ADMINISTRATION: A GUIDE FOR CREDITORS ON INSOLVENCY PRACTITIONER FEES

ENGLAND & WALES

1 Introduction

1.1 When a company goes into administration, the costs of the proceedings are paid out of its assets. 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 fees (also referred to as remuneration). This guide is intended to help creditors be aware of their rights under the legislation to approve and monitor fees, explains the basis on which fees are fixed and how creditors can seek information about expenses incurred by the administrator and challenge those they consider to be excessive.

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 following objective:

a) rescuing the company as a going concern, or

b) achieving a better result for the creditors as a whole than would be likely if the company were wound up without first being in administration,

or, if the administrator thinks neither of these objectives is reasonably practicable

c) realising property in order to make a distribution to secured or preferential creditors.

3 The creditors' committee

3.1 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. An invitation to decide on whether a committee is to be established will be sent to creditors at the same time as any decision of the creditors is sought. The administrator must call the first meeting of the committee within 6 weeks 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 they need to hold one. The committee has power to summon the administrator to attend before it and provide information about the exercise of the administrator's functions.

4 Fixing the administrator's fees

4.1 Basis

4.1.1 The basis for fixing the administrator's fees is set out in Rule 18.16 of the Insolvency Rules 2016, which states that it must be fixed:

- as a percentage of the value of the property which the administrator has to deal, or

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- by reference to the time properly given by the administrator and their staff in attending to matters arising in the administration, or

- as a set amount.

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

4.1.3 Where remuneration is sought on more than one basis by the administrator, it should be clearly stated to which part of the administrator's activities each basis relates.

4.1.4 Payments to an administrator from an administration should be fair and reasonable reflections of the work necessarily and properly undertaken in respect of the administrator's appointment. These payments should not be approved by any party with whom the administrator has a professional or personal relationship which gives rise to a conflict of interest. Those responsible for approving payments from an administration to an administrator or their associates should be provided with sufficient information to enable them to make an informed judgement about the reasonableness of the administrator's requests.

4.1.5 Information provided by the administrator should be presented in a manner which is transparent, consistent throughout the life of the appointment and useful to creditors and other interested parties, whilst being proportionate to the circumstances of the appointment.

4.2 Advance information where fees not based on time costs

4.2.1 Prior to the determination of the basis of fees, the administrator must give the creditors details of the work the administrator proposes to undertake, and the expenses they consider will be, or are likely to be, incurred.

4.3 Fee estimates where fees to be based on time costs

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

- details of the work the administrator and their staff propose to undertake;

- the hourly rate or rates the administrator and their staff propose to charge for each part of that work;

- the time the administrator anticipates each part of that work will take;

- whether the administrator anticipates it will be necessary to seek approval or further approval under the Rules; and

- the reasons it will be necessary to seek such approval.

4.3.2 When providing a fees estimate the administrator should supply that information in sufficient time for creditors (including when acting through a committee) to be able to make an informed judgement about the reasonableness of the administrator's requests. Fees estimates should be based on all of the information available to the administrator at the time that the estimate is provided.

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4.3.3 In addition, the administrator must give the creditors details of the expenses they considers will be, or are likely to be, incurred.

4.3.4 The fees estimate and details of expenses may include fees anticipated to be charged and expenses anticipated to be incurred if the administrator becomes the liquidator where the administration moves into winding up.

4.4 Who fixes the fees?

4.4.1 It is for the creditors' committee (if there is one) to determine on which bases, or combination of bases, the fee is to be fixed. Where it is fixed as a percentage, it is for the committee to determine the percentage or percentages to be applied, and where it is a set amount, to determine that amount. Rule 18.16(9) says that in arriving at its decision the committee shall have regard to the following matters:

- the complexity (or otherwise) of the case;
- any responsibility of an exceptional kind or degree which falls on the administrator;
- the effectiveness with which the administrator appears to be carrying out, or to have carried out, their duties;
- the value and nature of the property with which the administrator has to deal.

4.4.2 If there is no creditors' committee, or the committee does not make the requisite determination, the administrator's fee may be fixed by a decision of the creditors by a decision procedure having regard to the same matters as apply in the case of the committee. If the fee is not fixed in any of these ways, it will be fixed by the court on application by the administrator, but the administrator may not make such an application unless they have first tried to get their fees fixed by the committee or creditors as described above, and in any case not later than 18 months after their appointment.

4.4.3 There are special rules about creditors' decisions in cases where the administrator has stated in their proposals that the company has insufficient property to enable a distribution to be made to unsecured creditors except out of the prescribed part which may have to be set aside out of floating charge assets.

4.4.4 In this case, if there is no creditors' committee, or the committee does not make the requisite determination, the basis of the administrator's fees may be fixed by –

- the consent of each of the secured creditors of the company; or
- if the administrator has made or intends to make a distribution to preferential creditors –

  - the consent of each of the secured creditors of the company; and

  - a decision of the preferential creditors in a decision procedure.

4.5 Review of fees

4.5.1 Where there has been a material and substantial change in circumstances since the basis of the administrator's fee was fixed, the administrator may request that it be changed. The request must be

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made to the same body as initially approved the fees, and the same rules apply as to the original approval.

5 Approval of pre-administration costs

5.1 Sometimes the administrator may need to seek approval for the payment of costs in connection with preparatory work incurred before the company went into administration but which remain unpaid. Such costs may relate to work done either by the administrator or by another insolvency practitioner. Disclosure of such costs must be included in the administrator's proposals and should follow the principles and standards set out in section 6. Pre-administration costs are subject to approval under Rule 3.52.

5.2 Where there is a creditors' committee, it is for the committee to determine whether, and to what extent, such costs should be approved for payment. If there is no committee or the committee does not make the necessary determination, or if it does but the administrator, or other insolvency practitioner who has incurred pre-administration costs, considers the amount agreed to be insufficient, approval may be given by a decision of the creditors. Where the circumstances described in paragraph 4.4.4 apply, the determination may be made by the same creditors as approve the administrator's fees.

5.3 The administrator must convene a meeting of the committee or seek a decision of the creditors by a decision procedure for the purposes of approving the payment of pre-administration costs if requested to do so by another insolvency practitioner who has incurred such costs. If there is no determination under these provisions, or if there is but the administrator or other insolvency practitioner considers the amount agreed to be insufficient, the administrator may apply to the court for a determination.

6 What information should be provided by the administrator?

6.1 General principles

6.1.1 The administrator should provide those responsible for approving the fees with sufficient information to enable them to make an informed judgement about the reasonableness of the administrator's request. The information should be presented in a manner which is transparent, consistent throughout the life of the case and useful to creditors, while being proportionate to the circumstances of the case.

6.1.2 The administrator should provide an indication of the likely return to creditors when seeking approval for the basis of their remuneration.

6.1.3 The administrator should disclose:

a) all payments arising from the insolvency appointment to the administrator or their associates;

b) the form and nature of any professional or personal relationships between the administrator and their associates.

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

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6.1.5 Where the administrator sub-contracts work that could otherwise be carried out by the administrator or their staff, this should be drawn to the attention of creditors and other interested parties with an explanation of why it is being done, what is being done, and how much it will cost.

6.2 Key issues

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

- the work the administrator anticipates will be done, and why that work is necessary;
- the anticipated payment for that work;
- whether it is anticipated that the work will provide a financial benefit to creditors, and if so what anticipated benefit (or if the work provided no direct financial benefit, but was required by statute);
- the work actually done and why that work was necessary;
- the actual payment for the work, as against any estimate provided;
- whether the work has provided a financial benefit to creditors, and if so what benefit (or if the work provided no direct financial benefit, but was required by statute).

6.2.2 When providing information about payments from the administration, the administrator should do so in a way which clearly explains the key issues. Narrative explanations should be provided to support any numerical information supplied. Such an approach allows creditors and other interested parties to better recognise the nature of an administrator's role and the work they intend to undertake, or have undertaken, in accordance with the key issues.

6.2.3 When approval for a set fee or a percentage basis is sought, the administrator should explain why the basis requested is expected to produce a fair and reasonable reflection of the work that the administrator anticipates will be undertaken. Where a set amount or a percentage basis is being used, an explanation should be provided of the direct costs included. The administrator should not seek to separately recover sums already included in a set amount or percentage basis fee and should be transparent in presenting any information.

6.3 Fees estimates

6.3.1 When providing a fees estimate of time to be spent, creditors and other interested parties may find a blended rate (or rates) and total hours anticipated to be spent on each part of the anticipated work more easily understandable and comparable than detail covering each grade or person working on the appointment. The estimate should also clearly describe what activities are anticipated to be conducted in respect of the estimated fee.

6.3.2 The information provided in the fees estimate may not be presented on the basis of alternative scenarios or provide a range of estimated charges. However for other payments that the administrator anticipates will be, or are likely to be, made, it is acceptable to provide a range or repeat a range quoted by a third party, for example legal costs in litigation in any expense estimates.

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6.4 Expenses

6.4.1 Expenses are any payments from the administration which are neither an administrator's remuneration nor a distribution to a creditor or a member. Expenses also include disbursements. Disbursements are payments which are first met by the administrator, and then reimbursed to the administrator from the administration.

6.4.2 Expenses are divided into those that do not need approval before they are charged to the administration (category 1) and those that do (category 2).

- Category 1 expenses: These are payments to persons providing the service to which the expense relates who are not an associate of the administrator. Category 1 expenses can be paid without prior approval.
- Category 2 expenses: These are payments to associates or which have an element of shared costs. Before being paid, category 2 expenses require approval in the same manner as an administrator's remuneration. Category 2 expenses require approval whether paid directly from the estate or as a disbursement.

6.4.3 When seeking approval of category 2 expenses, the administrator should explain, for each expense, the basis on which the expense is being charged to the administration. If the administrator has obtained approval for the basis of category 2 expenses, that basis may continue to be used in a sequential appointment where further approval of the basis of remuneration is not required, or where the administrator is replaced.

6.4.4 Any shared or allocated payments incurred by the administrator or their firm are to be treated as category 2 expenses and approval sought before payment.

6.4.5 The following are not permissible as either remuneration or an expense:

a) an expense or any other charge calculated as a percentage of remuneration;

b) an administration fee or charge additional to an administrator's remuneration;

c) the recovery of any overheads other than those absorbed in the charge out rates.

7. Exceeding the amount set out in the fees estimate

7.1 Fees cannot be drawn in excess of the total amount set out in the fees estimate without approval, which must be made to:

- the creditors' committee, where the committee fixed the basis;
- the creditors or class of creditors, where the creditors fixed the basis;
- the court, where the court fixed the basis.

7.2 The above will apply in most circumstances, however, if there is a change in circumstance and there are (or are likely to be) sufficient realisations that enable a distribution to unsecured creditors (the prescribed part no longer applying), then approval is to be sought from the creditors' committee. If there is no committee, then approval is to be sought from creditors by decision procedure.

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7.3 The request for approval must specify –

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

8. Progress reports and requests for further information

8.1 The administrator is required to send a progress report to creditors at 6-monthly intervals. In addition to the items discussed above, the report must include:

- details of the basis fixed for the fees of the administrator (or if not fixed at the date of the report, the steps taken during the period of the report to fix it);
- if the basis has been fixed, the fee charged during the period of the report, irrespective of whether it was actually paid during that period (except where it is fixed as a set amount, in which case it may be shown as that amount without any apportionment for the period of the report);
- if the report is the first to be made after the basis has been fixed, the fees charged during the periods covered by the previous reports, together with a description of the things done during those periods, irrespective of whether payment was actually made during the period of the report;
- if fees have been fixed on a time costs basis, the actual hours and average rate (or rates) of the costs charged for each part of the work;
- a statement of the expenses incurred by the administrator during the period of the report, irrespective of whether payment was actually made during that period;
- details of progress during the period of the report, including a summary of the receipts and payments during the period;
- details of what remains to be done;
- where appropriate, a statement setting out whether, at the date of the report–
    - the fees expected to be charged is likely to exceed the fees estimate or any approval given for remuneration exceeding the estimate;
    - the expenses incurred or expected to be incurred are likely to exceed, or have exceeded, the details given to the creditors prior to the determination of the basis of the fees; and

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- the reason for that excess.

- the date of approval of any pre-administration costs and the amount approved;

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

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

8.3 The administrator must provide the requested information within 14 days, unless they consider that:

- the time and cost involved in preparing the information would be excessive, or

- disclosure would be prejudicial to the conduct of the administration or might be expected to lead to violence against any person, or

- the administrator is subject to an obligation of confidentiality in relation to the information requested,

in which case the administrator must give the reasons for not providing some or all of the information.

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

9. Provision of information – additional requirements

9.1 The administrator must provide certain information about time spent on a case, free of charge, upon request by any creditor, director or shareholder of the company.

9.2 The information which must be provided is –

- the total number of hours spent on the case by the administrator or staff assigned to the case;

- for each grade of staff, the average hourly rate at which they are charged out;

- the number of hours spent by each grade of staff in the relevant period.

9.3 The period for which the information must be provided is the period from appointment to the end of the most recent period of six months reckoned from the date of the administrator's appointment, or where they have vacated office, the date that they vacated office.

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

9.5 Requests for additional information about payments should be viewed upon their individual merits and treated by the administrator in a fair and reasonable way. The provision of additional information should be proportionate to the circumstances of the appointment.

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10 What if a creditor is dissatisfied?

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

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

10.3 If the court considers the application well founded, it may order that the fees be reduced, the basis be changed, or the expenses be disallowed or repaid. Unless the court orders otherwise, the costs of the application must be paid by the applicant and not as an expense of the administration.

11 What if the administrator is dissatisfied?

11.1 If the administrator considers that the fee fixed by the creditors' committee is insufficient or that the basis used to fix it is inappropriate they may request that the amount or rate be increased, or the basis changed, by decision of the creditors. If the administrator considers that the fee fixed by the committee or the creditors is insufficient or that the basis used to fix it is inappropriate, they may apply to the court for the amount or rate to be increased or the basis changed. If the administrator decides to apply to the court, they 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 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.

12 Other matters relating to fees

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

12.2 If a new administrator is appointed in place of another, any decision, determination, resolution or court order which was in effect immediately before the replacement continues to have effect in relation to the remuneration of the new administrator until a further decision, determination, resolution or court order is made.

12.3 Where the basis of the fee is a set amount, and the administrator ceases to act before the time has elapsed or the work has been completed for which the amount was set, application may be made for a determination of the amount that should be paid to the outgoing administrator. The application must be made to the same body as approved the fees. Where the outgoing administrator and the incoming administrator are from the same firm, they will usually agree the apportionment between them.

12.4 Where realisations are sufficient for creditors to be paid in full with interest, the creditors will not have the principal financial interest in the level of payments from the estate. Once this has been established by the administrator, they should provide the beneficiaries of the anticipated surplus, on request, with information in accordance with the principles and standards set out above.

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13. Effective date

13.1 This guide applies where an administrator is appointed on or after 1 October 2015, or where information is provided by the administrator about fees, expenses or other payments after 6 April 2017.

13.2 ***Please note that insolvency practitioners were subject to different regulatory requirements prior to 1 April 2021. Therefore, information provided by insolvency practitioner prior to that date may vary slightly to the information required as set out in this guide.***

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