

CREDITORS' GUIDE TO REMUNERATION OF TRUSTEES IN SEQUESTRATION : SCOTLAND

1 Introduction

- 1.1 When an individual becomes bankrupt in Scotland, the costs of the sequestration process are paid from the proceeds of assets realised/sold by the trustee in priority to creditors' claims. Creditors hope to recover some, or all, of their debt paid and have a direct interest in the level of costs e.g. the remuneration of the trustee. Insolvency legislation recognises this interest by providing mechanisms for creditors to determine the basis of the trustee's remuneration. This guide is intended to help creditors be aware of their rights to approve and monitor a trustee's remuneration and outlays, and to explain the basis on which remuneration and outlays are fixed.

2 Sequestration Procedure

- 2.1 Sequestration is a formal procedure for the administration of the affairs of an insolvent individual by a trustee in the interests of his (her) creditors generally. The trustee's role is to preserve the debtor's estate until the assets can be realised/sold and distributed to creditors in a prescribed order of priority. Sequestration commences when an award of sequestration is made either by the court as a result of a petition to the court at the instance of a creditor or trustee, or an application to the accountant in bankruptcy at the instance of the person seeking to be sequestrated. The petition/application may nominate a private practitioner as trustee and such person must be a registered insolvency practitioner authorised by a recognised professional body or the Secretary of State.
- 2.2 If a trustee is not nominated in the petition/application, the accountant in bankruptcy automatically becomes the trustee. The accountant in bankruptcy is an officer of court appointed by the Secretary of State.
- 2.3 The trustee has a duty to advise creditors within 60 days of the date award of sequestration whether he intends to call the statutory meeting. If he does not call such meeting, he must explain why to creditors.

3 Commissioner(s)

- 3.1 At the statutory meeting of creditors, or any subsequent meeting of creditors, the creditors or their proxies have the right to appoint from amongst themselves a commissioner, or commissioners (not more than five), to represent their interests throughout the sequestration process.
- 3.2 The trustee may call a meeting of the commissioner(s) at any time and must hold one when required to do so by an order of the court, or when the accountant in bankruptcy or a commissioner lodges a request.
- 3.3 The trustee is required to report to the commissioner(s) every 6 months on the progress of the sequestration. This provides an opportunity for the commissioner(s) to monitor and discuss progress made and the level of any claim by the trustee for remuneration.

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4 Fixing the Trustee's Remuneration

- 4.1 The basis for fixing the trustee's remuneration and outlays is set out in section 53 of the Bankruptcy (Scotland) Act 1985, as amended, "the bankruptcy act". Section 53 states that remuneration may be a commission calculated by reference to the value of the assets which are realised but that there shall be taken into account the work which, having regard to that value, was reasonably undertaken and the extent of the trustee's responsibilities in administering the estate. Normally, a trustee's claim is based upon hours allocated to a case by him and his staff, using hourly rates to calculate the sum sought.
- 4.2 If there is no commissioner(s), or the commissioner(s) does not make the requisite determination, the level of the trustee's remuneration is determined by the accountant in bankruptcy.
- 4.3 In fixing the trustee's remuneration for the final period of a sequestration, the commissioner(s) will take into account the trustee's best estimate of work required to conclude the case. The commissioner(s) may also take into account any adjustment necessary relative to remuneration fixed in respect of a prior period when fixing the remuneration for a current period.
- 4.4 In cases where a replacement trustee is elected at the statutory meeting of creditors, or any other valid meeting of creditors, and such election is confirmed, the remuneration and outlays of the original trustee are fixed by the accountant in bankruptcy in accordance with sections 26 and 26A of the bankruptcy act.

5 What information should be provided by the Trustee?

- 5.1 When seeking agreement to his remuneration and outlays, the trustee should provide sufficient supporting information to enable either the commissioner(s) or the accountant in bankruptcy to form a judgement as to whether the proposed remuneration and outlays are reasonable, having regard to all the circumstances of the case. The trustee should always make available an up-to-date receipts and payments account. Where the remuneration is charged on a time basis, the trustee should be prepared to disclose the amount of time spent on the case and hourly rates/time of each person involved, together with such additional information as may reasonably be required having regard to the size and complexity of the case.
- 5.2 Where remuneration is charged on a percentage basis, the trustee should provide details of any work which has been, or is intended to be, contracted out that would normally be undertaken directly by the trustee or his staff.
- 5.3 Where a trustee makes, or proposes to make, a separate charge by way of outlays to recover the cost of facilities provided by his firm e.g. room hire, document storage or communication facilities (category 2 disbursements), he should disclose such charges to either the commissioner(s) or the accountant in bankruptcy when seeking approval of his remuneration, together with an explanation of how those charges are derived and the basis upon which they are calculated.

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6 What if a Creditor is dissatisfied?

- 6.1 If a creditor believes that the trustee's remuneration is too high, he may appeal it. The statutory time limit for appealing a determination is contained within section 53 of the bankruptcy act and it is common practice to give fourteen days in which to appeal from the date that the trustee advises creditors of the determination of his remuneration. If the determination is made by a commissioner(s), the dissenting creditor must appeal to the accountant in bankruptcy. If a determination is made by the accountant in bankruptcy such creditor must appeal to the sheriff. In both instances a simultaneous notice of appeal must be sent to the trustee in order that a response can be prepared.
- 6.2 If a creditor believes that the original trustee's remuneration is too high i.e. after another trustee has assumed office, he may appeal it within 14 days of the issue of the determination. The appeal must be made to the sheriff and the detailed provisions are contained within sections 26 and 26(A) of the bankruptcy act.

7 What if the trustee is dissatisfied?

- 7.1 The appeal procedure for a trustee is identical to the procedure noted in paragraph 6.1 above in respect of a creditor's appeal, with the exception regarding simultaneous notice of appeal.
- 7.2 In cases where the original trustee does not become the trustee, both he and the trustee have a right of appeal on the same terms as creditors detailed in paragraph 6.2 above.
- 7.3 In cases where the accountant in bankruptcy was the original trustee and another practitioner becomes the trustee, the trustee (but not the original trustee) has a right of appeal on the same terms as creditors detailed in paragraph 6.2 above. This is because the original trustee, being the accountant in bankruptcy, will have determined the level of remuneration in accordance with a set scale.

8 Other matters relating to remuneration

- 8.1 There may be occasions when creditors will agree to make funds available from their resources to pay for the trustee to undertake tasks which cannot be paid for out of the assets within the estate either because they are insufficient 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 a debtor's affairs. Any arrangements of this nature will be a matter for agreement between the trustee and the creditor(s) concerned and not subject to the statutory rules noted above relating to remuneration.