



## STATEMENT OF INSOLVENCY PRACTICE 9 (SCOTLAND)

### Remuneration of insolvency office holders

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# 1 Introduction

1.1 This Statement of Insolvency Practice (SIP) is one of a series issued to licensed insolvency practitioners with a view to maintaining standards by setting out required practice and harmonising practitioners' approach to particular aspects of insolvency.

SIP 9 is issued under procedure agreed between the insolvency regulatory authorities acting through the Joint Insolvency Committee (JIC). It was commissioned by the JIC, produced by the Association of Business Recovery Professionals, and has been approved by the JIC and adopted by each of the regulatory authorities listed below:

Recognised Professional Bodies:

- The Association of Chartered Certified Accountants
- The Insolvency Practitioners Association
- The Institute of Chartered Accountants in England and Wales
- The Institute of Chartered Accountants in Ireland
- The Institute of Chartered Accountants of Scotland
- The Law Society
- The Law Society of Scotland

Competent Authority:

- The Insolvency Service (for the Secretary of State for Business Innovation and Skills)

The purpose of SIPs is to set out basic principles and essential procedures with which insolvency practitioners are required to comply. Departure from the standard(s) set out in the SIP(s) is a matter that may be considered by a practitioner's regulatory authority for the purposes of possible disciplinary or regulatory action.

SIPs should not be relied upon as definitive statements of the law. No liability attaches to any body or person involved in the preparation or promulgation of SIPs.

1.2 The purpose of this statement of insolvency practice is to:

- ensure that members are familiar with the statutory provisions relating to office holders' remuneration;
- set out required practice with regard to the observance of the statutory provisions;
- set out required practice with regard to the provision of information to those responsible for the approval of fees to enable them to exercise their rights under the insolvency legislation;
- set out required practice with regard to the disclosure and drawing of disbursements.

The statement has been produced in recognition of the principle that those with a direct financial interest in the level of office holders' fees should feel confident that the rules relating to the charging of remuneration have been properly complied with, and that those charged with responsibility for approval of fees have access to sufficient information about the basis of fees to be able to make an informed judgement about the level of remuneration in any particular case. The statement applies to Scotland only.

1.3 Members should be aware that the drawing of remuneration otherwise than in accordance with the relevant statutory provisions will render them in breach of the law.

1.4 The statement is divided into the following sections:

- The statutory provisions
- Provision of information when seeking fee approval
- Provision of information after fee approval
- Asset realisations
- Expenses and disbursements
- Payment in full
- Closure of cases

## **2 The statutory provisions**

2.1 The statutory provisions relating to the remuneration of office holders are set out in the Insolvency (Scotland) Rules 1986 (“the Rules”) (as amended), the Insolvency Act 1986 (as amended) and the Bankruptcy (Scotland) Act 1985 (as amended) (“the Bankruptcy Act”). The relevant provisions are set out in full in appendix A. The main provisions relating to the most common types of insolvency appointment are summarised in the following paragraphs.

### **2.2 Administration**

2.2.1 The Rules applicable in administration depend on whether the proceedings are based on a petition presented before 15 September 2003. If they are, then the Rules as they stood before the changes introduced by the Enterprise Act 2002 and its associated legislation continue to apply. The Rules substituted by the Insolvency (Scotland) Amendment Rules 2003 will apply to cases where the petition is presented after 15 September 2003 and before 6 April 2006. From 6 April 2006 the rules substituted by the Insolvency (Scotland) Amendment Rules 2006 will apply.

2.2.2 The basis for fixing the administrator’s remuneration and outlays is set out in Rule 2.16 for cases where the petition was presented before 15 September 2003 and the old Rule 2.39 for cases where the petition was presented after that date and before 6 April 2006. Both these Rules state that the remuneration and outlays shall be determined from time to time by the creditors’ committee, or if there is no creditors’ committee, by the court. For cases where the petition was presented on or after 6 April 2006 the revised Rule 2.39 applies and the remuneration and outlays are determined by the creditors’ committee or if there is no committee, by the creditors.

2.2.3 Where the appointment is made on or after 6 April 2006, under the revised Rule 2.39, if the administrator has made a statement under paragraph 52(1)(b) and there is no creditors committee, or the committee does not make the requisite determination, the administrator’s remuneration and outlays may be fixed by the approval of:

- Each secured creditor of the company; or
- If the administrator has made, or proposes to make, a distribution to preferred creditors:
  - Each secured creditor of the company; and
  - Preferential creditors whose debts amount to more than 50% of the preferential debts of the company, disregarding debts of any creditor who does not respond to an invitation to give or withhold approval.

2.2.4 The basis for determining the amount of the remuneration payable may be a commission calculated by reference to the value of the company’s property with which he has to deal, but in any event there shall be taken into account:

- (a) the work which, having regard to that value, was reasonably undertaken by him; and
- (b) the extent of his responsibilities in administering the company's assets.

Although not stated specifically in the Rules, the normal basis for determining the remuneration payable will be that of the time costs properly incurred by the administrator and his staff.

- 2.2.5 In cases where the petition is presented prior to 6 April 2006, Rules 4.32 and 4.35 apply to an administration. If an administrator's remuneration has been fixed by the creditors' committee and he considers that amount to be insufficient, he may request that it be increased by resolution of the creditors. He may also request the court for an order increasing its amount or rate, before or after recourse to the creditors. For appointments on or after 6 April 2006 Rule 2.39A (1) applies, which provides for appeal to the court if the administrator considers an amount fixed by the committee or by resolution of the creditors is insufficient.
- 2.2.6 Where the administrator has stated in his proposals that the company has insufficient property to enable a distribution to be made to unsecured creditors other than by virtue of the funds set aside out of floating charge assets, then a resolution of creditors (to increase the remuneration set by the creditors committee or to determine the apportionment in circumstances where joint administrators cannot agree as to how the remuneration should be apportioned) shall be taken to be passed if (and only if) passed with the approval of:
- Each secured creditor of the company; or
  - If the administrator has made, or proposes to make, a distribution to preferred creditors:
    - Each secured creditor of the company; and
    - Preferential creditors whose debts amount to more than 50% of the preferential debts of the company, disregarding debts of any creditor who does not respond to an invitation to give or withhold approval.
- 2.2.7 By virtue of Section 53(6) of the Bankruptcy Act, (as applied by Rules 2.39 and 4.32), creditors have a right of appeal against the administrator's remuneration. If his remuneration has been determined by a creditors' committee, the right of appeal is to the court while if the determination is by the court, the right of appeal is to a higher court. In cases where the petition was presented on or after 6 April 2006, and no statement has been made under paragraph 52(1)(b), in terms of Rule 2.39A(5), the creditors' right of appeal is to the court.
- 2.2.8 In terms of the Act, any appeal must be made not later than eight weeks from the end of the relevant accounting period. However as the determination may not have been made by that time, best practice is to give creditors to the end of the later of eight weeks from the end of the accounting period or 14 days from the date they are notified of the determination.
- 2.2.9 In cases where the petition is presented after 15 September 2003 a resolution of creditors may be taken by correspondence rather than at a meeting.

## **2.3 Insolvent Liquidations**

- 2.3.1 The basis for fixing remuneration is broadly the same for both insolvent liquidations and sequestrations.
- 2.3.2 The relevant provisions are Rule 4.32 and Section 53 of the Bankruptcy Act applied to liquidations by Rule 4.68.
- 2.3.3 These state that the remuneration may be fixed as a percentage of the value of the assets which are realised but there shall in any event be taken into account:
- (a) the work which, having regard to that value, was reasonably undertaken; and
  - (b) the extent of the responsibilities in administering those assets.
- 2.3.4 It is for the liquidation committee (if there is one) to fix remuneration. If there is no committee, or the committee does not make the requisite determination, the remuneration is fixed by the court.
- 2.3.5 Rule 4.35 gives creditors the right to appeal to the court for an order that the office holder's remuneration is excessive.
- 2.3.6 Rule 4.33 applies where a liquidator considers the amount fixed by the liquidation committee to be insufficient. He may request that it be increased by resolution of the creditors. He may also (by virtue of Rule 4.34) request the court for an order increasing its amount or rate, before or after recourse to the creditors.
- 2.3.7 In court liquidations, Rule 4.12(3) empowers the first meeting of creditors to resolve, inter-alia, unless a liquidation committee is to be established, the terms on which the liquidator is to be remunerated.
- 2.3.8 Rule 4.12 does not extend to creditors' voluntary liquidations.
- 2.3.9 In court liquidations, Rule 4.5 lays down that the remuneration of a provisional liquidator can only be fixed by the court. There is no specific provision in the insolvency legislation giving anyone the right of appeal against a court's determination of the remuneration due to a provisional liquidator. Consequently any appeal must be made to the appropriate court in accordance with normal court rules. Such rules normally provide for any appeal to be made within 14 days of the court's decision. Consequently, if there is a separate determination of remuneration due to a provisional liquidator, best practice is that creditors should be advised of the court's determination and of their right of appeal as soon as practicable after such determination.
- 2.3.10 A liquidator's outlays are also subject to approval by virtue of Rule 4.32.

## **2.4 Expenses of meeting under section 98**

- 2.4.1 Payment may be made out of the company's assets as an expense of the liquidation, either before or after the commencement of the winding up, of any reasonable and necessary expenses incurred in connection with the summoning, advertisement and holding of a creditors' meeting under Section 98.
- 2.4.2 Where any such payments are made before the commencement of the winding up, the director presiding at the creditors' meeting shall inform the meeting of their amount and the identity of the persons to whom they were made.

2.4.3 The liquidator appointed under Section 100 may make such a payment (subject to the next paragraph); but if there is a liquidation committee, he must give the committee at least seven days' notice of his intention to make the payment.

2.4.4 Such a payment shall not be made by the liquidator to himself, or to any associate of his, otherwise and with the approval of the liquidation committee, the creditors, or the court.

## **2.5 Statement of affairs fee**

2.5.1 Payment may be made as an expense of the liquidation, either before or after the commencement of the winding up, of any reasonable and necessary expenses of preparing the Statement of Affairs under Section 99.

2.5.2 Where such a payment is made before the commencement of the winding up, the director presiding at the creditors meeting held under Section 98 shall inform the meeting of the amount and the identity of the person to whom it was made.

2.5.3 The liquidator appointed under Section 100 may make such a payment (subject to the next paragraph); but if there is a liquidation committee he must give at least 7 days notice of his intention to make it.

2.5.4 Such a payment shall not be made to the liquidator himself, or to any associate of his, other than with the approval of the liquidation committee, the creditors, or the court.

## **2.6 Members' voluntary liquidations**

2.6.1 There are no statutory provisions relating to the fixing of remuneration in members' voluntary liquidations. It is recommended that the liquidator's remuneration in a members' voluntary liquidation should be determined by the members of the company in general meeting.

2.6.2 In determining the basis of the liquidator's remuneration, the members may have regard to the same factors as for insolvency liquidations.

## **2.7 Company voluntary arrangements**

2.7.1 The fees, costs, charges and expenses which may be incurred for any of the purposes of a voluntary arrangement are set out in Rule 1.22. They are:

- any disbursements made by the nominee prior to the decision approving the arrangement taking effect, and any remuneration for his services as such agreed between himself and the company (or the administrator or liquidator, as the case may be);
- any fees, costs, charges or expenses which are sanctioned by the terms of the arrangement, or would be payable or correspond to those which would be payable, in an administration or winding-up.

Rule 1.3 also requires the following matters to be stated or otherwise dealt with in the proposal:

- the amount proposed to be paid to the nominee (as such) by way of remuneration and expenses, and
- the manner in which it is proposed that the supervisor of the arrangement should be remunerated and his expenses defrayed.

2.7.2 It is for the creditors' meeting to decide whether to agree these terms along with the other provisions of the proposal. The creditors' meeting has the power to modify any of the terms of the proposal, including those relating to the fixing of remuneration. The nominee should be prepared to disclose the basis of his remuneration to the meeting if called upon to do so. Where a committee set up under the terms of a company voluntary arrangement is given the power to fix remuneration, it should be provided with the same information as if it were fixing remuneration in an administration.

## 2.8 Receiverships

2.8.1 The remuneration of a receiver appointed over property under powers contained in a floating charge will be a matter for agreement between the receiver and the holder of the floating charge under which he is appointed.

2.8.2 In terms of Section 58 (2) of the Insolvency Act 1986, where the remuneration to be paid to the receiver has not been determined by agreement between the receiver and the holder of the floating charge by virtue of which he was appointed, or where it has been so determined but is disputed by any of the following :

- (a) the receiver;
- (b) the holder of any floating charge or fixed security over all or any part of the property of the company;
- (c) the company;
- (d) the liquidator of the company;

it may be fixed instead by the Auditor of the Court of Session on application made to him by any of the aforementioned parties.

## 2.9 Sequestrations

2.9.1 The basis for fixing the trustee's remuneration in a sequestration is governed by Section 53 of the Bankruptcy Act. Under this section, remuneration may be calculated by reference to the value of the assets which are realised but there shall in any event be taken into account:

- (a) the work which, having regard to that value, was reasonably undertaken; and
- (b) the extent of the responsibilities in administering the estate.

2.9.2 It is for the commissioners to fix the remuneration but if there are no commissioners it will be determined by the Accountant in Bankruptcy.

2.9.3 Section 53(6) of the Bankruptcy Act gives creditors and the debtor the right of appeal that the office holder's remuneration is excessive. If the determination is made by commissioners the creditor or debtor must appeal to the Accountant in Bankruptcy, whilst if a determination is made by the Accountant in Bankruptcy the creditor or debtor must appeal to the Sheriff. In both instances a simultaneous notice of appeal must be sent to the trustee.

2.9.4 A debtor may appeal under Section 53(6) of the Bankruptcy Act if, and only if, he satisfies the Accountant in Bankruptcy or, as the case may be, the Sheriff, that he has, or is likely to have, a pecuniary interest in the outcome of the appeal.

2.9.5 In terms of the Bankruptcy Act, any appeal must be made not later than 8 weeks from the end of the relevant accounting period. However as the determination may not have been made by that time, best practice is to give creditors to the end of the later of 8 weeks from

the end of the accounting period or 14 days from the date they are notified of the determination.

- 2.9.6 A trustee's claim for outlays is subject to the same approval procedure as for his remuneration by virtue of Section 53 (1) (b) of the Bankruptcy Act.
- 2.9.7 Whether or not an interim trustee has been appointed, in cases where the original trustee does not himself become the trustee or where the Accountant in Bankruptcy was the original trustee and some other person becomes the trustee, the Accountant in Bankruptcy shall issue a determination fixing the amount of remuneration and outlays payable to the trustee as provided by Sections 26 or 26(A) of the Bankruptcy Act.
- 2.9.8 The original trustee (except where the Accountant in Bankruptcy has been the original trustee), the trustee, the debtor or any creditor may appeal to the Sheriff against such determination as provided for under Sections 26(4) or 26(A)(5).

## **2.10 Other types of appointment and situations**

### **2.10.1 Trustee acting under a Trust Deed**

The remuneration of a trustee acting under a trust deed will be determined by the trust deed.

Whether or not provision is made in the trust deed for auditing the trustee's accounts and for determining the method of fixing the trustee's remuneration or whether or not the trustee and the creditors have agreed on such auditing and the method of fixing the remuneration, the debtor, the trustee or any creditor may, at any time before the final distribution of the debtor's estate among the debtor's creditors, have the trustee's accounts audited by and his remuneration fixed by the Accountant in Bankruptcy.

- 2.10.2 A debtor may appeal under Section 53(6) of the Bankruptcy Act if, and only if, he satisfies the Accountant in Bankruptcy or, as the case may be, the Sheriff, that he has, or is likely to have, a pecuniary interest in the outcome of the appeal.

### **2.10.3 Sale of assets on behalf of a secured creditor**

In certain cases an insolvency practitioner will realise assets on behalf of a secured creditor and will agree with the secured creditor to be remunerated out of the proceeds of sale. This will be a matter between the practitioner and the secured creditor providing that it has no impact on any other creditor or class of creditor.

Practitioners should ensure that any fees which have an impact on the funds available to non-secured creditors are approved in accordance with the appropriate provisions contained within this guideline.

### **2.10.4 Allocation of fees**

In particular, in relation to the prescribed part set aside for the benefit of unsecured creditors, fees incurred in relation to prescribed part issues (such as the administration of and agreeing unsecured creditors' claims) should be applied against the funds of the prescribed part, and should not be treated as general fees chargeable against total distributable funds. Fees incurred in respect of the proposals for and meetings of creditors and general creditor correspondence are chargeable against total distributable funds.



### **3 The provision of information when seeking approval of remuneration**

- 3.1 Members should be mindful at all times of the rights accorded to creditors in relation to remuneration under insolvency legislation, and when acting in an advisory capacity or as office holder should ensure that adequate steps are taken to bring those rights to their attention. Appendix B contains the text of a set of explanatory notes on the basis on which office holders' remuneration is fixed in a format suitable for making creditors aware of the relevant provisions. Members are required to ensure that information on how to access the explanatory note appropriate to the type of insolvency proceedings concerned or the equivalent information in some other suitable format, is made available to creditors before any resolution is passed to fix or approve the office holder's remuneration.
- 3.2 The particular nature of an insolvency office holder's position renders it of primary importance that all payments made to his own firm out of funds under his control should be disclosed and explained to those who are charged with the responsibility for approving his remuneration. When seeking agreement to his remuneration, the office holder should be prepared to provide sufficient supporting information to enable those responsible for approving his remuneration to form a judgement as to whether the proposed remuneration is 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.
- 3.3 Where, at any creditors' or committee meeting, agreement is sought to the terms on which the office holder 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 in the case.
- 3.4 Where remuneration is sought during the course of an assignment an up to date receipts and payments account should always be available. Where the remuneration is based on time costs the office holder should be prepared to disclose the time spent and the charge-out value in the particular case, together with 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 office holder has achieved and how it was achieved to enable the value of the exercise to be assessed (whilst recognising that the office holder 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 rates at which that time was charged, bearing in mind the complexity, responsibility, value and nature of assets with which he has had to deal. Appendix C sets out a suggested format, with explanatory notes, for producing the information required to enable this assessment to be carried out. It provides for a degree of analysis of time by activity and grade of staff and sets out suggested categories for the purpose of this analysis. Whilst the approach embodied in Appendix C is potentially applicable to all types and sizes of case, the degree of analysis and form of presentation should be proportionate to the size and complexity of the case, and not all categories of activity will always be relevant.
- 3.5 The case records required to be maintained and retained under the Insolvency Regulations 1994 should include sufficient information to show full details of the time spent on the case by the office holder and his staff in cases where remuneration is on a time cost basis.
- 3.6 Where the remuneration is charged on a percentage basis the office holder should provide details of any work which has been or is intended to be sub-contracted out which would normally be carried out by office holders themselves.

- 3.7 A receiver appointed in relation to a company should on request provide the information detailed in paragraphs 3.4 to 3.6 to the company's liquidator.
- 3.8 When notices are sent out convening meetings under Section 98 of the Insolvency Act 1986 they should include a statement to the effect that the resolutions to be taken at the meeting may include a resolution specifying the terms on which the liquidator is to be remunerated, (although the actual liquidator's remuneration can only be approved by the liquidation committee or the court) and that the meeting may receive information about, or be called upon to approve, the costs of preparing the statement of affairs and convening the meeting. Members should advise directors when convening Section 98 meetings that the notices despatched to creditors should include such a statement and contain information on how to access the appropriate explanatory note referred to in paragraph 3.1. If that advice is given orally and not accepted by the directors it should be confirmed in writing.
- 3.9 In an administration, liquidation or a sequestration, where the office holder 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), to the commissioners (if there are any), to any meeting of creditors convened for the purposes of determining his remuneration, and in his reports to creditors.
- 3.10 In a sequestration or initially solvent liquidation where realisations are sufficient for payment of creditors in full, with interest, it should be remembered that, notwithstanding the right of the creditors or the committee to fix the office holder's remuneration, it will be the debtor or the members, as the case may be, who will have the principal financial interest in the level of remuneration. The office holder should therefore on request provide them with information, in accordance with the principles set out in paragraphs 3.2 – 3.6, about how the remuneration has been calculated.

#### **4 Provision of information after approval of remuneration**

- 4.1 Where a resolution fixing the basis of remuneration is passed at any creditors meeting held before he has substantially completed his administration the office holder should immediately notify the creditors of the details of the resolution. In subsequent reports to creditors the office holder should specify the amount of remuneration he has had approved (by the committee or the court) and has drawn in accordance with the resolution. Where the remuneration is based on time costs he also should provide details of the time spent and charge-out value to date and any material changes in the rates charged since the resolution was first passed. Where the remuneration is charged on a percentage basis the office holder should provide the details set out in paragraph 3.2 above regarding work which has been sub-contracted out. The same applies where the basis of the remuneration of a supervisor in a voluntary arrangement as set out in the proposal does not require any further approvals by the creditors or any creditors' committee established under the proposal.
- 4.2 It should be borne in mind, however, that in certain cases creditors have the right to requisition a meeting or to apply to the court if they consider the office holder's remuneration to be excessive. The office holder should provide creditors with sufficient information to enable them to decide whether to exercise those rights. The information provided in accordance with paragraph 3.4 should normally be sufficient for this purpose. Where, however, creditors make a reasonable request for further information, it should be provided.

## **5 Outlays, expenses and disbursements**

5.1 Approval is generally required for the drawing of necessary outlays, expenses and disbursements (together referred to as disbursements). However, not all costs properly charged in connection with insolvency assignments may necessarily be regarded as disbursements. The precise demarcation line between disbursements and remuneration is not defined by statute and has not been specifically determined by the courts. Particular difficulties arise in connection with charges that involve calculation of shared and overhead costs, as these may include an element of remuneration.

5.2 In the absence of a clear statutory definition best practice is that only those costs that clearly meet the definition of disbursements, where there is specific expenditure relating to the administration of the insolvent's affairs and referable to payment to an independent third party, are treated as disbursements. In this statement these are referred to as 'category 1 disbursements'. Category 1 disbursements will generally comprise external supplies of incidental services specifically identifiable to the case, typically for items such as identifiable telephone calls, postage, case advertising, invoiced travel and properly reimbursed expenses incurred by personnel in connection with the case. Also included will be services specific to the case where these cannot practically be provided internally such as printing, room hire and document storage.

Members should be prepared to disclose information about specific category 1 disbursements where reasonably requested.

5.3 Where it is proposed to recover costs which, whilst being of the nature of disbursements, include elements of shared or allocated costs, they should be identified and subject to approval as if they were remuneration. If the office holder wishes to make a separate charge for disbursements in this second category, he may do so provided that:

- Such disbursements are of an incidental nature and are directly incurred on the case, and there is a reasonable method of calculation and allocation; it will be persuasive evidence of reasonableness, if the resultant charge to creditors is in line with the cost of external provision; and
- The basis of the proposed charge is disclosed and is authorised by those responsible for approving his remuneration.

5.4 These are defined as category 2 disbursements. Category 2 disbursements will comprise cost allocations which may arise on some of the category 1 disbursements where supplied internally: typically, items such as room hire and document storage. Also typically included will be routine or more specialist copying and printing, and allocated communication costs provided by the practitioner or his firm. A charge for disbursements calculated as a percentage of the amount charged for remuneration will not constitute either category 1 or category 2 disbursements. Charges cannot be made on this basis.

5.5 Payments to outside parties in which the office holder or his firm or any associate (as defined by Section 435 of the Insolvency Act 1986) has an interest should be treated in the same way as remuneration payments to himself and subject to the same approval requirements.

## **6 Closure of cases**

6.1 On the closure of a liquidation or sequestration there will frequently be a small residual balance of funds in hand, due to the unavoidable difficulty of calculating the final outcome with absolute precision. Such monies should be consigned in accordance with the guidelines laid down by the Accountant of Court in the prescribed form in terms of Section 57 of the Bankruptcy Act and Section 193 of the Insolvency Act 1986.

- 6.2 The guidelines issued by the Accountant in Bankruptcy are to the effect that such funds in a sequestration should be forwarded to the Accountant in Bankruptcy to be deposited in a bank account designated by the Accountant in Bankruptcy. The consignment receipt detailing those entitled to claim should also be forwarded at the same time.

In respect of such funds in liquidation the guidelines issued by the Accountant of Court are to the effect that such funds should be deposited with the Royal Bank of Scotland plc, who should be instructed to place the funds in a special deposit account in the name of the Accountant of Court, bearing reference to the relevant liquidation. The consignment receipt detailing those entitled to claim should also be sent to the Accountant of Court.

**Effective Date: 1 February 2010**

## APPENDIX A

The following is the full text of the rules relating to the remuneration of office holders in the various types of proceedings covered by this statement of insolvency practice.

### A.1 Administration

#### Rule 2.39 Determination of remuneration and outlays

- 2.39 (1)** Within 2 weeks after the end of an accounting period, the administrator shall in respect of that period submit to the creditors' committee or, if there is no creditors' committee, to a meeting of creditors—
- (a) his accounts of his intrusions with the company's assets for audit and, where funds are available after making allowance for contingencies, a scheme of division of the divisible funds; and
  - (b) a claim for the outlays reasonably incurred by him and for his remuneration.
- 2.39 (2)** The administrator may, at any time before the end of an accounting period, submit to the creditors' committee or, if there is no creditors' committee, a meeting of creditors an interim claim in respect of that period for the outlays reasonably incurred by him and for his remuneration and the creditors' committee or meeting of creditors, as the case may be, may make an interim determination in relation to the amount of the outlays and remuneration payable to the administrator and, where they do so, they shall take into account that interim determination when making their determination under paragraph (3)(a)(ii).
- 2.39(3)** Within 6 weeks after the end of an accounting period—
- (a) the creditors' committee or, as the case may be, a meeting of creditors—
    - (i) may audit the accounts; and
    - (ii) shall issue a determination fixing the amount of the outlays and the remuneration payable to the administrator; and
  - (b) the administrator shall make the audited accounts, scheme of division and the said determination available for inspection by the members of the company and the creditors.
- 2.39 (4)** The basis for fixing the amount of the remuneration payable to the administrator may be a commission calculated by reference to the value of the company's assets which have been realised by the administrator, but there shall in any event be taken into account—
- (a) the work which, having regard to that value, was reasonably undertaken by him; and
  - (b) the extent of his responsibilities in administering the company's assets.
- 2.39(5)** If the administrator's remuneration and outlays have been fixed by determination of the creditors' committee in accordance with paragraph (3)(a)(ii) and he considers the amount to be insufficient, he may request that it be increased by resolution of the creditors.
- 2.39(6)** If the creditors' committee fails to issue a determination in accordance with paragraph (3)(a)(ii), the administrator shall submit his claim to a meeting of creditors and they shall issue a determination in accordance with paragraph(3)(a)(ii).

**2.39(7)** If the meeting of creditors fails to issue a determination in accordance with paragraph (6) then the administrator shall submit his claim to the court and it shall issue a determination.

**2.39 (8)** In a case where the administrator has made a statement under paragraph 52(1)(b), a resolution under paragraph (5) or Rule 2.39A(8) shall be taken to be passed if (and only if) passed with the approval of—

(a) each secured creditor of the company; or

(b) if the administrator has made, or proposes to make, a distribution to preferential creditors—

(i) each secured creditor of the company; and

(ii) preferential creditors whose debts amount to more than 50% of the preferential debts of the company, disregarding debts of any creditor who does not respond to an invitation to give or withhold approval.

**2.39(9)** In a case where the administrator has made a statement under paragraph 52(1)(b), if there is no creditor's committee, or the committee does not make the requisite determination in accordance with paragraphs (2) or (3)(a)(ii), the administrator's remuneration and outlays may be fixed (in accordance with this Rule) by the approval of—

(a) each secured creditor of the company; or

(b) if the administrator has made, or proposes to make, a distribution to preferential creditors—

(i) each secured creditor of the company; and

(ii) preferential creditors whose debts amount to more than 50% of the preferential debts of the company, disregarding debts of any creditor who does not respond to an invitation to give or withhold approval.

**2.39 (10)** In fixing the amount of the administrator's remuneration and outlays in respect of any accounting period, the creditors' committee or, as the case may be, a meeting of creditors may take into account any adjustment which the creditors' committee or meeting of creditors may wish to make in the amount of the remuneration and outlays fixed in respect of any earlier accounting period.

#### **Appeal against fixing of remuneration**

**2.39A (1)** If the administrator considers that the remuneration fixed for him by the creditors' committee, or by resolution of the creditors is insufficient, he may apply to the court for an order increasing its amount or rate.

**2.39A(2)** The administrator shall give at least 14 days' notice of his application to the members of the creditors' committee; and the committee may nominate one or more members to appear or be represented, and to be heard, on the application.

**2.39A(3)** If there is no creditors' committee, the administrator's notice of his application shall be sent to such one or more of the company's creditors as the court may direct, which creditors may nominate one or more of their number to appear or be

represented and be heard.

- 2.39A(4)** The court may, if it appears to be a proper case, order the expenses of the administrator's application, including the expenses of any member of the creditors' committee appearing or being represented on it, or any creditor so appearing or being represented, to be paid as an expense of the administration.
- 2.39A(5)** If the administrator's remuneration has been fixed by the creditors' committee or by the creditors, any creditor or creditors of the company representing in value at least 25 percent of the creditors may apply to the court not later than 8 weeks after the end of an accounting period for an order that the administrator's remuneration be reduced, on the grounds that it is, in all the circumstances, excessive.
- 2.39A(6)** If the court considers the application to be well-founded, it shall make an order fixing the remuneration at a reduced amount or rate.
- 2.39A(7)** The court may, if it appears to be a proper case, order the expenses of the creditor making the application to be paid as an expense of the administration.
- 2.39A(8)** Where there are joint administrators—
- (a) it is for them to agree between themselves as to how the remuneration payable should be apportioned;
  - (b) if they cannot agree as to how the remuneration payable should be apportioned, any one of them may refer the issue for determination—
    - i) by the court; or
    - (ii) by resolution of the creditors' committee or a meeting of creditors."

**Rule 2.39 Determination of remuneration and outlays (prior to 6 April 2006)**

- 2.39 (1)** Rules 4.32 to 4.35 and Rule 4.76 shall apply to an administration as they apply to a liquidation, subject to the modifications specified in the following paragraph of this Rule and to any other necessary modifications.
- 2.39 (2)** For any references in the said Rules 4.32 to 4.35 and 4.76 or in the provisions of the Bankruptcy Act as applied by Rule 4.32 to the liquidator, the liquidation and the liquidation committee, there shall be substituted a reference to the administrator, the administration and the creditors' committee in the administration.
- 2.39 (3)** Where the administrator has made a statement under paragraph 52(1)(b), a resolution under Rule 4.33, as applied by this Rule, or a resolution under paragraph 4(b) of this Rule, shall be taken to be passed if (and only if) passed with the approval of —
- (a) each secured creditor of the company; or
  - (b) if the administrator has made, or proposes to make, a distribution to preferential creditors —
    - (i) each secured creditor of the company; and (ii) preferential creditors whose debts amount to more than 50% of the preferential debts of the company, disregarding debts of any creditor who does not respond to an invitation to give or withhold approval.
- 2.39 (4)**
- (a) Where there are joint administrators it is for them to agree between themselves as to how the remuneration payable should be apportioned.
  - (b) Where joint administrators cannot agree as to how the remuneration payable should be apportioned, any one of them may refer the issue for determination

- (i) by the court;
- (ii) or by resolution of the creditors' committee or a meeting of creditors.

**Rule 4.32 Determination of amount of remuneration and outlays**

**4.32(1)** **[Application of S53]** Subject to the provisions of Rules 4.33 to 4.35, claims by the administrator for the outlays reasonably incurred by him and for his remuneration shall be made in accordance with section 53 of the Bankruptcy Act as applied by Rule 4.68 and as further modified by paragraphs (2) and (3) below.

**4.32(2)** **[Subsection]** After Section 53(1) of the Bankruptcy Act, there shall be inserted the following subsection -

“(1A) The administrator may, at any time before the end of an accounting period, submit to the creditors' committee (if any) an interim claim in respect of that period for the outlays reasonably incurred by him and for his remuneration and the creditors' committee may make an interim determination in relation to the amount of the remuneration and outlays payable to the administrator and, where they do so, they shall take into account that interim determination when making their determination under subsection (3)(a)(ii).”

**4.32(3)** **[Reference to subsection]** In Section 53(6) of the Bankruptcy Act, for the reference to “subsection (3)(a)(ii)” there shall be submitted a reference to “subsection (1A) or (3)(a)(ii)”.

**Rule 4.33 Recourse of administrator to meetings of creditors**

**4.33** **[Resolution of creditors]** If the administrator's remuneration has been fixed by the creditors' committee and he considers the amount to be insufficient, he may request that it be increased by resolution of the creditors.

**Rule 4.34 Recourse to the court**

**4.34(1)** **[Application to court]** If the administrator considers that the remuneration fixed for him by the creditors' committee, or by resolution of the creditors is insufficient, he may apply to the court for an order increasing its amount or rate.

**4.34(2)** **[Notice of application]** The administrator shall give at least 14 days' notice of his application to the members of the creditors' committee; and the committee may nominate one or more members to appear or be represented, and to be heard, on the application.

**4.34(3)** **[If no committee]** If there is no creditors' committee, the administrator's notice of his application shall be sent to one or more of the company's creditors as the court may direct, which creditors may nominate one or more of their number to appear or be represented.

**4.34(4)** **[Expenses of application]** The court may, if it appears to be a proper case, order the expenses of the administrator's application, including the expenses of any member of the creditors' committee appearing [or being represented] on it, or any creditor so appearing [or being represented], to be paid as an expense for the administration.

**Rule 4.35 Creditors' claim that remuneration is excessive**

**4.35(1)** If the administrator's remuneration has been fixed by the creditors committee, any creditor or creditors of the company representing in value at least 25 per cent of the creditors may apply to the court for an order that the administrator's remuneration be reduced, on the grounds that it is, in all the circumstances, excessive.

**4.35(2)** If the court considers the application to be well-founded, it shall make an order fixing the remuneration at a reduced amount or rate.



**4.35(3)** Unless the court orders otherwise, the expenses of the application shall be paid by the applicant, and are not payable as an expense of the administration.

**Section 53 Procedure after end of accounting period**

**53 (1) [Submissions to creditors' committee]** Within 2 weeks after the end of an accounting period, the administrator shall in respect of that period submit to the creditors' committee or, if there is no creditors' committee, to the court -

- (a) his accounts of his intrusions with the company's assets for audit and, where funds are available after making allowance for contingencies, a scheme of division of the divisible funds; and
- (b) a claim for the outlays reasonably incurred by him and for his remuneration;

and, where the said documents are submitted to the liquidation committee, he shall send a copy of them to the court.

**53 (3) [Action on receiving submissions]** Within 6 weeks after the end of an accounting period -

- (a) the creditors' committee or, as the case may be, the court shall -
  - (i) audit the accounts; and
  - (ii) issue a determination fixing the amount of the outlays and the remuneration payable to the administrator; and
- b) the administrator shall make the audited accounts, scheme of division and the said determination available for inspection by the company and the creditors.

**53 (4) [Basis]** The basis for fixing the amount of remuneration payable to the administrator may be a commission calculated by reference to the value of the company's assets which has been realised by the administrator, but there shall in any event be taken into account -

- (a) the work which, having regard to that value, was reasonably undertaken by him; and
- (b) the extent of his responsibilities in administering the company's assets.

**53 (5) [Adjustments in final period]** In fixing the amount of such remuneration in respect of the final accounting period, the creditors' committee or, as the case may be, the court may take into account any adjustment which the creditors' committee or the court may wish to make in the amount of the remuneration fixed in respect of any earlier accounting period.

**53 (6) [Appeal against determination]** Not later than 8 weeks after the end of an accounting period, the administrator, the company or any creditor may appeal against a determination issued under subsection (1A) or (3)(a)(ii) above -

- (a) where it is a determination of the creditors' committee, to the court; and
- (b) where it is a determination of the court, to a higher court;

and the determination of the court under paragraph (a) above shall be appealable to a higher court.

**53 (10) [Filing of determination]** The administrator shall insert in the sederunt book the audited accounts, the scheme of division and the final determination in relation to the administrator's remuneration and outlays.

## **A.2 Provisional Liquidation**

### **Rule 4.5 Remuneration**

**4.5 (1) [Fixing of remuneration]** The remuneration of the provisional liquidator shall be fixed by the court from time to time.

**4.5 (2) [Basis]** Section 53(4) of the Bankruptcy Act shall apply to determine the basis for fixing the amount of the remuneration of the provisional liquidator, subject to the modifications specified in Rule 4.16(2) and to any other necessary modifications.

**4.5 (3) [Payment of remuneration]** Without prejudice to any order of the court as to expenses, the provisional liquidator's remuneration shall be paid to him, and the amount of any expenses incurred by him (including the remuneration and expenses of any special manager appointed under Section 177) reimbursed:

- (a) if a winding up order is not made, out of the property of the company, and
- (b) if a winding up order is made, as an expense of the liquidation.

**4.5 (4) [If winding up order not made]** Unless the court otherwise directs, in a case falling within paragraph (3)(a) above, the provisional liquidator may retain out of the company's property such sums or property as are or may be required for meeting his remuneration and expenses.

### **Section 53 Procedure after end of accounting period**

**53(4) [Basis]** The basis for fixing the amount of the remuneration payable to the provisional liquidator may be a commission calculated by reference to the value of the company's assets which has been realised by the provisional liquidator, but there shall in any event be taken into account -

- (a) the work which, having regard to that value, was reasonably undertaken by him; and
- (b) the extent of his responsibilities in administering the company's assets.

## **A.3 Liquidations**

### **Rule 4.32 Determination of amount of remuneration and outlays**

**4.32(1) [Application of S53]** Subject to the provisions of Rules 4.33 to 4.35, claims by the liquidator for the outlays reasonably incurred by him and for his remuneration shall be made in accordance with Section 53 of the Bankruptcy Act as applied by Rule 4.68 and as further modified by paragraphs (2) and (3) below.

**4.32(2) [Subsection]** After Section 53(1) of the Bankruptcy Act, there shall be inserted the following subsection:

"(1A) The liquidator may, at any time before the end of an accounting period, submit to the liquidation committee (if any) an interim claim in respect of that period for the outlays reasonably incurred by him and for his remuneration and the liquidation committee may make an interim determination in relation to the amount of the remuneration and outlays payable to the liquidator and, where they do so, they shall take into account that interim determination when making their determination under subsection (3)(a)(ii)."

**4.32(3) [Reference to subsection]** In Section 53(6) of the Bankruptcy Act, for the reference to "subsection (3)(a)(ii)" there shall be substituted a reference to "subsection (1A) or (3)(a)(ii)".

### **Rule 4.33 Recourse of liquidator to meeting of creditors**

**4.33 [Resolution of creditors]** If the liquidator's remuneration has been fixed by the liquidation committee and he considers the amount to be insufficient, he may

request that it be increased by resolution of the creditors.

**Rule 4.34 Recourse to the court**

**4.34(1) [Application to court]** If the liquidator considers that the remuneration fixed for him by the liquidation committee, or by resolution of the creditors, is insufficient he may apply to the court for an order increasing its amount or rate.

**4.34(2) [Notice of application]** The liquidator shall give at least 14 days' notice of his application to the members of the liquidation committee; and the committee may nominate one or more members to appear or be represented, and to be heard, on the application.

**4.34(3) [If no committee]** If there is no liquidation committee, the liquidator's notice of his application shall be sent to such one or more of the company's creditors as the court may direct, which creditors may nominate one or more of their number to appear or be represented.

**4.34(4) [Expenses of application]** The court may, if it appears to be a proper case, order the expenses of the liquidator's application, including the expenses of any member of the liquidation committee appearing [or being represented] on it, or any creditor so appearing [or being represented], to be paid as an expense for the liquidation.

**Rule 4.35 Creditors' claim that remuneration is excessive**

**4.35(1) [Application to court]** If the liquidator's remuneration has been fixed by the liquidation committee or by the creditors, any creditor or creditors of the company representing in value at least 25 per cent of the creditors may apply to the court for an order that the liquidator's remuneration be reduced, on the grounds that it is, in all the circumstances, excessive.

**4.35(2) [Order to fix remuneration]** If the court considers the application to be well-founded, it shall make an order fixing the remuneration at a reduced amount or rate.

**4.35(3) [Expenses of application]** Unless the court orders otherwise, the expenses of the application shall be paid by the applicant, and are not payable as an expense of the liquidation.

**Section 53 Procedure after end of accounting period**

**53 (1) [Submissions to liquidation committee]** Within 2 weeks after the end of an accounting period, the liquidator shall in respect of that period submit to the liquidation committee or, if there is no liquidation committee, to the court:

(a) his accounts of his intromissions with the company's assets for audit and, where funds are available after making allowance for contingencies, a scheme of division of the divisible funds; and

(b) a claim for the outlays reasonably incurred by him and for his remuneration; and, where the said documents are submitted to the liquidation committee, he shall send a copy of them to the court.

**53 (3) [Action on receiving submissions]** Within 6 weeks after the end of an accounting period

a) the liquidation committee or, as the case may be, the court shall -  
(i) audit the accounts; and  
(ii) issue a determination fixing the amount of the outlays and the remuneration payable to the liquidator; and

(b) the liquidator shall make the audited accounts, scheme of division and the said determination available for inspection by the company and the creditors.

**53 (4) [Basis]** The basis for fixing the amount of remuneration payable to the liquidator

may be a commission calculated by reference to the value of the company's assets which has been realised by the liquidator, but there shall in any event be taken into account:

- (a) the work which, having regard to the value, was reasonably undertaken by him; and
- (b) the extent of his responsibilities in administering the company's assets.

**53 (5) [Adjustments in final period]** In fixing the amount of such remuneration in respect of the final accounting period, the liquidation committee or, as the case may be, the court may take into account any adjustment which the liquidation committee or the court may wish to make in the amount of the remuneration fixed in respect of any earlier accounting period.

**53 (6) [Appeal against determination]** Not later than 8 weeks after the end of an accounting period, the liquidator, the company or any creditor may appeal against a determination issued under subsection (1A) or (3)(a)(ii) above:

- (a) where it is a determination of the liquidation committee, to the court ; and
- (b) where it is a determination of the court, to the sheriff;

and the determination of the court under paragraph (a) above shall be appealable to the sheriff.

**53 (10) [Filing of determination]** The liquidator shall insert in the sederunt book the audited accounts, the scheme of division and the final determination in relation to the liquidator's remuneration and outlays.

#### **Rule 4.12 First meetings in the liquidation**

**4.12(3) [Terms of remuneration]** Subject as follows, no resolution shall be taken at first meeting of creditors other than the following:

- (c) unless a liquidation committee is to be established, a resolution specifying the terms on which the liquidator is to be remunerated or to defer consideration of that matter;

#### **Rule 4.13 Other meetings**

**4.13(2) [Meetings of creditors and contributories]** Subject to the above provision, the liquidator may summon a meeting of the creditors or of the contributories at any time for the purpose of ascertaining their wishes in all matters relating to the liquidation.

### **A.4 Bankruptcy**

#### **Section 53 Procedure after end of accounting period**

**53 (1) [Submissions to commissioners]** Within 2 weeks after the end of an accounting period, the trustee shall in respect of that period submit to the commissioners or, if there are no commissioners, to the Accountant in Bankruptcy:

- (a) his accounts of his intromissions with the debtor's estate for audit and, where funds are available after making allowance for contingencies, a scheme of division of the divisible funds; and
- (b) a claim for the outlays reasonably incurred by him and for his remuneration;

and, where the said documents are submitted to the commissioners, he shall send a copy of them to the Accountant in Bankruptcy.

- 53 (3)** **[Action on receiving submissions]** Within 6 weeks after the end of an accounting period:
- (a) the commissioners or, as the case may be, the Accountant in Bankruptcy shall:
    - (i) audit the accounts; and
    - (ii) issue a determination fixing the amount of the outlays and the remuneration payable to the trustee; and
  - (b) the trustee shall make the audited accounts, scheme of division and the said determination available for inspection by the debtor and the creditors.
- 53 (4)** **[Basis]** The basis for fixing the amount of remuneration payable to the trustee may be a commission calculated by reference to the value of the debtor's estate which has been realised by the trustee, but there shall in any event be taken into account:
- (a) the work which, having regard to the value, was reasonably undertaken by him; and
  - (b) the extent of his responsibilities in administering the debtor's estate.
- 53 (5)** **[Adjustments in final period]** In fixing the amount of such remuneration in respect of the final accounting period, the commissioners or, as the case may be, the Accountant in Bankruptcy may take into account any adjustment which the commissioners or the Accountant in Bankruptcy may wish to make in the amount of the remuneration fixed in respect of any earlier accounting period.
- 53 (6)** **[Appeal against determination]** Not later than 8 weeks after the end of an accounting period, the trustee, the debtor or any creditor may appeal against a determination issued under (3)(a)(ii) above:
- (a) where it is a determination of the commissioners, to the Accountant in Bankruptcy; and
  - (b) Where it is a determination of the Accountant in Bankruptcy, to the sheriff;
- and the determination of the Accountant in Bankruptcy under paragraph (a) above shall be appealable to the sheriff.
- 53 (10)** **[Filing of determination]** The trustee shall insert in the sederunt book the audited accounts, the scheme of division and the final determination in relation to the permanent trustee's remuneration and outlays.

## **A.5 Trustee acting under a trust deed**

### **Schedule 5 Voluntary trust deeds for creditors**

**Sch 5(1)** **[Remuneration of trustee]** Whether or not provision is made in the trust deed for auditing the trustee's accounts and for determining the method of fixing the trustee's remuneration or whether or not the trustee and the creditors have agreed on such auditing and the method of fixing the remuneration, the debtor, the trustee or any creditor may, at any time before the final distribution of the debtor's estate among the creditors, have the trustee's accounts audited by and his remuneration fixed by the Accountant in Bankruptcy.

### **Section 56 Appeals**

**56(6A)** A debtor may appeal under Section 53(6) of the Bankruptcy Act if, and only if, he satisfies the Accountant in Bankruptcy or, as the case may be, the Sheriff, that he has, or is likely to have, a pecuniary interest in the outcome of the appeal.

## **A.6 Voluntary Arrangements**

### **Rule 1.22 Fees, costs, charges and expenses**

- 1.22 [Fees, etc which may be incurred]** The fees, costs, charges and expenses that may be incurred for any of the purposes of a voluntary arrangement are:
- (a) any disbursements made by the nominee prior to the decision approving the arrangement taking effect under section 4A, and any remuneration for his services as is agreed between himself and the company (or, as the case may be, the administrator or liquidator);
  - (b) any fees, costs, charges or expenses which:
    - (i) are sanctioned by the terms of the arrangement, or
    - (ii) would be payable in, or correspond to those which would be payable, in an administration or winding up.

### **Rule 1.3 Contents of proposal**

- 1.3(2)(g) [Amount of remuneration and expenses]** The amount proposed to be paid to the nominee (as such) by way of remuneration and expenses.
- 1.3(2)(h) [Manner of remuneration]** The manner in which it is proposed that the supervisor of the arrangement should be remunerated and his expenses defrayed;

## **A.7 Receiverships**

### **Section 58 Remuneration of Receiver**

- 58(1) [Agreement with floating charge holder]** The remuneration to be paid to a receiver is to be determined by agreement between the receiver and the holder of the floating charge by virtue of which he was appointed.
- 58(2) [Where not determined under (1)]** Where the remuneration to be paid to the receiver has not been determined under subsection (1), or where it has been so determined but is disputed by any of the persons mentioned in paragraphs (a) to (d) below, it may be fixed instead by the Auditor of the Court of Session on application made to him by:
- (a) the receiver
  - (b) the holder of any floating charge or fixed security over all or any part of the property of the company;
  - (c) the company; or
  - (d) the liquidator of the company.
- 58(3) [Remuneration in excess to that fixed]** Where the receiver has been paid or has retained for his remuneration for any period before the remuneration has been fixed by the Auditor of the Court of Session under subsection (2) any amount in excess of the remuneration so fixed for that period, the receiver or his personal representatives shall account for the excess

## **APPENDIX B**

### **A CREDITORS' GUIDE TO ADMINISTRATORS' REMUNERATION**

#### **SCOTLAND**

**This guide applies to all appointments on or after 6 April 2006. Any creditor requiring guidance on a case where the Insolvency Practitioner was appointed prior to 6 April 2006 should refer to the previous guide, which should have been issued to all creditors at the time of appointment.**

#### **1 Introduction**

- 1.1 When a company goes into administration the costs of the proceedings are paid out of the company's assets in priority to creditors' claims. The creditors, who hope eventually 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 administrator. The insolvency legislation recognises this interest by providing mechanisms for creditors to determine the basis of the administrator's remuneration. This guide is intended to help creditors be aware of their rights under the legislation to approve and monitor remuneration and outlays and explain the basis on which remuneration and outlays are fixed.

#### **2 The nature of administration**

- 2.1 Administration is a procedure which places a company under the control of an insolvency practitioner and the protection of the court with the objective of:
- (a) rescuing the company as a going concern, or
  - (b) achieving a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration), or
  - (c) realising property in order to make a distribution to one or more secured or preferential creditors

Administration may be followed by a company voluntary arrangement or liquidation.

#### **3 The creditors' committee**

- 3.1 Where a meeting is held by the Administrator the creditors have the right to appoint a committee with a minimum of 3 and a maximum of 5 members. One of the functions of the committee is to determine the basis of the administrator's remuneration. The committee is established at the meeting of creditors which the administrator is required to hold within 10 weeks of the administration order (or longer with the consent of the court) to consider his proposals. The administrator must call the first meeting of the committee within 3 months of its establishment, and subsequent meetings must be held either at specified dates agreed by the committee, or when a member of the committee asks for one, or when the administrator decides he needs to hold one. The committee has power to summon the administrator to attend before it and provide such information as it may require.

#### **4 Fixing the administrator's fees**

- 4.1 The basis for fixing the administrator's remuneration is set out in Rule 2.39 of the Insolvency (Scotland) Rules 1986 which states that it may be a commission calculated by reference to the value of the company's property with which he has to deal.

It is for the creditors' committee (if there is one) to fix the remuneration and Rule 2.39 says that in arriving at its decision the committee shall take into account:

- the work which, having regard to the value of the company's property, was reasonably undertaken by the administrator; and

- the extent of his responsibilities in administering the company's assets.

Although not specifically stated in the rules, the normal basis for determining the remuneration will be that of the time costs properly incurred by the administrator and his staff.

- 4.2 If there is no creditors' committee, or the committee does not make the requisite determination, the administrator's remuneration will be fixed by the creditors.
- 4.3 Where no meeting is held, the administrator's remuneration is approved by each secured creditor of the company or where a distribution to the preferential creditors is proposed by each secured creditor and 50% in value of the preferential creditors disregarding those who do not respond or withhold approval.

## **5 What information should be provided by the administrator?**

- 5.1 Claims by the administrator for the outlays reasonably incurred by him and for his remuneration shall be made in accordance with Rule 2.39 of the Insolvency (Scotland) Rules 1986 which provides that within two weeks after the end of an accounting period, the administrator shall submit to the creditors' committee or if there is no creditors' committee, to a meeting of creditors.
- his accounts of intromissions for audit;
  - a claim for the outlays reasonably incurred by him and for his remuneration, broken down into category 1 disbursements, being those costs where there is specific expenditure relating to the administration of the insolvent's affairs and referable to payment to an independent third party, and category 2 disbursements, which are costs which include elements of shared or allocated costs, and are supplied internally by the administrator's own firm and
- 5.2 The administrator may at any time before the end of an accounting period submit to the creditors' committee or a meeting of creditors an interim claim for category 1 and 2 disbursements reasonably incurred by him and for his remuneration.
- 5.3 When seeking agreement to his fees and disbursements, the administrator should provide sufficient supporting information to enable the committee or the creditors to form a judgement as to whether the proposed fee and disbursements are reasonable having regard to all 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.
- 5.4 Where, at any creditors' committee meeting or meeting of creditors, the administrator 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.
- 5.5 Where the administrator seeks agreement to his remuneration during the course of the administration, he should always provide an up to date receipts and payments account. Where the proposed remuneration is based on time costs the administrator should disclose 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 administrator has achieved and how it was achieved to enable the value of the exercise to be assessed (whilst recognising that the administrator 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 rates at which that time was charged, bearing in mind the factors set out in paragraph 4.1 above. To



enable this assessment to be carried out it may be necessary for the administrator to provide an analysis of the time spent on the case by type of activity and grade of staff. The degree of detail will depend on the circumstances of the case, but it will be helpful to be aware of the professional guidance which has been given to insolvency practitioners on this subject. The 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 analysis by grade of staff:

- Partner
- 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 administrator'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 administrator 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.
- In cases where there are distributable funds available to unsecured creditors by means of the creditors' prescribed part, how the administrator has allocated remuneration and costs with regard to dealing with the administration of and agreeing of unsecured creditors' claims. Remuneration in respect of time spent dealing with issues specific to the funds for ordinary creditors will be applied against the creditors prescribed part, prior to the funds being distributed, and will **not** be applied against the total funds available to all creditors, including those available to the floating charge holder.
- Details of how other professionals, including subcontractors, were chosen, how they were contracted to be paid, and what steps have been taken to review their fees.

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.

- 5.6 Where the remuneration is charged as a commission based on the value of the company's property with which the administrator has had to deal, the administrator should provide details of any work which has been or is intended to be contracted out which would normally be undertaken directly by the administrator or his staff.
- 5.7 As noted in 5.1, any claim for outlays must be approved in the same way as remuneration. Professional guidance issued to Insolvency Practitioners requires that where the administrator proposes to recover costs which, whilst being in the nature of expenses or disbursements may include an element of shared or allocated costs (such as room hire,

document storage or communication facilities) they must be approved as if they were remuneration. Such disbursements must be directly incurred on the case and subject to a reasonable method of calculation and allocation. A charge for disbursements calculated as a percentage of the amount charged for remuneration is not allowed.

- 5.8 Payments to outside parties in which the office holder or his firm or any associate has an interest should be disclosed to the body approving remuneration and should be treated in the same way as payments to himself. They therefore require specific approval as remuneration prior to being paid.

## **6 What if a creditor is dissatisfied?**

- 6.1 If the administrator's remuneration has been fixed by the creditors' committee or by the creditors, by virtue of Rule 2.39A of the Insolvency (Scotland) Rules 1986, any creditor or creditors of the company representing in value at least 25 percent of the creditors may apply to the court not later than eight weeks after the end of an accounting period for an order that the administrator's remuneration be reduced, on the grounds that it is, in all the circumstances excessive.
- 6.2 Notwithstanding the fact that the statutory time limit for appealing expires eight weeks from the end of the accounting period concerned, it is normal practice to advise the creditors that they may appeal within 14 days of being notified of the determination in cases where this extends beyond the statutory appeal period.

## **7 What if the administrator is dissatisfied?**

- 7.1 If the administrator considers that the remuneration fixed by the creditors' committee or by resolution of the creditors is insufficient he may apply to the court for an order increasing its amount or rate. If he decides to apply to the court he must give at least 14 days' notice to the members of the creditors' committee and the committee may nominate one or more of its members to appear or be represented on the application. If there is no committee, the administrator's notice of his application must be sent to such of the company's 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 as an expense of the administration.

## **8 Other matters relating to fees**

- 8.1 Where there are joint administrators it is for them to agree between themselves how remuneration payable should be apportioned. Any dispute arising between them may be referred to the court, the creditors' committee or a meeting of creditors.

# A CREDITORS' GUIDE TO LIQUIDATORS' REMUNERATION

## SCOTLAND

### **1 Introduction**

- 1.1 When a company goes into liquidation the costs of the proceedings are paid out of its assets in priority to creditors' claims. 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 liquidator. The insolvency legislation recognises this interest by providing mechanisms for creditors to fix the basis of the liquidator's remuneration. This guide is intended to help creditors be aware of their rights to approve and monitor remuneration and disbursements, and explains the basis on which remuneration and disbursements are fixed.

### **2 Liquidation procedure**

- 2.1 Liquidation (or "winding up") is the most common type of corporate insolvency procedure. Liquidation is the formal winding up of a company's affairs entailing the realisation of its assets and the distribution of the proceeds 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 order of the court.
- 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 the 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. In all court liquidations, an insolvency practitioner is appointed to act as interim liquidator from the making of the winding up order until the first meeting in the liquidation, and the creditors can vote on the appointment of the liquidator at the first meeting of creditors.
- 2.4 Where a court liquidation follows immediately on an administration the court may appoint the former administrator to act as liquidator.

### **3 The liquidation committee**

- 3.1 In a liquidation (whether voluntary or court) the creditors have the right to appoint a committee called the liquidation committee, with a minimum of 3 and a maximum of 5 members, to monitor the conduct of the liquidation and approve the liquidator's remuneration and disbursements. The committee is usually established at the creditors' meeting which appoints the liquidator, but in cases where a liquidation follows immediately on from an administration any committee established for the purposes of the administration will continue in being as the liquidation committee.
- 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, or 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's)

remuneration is set out in Rule 4.32 of the Insolvency (Scotland) Rules 1986 (as amended) (“the Rules”), and in Section 53 of the Bankruptcy (Scotland) Act 1985 (as amended) (“the Bankruptcy Act”) which is applied to liquidations by Rule 4.68. These Rules state that the remuneration may be a commission calculated by reference to the value of the assets which are realised but there shall in any event be taken into account the work which, having regard to that value, was reasonably undertaken, and the extent of the responsibilities in administering the estate.

4.2 It is for the liquidation committee (if there is one) to fix the remuneration and approve disbursements. If there is no liquidation committee, or the committee does not make the requisite determination, the liquidator’s remuneration is fixed by the court.

4.3 Rule 4.5 lays down that the remuneration of a provisional liquidator can only be fixed by the court.

## **5 What information should be provided by the liquidator?**

5.1 When seeking agreement to his remuneration and disbursements, the liquidator should provide sufficient supporting information to enable 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 should always provide an up to date receipts and payments account. Where the proposed remuneration is based on time costs the liquidator should disclose 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 rates at which that time was charged, bearing in mind the factors set out in paragraph 4.1 above. To enable this assessment to be carried out it may be necessary for the liquidator to provide an analysis of the time spent on the case by type of activity and grade of staff. The degree of detail will depend on the circumstances of the case, but it will be helpful to be aware of the professional guidance which has been given to insolvency practitioners on this subject.

The 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 analysis by grade of staff:

- Partner
- 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 subcontractors, 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 always be relevant, whilst further analysis may be necessary in larger cases.

The liquidator should always make available an up to date receipts and payments account. Where the remuneration is to be charged on a time basis the liquidator should be prepared to disclose the amount of time spent on the case and the charge-out value of 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), (category 2 disbursements) 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 made up. Disbursements must either be directly incurred on the case or be subject to a reasonable method of calculation and allocation and the basis on which they are allocated must be disclosed. Such disbursements must be directly incurred on the case and subject to a reasonable method of calculation and allocation. 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 office holder or his firm or any associate has an interest should be disclosed to the body approving remuneration and should be treated in the same way as payments to himself. They therefore require specific approval as remuneration prior to being paid.
- 5.5 In Rule 4.12, 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 also should provide details of the time spent and charge-out value to date and any material changes in the 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 out.
- 5.6 Paragraph 5.3 above does not however apply to a voluntary liquidation.

## **6 What if a creditor is dissatisfied?**

- 6.1 If a creditor believes that the liquidator's remuneration is too high he may, under Rule 4.35, apply to the court for an order that it be reduced. If the court considers the application to be well-founded, it shall make an order fixing the remuneration at a reduced amount or rate. Unless the court orders otherwise, the expenses of the application shall be paid by the applicant, and are not payable as an expense of the liquidation.
- 6.2 As noted in paragraph 4.3 above, the remuneration of a provisional liquidator is fixed by the court and there is no specific provision in the 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 committee is insufficient he may request that it be increased by resolution of the creditors. He may also request the court for an order increasing its amount or rate, before or after recourse to the creditors. 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 liquidator'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, if it appears to be a proper case, order the costs to be paid out of the assets of the company.

## **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 two (or more) 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 the court, the committee or a meeting of creditors.
- 8.3 There may also be occasions when creditors will agree to make funds available themselves to pay for the liquidator 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 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.

# A CREDITORS' GUIDE TO REMUNERATION OF TRUSTEES IN BANKRUPTCY

## SCOTLAND

### 1 Introduction

1.1 When an individual becomes bankrupt the costs of the bankruptcy proceedings are paid out of his or her assets in priority to creditors' claims. 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 remuneration. This guide is intended to help creditors to be aware of their rights to approve and monitor remuneration and outlays and explain the basis on which remuneration and outlays are fixed.

### 2 Sequestration procedure

2.1 Sequestration is the court procedure for the administration of the affairs of an insolvent individual by a trustee in the interests of his creditors generally. The trustee's role is to preserve the debtor's estate until the assets can be realised and distributed among the creditors in a prescribed order of priority. Sequestration proceedings commence when an Award of Sequestration is made by the court as a result of a petition to the court at the instance of a creditor or a Trustee, or an application to the Accountant in Bankruptcy at the instance of the debtor. The petition for sequestration may nominate a trustee who may be appointed as interim trustee, who must be a registered insolvency practitioner authorised by a recognised professional body or the Secretary of State, or the Accountant in Bankruptcy.

2.2 In certain cases no trustee is nominated in the petition or application for sequestration in which case the Accountant in Bankruptcy automatically becomes the trustee. The Accountant in Bankruptcy is an officer of the court appointed by the Secretary of State and will advise creditors within 60 days of the date award of sequestration as to whether he intends to call a statutory meeting.

### 3 Commissioner/s

3.1 At the statutory meeting of creditors, or any subsequent meeting of creditors, the creditors or their mandatories 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 commissioners at any time but he must hold one when required to do so by an order of the court or when the Accountant in Bankruptcy or any commissioner asks for one.

3.3 The trustee is required to report to the commissioners every 6 months on the progress of the sequestration. This provides an opportunity for the commissioners to monitor and discuss progress made and the level of the trustee's fees.

### 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"). This section 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.

4.2 If there are no commissioners, or the commissioners do 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 the commissioners will require to take into account the trustee's best estimate of work required to conclude the case. The commissioners may also take into account any adjustment necessary relative to remuneration fixed in respect of a prior period when fixing the remuneration for any period.

4.4 In cases where a replacement trustee is elected at the statutory meeting of creditors and subsequently that election is confirmed by the Sheriff, 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 the commissioners 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 to be charged on a time basis the trustee should be prepared to disclose the amount of time spent on the case and the charge-out value of 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 trustee should provide details of any work which has been or is intended to be contracted out which would normally be undertaken directly by a trustee or his staff.

5.2 Where a trustee makes, or proposes to make, a separate charge by way of outlays to recover the cost of facilities provided by his own firm, such as room hire, document storage or communication facilities (category 2 disbursements), he should disclose those charges to the commissioners or the Accountant in Bankruptcy when seeking approval of his remuneration, together with an explanation of how those charges are made up and the basis on which they are arrived at.

## **6 What if a creditor is dissatisfied?**

6.1 If a creditor believes the trustee's remuneration is too high, he may appeal it. The statutory time limits for appealing against the determination are contained within Section 53 of the Bankruptcy Act although it is common practice to give fourteen days in which to appeal from the date of advising creditors of the determination of remuneration. If the determination is made by a commissioner he must do so to the Accountant in Bankruptcy, whilst if a determination is made by the Accountant in Bankruptcy he must do so to the Sheriff. In both instances a simultaneous notice of appeal must be sent to the trustee.

6.2 If a creditor believes that the original trustee's remuneration is too high, he may appeal it within 14 days of the issue of its 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 creditor's appeals with the obvious exception regarding the simultaneous notice of appeal.

7.2 In cases where the original trustee does not himself 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 some other person 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 in such cases, the original trustee being the Accountant in Bankruptcy will have determined his remuneration in accordance with a set scale and there is therefore no need for a right of appeal by the original trustee.

## **8 Other matters relating to remuneration**

8.1 There may 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.

# A CREDITORS' GUIDE TO REMUNERATION FOR A TRUSTEE ACTING UNDER A TRUST DEED

## SCOTLAND

### 1 Introduction

1.1 When a debtor grants a trust deed the costs of the proceedings are paid out of the debtor's assets in priority to creditors' claims. 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 fix the basis of the trustee's remuneration. This guide is intended to help creditors be aware of their rights to approve and monitor remuneration, and explains the basis on which remuneration is fixed.

### 2 Trust deed procedure

2.1 A trust deed is a deed granted by or on behalf of the debtor whereby his estate is conveyed to the trustee for the benefit of his creditors generally. It tends to be less formal and less expensive than a sequestration.

2.2 Under the deed, the debtor conveys his entire estate to a trustee, who is empowered to sell and dispose of all the assets, and to carry on any business formerly conducted by the debtor. The trustee will distribute the balance of funds available after the payment of expenses to the creditors, following which the trustee will obtain his discharge from the creditors.

2.3 Accession of creditors is an essential part of the procedure, as without it there may be problems in discharging the deed. Unless a majority of creditors or not less than one third in value object to the trust deed, the creditors are presumed to have acceded and it becomes a protected trust deed. Once a trust deed has become protected, a creditor who has been notified of but who has not acceded to the trust deed will have no higher right to recover his debt than a creditor who has acceded. It should be noted that if a creditor receives notification of, but does not object to a trust deed, he is deemed to have acceded.

2.4 If a trust deed remains unprotected, creditors can still take action to recover their debts. This covers the various forms of diligence available to them including petitioning for sequestration.

### 3 Fixing the Trustee's Remuneration

3.1 The remuneration of a trustee will be determined by the trust deed. However, there is provision in the insolvency legislation for the formation of a committee of creditors to assist the trustee, audit his accounts and fix his remuneration.

3.2 Whether or not this provision is included in the deed, Schedule 5 of the Bankruptcy (Scotland) Act 1985 (as amended) ("the Bankruptcy Act") states that on application of the debtor, the trustee, or any creditor, the Accountant in Bankruptcy is specifically authorised to audit the trustee's accounts and fix his remuneration. Schedule 5 also provides that the Accountant in Bankruptcy may, at any time, audit the trustee's accounts and fix his remuneration. The Accountant in Bankruptcy is an officer of the court appointed by the Scottish Ministers.

3.3 The trustee under a protected trust deed, or the debtor, or any creditor may appeal to the sheriff by way of summary application against any determination by the Accountant in Bankruptcy fixing the remuneration to the trustee. A debtor or creditor may appeal only if able to satisfy the sheriff that he or she has, or is likely to have, a pecuniary interest in the outcome of the appeal.

**4 What information should be provided by the trustee?**

4.1 There are no specific requirements under Schedule 5 of the Bankruptcy Act for the provision of information by the trustee.

# **A CREDITORS' GUIDE TO INSOLVENCY PRACTITIONERS' FEES UNDER A VOLUNTARY ARRANGEMENT**

## **SCOTLAND**

### **1 Introduction**

1.1 In a voluntary arrangement, as in other types of insolvency, the amount of money available for creditors is likely to be affected by the level of costs, including the remuneration of the insolvency practitioner appointed to implement the arrangement. This guide explains how fees are fixed in voluntary arrangements, how the creditors can affect the level of fees, and the information which should be made available to them regarding fees.

### **2 The voluntary arrangement procedure**

2.1 Voluntary arrangements are available to companies and are often referred to as CVAs.

2.2 The procedure enables the company to put a proposal to their creditors for a composition in satisfaction of their debts or a scheme of arrangement of their affairs. A composition is an agreement under which creditors agree to accept a certain sum of money in settlement of the debts due to them. A CVA may be used as a stand-alone procedure or as an exit route from an administration. It may also be used where a company is in liquidation, but this is extremely rare. The proposal will be made by the directors, the administrator or the liquidator, depending on the circumstances. The procedure is extremely flexible and the form which the voluntary arrangement takes will depend on the terms of the proposal agreed by the creditors. The proposal must provide for an insolvency practitioner to supervise the implementation of the arrangement. Until the proposal is approved by the creditors, the practitioner is known as the nominee. If the proposal is approved, the nominee (or if the creditors choose to replace him, his replacement) becomes the supervisor.

### **3 Fees, costs and charges - statutory provisions**

3.1 The fees, costs, charges and expenses which may be incurred for the purposes of a voluntary arrangement are set out in the Insolvency (Scotland) Rules 1986 (as amended) ("the Rules") (rule 1.22). They are:

- any disbursements made by the nominee prior to the decision approving the arrangement taking effect under section 4A of the Insolvency Act 1986 (as amended), and any remuneration for his services agreed between himself and the company (or the administrator or liquidator, as the case may be);
- any fees, costs, charges or expenses which:
  - are sanctioned by the terms of the arrangement (see below), or
  - would be payable, or correspond to those which would be payable, in an administration or winding up.

3.2 The rules also require the following matters to be stated or otherwise dealt with in the proposal (Rule 1.3):

- The amount proposed to be paid to the nominee (as such) by way of remuneration and expenses, and
- The manner in which it is proposed that the supervisor of the arrangement should be remunerated and his expenses defrayed.

#### **4 The role of the creditors**

4.1 It is for the creditors' meeting to decide whether to agree the terms relating to remuneration along with the other provisions of the proposal. The creditors' meeting has the power to modify any of the terms of the proposal, including those relating to the fixing of remuneration. The nominee should be prepared to disclose the basis of his fees to the meeting if called upon to do so. Although there are no further statutory provisions relating to remuneration in voluntary arrangements, the terms of the proposal may provide for the establishment of a committee of creditors and may include among its functions the fixing of the supervisor's remuneration.

#### **5 What information should the creditors receive?**

5.1 Whether the basis of the supervisor's remuneration is determined at the meeting which approves the arrangement or by a committee of creditors, the supervisor, or proposed supervisor should provide details of the charge-out rates of all grades of staff, including principals, which are likely to be involved on the case.

5.2 Where the supervisor's fees are to be agreed by a committee of creditors during the course of the arrangement, the supervisor should provide sufficient supporting information to enable the committee to form a judgement as to whether the proposed fee is reasonable having regard to all the circumstances of the case, and should always provide an up to date receipts and payments account. Where the fee is to be charged on a time basis the supervisor should disclose the amount of time spent on the case and the charge out value of the time spent, together with such additional information as may reasonably be required having regard to the size and complexity of the case and the functions conferred on the supervisor under the terms of the arrangement. The additional information should comprise a sufficient explanation of what the supervisor has achieved and how it was achieved to enable the value of the exercise to be assessed and to establish that the time has been properly spent on the case.

5.3 Where the basis of the remuneration of the supervisor as set out in the proposal does not require any further approvals by the creditors or any committee of creditors, the supervisor should specify the amount of remuneration he has drawn in accordance with the provisions of the proposal in his subsequent reports to creditors on the progress of the arrangement. Where the fee is based on time costs he should also provide details of the time spent and charge-out value to date and any material changes in the rates charged for the various grades since the arrangement was approved. He should also provide such additional information as may be required in accordance with paragraph 5.2.

5.4 Where the supervisor proposes to recover costs which, whilst being in the nature of expenses or disbursements, may include an element of shared or allocated costs (such as room hire, document storage or communication facilities provided by the supervisor's own firm), they must be disclosed and be authorised by those responsible for approving his remuneration. Such expenses must be directly incurred on the case and subject to a reasonable method of calculation and allocation. A charge for disbursements calculated as a percentage of the amount charged for remuneration is not allowed.

## APPENDIX C

### Suggested format for production of information

#### Notes

1. The purpose of the attached form is to provide information to support requests for approval of office-holders' remuneration in a standard way so that those receiving such requests can make ready comparisons between cases and an informed assessment of each application. In larger or more complex cases further levels of narrative or tabular information may be needed.

Office-holders should appreciate that it is for them to provide the information that those receiving the request will need in order to be satisfied about the reasonableness of their request and that failure to provide adequate information is likely to have an adverse effect on the assessment.

2. The time and rate schedules should be completed to show the total hours spent. Office-holders, if requested, should be able to give a breakdown of hours by person by period together with an explanation of the activity performed. Any such breakdown should identify clearly how each figure in the schedule is constituted.
3. The level of disclosure suggested by the standard format may not be appropriate in all instances. The office-holder may take account of the proportionality considerations referred to in paragraph 3.4 of Statement of Insolvency Practice 9. For example, where the cumulative remuneration for which approval is sought are expected to amount to less than £10,000 a breakdown of the summary should only be submitted if required to explain any unusual features. For cumulative remuneration between £10,000 and £50,000 a first level of breakdown similar to that shown may well provide the appropriate detail. Where cumulative remuneration exceeds £50,000, proportionality is likely to require a further level of breakdown.
4. The total remuneration included in the approval request should exclude VAT. In cases where VAT on fees is not recoverable, such VAT can be shown separately as a cost of the process.
5. In larger cases it will be appropriate to show other categories of work, particularly if they have already been produced for budgeting purposes or for creditors or their representatives, for example in reports to a charge holder in a receivership, or to informal committees of creditors in a provisional liquidation.
6. All payments from or on behalf of the insolvent estate to the office-holder's firm or to any party in which the office-holder, or his firm or any associate has an interest should be included in the disbursements schedules whether or not they are true disbursements or relate to out of pocket expenses. The office-holder should categorise these payments according to the recipient and their nature and purpose and the figures should be readily cross-referable to the receipts and payments account and shown net of VAT.

### Suggested format

<b>Case name</b>	
<b>Court and number</b>	
<b>Office Holder</b> <b>Firm</b>	
<b>Address</b>  <b>Telephone</b> <b>Reference</b>	
<b>Type of Appointment</b> <b>Date of Appointment</b> <b>Date of Administration/Liquidation</b>	

\* Delete as appropriate

#### 1. AN OVERVIEW OF THE CASE

This overview should be framed in terms that will enable the approving body to judge

- the complexity of the case,
- any exceptional responsibility falling on the office-holder,
- the office-holder's effectiveness, and
- the value and nature of the property in question.

This overview would normally be expected to include an explanation of the nature of the assignment and the office-holder's own initial assessment of the assignment (including the anticipated return to creditors) and the outcome (if known). This should refer to the initial views on how the assignment was to be handled, including decisions on staffing or subcontracting and the appointment of advisers. 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 office-holder wishes to make. Office-holders should recognise that if they are not able to provide a clear and sufficient explanation of time spent then this is likely to have an adverse impact on the fee assessment.



- 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 subcontractors, were chosen, how they were contracted to be paid, and what steps have been taken to review their fees.

In a larger case, particularly if it involved trading, the practitioner should be prepared to support his explanation with evidence of his considerations about staffing and managing the assignment and how he set and reviewed his strategy. Where they have been agreed with creditors or their representatives, he should also provide copies of his time budgets and fee reports.

## **2. EXPLANATION OF OFFICE-HOLDERS CHARGING AND DISBURSEMENT RECOVERY POLICIES**

This section should comprise:-

- A statement of the office-holder's charging policy in relation to time to enable those receiving the application to make a comparison with other applications and with current published fee information. It should be made clear what grades of staff were charged to the assignment and what sort of staff working on the assignment were not charged to it directly. For example, were secretaries and cashiers charged to the assignment for all the time they worked on it, only in respect of large blocks of time devoted to it or, being accounted for as an overhead cost of the office-holder's firm, not at all?
- A statement of the office-holder's policy in relation to recharges of disbursements. This should explain payments made to the office-holder's firm, whether simple reimbursement of actual payments made on behalf of the assignment, such as statutory advertising costs, or charges relating to the recovery of overhead costs, which are discussed in section 5 of SIP9.

## **3. NARRATIVE DESCRIPTION OF WORK CARRIED OUT**

The narrative should provide details of work undertaken during the period and should be related to the table of time spent for the period.

An explanation should be given regarding the grades of staff used to undertake the different tasks carried out and the reasons why it was appropriate for those grades to be used.

Mention should also be made of any additional value brought to the estate during the period, for which the office-holder wishes to claim increased remuneration.

To aid understanding of the narrative it may be appropriate to divide it into separate time periods. These might be, for example, statutory accounting periods, or periods devoted to trading or some other significant activity. In smaller or routine cases it may be appropriate for the narrative to treat the case as a whole.

## **4. TIME AND CHARGE OUT SUMMARIES**

A table of time spent and charge out value should be provided for each of the time periods chosen by the office-holder under paragraph 3 above. The summary should be in the following (or similar) format.

<b>Hours</b>						<b>Time Cost £</b>	<b>Average hourly rate £</b>
<b>Classification of work function</b>	<b>Partner</b>	<b>Manager</b>	<b>Other Senior Professionals</b>	<b>Assistants &amp; Support Staff</b>	<b>Total Hours</b>		
Administration and planning							
Investigations							
Realisation of assets							
Trading							
Creditors							
Case specific matters (Specify)							
Total hours							
Total fees claimed (£)							

(Further analysis may be necessary in larger cases. In smaller cases these categories of activity may not always be relevant. See paragraph b) below and note 3 of the Notes to the suggested format.)

To be able to produce this information the following points should be noted:-

- a) For each individual working on the case, hours spent, by activity, will need to be collated, together with the total fees attributed to that time and a resultant average hourly rate.
- b) The five standard activities - administration and planning, investigations, realisation of assets, trading and creditors - should be shown in every case (although, clearly, not all of these activities will always take place). However, there may well be additional activities that need to be identified separately in a particular case such as, for example, insurance litigation, managing investments in subsidiaries or negotiating settlement of claims against directors. A guide to what might be included in the standard activities is:

Standard Activity	Examples of work
Administration and Planning	<ul style="list-style-type: none"> <li>Case planning</li> <li>Case reviewing</li> <li>Administrative set-up</li> <li>Appointment notification</li> <li>Maintenance of records</li> <li>Statutory reporting and compliance</li> </ul>
Investigations	<ul style="list-style-type: none"> <li>SIP 2 review</li> <li>CDDA reports</li> <li>Investigating antecedent transactions</li> </ul>
Realisation of Assets	<ul style="list-style-type: none"> <li>Identifying, securing, insuring assets</li> <li>Retention of title</li> <li>Debt collection</li> <li>Property, business and asset sales – fixed charge</li> <li>Property, business and asset sales - floating charge</li> </ul>
Trading	<ul style="list-style-type: none"> <li>Management of operations</li> <li>Accounting for trading</li> <li>On-going employee issues</li> </ul>
Creditors	<ul style="list-style-type: none"> <li>Communication with creditors</li> <li>Creditors' claims (including employees' and other preferential creditors')</li> <li>Adjudication on claims and closure</li> </ul>

## 5. CATEGORY 2 DISBURSEMENTS

Details of category 2 disbursements paid during each of the time periods should be provided in the following or similar format:-

Amounts paid or payable to the office holder's firm or to any party in which the office holder or his firm or any associate has an interest (note 6)	
Type and purpose	£
Total	

## 6. SUPPORTING DOCUMENTS

Any relevant documents should be attached and details should be supplied. Documents which will normally be required included:-

- An up to date receipts and payments account which complies with current best practice
- A schedule of charge out rates applied from time to time.
- Relevant resolutions (if any).