 The key issues of concern to those with a financial interest in the level of payments from the insolvency estate will commonly be:

- The work the trustee anticipates will be done, and why that work is necessary;
- The anticipated cost of that work, including any expenses expected to be incurred in connection with it;
- Whether it is anticipated that the work will provide a financial benefit to creditors, and if so what anticipated benefit (or if the work provided no direct financial benefit, but was required by statute);
- The work actually done and why that work was necessary;
- The actual costs of the work, including any expenses incurred in connection with it, as against any estimate provided;
- Whether the work has provided a financial benefit to creditors, and if so what benefit (or if the work provided no direct financial benefit, but was required by statute).

6.2.2 When providing information about payments, fees and expenses, the trustee should do so in a way which facilitates clarity of understanding of these key issues. Narrative explanations should be provided to support any numerical information supplied. Where it is practical to do so, the trustee should provide an indication of the likely return to creditors when seeking approval for the basis of his remuneration.

6.2.3 When approval for a fixed amount or a percentage basis is sought, the trustee should explain why the basis requested is expected to produce a fair and reasonable reflection of the work that the trustee anticipates will be undertaken.

6.3 Fee estimates and subsequent reports

6.3.1 When providing a fees estimate, the trustee should ensure that the information is provided in sufficient time to facilitate those with the authority to approve fees making an informed judgement about the reasonableness of the trustee's requests. The estimate should clearly describe what activities are anticipated to be conducted in respect of the estimated fee.

6.3.2 When subsequently reporting to creditors, the actual hours and average rate (or rates) of the costs charged for each activity should be provided for comparison.

6.4 Disbursements

6.4.1 Costs met by and reimbursed to the trustee in connection with the bankruptcy will fall into two categories:

- Category 1 disbursements: These are payments to independent third parties where there is specific expenditure directly referable to the bankruptcy. Category 1 disbursements can be drawn without prior approval, although the trustee should be prepared to disclose information about them in the same way as any other expenses.
- Category 2 disbursements: These are costs that are directly referable to the bankruptcy but not to a payment to an independent third party. They may include shared or allocated costs that may be incurred by the trustee or their firm, and that can be allocated to the bankruptcy on a proper and reasonable basis. Category 2 disbursements require approval in the same manner as an office holder's remuneration.

6.4.2 When seeking approval, the trustee should explain, for each category of cost, the basis on which the charge is being made. If the trustee has obtained approval for the basis of Category 2 disbursements, that basis may continue to be used in a sequential appointment where further approval of the basis of remuneration is not required, or where the trustee is replaced.

6.4.3 The following are not permissible as disbursements:

- A charge calculated as a percentage of remuneration;
- An administration fee or charge additional to the trustee's remuneration;
- Recovery of basic overhead costs such as office and equipment rental, depreciation and finance charges.

6.5 Realisations for secured creditors

Where the trustee realises an asset on behalf of a secured creditor and receives remuneration out of the proceeds, he should disclose the amount of that remuneration to the committee (if there is one) and in any reports he sends to creditors.

7. Exceeding the amount set out in the fees estimate

7.1 Remuneration cannot be drawn in excess of the fees estimate without approval by the body which fixed the original basis of the remuneration. The request for approval must specify:

- The reason why the trustee has exceeded, or is likely to exceed, the fees estimate;
- The additional work the trustee has undertaken or proposes to undertake;
- The hourly rate or rates the trustee proposes to charge for each part of that additional work;
- The time that additional work has taken or the trustee anticipates that work will take;
- Whether the trustee anticipates that it will be necessary to seek further approval; and
- The reasons it will be necessary to seek further approval.

8. Progress reports and requests for further information

8.1 The trustee is required to send annual progress reports to creditors. In addition to the items described above and especially those in paragraph 6.2 the reports must include:

- Details of the basis fixed for the remuneration of the trustee (or if not fixed at the date of the report, the steps taken during the period of the report to fix it);
- If the basis has been fixed, the remuneration charged during the period of the report, irrespective of whether it was actually paid during that period (except where it is fixed as a set amount, in which case it may be shown as that amount without any apportionment for the period of the report);
- If the report is the first to be made after the basis has been fixed, the remuneration charged during the periods covered by the previous reports, together with a description of the work done during those periods, irrespective of whether payment was actually made during the period of the report;
- A statement of the expenses incurred by the trustee during the period of the report, irrespective of whether payment was actually made during that period;
- Where appropriate, a statement –

- That the remuneration anticipated to be charged is likely to exceed the

fees estimate or any approval given for remuneration exceeding the estimate;
- That expenses incurred or anticipated to be incurred are likely to exceed, or have exceeded, the details given to the creditors prior to the determination of the basis of remuneration; and
- The reason for that excess.

- A statement of the creditors' rights to request further information, as explained in paragraph 8.2, and their right to challenge the trustee's remuneration and expenses.

8.2 Within 21 days of receipt of a progress report a creditor may request the trustee to provide further information about the remuneration and expenses set out in the report. A request must be in writing, and may be made either by a secured creditor, or by an unsecured creditor with the concurrence of at least 5% in value of unsecured creditors (including himself) or the permission of the court.

8.3 The trustee must provide the requested information within 14 days, unless he considers that:

- The time and cost involved in preparing the information would be excessive, or
- Disclosure would be prejudicial to the conduct of the bankruptcy or might be expected to lead to violence against any person, or
- The trustee is subject to an obligation of confidentiality in relation to the information requested,

in which case he must give the reasons for not providing the information.

8.4 Any creditor may apply to the court within 21 days of the trustee's refusal to provide the requested information, or the expiry of the 14 days' time limit for the provision of the information.

9. Provision of information – additional requirements

9.1 The trustee must provide certain information about time spent on the case, free of charge, upon request by the bankrupt or any creditor. The information which must be provided is:

- The total number of hours spent on the case by the trustee or staff assigned to the case;
- For each grade of staff, the average hourly rate at which they are charged out;
- The number of hours spent by each grade of staff in the relevant period.

9.2 The period for which the information must be provided is the period from appointment to the end of the most recent period of six months reckoned from the date of the trustee's appointment, or where he has vacated office, the date that he vacated office.

9.3 The information must be provided within 28 days of receipt of the request by the trustee, and requests must be made within two years from vacation of office.

10. What if a creditor or the bankrupt is dissatisfied?

10.1 Except in cases where there is a committee it is the creditors as a body who have authority to approve the trustee's fees.

10.2 If a creditor believes that the trustee's fees are excessive, the basis is inappropriate, or the expenses incurred by the trustee are in all the circumstances excessive he may, provided certain conditions are met, apply to the court.

10.3 Application may be made to the court by any secured creditor, or by any unsecured creditor provided at least 10 per cent in value of unsecured creditors (including himself) agree, or he has the permission of the court. Any such application must be made within 8 weeks of the applicant receiving the trustee's progress or final report in which the charging of the remuneration or incurring of the expenses in question is first reported (see paragraph 8.1 above). If the court does not dismiss the application (which it may if it considers that insufficient cause is shown) the applicant must give the trustee a copy of the application and supporting evidence at least 14 days before the hearing.

- 10.4 If the court considers the application well founded, it may order that the remuneration be reduced, the basis be changed, or the expenses be disallowed or repaid. Unless the court orders otherwise, the costs must be paid by the applicant and not out of the bankrupt's assets.
- 10.5 The bankrupt also has the right to challenge the trustee's remuneration or expenses with the permission of the court.

11 What if the trustee is dissatisfied?

- 11.1 If the trustee considers that the remuneration fixed by the committee is insufficient or that the basis used to fix it is inappropriate he may request that the amount or rate be increased, or the basis changed, by decision of the creditors. If the trustee considers that the remuneration fixed by the committee or the creditors or in accordance with the statutory scale is insufficient or that the basis used to fix it is inappropriate, he may apply to the court for the amount or rate to be increased or the basis changed. If he decides to apply to the court he must give at least 14 days' notice to the members of the committee and the committee may nominate one or more of its members to appear or be represented at the court hearing. If there is no committee, the trustee's notice of his application must be sent to such of the creditors as the court may direct, and they may nominate one or more of their number to appear or be represented. The court may order the costs to be paid out of the assets.

12 Other matters relating to remuneration

- 12.1 Where the trustee realises assets on behalf of a secured creditor he is entitled to be remunerated out of the proceeds of sale in accordance with a scale set out in the Rules. Usually, however, the trustee will agree the basis of his fee for dealing with charged assets with the secured creditor concerned.
- 12.2 Where joint trustees are appointed it is for them to agree between themselves how the remuneration payable should be apportioned. Any dispute between them may be referred to the court, the committee or the creditors.
- 12.3 If a new trustee is appointed in place of another, any determination, decision or court order which was in effect immediately before the replacement continues to have effect in relation to the remuneration of the new trustee until a further determination, decision or court order is made.
- 12.4 Where the basis of the remuneration is a set amount, and the trustee ceases to act before the time has elapsed or the work has been completed for which the amount was set, application may be made for a determination of the amount that should be paid to the outgoing trustee. The application must be made to the same body as approved the remuneration. Where the outgoing trustee and the incoming trustee are from the same firm, they will usually agree the apportionment between them.
- 12.5 There may also be occasions when creditors will agree to make funds available themselves to pay for the trustee to carry out tasks which cannot be paid for out of the assets, either because they are deficient or because it is uncertain whether the work undertaken will result in any benefit to creditors. Arrangements of this kind are sometimes made to fund litigation or investigations into the bankrupt's affairs. Any arrangements of this nature will be a matter for agreement between the trustee and the creditors concerned and will not be subject to the statutory rules relating to remuneration.

13. Effective date

This guide applies where an insolvency practitioner is appointed as trustee in bankruptcy on or after 1 October 2015, or where information is provided by the trustee about fees, expenses or other payments on or after 6 April 2017.