LIQUIDATION: A GUIDE FOR CREDITORS ON INSOLVENCY PRACTITIONER FEES

ENGLAND AND WALES

1 Introduction

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

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 compulsory, when it is instituted by order of the court.

2.2 Voluntary liquidation is the more common of the two. 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 participate in the appointment of the liquidator. A solvent liquidation is called a members' voluntary liquidation. It should be noted that this guide does not extend to members' voluntary liquidations as the fees in these cases are not determined by the creditors.

2.3 In a compulsory liquidation, the function of the liquidator is, in most cases, initially performed not by an insolvency practitioner but by an official called the official receiver. The official receiver is an officer of the court and an official belonging to The Insolvency Service. In most compulsory liquidations, the official receiver becomes liquidator immediately on the making of the winding-up order. Where the specialist skills of an insolvency practitioner are required or the majority of creditors request the appointment of an insolvency practitioner, an insolvency practitioner will usually be appointed to act as liquidator in place of the official receiver. Where an insolvency practitioner is not appointed the official receiver remains as liquidator.

2.4 Where a compulsory liquidation follows immediately on an administration the court may appoint the former administrator to act as liquidator. In such cases the official receiver does not become liquidator. An administrator may also subsequently act as liquidator in a CVL.

3 The liquidation committee

3.1 In a liquidation (whether voluntary or compulsory) 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 fees. An invitation to decide on whether a committee is to be established will be sent to creditors at the same time as a decision is sought on the appointment of a liquidator. In cases where a liquidation follows immediately on an administration any committee established for the purposes of the administration will continue in being as the liquidation committee.

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3.2 The liquidator 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 requested by a member of the committee, or when the liquidator decides they need to hold one. The liquidator is required to report to the committee at least every 6 months on the progress of the liquidation, unless the committee directs otherwise. This provides an opportunity for the committee to monitor and discuss the progress of the insolvency and the level of the liquidator's fees.

4 Fixing the liquidator's fees

4.1 Basis

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

- as a percentage of the value of the assets which are realised, distributed or both, by the liquidator
- by reference to the time properly given by the liquidator and their staff in attending to matters arising in the liquidation, 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 liquidator. Where the fee is fixed as a percentage, different percentages may be used for different things done by the liquidator.

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

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

4.1.5 Information provided by the liquidator 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 are not based on time costs

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

4.3 Fees estimates where fees are to be based on time costs

4.3.1 Where the liquidator 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 –

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- details of the work the liquidator and their staff propose to undertake;
- the hourly rate or rates the liquidator and their staff propose to charge for each part of that work;
- the time the liquidator anticipates each part of that work will take;
- whether the liquidator 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 liquidator 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 liquidator's requests. Fees estimates should be based on all of the information available to the liquidator at the time that the estimate is provided.

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

4.4 Who fixes the fees?

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

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

4.4.2 If there is no liquidation committee, or the committee does not make the requisite determination, the liquidator's fees may be fixed by a decision of the creditors by a decision procedure. The creditors take account of the same matters as apply in the case of the committee.

4.4.3 If the fees are not fixed as above, it will be fixed in one of the following ways. In a CVL, it will be fixed by the court on application by the liquidator, but the liquidator 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. In a compulsory liquidation, it will be calculated in accordance with a scale set out in the Rules.

4.4.4 Where the liquidation follows directly on from an administration in which the liquidator had acted as administrator, the basis of fees fixed in the administration continues to apply in the liquidation.

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5. Review of fees

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

6 What information should be provided by the liquidator?

6.1 General principles

6.1.1 The liquidator should provide those responsible for approving the fees with sufficient information to enable them to make an informed judgement about the reasonableness of the liquidator'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 liquidator should provide an indication of the likely return to creditors when seeking approval for the basis of their remuneration.

6.1.3 The liquidator should disclose:

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

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

6.1.4 The liquidator 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. An insolvency practitioner may provide information, including a fees estimate, within pre-appointment communications (such as when assisting directors in commencing a liquidation).

6.1.5 Where the liquidator sub-contracts work that could otherwise be carried out by the liquidator 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 liquidator 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;
- 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).

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6.2.2 When providing information about payments from the liquidation, the liquidator 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 a liquidator'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 liquidator should explain why the basis requested is expected to produce a fair and reasonable reflection of the work that the liquidator 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 liquidator 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 Fee 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 liquidator 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.

6.4 Expenses

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

6.4.2 Expenses are divided into those that do not need approval before they are charged to the liquidation (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 liquidator. 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 a liquidator'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 liquidator should explain, for each expense, the basis on which the expense is being charged to the liquidation. If the liquidator 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 liquidator is replaced.

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6.4.4 Any shared or allocated payments incurred by the liquidator 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 a liquidator's remuneration;

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

6.5 Payment of pre-appointment expenses

6.5.1 The following categories of expenses may be paid out of the company's assets, either before or after the commencement of the liquidation, as an expense of the liquidation:

- any reasonable and necessary expenses of preparing the statement of affairs
- any reasonable and necessary expenses of the decision procedure or deemed consent procedure to seek a decision from the creditors on the nomination of a liquidator

6.5.2 If payment has not been made pre-commencement of the liquidation, payment may not be made to the liquidator or any associate of the liquidator, otherwise than with the approval of the liquidation committee, creditors or the court.

6.5.3 Disclosure should be made of amounts already paid to the liquidator in respect of pre-appointment costs, giving the amounts paid, the name of the payer, and its relationship to the estate and the nature of the payment.

6.5.4 Disclosure should follow the principles and standards as set out in this Guidance.

6.6 Realisations for secured creditors

6.6.1 Where the liquidator realises an asset on behalf of a secured creditor and receives remuneration out of the proceeds (see paragraph 12.1 below), they should disclose the amount of that remuneration in any reports they send to creditors.

7. Exceeding the amount set out in the fees estimate

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

- the reason why the liquidator has exceeded, or is likely to exceed, the fees estimate;
- the additional work the liquidator has undertaken or proposes to undertake;
- the hourly rate or rates the liquidator proposes to charge for each part of that additional work;
- the time that additional work has taken or the liquidator anticipates that work will take;

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- whether the liquidator 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 liquidator is required to send annual progress reports to creditors. In addition to the items described above and especially those in paragraph 6.2.1, the reports must include:

- details of the basis fixed for the fee of the liquidator (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 fee 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 the 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 liquidator 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 needs to be done;

- where appropriate, a statement setting out whether, at the date of the report –

    - the fee expected to be charged is likely to exceed the fees estimate or any approval given;

    - 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 fees; and

    - the reason for that excess.

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

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

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

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

in which case the liquidator 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 liquidator'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 liquidator must provide certain information about the time spent on the 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 liquidator 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 liquidator'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 liquidator, 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 liquidator in a fair and reasonable way. The provision of additional information should be proportionate to the circumstances of the appointment.

10. What if a creditor is dissatisfied?

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

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

10.3 Application may be made to the court by any secured creditor, or by any unsecured creditor provided at least 10 per cent in value of unsecured creditors (including themselves) agree, or they have the permission of the court. Any such application must be made within 8 weeks of the applicant receiving the liquidator's progress report in which the charging of the fees 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 liquidator a copy of the application and supporting evidence at least 14 days before the hearing.

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10.4 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 out of the assets of the insolvent company.

10.5 On receipt of the liquidator's final account, creditors have 8 weeks in which they may challenge the liquidator's fees and expenses as set out above.

11. What if the liquidator is dissatisfied?

11.1 If the liquidator considers that the fee fixed by the liquidation committee, or in the preceding administration, is insufficient or that the basis used to fix it is inappropriate, the liquidator may request that the amount or rate be increased, or the basis changed, by decision of the creditors. If the liquidator considers that the fees fixed by the liquidation committee or the creditors, or in the preceding administration or in accordance with the statutory scale 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 liquidator decides to apply to the court, they 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 application must be sent to such of the creditors as the court may direct, and they may nominate one or more of their number to appear or be represented. The court may order the costs to be paid out of the assets.

12 Other matters relating to fees

12.1 Where the liquidator realises assets on behalf of a secured creditor, the liquidator is entitled to be remunerated out of the proceeds of sale in accordance with a scale set out in the Rules. Usually, however, the liquidator will agree the basis of their fee for dealing with charged assets with the secured creditor concerned.

12.2 Where two (or more) joint liquidators are appointed it is for them to agree between themselves how the fee payable should be apportioned. Any dispute between them may be referred to the court, the committee or the creditors.

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

12.4 Where the basis of the fees is a set amount, and the liquidator 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 liquidator. The application must be made to the same body as approved the fees. Where the outgoing liquidator and the incoming liquidator are from the same firm, they will usually agree the apportionment between them.

12.5 There may also be occasions when creditors will agree to make funds available themselves to pay for the 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.

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12.6 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 liquidator, they should provide the beneficiaries of the anticipated surplus, on request, with information in accordance with the principles and standards set out above.

13. Effective date

13.1 This guide applies where a liquidator is appointed on or after 1 October 2015, or where information is provided by the liquidator 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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