

A CREDITORS' GUIDE TO A LIQUIDATOR'S REMUNERATION : SCOTLAND

These guidance notes are drawn from Statement of Insolvency Practice 9 (Scotland) and are designed to provide information on the fee process for a liquidation in Scotland. SIP9 is updated from time to time and a copy of the most current document can be obtained from Meston Reid & Co upon request.

1 Introduction

1.1 When a company goes into liquidation, the valid costs of the proceedings are paid out of its assets in priority to creditors' claims. Creditors, who hope to recover some of their debt out of the company's assets, have a direct interest in the level of costs, and in particular the remuneration of the insolvency practitioner appointed to act as liquidator. Insolvency legislation recognises this interest by providing mechanisms for creditors to fix the basis of the liquidator's remuneration. These notes are intended to help creditors be aware of their rights to approve and monitor remuneration and disbursements, and explain the basis upon which remuneration and disbursements are fixed.

2 Liquidation Procedure

2.1 Liquidation (or "winding up") is a common type of corporate insolvency procedure. Liquidation is the formal winding up of a company's affairs and entails the realisation of its assets and the distribution of monies in a prescribed order of priority. Liquidation may be either voluntary (when it is instituted by resolution of the shareholders) or court (when it is instituted by a court order).

2.2 Voluntary and court liquidation are equally common. An insolvent voluntary liquidation is called a creditors' voluntary liquidation (often abbreviated to "CVL"). In this type of liquidation an insolvency practitioner acts as liquidator throughout and creditors can vote on the appointment of the liquidator at the first meeting of creditors.

2.3 In a court liquidation, an insolvency practitioner may be appointed to act as provisional liquidator until the making of the winding up order at which time he is referred to as interim liquidator. In all court liquidations, an insolvency practitioner is appointed to act as interim liquidator until the first meeting of creditors, at which time creditors can vote on the appointment of a liquidator to continue the process.

2.4 Where a court liquidation follows immediately after an administration, the court may appoint the former administrator to act as liquidator. If a CVL follows an administration, the administrator's proposals normally provide for him to act as liquidator thereafter.

3 The Liquidation Committee

3.1 In any liquidation, creditors have the right to appoint a committee called the liquidation committee. Such committee has a minimum of 3 and a maximum of 5 members and is appointed in order to monitor the conduct of the liquidation, and approve the liquidator's remuneration and disbursements. The committee is usually established at the meeting which appoints the liquidator, but in cases where a liquidation follows immediately from an administration, any committee established for the purposes of the administration will become the liquidation committee as long as sufficient committee members agree to continue to act.

3.2 The liquidator must call the first meeting of the committee within 3 months of its establishment (or his appointment if that is later), and subsequent meetings must be held either at specified dates agreed by the committee, when requested by a member of the committee, or when the liquidator decides he needs to hold one. The liquidator is required to report to the committee at least every 6 months on the progress of the liquidation. This provides the opportunity for the committee to monitor and discuss the progress of the insolvency and the level of the liquidator's remuneration.

4 Fixing the Liquidator's Fees

- 4.1 The basis for fixing the liquidator's (which includes an interim liquidator) remuneration is set out in Rule 4.32 of The Insolvency (Scotland) Rules 1986, and in section 53 of the Bankruptcy (Scotland) Act 1985 which is applied to liquidations by Rule 4.68. Remuneration may be a commission calculated by reference to the value of the assets which are realised but there shall be taken into account the work which, having regard to that value, was reasonably undertaken, and the extent of the responsibility/complexity in administering the liquidated estate.
- 4.2 It is for the liquidation committee to fix the remuneration and approve disbursements. If there is no liquidation committee, or the committee does not make a determination, the liquidator's remuneration is fixed by court. This involves the appointment of a court reporter and fee approval by court.
- 4.3 Rule 4.5 provides that the remuneration of a provisional liquidator can only be fixed by court.

5 What information should be provided by the Liquidator?

- 5.1 When seeking agreement to his remuneration and disbursements, the liquidator will provide sufficient supporting information in order to enable either the committee or the court to form a judgement as to whether the proposed remuneration and disbursements are reasonable having regard to all the circumstances of the case. The nature and extent of the supporting information which should be provided will depend on:
- The nature of the approval being sought;
 - The stage during the administration of the case at which it is being sought; and
 - The size and complexity of the case.

Where, at any creditors' meeting, the liquidator seeks agreement to the terms on which he is to be remunerated, he should provide the meeting with details of the charge-out rates of all grades of staff, including principals, which are likely to be involved on the case.

Where the liquidator seeks agreement to his remuneration during the course of the liquidation, he will provide an up to date receipts and payments account. Where the proposed remuneration is based upon time costs (which is the normal method), the liquidator should disclose, either to the committee or the creditors, the time spent and the charge-out value in the particular case, together with, where appropriate, such additional information as may reasonably be required having regard to the size and complexity of the case. The additional information should comprise a sufficient explanation of what the liquidator has achieved and how it was achieved to enable the value of the exercise to be assessed (whilst recognising that the liquidator must fulfil certain statutory obligations that might be seen to bring no added value for creditors) and to establish that the time has been properly spent on the case. That assessment will need to be made having regard to the time spent and the hourly rates applied, bearing in mind the factors set out in paragraph 4.1 above. In order to enable this assessment to be undertaken, it is normally necessary for the liquidator to provide an analysis of the time spent by key activity and grade of personnel. The degree of detail will depend upon the circumstances of a case, but it is helpful to be aware of the professional guidance which has been given to insolvency practitioners on this subject.

Current guidance suggests the following areas of activity as a basis for the analysis of time spent:

- Administration and planning
- Investigations

- Realisation of assets
- Trading
- Creditors
- Any other case specific matters

The following categories are suggested as a basis for personnel analysis :

- Partner/liquidator
- Director/manager
- Other senior professionals
- Assistants and support staff

The explanation of what has been done can be expected to include an outline of the nature of the assignment and the liquidator's own initial assessment, including the anticipated return to creditors. To the extent applicable it should also explain:

- Any significant aspects of the case, particularly those that affect the amount of time spent.
- The reasons for subsequent changes in strategy.
- Any comments on any figures in the summary of time spent accompanying the request the liquidator wishes to make.
- The steps taken to establish the views of creditors, particularly in relation to agreeing the strategy for the assignment, budgeting, time recording, or the drawing or agreement of remuneration.
- Any existing agreement about remuneration.
- Details of how other professionals, including sub-contractors, were chosen, how they were contracted to be paid, and what steps have been taken to review their fees.

5.2 It should be borne in mind that the degree of analysis and form of presentation should be proportionate to the size and complexity of the case. In smaller cases not all categories of activity will be relevant, whilst further analysis may be necessary in larger cases.

Where remuneration is charged on a time basis the liquidator should disclose the time spent on the case and the hourly rates applied to the time spent, together with such additional information as may reasonably be required having regard to the size and complexity of the case. Where the remuneration is charged on a percentage basis, the liquidator should provide details of any work which has been or is intended to be contracted out which would normally be undertaken directly by a liquidator or his staff.

5.3 A liquidator's disbursements are subject to approval by virtue of Rule 4.32. Where a liquidator makes, or proposes to make, a separate charge by way of disbursements to recover the cost of facilities provided by his own firm (such as room hire, document storage or communication facilities), he should disclose those charges to the committee, or the creditors, when seeking approval of his remuneration and disbursements together with an explanation of how those charges are calculated. Disbursements must either be directly incurred on the case or subject to a reasonable method of calculation and allocation. The basis on which they are allocated must be disclosed. A charge for disbursements calculated as a percentage of the amount charged for remuneration is not allowed.

5.4 Payments to outside parties in which the liquidator, his firm or any associate has an interest should be disclosed to the body approving the claim for remuneration and treated in the same way as payments to the liquidator i.e. specific approval should be sought prior to such amounts being paid.

5.5 Rule 4.12 provides that a resolution may be passed fixing the basis of remuneration at the first meeting of creditors in a court liquidation. The liquidator should immediately notify the creditors of the details of the resolution, and when subsequently reporting to creditors on the progress of the liquidation, or submitting his final report, he should specify the amount of remuneration he has drawn in accordance with the resolution. Where the remuneration is based on time costs he should provide details of the time spent and total value to date, and any material changes in hourly rates charged since the resolution was first passed. Where the remuneration is charged on a percentage basis the liquidator should provide the details set out in paragraph 5.1 above regarding work which has been sub-contracted.

5.6 Paragraph 5.3 above does not apply to a CVL.

6 What if a Creditor is Dissatisfied?

6.1 If a creditor believes the liquidator's remuneration is too high, under Rule 4.35, allows such creditor to apply to the court for an order that it be reduced. If the court considers the application to be well-founded, it will issue an order fixing the remuneration at a reduced amount/rate. Unless the court orders otherwise, the expenses of the application are paid by the applicant i.e. are not an expense of the liquidation process.

6.2 As noted in paragraph 4.3 above, the remuneration of a provisional liquidator is fixed by court and there is no provision in current insolvency legislation to give creditors the right of appeal against the court's determination. Consequently if a creditor is dissatisfied, any appeal must be made to the appropriate court in accordance with normal court rules.

7 What if the Liquidator is Dissatisfied?

7.1 If the liquidator considers that the remuneration fixed by the liquidation committee is insufficient he may request that it be increased by resolution of the creditors. He may also ask the court to issue an order increasing the amount/rate, before or after recourse to creditors. If the liquidator decides to apply to court, he must give at least 14 days' notice to the members of the liquidation committee who may nominate one or more of its members to appear or be represented at the court hearing. If there is no committee, the liquidator's notice of his application must be sent to such of the creditors as the court directs, 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 of the liquidated estate.

8 Other Matters Relating to Remuneration

8.1 Where the liquidator realises assets on behalf of a secured creditor, he will usually agree the basis of his remuneration for dealing with charged assets with the secured creditor concerned.

8.2 Where joint liquidators 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 court, the liquidation committee or a meeting of creditors.

8.3 There may be occasions when creditors will agree to make funds available from their own resources in order to pay for the liquidator to carry out tasks which cannot be funded from the assets within the liquidated estate, either because there are insufficient assets 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 affairs of the insolvent company. Any arrangements of this nature will be a matter for agreement between the liquidator and the creditors concerned and will not be subject to the statutory rules relating to remuneration.