

## OFFICE HOLDER REMUNERATION

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*The general opinion of insolvency receivers and liquidators is that they are an unnecessary evil put in for the purpose of earning a decent living for themselves."*

The Cork Report, 1982

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### **Introduction**

1. The provisions of the Insolvency Act 1986 ("IA 1986") and the Insolvency Rules 1986 ("IR 1986") provide guidance as to the mechanics of how a trustee (or any other qualifying office holder) remuneration shall be fixed, but little as to the factors which a court will take into account when actually fixing remuneration.
2. The spotlight first shone on office holders fees following the now infamous comments of Ferris J in large insolvencies which attracted attention outside the cloistered world of the insolvency profession and in particular following the death of Robert Maxwell and the administration of his estate.
3. Despite the subsequent review of the fees in the *Maxwell* case resulting in no meaningful reduction in the insolvency practitioners fees, it did trigger *The Ferris Report* and result in greater regulation and directly led to:-
  - a. SIP 9 (version 2 onwards);
  - b. The 2004 Practice Statement, and;
  - c. The Insolvency (Amendment) Rules 2005.
4. The application of these reforms has more recently been demonstrated by the cases of *UIC Insurance* and *Simion –v- Brown* (see below) which demonstrate the very strict approach adopted by the courts in assessing, and ultimately, reducing office holder's fees.
5. It should also be recognised that there is an increasing awareness and willingness to challenge fees from stake holders, who ultimately bear the costs. TiX in respect of IVA's is the most recent example. Whatever the nature of the challenge, the result is rarely to the advantage of the office holder.

### **Historical context**

6. As can be seen from the quote above from the Cork Report prior to 1986 there was a perception that the most important thing to an office holder was fees and that the professionals received an unreasonable proportion of the total assets. Without doubt pre-1986 there was a lack of transparency in respect of fees.
7. The Cork Report, along with recommending that insolvency practitioners should be professionally qualified, also made several recommendations in respect of office holder fees, including:-
  - a. There should be a uniform system as to remuneration for most office holders;
  - b. It should be fixed by a creditors committee;
  - c. Either on a percentage basis or on a time basis, and if on time taking into account:

- i. The time actually spent on the case by the office holder and his staff
  - ii. The complexity of the case;
  - iii. The responsibility borne by the office holder;
  - iv. The effectiveness of the office holder's actions;
  - v. The value of the assets dealt with.
- d. The quantification of legal and other professional fees should not be open to challenge unless required by the office holder.

### **Insolvency Rules 1986**

8. The relevant Insolvency Rules relating to office holder remuneration are attached as Appendix 1.

### **Fixing fees**

9. Generally the rules follow the Cork Report suggestions, with the exception of receivership, provisional liquidation and voluntary arrangements.
10. In relation to liquidations and bankruptcy the methods of fixing fees are similar. Remuneration shall be fixed by reference to the value of the assets realised or distributed or on a time basis. The decision as to the basis is to be taken by the creditors committee, or in the absence of a creditor committee (or if the creditors committees does not decide) a general meeting of creditors.
11. In deciding the basis for fixing remuneration the meeting should have regard to:-
- a. The complexity or otherwise of the case;
  - b. Any exceptional responsibility of the office holder;
  - c. The effectiveness with which the trustee has carried out his duties;
  - d. Value and nature of the assets in the estate.
12. If there is no committee or determination the default provisions come into play:
- a. If the bankruptcy order was made or a company entered liquidation before 1 April 2004 on the official receivers scale rates;
  - b. If the bankruptcy order was made or a company entered liquidation after 1 April 2004 on the official receivers scale rates on realisations and distributions but limited to sums sufficient to pay bankruptcy debts, expenses and remuneration.
13. If the office holder considers that the remuneration fixed by the creditors committee is insufficient he may request a general meeting of creditors to increase it.
14. Alternatively if an office holder considers the remuneration fixed by any of the above methods is insufficient he may apply to the court to fix his remuneration.

### Who can challenge fees?

15. In bankruptcy, liquidation and administration a creditor or creditors holding more than 25% of the value of the estate can apply to the court to challenge the office holder's remuneration.
16. In *Engle –v- Peri [2002] BPIR 961* it was held on an application for an annulment that a bankrupt had the ability to challenge fees because it affects the amount of money required to be paid in order to satisfy the court that an annulment should be granted. The basis upon which the court could fix remuneration was s. 363 of IA 1986 and the court's inherent jurisdiction.
17. In *Woodbridge –v- Smith [2004] BPIR 247* it was held, again in the context of a challenge to a trustee's remuneration on an application to annul a bankruptcy order, that whilst section 303 IA 1986 may not confer jurisdiction to assess of fix remuneration it does enable the court to grant relief as to the manner in which it could be fixed.
18. In both cases section 303 IA 1986 was relied upon by the applicant to give them the required locus as a "person dissatisfied" with the conduct of the trustee. It should be pointed out that in both cases the trustee had lost the sympathy of the court. In *Engle* the judge could see no reason for the challenge and in *Woodbridge* the trustee had acted in a manner which was "*perverse, unreasonable and manifestly absurd*".

### Maxwell No 1<sup>1</sup> and onwards

19. Issues of remuneration made relatively few appearances in the law reports until this case which involved three court appointed receivers who had been appointed over the estate of Robert Maxwell.
20. The Receivers had realised £1,672,000. They claimed remuneration of £744,289 and legal fees of £705,282 and other disbursements of £179,000 leaving a net balance in the estate of £43,428.
21. Ferris J found the figures:

*"...profoundly shocking. If the amounts claimed are allowed in full this receivership will have produced substantial rewards for the receivers and their lawyers and nothing for the estate."*
22. Ferris J then set out some general points concerning claims by office holders, many of which are picked up in later cases and the Practice Statement:
  - a. Office holders are fiduciaries appointed because of their professional skill and experience;
  - b. An office holder is an exception to the general rule that a fiduciary must not profit from his trust, but it is for the office holder who seeks to be remunerated to justify his fees;
  - c. An office holder must expect to give full particulars of the work they carried out and accurately record time together with a description of the work carried out ;
  - d. The charging rate must similarly be justified;
  - e. All actions must be appropriate;
  - f. The emphasis should change from time spent to the value of the work carried out. As Ferris J put it in his judgment,

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<sup>1</sup> [1998] BCLC 638

*“Time spent represents a measure not of the value of the service rendered but of the cost of rendering it. Remuneration should be fixed so as to reward value, not so as to indemnify against cost.”<sup>2</sup>*

23. As is common knowledge, after ordering a detailed assessment of the remuneration of the receivers and their advisors in *Maxwell*, the court eventually taxed very little off the amounts claimed. The issue concerning the expertise of the courts in dealing properly was still unresolved.
24. The matter next achieved an airing when the provisional liquidators of *Independent Insurance* came to court to fix their remuneration in 2002. This time (contrary to the view he expressed in *Maxwell* where he refused to appoint an expert), Ferris J held that the court could appoint an assessor under s70 of the Supreme Court Act 1981. This was, he declared, preferable to the remuneration being fixed by the informal creditors’ committee.<sup>3</sup>
25. The assessor was duly appointed and ultimately sat with the judge on the application which fixed the remuneration.<sup>4</sup> The case also dealt with what was considered to be a normal utilisation rate (70%) in relation to a fee earner’s time, the circumstances where this could be reasonably exceeded and issues surrounding the charging out of ancillary services such as secretarial time. In this respect the court drew a distinction between time spent in relation to the provision of, say, a treasury service to a case compared with the provision of services more commonly supplied in relation to any professional services firm. In this case the practice adopted by the court in dealing with the fixing of solicitors remuneration was followed. Such a cost is considered an overhead and consequently irrecoverable on an assessment.

#### **Statement of Insolvency Practice (“SIP”) 9**

26. In 2002, R3 produced SIP 9 dealing with the remuneration of office holders in England and Wales. It provides a useful meander through the legislation and also attempts to set out the forms that should be adopted in relation to the application itself. The information that should be supplied to the person or persons that fixes the remuneration is specified. The appendices contain standard forms applicable to various types of appointment are supplied and there is an attempt to provide a standard form to be used when seeking approval.
27. The contents of SIP 9 are useful as far as they go. The attempt at setting out a standard format is helpful but the statement is silent on the way that time charges are established. As will be seen the level of detail suggested by the Practice Statement is significantly more than the appendix to SIP suggests. Indeed in 2006 Chief Registrar Baister described SIP 9, insofar as it was as a response to the Ferris report, as a disappointing one:-

*“It sets out the law at great length, provides guidelines on the presentation of material in support of remuneration claims, but provides no help in relation to the really difficult issues such as time cost, market rates, charging units and other things that would have been really useful.”<sup>5</sup>*

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<sup>2</sup> See *Mirror Group Newspapers v. Maxwell* [1998] B.C.C. 324 at 336–337

<sup>3</sup> *Independent Insurance Co Ltd (In Provisional Liquidation), Re (No. 1)* [2002] EWHC 1577; [2002] 2 B.C.L.C. 709; [2003] B.P.I.R. 562

<sup>4</sup> *Independent Insurance Co Ltd (In Provisional Liquidation), Re (No.2)* [2003] EWHC 51; [2003] 1 B.C.L.C. 640; [2003] B.P.I.R. 577

<sup>5</sup> (2006) 22 IL and P 50

### **Cabletel – a salutary tale<sup>6</sup>**

28. In the spring of 2004, the joint administrators of Cabletel Installations Ltd applied to have their remuneration fixed by the court. There had evidently been a falling out with directors who challenged the level of remuneration.<sup>7</sup> The matter came before Mr Registrar Baister. The hearing itself took 7 days and the judgment runs to some 96 paragraphs over some 50 pages.
29. The primary problem in the case involved a dispute with Sky Television for which the company manufactured set top boxes. The administrators decided to replace the company's own solicitors with a large city based firm. This aggravated the directors. There then followed a meeting of creditors which effectively passed a motion of no confidence in the administrators. From that moment on the administrators and the directors were effectively set on a collision course. The creditors were alarmed at the level of the remuneration (they had received an initial quote of £67,000) and resolved to try and replace them because of this. When the matter came to court the administrators were claiming £280,000 in respect of their own remuneration and £90,000 in respect of their solicitors' fees.
30. In dealing with the dispute the Registrar adopted the methodology adopted by the assessor in the *Independent Insurance* case. He considered that time spent was a measure not of the value of the time spent but of the cost of rendering it. Any doubts he had were resolved against the administrators. He disallowed the cost of the support staff saying that this was effectively an overhead item. Criticism was made of the manner in which the time was recorded. Time claimed in relation to discussions with the bank on the appointment was disallowed in full on the grounds that most of it was for the benefit of the Bank rather than the company. There was a general criticism that the case was "over managed". The dispute with Sky was considered to be a standard piece of commercial litigation that did not justify replacing Cabletel's own lawyers with an expensive City based firm.
31. The outcome was to reduce the figures down to approximately £109,000. From this was deducted a 20% discount to reflect certain other matters relating to the behaviour of the administrators. The figure awarded amounted to some £87,000, nearly £200,000 less than the original claim.
32. The lessons that can be learnt from *Cabletel* are symptomatic of the problem that practitioners seem to be faced with as a whole. Time is not the only factor and there is a need to record accurately the time that was being spent and, where possible justify the decisions to be taken.

### **Practice Statement – The fixing and approval of the remuneration of trustees (2004)**

33. The major points of the practice direction are a distillation of points previously raised in the cases and by the Ferris Report. A copy is attached to these notes as Appendix 2.
34. Its objective is set out at paragraph 3.2 which states:-

*"The objective of this Practice Statement is to ensure that the remuneration of an appointee which is fixed and approved by the court is fair, reasonable and commensurate with the nature and extent of the work properly undertaken by the appointee in any given case and is fixed and approved by reference to a process which is consistent and predictable."*

35. Paragraph 3 also lays down certain guiding principles – they are:-

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<sup>6</sup> See *Re Cabletel Installations Ltd* [2005] BPIR 28

<sup>7</sup> No doubt encouraged by the fact that the bank insisted on its own nominee being appointed as a condition of support in place of the directors' nomination of partners in a much smaller firm.

- a. Justification: it is for the appointee who seeks to be remunerated...to justify his claim and in order to do so the appointee should be prepared to provide full particulars of the basis for and nature of his claim for remuneration'.
  - b. Benefit of the doubt: where there is doubt as to the appropriateness or reasonableness of the remuneration sought such doubt should be resolved against the appointee.
  - c. However; professional integrity is the counter-balance: the court should give credit for the fact that the appointee is a member of a regulated professional body and an officer of the court.
  - d. Value: remuneration should reward the value of the service rendered not simply reimburse the appointee for time expended and cost incurred.
  - e. The amount of remuneration should be fair and reasonable.
  - f. Proportionality has two aspects: the information the court requires from the appointee should be proportionate to the amount of remuneration sought and the nature and complexity of the case ('proportionality of information'); and the remuneration itself should be proportionate to the nature, complexity and extent of the work completed or to be completed; the level of responsibility, the level of risk and efficiency should all be taken into account ('proportionality of remuneration').
  - g. Professional guidance: the court may have regard to relevant and current statements of practice of regulators and professional bodies. Note that the court is not obliged to do so, as it is for the court to determine remuneration, not any professional body.
  - h. Impracticability is designed to cater for rare circumstances where the appointee has been unable to obtain approval from a creditors' committee or the general body of creditors.
36. The Practice Statement at paragraph 5.2 further sets out the matters an office holder should address in evidence:-
- a. Background and the reasons for the appointment;
  - b. A detailed description of the work undertaken divided into individual tasks or categories of task. General descriptions should be avoided.
  - c. Reasons why it was considered reasonable, necessary or beneficial for the work to be conducted and why particular individuals did the work.
  - d. The amount of time spent or to be spent on tasks still to be completed and which is considered fair and reasonable;
  - e. Total number of hours worked by members of staff and a breakdown of the tasks undertaken;
  - f. A break down of the proportion of work as between different tasks;
  - g. A breakdown of the proportion of work as between different tasks;
  - h. Breakdown of total amount to be charged as between staff, tasks and time spent;
  - i. Details of the experience, training and qualifications and seniority of staff;

- j. Explanation of steps taken to ensure that the tasks were carried out by the appropriate level of staff and to avoid duplication;
- k. Individual charge out rates for staff;
- l. Identify stake holder (e.g. major creditors) and what (if any ) consultation has taken place;
- m. If any of the above matters have not been addressed in evidence, an explanation as to why not.

**Practice statement in action**

37. There have been two reported cases involving the application of the practice direction:-
- a. In *re UIC Insurance Company Ltd (in Provisional liquidation) (No 1)*<sup>8</sup>, the Court was asked to assess the fees of a provisional liquidator;
  - b. In *Simion –v- Brown*<sup>9</sup> the court was asked to assess the fees of a trustee in bankruptcy.

**UIC**

38. In *UIC* joint provisional liquidators appealed against the decisions of Registrar Nicholls fixing their remuneration in a sum less than they had claimed and also in respect of the costs of the assessment procedure itself. Previous applications had been made fixing remuneration in the sum of £6,401,645. On this application a further £1.7 million was claimed.
39. Joint provisional liquidators had been appointed by an order of Robert Walker J, made on 12 August 1996, which provided that the remuneration of the joint provisional liquidators was to be fixed by the court by reference to the work done by the joint provisional liquidators and consultants and employees of the provisional liquidators' under their control, to the time spent by them on the basis of those firms usual rates for the type of work involved, any expenses incurred and value added tax.
40. The joint provisional liquidators used the services of a Mr Johnson, an insurance consultant, and included remuneration in respect of his services as part of their application – this having been done for earlier years in previous applications. Equitas, who represented 40% of UIC's creditors and were joined as second respondent to the application, had also used the services of Mr Johnson and were therefore aware of his charging rates.
41. Their application also included a claim in respect of the work of Mr Laventure, a tax consultant, although his position was different from that of Mr Johnson.
42. On the initial application the registrar had ordered:
- a. The joint provisional liquidators should not be allowed any remuneration in respect of the work carried out by Mr Johnson but should merely be reimbursed the sums in his invoices as a disbursement.
  - b. In the light of the evidence filed concerning Mr Johnson and notwithstanding an earlier indication that applications in respect of earlier years would not be reopened it was nevertheless appropriate to do so.

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<sup>8</sup> [2007] BPIR 494

<sup>9</sup> [2007] BPIR 412

- c. While the joint provisional liquidators were entitled to the remuneration of a tax consultant no remuneration should in fact be allowed since his work was carried out prior to the start of the remuneration period and there was insufficient evidence as to what work he had carried out.
  - d. In relation to failures by the joint provisional liquidators and their staff to operate a proper time recording system deductions should be made for 'null' and 'unhelpful' narratives.
  - e. A 1% deduction should be made against all time costs to reflect over management of the estate, the use of staff of too high a grade and the use of 15 minutes rather than 6-minute time units.
43. The overall deductions made by the Registrar amounted to £336,113.56.
44. At a subsequent hearing in relation to costs the registrar held that the joint provisional liquidators should be reimbursed their reasonable costs for preparing the application and providing the evidence for the assessor and Equitas and dealing with the filing of the same.
45. However, he then held that the trial costs of the joint provisional liquidators should be borne by the joint provisional liquidators personally and that Equitas' trial costs should also be borne by them personally with no right of reimbursement from the estate.
46. After the hearings before the registrar a scheme of arrangement was sanctioned by the court under which a return of approximately 145 pence in the pound was to be made.
47. On appeal Peter Smith J held that:-
- a. The reopening of previous years was inappropriate when details of the remuneration in respect of the same had been provided to Equitas and the Informal Creditors Committee over the years and Equitas was aware, without knowing the precise mechanism used by the joint provisional liquidators, that Mr Johnson had been charged out at rate greater than that used by him in his charges to Equitas, particularly when the possible personal consequences for the joint provisional liquidators, including Mr Cooper who was not a party to the present application, were considered together with the fact that because of the scheme the creditors would suffer no loss.
  - b. The joint provisional liquidators claim for remuneration in respect of the work carried out by Mr Johnson as distinct from the amount of his invoices being treated as a disbursement was correctly disallowed as Mr Johnson was not a member of the joint provisional liquidator's staff.
  - c. There was no justification for any mark up on Mr Johnson's invoices and the joint provisional liquidators should not seek to maintain the same.
  - d. The order of Robert Walker J could not be construed as enabling the joint provisional liquidators to increase the fees of Mr Johnson and charge them out at anything other than at the rate which he charged and, in any event, in the future, such form of order should not be used; the court can examine all aspects of the expenses of the provisional liquidators whether their own remuneration, the remuneration of their partners and staff if appropriate and their disbursements in respect of third parties and it was immaterial whether it was done under r 4.30 of the Insolvency Rules 1986 or when they had to pass their accounts.
  - e. The joint provisional liquidators could recover remuneration in respect of the work previously carried out by Mr Laventure in bills that were delivered and paid in the



present period; there was material available which established the work carried out by him.

- f. There was no basis for suggesting that the deduction for time spent on null and unhelpful narratives was wrong.
- g. The decision to make an overall deduction of 1% could not be faulted and in particular the charge-out times in units of 15 minutes was unacceptable.
- h. Whilst success clearly had to be taken into account in fixing the joint provisional liquidators' remuneration, this did not mean that the court could award an extra success fee beyond reasonable remuneration; in particular, it would be wrong to use 'success' to remedy inadequate recording of what had been done by them or their staff.
- i. The decision to require the joint provisional liquidators to bear the cost of all of the hearings given their overall success was wrong.

### **Simion v Brown**

- 48. In *Simion* ("S") a bankruptcy order was made against Mr Brown on 31 July 2003. S was the major and petitioning creditor. Joint trustees in bankruptcy were appointed and one of these later became sole trustee. The Bankrupt's only significant asset was a Dutch barge, which was eventually taken possession of and sold by the trustee in December 2004 for £43,000.
- 49. Some repair work had been required to be carried out before sale and the boat had to be insured. Total bankruptcy costs amounted to £24,274 and, in addition, the trustee claimed remuneration, calculated on a time basis, of £21,265.50 exclusive of VAT. If this claim was upheld in full there would be nothing left for creditors. The final creditors' meeting, which was attended only by S, refused to approve this claim.
- 50. Accordingly, r 6.138A of the Insolvency Rules 1986 was engaged which determined remuneration at £5,050. The trustee on 10 November 2005 applied to have the proceedings transferred to the High Court and to challenge this latter figure under r 6.141 by substituting a time basis calculation. In ignorance of the trustee's application, S, in January 2006, applied to the court under r 6.142 to have the remuneration capped at a maximum of £8,323.50. On hearing of the pending hearing of this application, lawyers acting for the trustee asked for the trustee's application to be stayed. The application of S was dismissed by the district judge in March 2006, who awarded costs of £2,832.50 against S. Representatives of the trustee then, on 22 March 2006, sought clarification from the district judge as to whether a method of calculation had been fixed and the response received was that the court had merely dismissed the application by S. S appealed from the decision of the district judge and the trustee sought to revive his own application. David Richards J indicated that it had been a mistake for the trustee to stay his earlier application but, with the consent of both parties, the trustee's application and the appeal of S were heard together.
- 51. David Richards J also held:-
  - a. It must be borne in mind that a trustee had no choice but to carry out certain statutory duties and that in a small bankruptcy, such as this, the trustee's costs might appear disproportionately large.
  - b. There were some complexities in realising this asset but the court must be careful to ensure that they have not been overstated.
  - c. The court, under the terms of the Practice Statement, must strive to attain a balance based upon proportionality. The work undertaken must be commensurate with the

value accruing from such services to the estate. The court should consider the nature of the work undertaken and by whom it was undertaken.

- d. Looking at the itemised claim for expenses much of the work was done by solicitors and agents acting under the instructions of the trustee. This should not involve considerable monitoring costs, but the trustee needs to know what is going on. The items claimed under this head were reasonable.
- e. The time based payment claimed to arrange the insurance was excessive and this item should be reduced from £2,740 to £1,200.
- f. The time claimed for communicating with the representative of S should also be scaled back to £545 from the initial claim of £1,600.
- g. It was doubtful if there was need for the trustee's manager to attend at the execution of the possession order. More cost effective methods could have been used to ensure everything went smoothly. This item should be reduced from £1,710 to £260.
- h. The time spent on dealing with the calculation of the trustee's remuneration claim by calculating time sheets was grossly disproportionate and should be reduced from £5,257 to £1,650.
- i. Although the general claim to overheads not charged separately should have been itemised, as the Practice Statement required, these overheads will be allowed in this case.
- j. In conclusion the trustee's remuneration should be fixed at £13,613.50. Costs to be determined after further submissions.

### **Conditional Fee Agreements**

- 52. Whilst technically within a different topic entirely (Litigation Funding) practitioners should be aware of recent comments that have been made about the use of conditional fee agreements (CFAs), in particular as regards uplifts.
- 53. Sir Gavin Lightman recently used the opportunity to address a Norton Rose conference on litigation funding as an opportunity to launch what has been described as a "scathing attack" on conditional fee agreements (CFAs). He condemned CFAs as "a half-cocked form of private funding" brought in by the Government, which are "deficient, if not fatally flawed, due to an unprincipled conflict of interest on the part of the lawyer" where in some cases settlement would be better for the client, but not the lawyer's pocket. He saw litigation funding as an answer to provide better access to justice. "Recently the courts have begun to recognise... that litigation is a business which, like other businesses, requires private funding," he said.
- 54. The use of CFAs as an opportunity to line the lawyers' pockets was the theme of the criticism launched by Robin Knowles QC sitting as a deputy judge of the High Court in *Segal v. Pasram (No. 2)*<sup>10</sup>. In *Segal v. Pasram*<sup>11</sup>, after a trial, the Deputy Judge had declared that the bankrupt and his wife had shared a property in 50/50 shares and that a transfer of it to the wife solely amounted to a transaction at an undervalue that ought to be set aside, so that a half interest vested in the trustee. As the property was split into 2 maisonettes, he indicated that one party should have one of them, the other party the other. They were unable to agree, and so came back to Court to argue about the partition.
- 55. Having made a decision on that, the Deputy Judge then proceeded to deal with the trustee's litigation costs and the incidence of the costs of the proceedings. He said the following:-

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<sup>10</sup> [2007] All ER (D) 20 (Dec).

<sup>11</sup> [2007] BPIR 881

### **“Amount of Trustee’s costs of the proceedings**

14. *At the trial I had then been shown a schedule which revealed that the Trustee’s legal costs had by the week before the trial reached £86,000, including VAT. I was told that there was a conditional fee agreement with the Trustee’s solicitors, and on my asking what the uplift was I was told 80%. By the time the trial had happened and I heard further argument, an updated schedule showed the costs at £160,000 including VAT. This including a conditional fee agreement uplift now put at 85%, and comprised solicitor’s fees of £125,000 including VAT, and Counsel’s fees of £35,000 including VAT.*
15. *On any assessment of the Trustee’s legal costs (whether as a result of an order made in these proceedings, or generally in the bankruptcy) I believe it to be important that the need for a conditional fee agreement, and the reasonableness of an 80% or 85% uplift, are examined closely, in the context of several matters:*
  - (a) *Adverse costs insurance was purchased by the Trustee for a total sum of £9,450.*
  - (b) *In the course of further argument I asked whether the Trustee had asked the creditors to fund this litigation and was told that he had not.*
  - (c) *Those creditors are financial institutions, owed a total of about £65,000. The largest of them held a legal charge over the Property.*
  - (d) *The pursuit of beneficial interest in the Property by these proceedings was left for many years, presumably with the acquiescence of the creditors.*
  - (e) *With the uplift, the total of legal costs and bankruptcy costs and fees will, on the face of the updated schedule I have been shown, be more than three times the total of the debts.*
16. *More generally, as I said in my earlier decision, when the details available on costs showed them to be less than they are now, the costs seem acutely to lack proportionality in a bankruptcy that involved only one asset (a beneficial interest in the Property) and debts of £65,000.*
17. *I emphasise again, as in my earlier decision, that it would do nothing for the reputation of the administration of insolvent estates if large conditional fee agreement uplifts were regularly agreed with solicitors for trustees in bankruptcy in cases involving arguments over the equity in the matrimonial home that vests in the Trustee. Further, the presence of a conditional fee agreement with a large uplift may also place undue pressure on the spouse of the bankrupt to accede to the Trustee’s claim – the spouse who chooses to contest will jeopardize a substantial part of the remaining equity in the home if the Trustee will be looking to recover costs that are substantially increased by a large conditional agreement uplift.*

### **Incident of costs of the proceedings**

18. *On the Trustee’s figures, if the lower maisonette is sold, the proceeds will be broadly sufficient to pay the costs of the bankruptcy (including the Trustee’s costs of these proceedings) and the creditors. If Mrs Pasram is ordered to pay the Trustee’s costs of these proceedings there will be a material surplus in the bankruptcy estate, which will accrue to Mr Pasram.*
19. *Mr Pasram opposed the Trustee’s application throughout, although he did not attend the trial. Whatever may be the position as against the Trustee, by the Transfer he intended to give his beneficial interest in the Property to Mrs Pasram. If the Transfer does not stand then Mrs Pasram would, at least eventually and after further costs, be entitled to*

ask this Court of the Family Division to assist her to have the benefit of the surplus that would result from an order now that she pay the Trustee's costs of these proceedings.

20. Taking these rather individual features into account, in the exercise of my discretion as to costs I do not propose to order that Mrs Pasram pay the Trustee's costs of the proceedings. Instead I shall order that the Trustee's costs (to be assessed) be paid as an expense of the bankruptcy estate. The effect will be that the creditors are paid, that any surplus payable to Mr Pasram will be reduced, but that Mrs Pasram will not have to sell the upper maisonette to meet the Trustee's costs."

56. This echoes to a degree some passing comments of Evans-Lombe J in *Martin-Sklan v. White*<sup>12</sup>, an appeal on the issue of exceptional circumstances and the matrimonial home. When considering the value of the property against the state of the bankrupt's estate, he had the following comments:-

*"[24] I had put before me the analysis of the financial state of the bankrupt's affairs as at 30 April 2006, not long before the matter came before the district judge. This was analysed by calculating the sums which would be necessary as at 30 April to procure an annulment of the bankruptcy order upon payment in full. It shows a total sum of £51,139.26 as being required. Of that sum slightly more than £30,000 consists of solicitors' costs and trustee's remuneration, both of which figures might be the subject of review on application to the bankruptcy court.*

*[25] The debts, including interest, at the statutory rate of 8% amounted to £17,126. Those debts are attributable to three creditors, by far the largest, £14,000, being the Inland Revenue, the two other creditors being a bank, £500, and Mid Kent Water Authority £295, the total debts being of some £15,000 together with interest of rather more than £2,000 at 8% over the two years since the vesting of the estate in the trustee.*

*[26] These figures fall to be compared with figures produced for the first time in this court as to an assessment by the trustee of the financial state of the bankrupt's affairs as they are forecast to exist when the order of the district judge expires, namely, 30 April 2013. By that date the creditors (by reason of interest) have increased to £25,432, the estimated solicitors' costs have increased from just less than £9,000 to £19,681 and the trustee's remuneration has increased from £21,000-odd to £33,000-odd. As I say, each of those figures is capable of review by the Bankruptcy Court. Of the £83,180 required to annul the bankruptcy, £52,000 is represented by professional fees."*

The continued reference to the ability of the Court to review the professional costs (the trustee's solicitors' costs and the trustee's remuneration), which vastly exceeded the debts, shows that the Judge was not at all happy with what had transpired.

57. It is clear therefore that the bankruptcy courts are beginning to take into account the prejudices suffered by respondents to trustees' claim funded, effectively, by credit advanced by the lawyers. The general theme of the Deputy Judge's comments appears to be that CFAs should only be used as a funding tool if creditors themselves are not prepared to fund the litigation; the creditors have to be asked, and, presumably, there have to be good reasons what the creditors themselves should not fund it. If the creditors themselves are not prepared to fund litigation for their own benefit, then the lawyers should not be allowed to fund it, and cream off a high uplift, especially if that causes prejudice to the respondent.
58. Whether, as a result, the Court may expect to see phased uplifts, with differing percentages to be applied depending upon when the case concludes (as is the practice with personal injury cases) remains to be seen. But, the days of a standard uplift, irrespective of the merits of the

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<sup>12</sup> [2006] EWHC 3313 (Ch), [2007] BPIR 76

case, which results in the trustee's costs potentially far exceeding the level of the debts, may be gone.

### **Conclusions**

59. The courts have shown an increasing and marked inclination to reduce fees, largely with the benefit of hindsight, they are suspicious of the amount of time recorded, particularly where the fee earners have time recording targets. Further value can often only be assessed with hindsight and is used as a tool to disallow time which a judge will consider has not provided value for money.
60. The concept of fair and reasonable is vague and introduces only increases uncertainty and unpredictability.
61. It leaves office holders starting any assessment procedure in an unenviable position and facing a regime which assumes he is in the wrong.

**Christopher Brockman, Guildhall Chambers**  
**Paul French, Guildhall Chambers**

**April 2008**

## Appendix 1

Set out below are the relevant insolvency rules relating to office holder remuneration

### Administration

#### **Petition presented before 15 September 2003**

#### **Rule 2.47 Fixing of remuneration**

**2.47(1) [Entitlement to remuneration]** The administrator is entitled to receive remuneration for his services as such.

**2.47(2) [How Fixed]** The remuneration shall be fixed either:

- (a) as a percentage of the value of the property with which he has to deal, or
- (b) by reference to the time properly given by the insolvency practitioner (as administrator) and his staff in attending to matters arising in the administration.

**2.47(3) [Determination under r. 2.47(2)]** It is for the creditors' committee (if there is one) to determine whether the remuneration is to be fixed under paragraph (2)(a) or (b) and, if under paragraph (2)(a), to determine any percentage to be applied as there mentioned.

**2.47(4) [Matters relevant to r.2.47(3) determination]** In arriving at that determination, the committee shall have regard to the following matters:

- (a) the complexity (or otherwise) of the case,
- (b) any respects in which, in connection with the company's affairs, there falls on the administrator any responsibility of an exceptional kind or degree,
- (c) the effectiveness with which the administrator appears to be carrying out, or to have carried out, his duties as such, and
- (d) the value and nature of the property with which he has to deal.

**2.47(5) [If no committee or determination]** If there is no creditors' committee, or the committee does not make the requisite determination, the administrator's remuneration may be fixed (in accordance with paragraph (2)) by a resolution of a meeting of creditors; and paragraph (4) applies to them as it does to the creditors' committee.

**2.47(6) [Fixed by court]** If not fixed as above, the administrator's remuneration shall, on his application, be fixed by the court.

**2.47(7) [Where joint administrators]** Where there are joint administrators, it is for them to agree between themselves as to how the remuneration payable should be apportioned. Any dispute arising between them may be referred:

- (a) to the court, for settlement by order, or
- (b) to the creditors' committee or a meeting of creditors, for settlement by resolution.

**2.47(8) [Where administrator solicitor]** If the administrator is a solicitor and employs his own firm, or any partner in it, to act on behalf of the company, profit costs shall not be paid unless this is authorised by the creditors' committee, the creditors or the court.

#### **Rule 2.48 Recourse to meeting of creditors**

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

#### **Rule 2.49 Recourse to the court**

**2.49(1) [Administrator may apply 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.

**2.49(2) [Notice to committee members etc.]** 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.

**2.49(3) [Where no committee]** 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.

**2.49(4) [Costs of application]** The court may, if it appears to be a proper case, order the costs of the administrator's application, including the costs 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.

#### **2.50 Creditors' claim that remuneration is excessive**

**2.50(1) [Creditor may apply to court]** Any creditor of the company may, with the concurrence of at least 25 per cent in value of the creditors (including himself), 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.

**2.50(2) [Power of court to dismiss etc.]** The court may, if it thinks that no sufficient cause is shown for a reduction, dismiss the application; but it shall not do so unless the applicant has had an opportunity to attend the court for an ex parte hearing, of which he has been given at least 7 days' notice.

If the application is not dismissed under this paragraph, the court shall fix a venue for it to be heard, and give notice to the applicant accordingly.

**2.50(3) [Notice to administrator]** The applicant shall, at least 14 days before the hearing, send to the administrator a notice stating the venue and accompanied by a copy of the application, and of any evidence which the applicant intends to adduce in support of it.

**2.50(4) [Court Order]** If the court considers the application to be well-founded, it shall make an order fixing the remuneration at a reduced amount or rate.

**2.50(5) [Costs of application]** Unless the court orders otherwise, the costs of the application shall be paid by the applicant, and are not payable as an expense of the administration.

## **Application or appointment made on or after 15 September 2003**

### **Rule 2.106 Fixing of remuneration**

**2.106(1) [Entitlement to remuneration]** The administrator is entitled to receive remuneration for his services as such.

**2. 106 (2)[How Fixed]** The remuneration shall be fixed either:

- (a) as a percentage of the value of the property with which he has to deal, or
- (b) by reference to the time properly given by the insolvency practitioner (as administrator) and his staff in attending to matters arising in the administration.

**2. 106 (3) [Determination under r. 2. 106 (2)]** It is for the creditors' committee (if there is one) to determine whether the remuneration is to be fixed under paragraph (2)(a) or (b) and, if under paragraph (2)(a), to determine any percentage to be applied as there mentioned.

**2. 106 (4) [Matters relevant to r.2. 106 (3) determination]** In arriving at that determination, the committee shall have regard to the following matters:

- (a) the complexity (or otherwise) of the case,
- (b) any respects in which, in connection with the company's affairs, there falls on the administrator any responsibility of an exceptional kind or degree,
- (c) the effectiveness with which the administrator appears to be carrying out, or to have carried out, his duties as such, and
- (d) the value and nature of the property with which he has to deal.

**2. 106 (5) [If no committee or determination]** If there is no creditors' committee, or the committee does not make the requisite determination, the administrator's remuneration may be fixed (in accordance with paragraph (2)) by a resolution of a meeting of creditors; and paragraph (4) applies to them as it does to the creditors' committee.

**2.106 (5A) [Approval where insufficient to pay unsecured creditors]** In a case where the administrator has made a statement under paragraph 52(1)(b), if there is no creditors' committee, or the committee does not make the requisite determination, the administrator's remuneration may be fixed (in accordance with paragraph (2)) by the approval of-

- (a) each secured creditor of the company: or
- (b) if the administrator has made or intends 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; and paragraph (4) applies to them as it does to the creditors' committee.

**2. 106 (6) [Fixed by court]** If not fixed as above, the administrator's remuneration shall, on his application, be fixed by the court.



**2. 106 (7) [Where joint administrators]** Where there are joint administrators, it is for them to agree between themselves as to how the remuneration payable should be apportioned. Any dispute arising between them may be referred:

- (a) to the court, for settlement by order, or
- (b) to the creditors' committee or a meeting of creditors, for settlement by resolution.

**2. 106 (8) [Where administrator solicitor]** If the administrator is a solicitor and employs his own firm, or any partner in it, to act on behalf of the company, profit costs shall not be paid unless this is authorised by the creditors' committee, the creditors or the court.

#### **Rule 2.107 Recourse to meeting of creditors**

**2.107 (1)** If the administrator's remuneration has been fixed by the creditors' committee, and he considers the rate or amount to be insufficient, he may request that it be increased by resolution of the creditors.

**2.107 (2)** In a case where the administrator has made a statement under paragraph 52(1)(b), if the administrator's remuneration has been fixed by the creditors' committee, and he considers the rate or amount to be insufficient, he may request that it be increased by the approval of-

- (a) each secured creditor of the company: or
- (b) if the administrator has made or intends 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.

#### **Rule 2.108 Recourse to the court**

**2. 108 (1) [Administrator may apply 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.

**2.108 (1A)** In a case where the administrator has made a statement under paragraph 52(1)(b), if the administrator considers that the remuneration fixed by the approval of the creditors in accordance with Rule 2.107(2) is insufficient, he may apply to the court for an order increasing its amount or rate.

**2. 108 (2)[Notice to committee members etc.]** 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. 108 (3) [Where no committee]** 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.

**2. 108 (4) [Costs of application]** The court may, if it appears to be a proper case, order the costs of the administrator's application, including the costs 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.

## **2.109 Creditors' claim that remuneration is excessive**

**2. 109 (1) [Creditor may apply to court]** Any creditor of the company may, with the concurrence of at least 25 per cent in value of the creditors (including himself), 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.

**2. 109 (2) [Power of court to dismiss etc.]** The court may, if it thinks that no sufficient cause is shown for a reduction, dismiss it without a hearing but it shall not do so without giving the applicant at least 7 days' notice, upon receipt of which the applicant may require the court to list the application for a without notice hearing.

If the application is not dismissed under this paragraph, the court shall fix a venue for it to be heard, and give notice to the applicant accordingly.

**2. 109 (3)[Notice to administrator]** The applicant shall, at least 14 days before the hearing, send to the administrator a notice stating the venue and accompanied by a copy of the application, and of any evidence which the applicant intends to adduce in support of it.

**2. 109 (4) [Court Order]** 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. 109 (5) [Costs of application]** Unless the court orders otherwise, the costs of the application shall be paid by the applicant, and are not payable as an expense of the administration.

## **Provisional Liquidation**

### **Rule 4.30 Remuneration**

**4.30(1) [To be fixed by court]** The remuneration of the provisional liquidator (other than the official receiver) shall be fixed by the court from time to time on his application.

**4.30(2) [Matters to be taken into account]** In fixing his remuneration, the court shall take into account:

- (a) the time properly given by him (as provisional liquidator) and his staff in attending to the company's affairs;
- (b) the complexity (or otherwise) of the case;
- (c) any respects in which, in connection with the company's affairs, there falls on the provisional liquidator any responsibility of an exceptional kind or degree;
- (d) the effectiveness with which the provisional liquidator appears to be carrying out, or to have carried out, his duties; and
- (e) the value and nature of the property with which he has to deal.

**4.30(3) [Source of payment of remuneration etc.]** Without prejudice to any order the court may make as to costs, the provisional liquidator's remuneration (whether the official receiver or another) 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, out of the assets, in the prescribed order of priority, or, in either case (the relevant funds being insufficient), out of the deposit under Rule 4.27.

**4.30(3A) [Power of retention]** 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.

**4.30(4) [Provisional liquidator other than official receiver]** Where a person other than the official receiver has been appointed provisional liquidator, and the official receiver has taken any steps for the purpose of obtaining a statement of affairs or has performed any other duty under the Rules, he shall pay the official receiver such sum (if any) as the court may direct.

## Liquidation

### **Rule 4.127 Fixing of remuneration**

**4.127(1) [Entitlement to remuneration]** The liquidator is entitled to receive remuneration for his services as such.

**4.127(2) [How fixed]** The remuneration shall be fixed either:

- (a) as a percentage of the value of the assets which are realised or distributed, or of the one value and the other in combination, or
- (b) by reference to the time properly given by the insolvency practitioner (as liquidator) and his staff in attending to matters arising in the winding up.

**4.127(3) [Determination under r. 4.127(2)]** Where the liquidator is other than the official receiver, it is for the liquidation committee (if there is one) to determine whether the remuneration is to be fixed under paragraph (2)(a) or (b) and, if under paragraph (2)(a), to determine any percentage to be applied as there mentioned.

**4.127(4) [Matters relevant r. 4.127(3) determination]** In arriving at that determination, the committee shall have regard to the following matters:

- (a) the complexity (or otherwise) of the case,
- (b) any respects in which, in connection with the winding up, there falls on the insolvency practitioner (as liquidator) any responsibility of an exceptional kind or degree,
- (c) the effectiveness with which the insolvency practitioner appears to be carrying out, or to have carried out, his duties as liquidator, and
- (d) the value and nature of the assets with which the liquidator has to deal.

**4.127(5) [If no committee or no determination]** If there is no liquidation committee, or the committee does not make the requisite determination, the liquidator's remuneration may be fixed (in accordance with paragraph (2)) by a resolution of a meeting of creditors; and paragraph (4) applies to them as it does to the liquidation committee.

**4.127(6) [Otherwise fixed]** Where the liquidator is not the official receiver and his remuneration is not fixed as above, the liquidator shall be entitled to remuneration fixed in accordance with the provisions of Rule 4.127A.

***[Where company in liquidation before 1 April 2004]***

**4.127(6) [Otherwise fixed]** *If not fixed as above, the liquidator's remuneration shall be in accordance with the scale laid down for the official receiver by general regulations.]*

**4.127A Liquidator's entitlement to remuneration where it is not fixed under Rule 4.127**

**4.127A(1)** This Rule applies where the liquidator is not the official receiver and his remuneration is not fixed in accordance with Rule 4.127.

**4.127A (2) [Application of scale]** The liquidator shall be entitled by way of remuneration for his services as such, to such sum as is arrived at by –

- (a) first applying the realisation scale set out in Schedule 6 to the monies received by him from the realisation of the assets of the company (including any Valued Added Tax thereon but after deducting any sums paid to secured creditors and any sums spent out of money received in carrying on the business of the company); and
- (b) then by adding to the sum arrived at under sub-paragraph (a) such sum as is arrived at by applying the distribution scale set out in Schedule 6 to the value of assets distributed to creditors of the company (including payments made in respect of preferential debts) and to contributories.

**4.127B Liquidator's remuneration where he realises assets on behalf of chargeholder**

**4.127B(1) [Where liquidator sells for secured creditor]** This Rule applies where the liquidator is not the official receiver and realises assets on behalf of a secured creditor.

**4.127B(2) [Where charge is mortgage or fixed charge]** Where the assets realised for a secured creditor are subject to a charge which when created was a mortgage or a fixed charge, the liquidator shall be entitled to such sum by way of remuneration as is arrived at by applying the realisation scale set out in Schedule 6 to the monies received by him in respect of the assets realised (including any sums received in respect of Value Added Tax thereon but after deducting any sums spent out of money received in carrying on the business of the company).

**4.127B(3) [Where charge is floating charge]** Where the assets realised for a secured creditor are subject to a charge which when created was a floating charge, the liquidator shall be entitled to such sum by way of remuneration as is arrived at by–

- (a) first applying the realisation scale set out in Schedule 6 to monies received by him from the realisation of those assets (including any Value Added Tax thereon but ignoring any sums received which are spent in carrying on the business of the company); and
- (b) then by adding to the sum arrived at under sub-paragraph (a) such sum as is arrived at by applying the distribution scale set out in Schedule 6 to the value of the assets distributed to the holder of the charge and payments made in respect of preferential debts.

**4.128 Other matters affecting remuneration**

***[Where company in liquidation before 1 April 2004]***

**4.128(1) [Where liquidator sells for secured creditor]** *Where the liquidator sells assets on behalf of a secured creditor, he is entitled to take for himself, out of the proceeds of sale, a sum by way of remuneration equivalent to that which is chargeable in corresponding circumstances by the official receiver under general regulations.]*

**4.128(2) [Where joint liquidators]** Where there are joint liquidators, it is for them to agree between themselves as to how the remuneration payable should be apportioned. Any dispute arising between them may be referred:

- (a) to the court, for settlement by order, or
- (b) to the liquidation committee or a meeting of creditors, for settlement by resolution.

**4.128(3) [If liquidator is a solicitor]** If the liquidator is a solicitor and employs his own firm, or any partner in it, to act on behalf of the company, profit costs shall not be paid unless this is authorised by the liquidation committee, the creditors or the court.

#### **4.129 Recourse of liquidator to meeting of creditors**

**4.129(1)** If the liquidator's remuneration has been fixed by the liquidation committee, and he considers the rate or amount to be insufficient, he may request that it be increased by resolution of the creditors.

#### **4.130 Recourse to the court**

**4.130(1) [Liquidator may apply to court]** If the liquidator considers that the remuneration fixed for him by the liquidation committee, or by resolution of the creditors, or as under Rule 4.127(6), is insufficient, he may apply to the court for an order increasing its amount or rate.

**4.130(2) [Notice to committee etc.]** 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.

**4.130(3) [Where 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.

**4.130(4) [Costs of application]** The court may, if it appears to be a proper case, order the costs of the liquidator's application, including the costs of any member of the liquidation committee appearing or being represented on it, or any creditor so appearing or being represented, to be paid out of the assets.

#### **Rule 4.131 Creditors' claim that remuneration is excessive**

**4.131(1) [Creditor may apply to court]** Any creditor of the company may, with the concurrence of at least 25 per cent in value of the creditors (including himself), 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.

**4.131(2) [Power of court to dismiss etc.]** The court may, if it thinks that no sufficient cause is shown for a reduction, dismiss the application; but it shall not do so unless the applicant has had an opportunity to attend the court for an *ex parte* hearing, of which he has been given at least 7 days' notice.

If the application is not dismissed under this paragraph, the court shall fix a venue for it to be heard, and give notice to the applicant accordingly.

**4.131(3) [Notice to liquidator]** The applicant shall, at least 14 days before the hearing, send to the liquidator a notice stating the venue and accompanied by a copy of the application, and of any evidence which the applicant intends to adduce in support of it.

**4.131(4) [Court order]** If the court considers the application to be well-founded, it shall make an order fixing the remuneration at a reduced amount or rate.

**4.131(5) [Costs of application]** Unless the court orders otherwise, the costs of the application shall be paid by the applicant, and are not payable out of the assets.

#### **Rule 4.148A Remuneration of liquidator in members' voluntary winding up**

**4.148A(1) [Entitlement]** The liquidator is entitled to receive remuneration for his services as such.

**4.148A(2) [How fixed]** The remuneration shall be fixed either:

- (a) as a percentage of the value of the assets which are realised or distributed, or of the one value and the other in combination, or
- (b) by reference to the time properly given by the insolvency practitioner (as liquidator) and his staff in attending to matters arising in the winding up;

and the company in general meeting shall determine whether the remuneration is to be fixed under subparagraph (a) or (b) and, if under subparagraph (a), the percentage to be applied as there mentioned.

**4.148A(3) [Matters in determination]** In arriving at that determination the company in general meeting shall have regard to the matters set out in paragraph (4) of Rule 4.127.

**4.148A(4) [Otherwise fixed]** Where the liquidator's remuneration is not fixed as above, the liquidator shall be entitled to remuneration calculated in accordance with the provisions of Rule 4.148B.

#### ***[Where company in liquidation before 1 April 2004]***

**4.148A(4) [Otherwise fixed]** *If not fixed as above, the liquidator's remuneration shall be in accordance with the scale laid down for the official receiver by general regulations.]*

**4.148A(5) [Application of r. 4.128]** Rule 4.128 and Rule 4.127B shall apply in relation to the remuneration of the liquidator in respect of the matters there mentioned and for this purpose References in that Rule to 'the liquidation committee' and 'a meeting of creditors' shall be read as references to the company in general meeting.

**4.148A(6) [Liquidator may apply to court]** If the liquidator considers that the remuneration fixed for him by the company in general meeting, or as under paragraph (4), is insufficient, he may apply to the court for an order increasing its amount or rate.

**4.148A(7) [Notice to contributories]** the liquidator shall give at least 14 days' notice of an application under paragraph (6) to the company's contributories, or such one or more of them as the court may direct, and the contributories may nominate any one or more of their number to appear or be represented.

**4.148A(8) [Costs of application]** The court may, if it appears to be a proper case, order the costs of the liquidator's application, including the costs of any contributory appearing or being represented on it, to be paid out of the assets.

#### **4.148B Liquidator's remuneration in members' voluntary liquidation where it is not fixed under Rule 4.148A**

**4.148B(1)** This Rule applies where the liquidator's remuneration is not fixed in accordance with Rule 4.148A.

**4.148B(2) [Application of scale]** The liquidator shall be entitled by way of remuneration for his services as such, to such sum as is arrived at by-

- (a) first applying the realisation scale set out in Schedule 6 to the monies received by him from the realisation of the assets of the company (including any Valued Added Tax thereon but after deducting any sums paid to secured creditors and any sums spent out of money received in carrying on the business of the company); and
- (b) then by adding to the sum arrived at under sub-paragraph (a) such sum as is arrived at by applying the distribution scale set out in Schedule 6 to the value of assets distributed to creditors of the company (including payments made in respect of preferential debts) and to contributories

## **Bankruptcy**

### **6.138 Fixing of remuneration**

**6.138(1) [Entitlement to remuneration]** The trustee is entitled to receive remuneration for his services as such.

**6.138(2) [How fixed]** The remuneration shall be fixed either:

- (a) as a percentage of the value of the assets in the bankrupt's estate which are realised or distributed, or of the one value and the other in combination, or
- (b) by reference to the time properly given by the insolvency practitioner (as trustee) and his staff in attending to matters arising in the bankruptcy.

**6.138(3) [Determination under r. 6.138(2)]** Where the trustee is other than the official receiver, it is for the creditors' committee (if there is one) to determine whether his remuneration is to be fixed under paragraph (2)(a) or (b) and, if under paragraph (2)(a), to determine any percentage to be applied as there mentioned.

**6.138(4) [Matters relevant to r. 6.138(3) determination]** In arriving at that determination, the committee shall have regard to the following matters:

- (a) the complexity (or otherwise) of the case,
- (b) any respects in which, in connection with the administration of the estate, there falls on the insolvency practitioner (as trustee) any responsibility of an exceptional kind or degree,
- (c) the effectiveness with which the insolvency practitioner appears to be carrying out, or to have carried out, his duties as trustee, and
- (d) the value and nature of the assets in the estate with which the trustee has to deal.

**6.138(5) [If no committee or no determination]** If there is no creditors' committee, or the committee does not make the requisite determination, the trustee's remuneration may be fixed (in accordance with paragraph (2)) by a resolution of a meeting of creditors; and paragraph (4) applies to them as it does to the creditors' committee.

**6.138(6) [Otherwise fixed]** Where the trustee is not the official receiver and his remuneration is not fixed as above, the trustee shall be entitled to remuneration calculated in accordance with Rule 6.138A.

***[Where bankruptcy order made before 1 April 2004***

**6.138(6) [Otherwise fixed]** *If not fixed as above, the trustee's remuneration shall be on the scale laid down for the official receiver by general regulations.]*

**6.138A** Trustee's remuneration where it is not fixed in accordance with Rule 6.138

**6.138A(1)** This Rule applies where the trustee is not the official receiver and his remuneration is not fixed in accordance with Rule 6.138.

**6.138A(2)** [Application of scale] Subject to paragraph (3), the trustee shall be entitled by way of remuneration for his services as such, to such sum as is arrived at by -

- (a) first applying the realisation scale set out in Schedule 6 to the monies received by him from the realisation of the assets of the bankrupt (including any Valued Added Tax thereon but after deducting any sums paid to secured creditors and any sums spent out of money received in carrying on the business of the bankrupt); and
- (b) then by adding to the sum arrived at under sub-paragraph (a) such sum as is arrived at by applying the distribution scale set out in Schedule 6 to the value of assets distributed to creditors of the bankrupt (including sums paid in respect of preferential debts).

**6.138A(3)** [**Limit on realisation scale**] That part of the trustee's remuneration calculated by reference to the realisation scale shall not exceed such sum as is arrived at by applying the realisation scale to such part of the bankrupt's assets as are required to pay the items referred to in paragraph (4).

**6.138A(4)** The items referred to in paragraph (3) are –

- (a) the bankruptcy debts (including any interest payable by virtue of section 328(4)) to the extent required to be paid by these Rules (ignoring those debts paid otherwise than out of the proceeds of the realisation of the bankrupt's assets or which have been secured to the satisfaction of the court);
- (b) the expenses of the bankruptcy other than
  - (i) fees or the remuneration of the official receiver; and
  - (ii) any sums spent out of money received in carrying on the business of the bankrupt;
- (c) fees payable under the Insolvency Proceedings (Fees) Order 2004; and
- (d) the remuneration of the official receiver.

#### **Rule 6.139 Other matters affecting remuneration**

**6.139(1)** [**Where trustee sells for secured creditor**] Where the trustee (not being the official receiver) realises assets on behalf of a secured creditor, the trustee is entitled to such sum by way of remuneration as is arrived at by applying the realisation scale set out in Schedule 6 to the monies received by him in respect of the assets realised (including any Value Added Tax thereon).

#### ***[Where bankruptcy order made before 1 April 2004***

**6.139(1)** [**Where trustee sells for secured creditor**] *Where the trustee sells assets on behalf of a secured creditor, he is entitled to take for himself, out of the proceeds of sale, a sum by way of remuneration equivalent to the remuneration chargeable in corresponding circumstances by the official receiver under general regulations.]*



**6.139(2) [Where joint trustees]** Where there are joint trustees, it is for them to agree between themselves as to how the remuneration payable should be apportioned. Any dispute arising between them may be referred:

- (a) to the court, for settlement by order, or
- (b) to the creditors' committee or a meeting of creditors, for settlement by resolution.

**6.139(3) [If trustee is a solicitor]** If the trustee is a solicitor and employs his own firm, or any partner in it, to act on behalf of the estate, profit costs shall not be paid unless this is authorised by the creditors' committee, the creditors or the court.

#### **6.140 Recourse of trustee to meeting of creditors**

**6.140** If the trustee's remuneration has been fixed by the creditors' committee, and he considers the rate or amount to be insufficient, he may request that it be increased by resolution of the creditors.

#### **Rule 6.141 Recourse to the court**

**6.141(1) [Trustee may apply to court]** If the trustee considers that the remuneration fixed for him by the creditors' committee, or by resolution of the creditors, or as under Rule 6.138(6), is insufficient, he may apply to the court for an order increasing its amount or rate.

**6.141(2) [Notice to committee etc.]** The trustee 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.

**6.141(3) [If no committee]** If there is no creditors' committee, the trustee's notice of his application shall be sent to such one or more of the bankrupt's creditors as the court may direct, which creditors may nominate one or more of their number to appear or be represented.

**6.141(4) [Costs of application]** The court may, if it appears to be a proper case, order the costs of the trustee's application, including the costs of any member of the creditors' committee appearing or being represented on it, or any creditor so appearing or being represented, to be paid out of the estate.

#### **Rule 6.142 Creditor's claim that remuneration is excessive**

**6.142(1) [Creditor may apply to court]** Any creditor of the bankrupt may, with the concurrence of at least 25 per cent in value of the creditors (including himself), apply to the court for an order that the trustee's remuneration be reduced, on the grounds that it is, in all the circumstances, excessive.

**6.142(2) [Court may dismiss application etc.]** The court may, if it thinks that no sufficient cause is shown for the application, dismiss it; but it shall not do so unless the applicant has had an opportunity to attend the court for an *ex parte* hearing, of which he has been given at least 7 days' notice.

If the application is not dismissed under this paragraph, the court shall fix a venue for it to be heard.

**6.142(3) [Notice to trustee]** The applicant shall, at least 14 days before the hearing, send to the trustee a notice stating the venue so fixed; and the notice shall be accompanied by a copy of the application, and of any evidence which the applicant intends to adduce in support of it.

**6.142(4) [Court order]** If the court considers the application to be well-founded, it shall make an order fixing the remuneration at a reduced amount or rate.

**6.142(5) [Costs of application]** Unless the court orders otherwise, the costs of the application shall be paid by the applicant, and do not fall on the estate.

### **Voluntary Arrangements**

#### **Company Voluntary Arrangements**

##### **Rule 1.28 Fees, costs, charges and expenses**

**1.28** The fees, costs, charges and expenses that may be incurred for any of the purposes of the 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 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 as such agreed between himself and the company (or, as the case may be, payable, or correspond to those which would be payable, in an administration or winding up.

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

**1.3(2) [Other matters]** The following matters shall be stated, or otherwise dealt with, in the directors' proposal:

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

#### **Individual Voluntary Arrangements**

**5.33** Fees, costs, charges and expenses [previously rule 5.28, which still applies to pre-2003 cases]

**5.33** The fees, costs, charges and expenses that may be incurred for any purposes of the voluntary arrangement are:

- (a) any disbursements made by the nominee prior to the approval of the arrangement, and any remuneration for his services as such agreed between himself and the debtor, the official receiver or the trustee;
- (b) any fees, costs, charges or expenses which:
  - (i) are sanctioned by the terms of the arrangement, or
  - (ii) would be payable, or correspond to those which would be payable, in the debtor's bankruptcy.

## **Rule 5.3 Contents of proposal**

**5.3(2) [Other matters]** The following matters shall be stated, or otherwise dealt with, in the proposal:

...(h) the amount proposed to be paid to the nominee (as such) by way of remuneration and expenses;

(j) the manner in which it is proposed that the supervisor of the arrangement should be remunerated, and his expenses defrayed; ...

## **Receiverships**

### **Section 36 Court's power to fix remuneration**

**36(1) [Remuneration]** The court may, on an application made by the liquidator of a company, by order fix the amount to be paid by way of remuneration to a person who, under powers contained in an instrument, has been appointed receiver or manager of the company's property.

**36(2) [Extent of court's power]** The court's power under subsection (1), where no previous order has been made with respect thereto under the subsection:

- (a) extends to fixing the remuneration for any period before the making of the order or the application for it,
- (b) is exercisable notwithstanding that the receiver or manager has died or ceased to act before the making of the order or the application, and
- (c) where the receiver or manager has been paid or has retained for his remuneration for any period before the making of the order any amount in excess of that so fixed for that period, extends to requiring him or his personal representatives to account for the excess or such part of it as may be specified in the order.

But the power conferred by paragraph (c) shall not be exercised as respects any period before the making of the application for the order under this section, unless in the court's opinion there are special circumstances making it proper for the power to be exercised.

**36(3) [Variation, amendment of order]** The court may from time to time on an application made either by the liquidator or by the receiver or manager, vary or amend an order made under subsection (1).

## Appendix 2

### Practice Statement—the Fixing and Approval of the Remuneration of Appointees (2004)

*The Chief Registrar Mr Stephen Baister has issued the following Practice Statement, fixing the remuneration of appointees in insolvency proceedings, which came into force on October 1, 2004. The Practice Statement is the outcome of the work of a sub-committee of the Insolvency Court Users' Committee. The purpose of the Statement is to provide guidelines as to the approach the courts take to the fixing of remuneration so as to ensure that applications relating to remuneration are dealt with fairly as well as flexibly and so as to ensure that any remuneration which the courts are called on to assess is fixed on a reasonable and fair basis and by reference to value.*

#### General

##### 1. Definitions and Interpretation

##### 1.1 In this Practice Statement:

###### (1) "appointee" means:

- (i) a provisional liquidator appointed under Insolvency Act Section 135 of the Insolvency Act;
  - (ii) a special manager appointed under Insolvency Act Section 177 or Section 370 of the Insolvency Act;
  - (iii) a liquidator appointed by the members of a company or partnership or by the creditors of a company or partnership or by the Secretary of State pursuant to Insolvency Act Section 137 of the Insolvency Act, or by the court pursuant to Insolvency Act Section 140 of the Insolvency Act;
  - (iv) an administrator of a company appointed to manage the property, business and affairs of that company under the Insolvency Act or other enactment and to which the provisions of the Insolvency Act are applicable;
  - (v) a trustee in bankruptcy (other than the Official Receiver) appointed under the Insolvency Act;
  - (vi) a nominee or supervisor of a voluntary arrangement under Insolvency Act Part I or Part VIII of the Insolvency Act;
  - (vii) a licensed insolvency practitioner appointed by the court pursuant to Insolvency Act Section 273 of the Insolvency Act;
  - (viii) an interim receiver appointed by the court pursuant to Insolvency Act Section 286 of the Insolvency Act;
- (2) "appointment" means the appointment as an appointee;
- (3) "assessor" means a person appointed in accordance with Civil Procedure Rules Rule 35.15 of the CPR;
- (4) "CPR" means the Civil Procedure Rules 1998 (as amended);

- (5) the court” means the court exercising jurisdiction in respect of the appointment in accordance with the Insolvency Act Insolvency Act and the Insolvency Rules Insolvency Rules or other relevant enactment and/or applicable rules;
- (6) “the guiding principles” means the statements of principle contained in paragraph 3.4;
- (7) “Insolvency Act” means the Insolvency Act Insolvency Act 1986 (as amended);
- (8) “Insolvency Rules” means the Insolvency Rules Insolvency Rules 1986 (as amended);
- (9) “the objective” means the objective stated in paragraph 3.2.  
1.2 References to paragraphs are references to paragraphs of this Practice Statement.

## 2. Applicability

- 2.1 This Practice Statement shall, save to the extent and as may otherwise be ordered by the court, apply to all appointees in respect of:
  - (1) any application to the court by an appointee for the fixing and approval of his remuneration where his remuneration has not otherwise already been fixed and approved;
  - (2) any application to the court by an appointee for the fixing and approval of his remuneration in circumstances where he considers that the amount of his remuneration as fixed and approved by resolution of the members of the partnership or company or the creditors' committee or the liquidation committee or by resolution of the general body of creditors (as appropriate) is insufficient;
  - (3) any application by a person who may be permitted to apply under the Insolvency Act Insolvency Act, the Insolvency Rules Insolvency Rules, or otherwise including by reference to the jurisdiction of the court to supervise the conduct of one of its officers and the inherent jurisdiction of the Supreme Court and is dissatisfied with the remuneration of an appointee that has otherwise been fixed and approved on the basis that such remuneration is excessive.
- 2.2 This Practice Statement shall come into effect on 1 October 2004 and shall apply to all applications for the fixing and approval of the remuneration of an appointee issued after that date.

## 3. The Objective and the Guiding Principles

- 3.1 This Practice Statement is supplemental to the Insolvency Act Insolvency Act, the Insolvency Rules Insolvency Rules and such other enactments or rules as have been or may be introduced and which are relevant to the fixing and approval of the remuneration of an appointee.
- 3.2 The objective of this Practice Statement is to ensure that the remuneration of an appointee which is fixed and approved by the court is fair, reasonable and commensurate with the nature and extent of the work properly undertaken by the appointee in any given case and is fixed and approved by reference to a process which is consistent and predictable.
- 3.3 Set out below are the guiding principles by reference to which applications for the fixing and approval of the remuneration of appointees are to be considered both by applicants, in the preparation and presentation of their application, and by the court which is required to determine such applications.

3.4 The guiding principles are as follows:

- (1) "Justification": It is for the appointee who seeks to be remunerated at a particular level and/or in a particular manner to justify his claim and in order to do so the appointee should be prepared to provide full particulars of the basis for and the nature of his claim for remuneration.
- (2) "The benefit of the doubt": The corollary of guiding principle (1) is that on any application for the fixing and approval of the remuneration of an appointee, if after considering the evidence before it and after having regard to the guiding principles (in particular guiding principle (3)), the matters contained in paragraph 5.2 (in particular paragraph 5.2(10)) and the matters referred to in paragraph 5.3 (as appropriate) there remains any element of doubt as to the appropriateness, fairness or reasonableness of the amount sought to be fixed and approved (whether arising from a lack of particularity as to the basis for and the nature of the appointee's claim to remuneration or otherwise) such element of doubt should be resolved by the court against the appointee.
- (3) "Professional integrity": The court should give weight to the fact that the appointee is a member of a regulated profession (where such is the case) and as such is subject to rules and guidance as to professional conduct and (where such is the case) the fact that the appointee is an officer of the court;
- (4) "The value of the service rendered": the remuneration of an appointee should reflect and should be fixed and approved so as to reward the value of the service rendered by the appointee, not simply to reimburse the appointee in respect of time expended and cost incurred.
- (5) "Fair and reasonable": the amount of the remuneration to be fixed and approved by the court should be fair and reasonable and represent fair and reasonable remuneration for the work properly undertaken or to be undertaken.
- (6) "Proportionality":
  - (i) "proportionality of information": in considering the nature and extent of the information which should be provided by an appointee in respect of an application for the fixing and approval of his remuneration the court, the appointee and any other parties to the application shall have regard to what is proportionate by reference to the amount of remuneration to be fixed and approved, the nature, complexity and extent of the work to be completed (where the application relates to future remuneration) or that has been completed by the appointee and the value and nature of the assets and liabilities with which the appointee will have to deal or has had to deal;
  - (ii) "proportionality of remuneration": the amount of remuneration to be fixed and approved by the court should be proportional to the nature, complexity and extent of the work to be completed (where the application relates to future remuneration) or that has been completed by the appointee and the value and nature of the assets and/or potential assets and the liabilities and/or potential liabilities with which the appointee will have to deal or has had to deal, the nature and degree of the responsibility to which the appointee has been subject in any given case, the nature and extent of the risk (if any) assumed by the appointee and the efficiency (in respect of both time and cost) with which the appointee has completed the work undertaken;
- (7) "Professional guidance": In respect of an application for the fixing and approval of the remuneration of an appointee, the appointee may have regard to the relevant and

current statements of practice promulgated by any relevant regulatory and professional bodies in relation to the fixing and approval of the remuneration of an appointee. In considering an application for the fixing or approval of the remuneration of an appointee, the court may also have regard to such statements of practice and the extent of compliance with such statements of practice by the appointee.

- (8) “Impracticability”: where the appointee has not, either upon or shortly after the commencement of his appointment, sought to have the basis upon which his remuneration is to be fixed approved by the members of the partnership or the company, the creditors' committee, the liquidation committee or the general body of creditors (as appropriate) and in circumstances where the appointee considers that it will be impracticable to have his remuneration fixed and/or approved in such a manner, he may, as soon as reasonably practicable after his appointment, apply to the court to have the basis upon which he is to be remunerated fixed and for directions as to the manner in which his remuneration is to be approved (which may include provision for payments to be made on account). In circumstances where such an application may be made, to the extent that such an application is not made but the appointee subsequently makes an application to the court for the fixing and approval of the whole or any part of his remuneration, an explanation as to why no earlier application was made shall be provided to the court. The Fixing and Approval of Remuneration

#### 4. Distribution of Business

- 4.1 All applications for the fixing and approval of the remuneration of an appointee shall in the first instance (unless otherwise ordered by the court, having regard to the particular circumstances of an application) be made, where the court is the High Court to a Registrar or a District Judge in the appropriate District Registry of the High Court or, where the court is a County Court, a District Judge in the appropriate County Court.
- 4.2 On the hearing of the application the court shall consider the evidence then available to it and may either summarily determine the application or adjourn it giving such directions as it thinks appropriate. Such directions may include a direction that:
- (1) an assessor or a Costs Judge prepare a report to the court in respect of the remuneration which is sought to be fixed and approved; and/or
  - (2) the application be heard by the Registrar or the District Judge sitting with or without an assessor or a Costs Judge or by a Judge sitting with or without an assessor or a Costs Judge.
- 4.3 In the usual course an application for the fixing and approval of the remuneration of an appointee should be determined by a Registrar or a District Judge sitting without an assessor or a Costs Judge and without the need for a report from an assessor or a Costs Judge.
- 4.4 The court may give the directions referred to in paragraphs 4.2(1) and (2) where it considers this to be appropriate having regard to the size and complexity of the case or in the event that the application gives rise to complicated issues of fact or of law. The court ought only to make an order for the involvement of a Costs Judge in circumstances where it considers the involvement of an assessor is (for whatever reason) not appropriate and that the application can only properly be determined by reference to the particular expertise and assistance that can be provided by a Costs Judge.
- 4.5 A list of suitably qualified persons appointed by the court to act as assessors in respect of applications for the fixing and approval of the remuneration of an appointee is available from the court.

4.6 The reasonable costs of an assessor appointed by the court shall be paid from the assets under the control of the appointee.

## 5. Relevant Criteria and Procedure

5.1 When considering an application for the fixing and approval of the remuneration of an appointee the court shall have regard to the objective, the guiding principles and all relevant circumstances including the matters referred to in paragraph 5.2 and where appropriate paragraph 5.3, each of which should be addressed in the evidence placed before the court.

5.2 On any application for the fixing and approval of the remuneration of an appointee, the appointee should:

- (1) Provide a narrative description and explanation of
  - (i) the background to, the relevant circumstances of and the reasons for the appointment;
  - (ii) the work undertaken or to be undertaken in respect of the appointment and in respect of which work the remuneration of the appointee is sought to be fixed and approved, which description should be divided, insofar as possible, into individual tasks or categories of task. General descriptions of work, tasks, or categories of task should (insofar as possible) be avoided;
  - (iii) the reasons why it is or was considered reasonable and/or necessary and/or beneficial for such work to be conducted, giving details of why particular tasks or categories of task were undertaken and why such tasks or categories of task are to be undertaken or have been undertaken by particular individuals and in a particular manner;
  - (iv) the amount of time to be spent or that has been spent in respect of work to be completed or that has been completed and in respect of which the fixing and approval of remuneration is sought and which it is considered is fair, reasonable and proportionate;
  - (v) what is likely to be and has been achieved, the benefits that are likely to and have accrued as a consequence of the work that is to be or has been completed, the manner in which the work required in respect of the appointment is progressing and what, in the opinion of the appointee, remains to be achieved.
- (2) Provide details sufficient for the court to determine the application by reference to the criteria which is required to be taken into account by reference to the Insolvency Rules and any other applicable enactments or rules relevant to the fixing and approval of the remuneration of an appointee.
- (3) Provide a statement of the total number of hours of work undertaken or to be undertaken in respect of which the fixing and approval of remuneration is sought, together with a breakdown of such hours by individual member of staff and individual tasks or categories of tasks to be performed or that have been performed. Details should also be given of:
  - (i) the tasks or categories of tasks to be undertaken as a proportion of the total amount of work to be undertaken in respect of which the fixing and approval of remuneration is sought and the tasks or categories of tasks that have been undertaken as a proportion of the total amount of work that has been undertaken in respect of which the fixing and approval of remuneration is sought; and



- (ii) the tasks or categories of task to be completed by individual members of staff or grade of personnel including the appointee as a proportion of the total amount of work to be completed by all members of staff including the appointee in respect of which the fixing and approval of remuneration is sought, or the tasks or categories of task that have been completed by individual members of staff or grade of personnel as a proportion of the total amount of work that has been completed by all members of staff including the appointee in respect of which the fixing and approval of remuneration is sought.
- (4) Provide a statement of the total amount to be charged for the work to be undertaken or that has been undertaken in respect of which the fixing and approval of remuneration is sought which should include:
  - (i) a breakdown of such amounts by individual member of staff and individual task or categories of task performed;
  - (ii) details of the time expended and the remuneration charged in respect of each individual task or category of task as a proportion (respectively) of the total time expended and the total remuneration charged. In respect of an application pursuant to which the amount of the appointee's remuneration is to be fixed and approved on the basis of a percentage of the value of the assets realised and/or distributed, the appointee shall provide (for the purposes of comparison) the same details as are required by this paragraph (4), but on the basis of what would have been charged had he been seeking remuneration on the basis of the time properly spent by him and his staff.
- (5) Provide details of each individual to be engaged or who has been engaged in work in respect of the appointment and in respect of which the fixing and approval of remuneration is sought, including details of their relevant experience, training, qualifications and the level of their seniority.
- (6) Provide an explanation of:
  - (i) the steps, if any, to be taken or that have been taken by the appointee to avoid duplication of effort and cost in respect of the work to be completed or that has been completed in respect of which the fixing and approval of the remuneration is sought; and
  - (ii) the steps to be taken or that have been taken to ensure that the work to be completed or that has been completed is to be or was undertaken by individuals of appropriate experience and seniority relative to the nature of the work to be or that has been undertaken.
- (7) Provide details of the individual rates charged by the appointee and members of his staff in respect of the work to be completed or that has been completed and in respect of which the remuneration is sought to be fixed and approved. Such details should include:
  - (i) a general explanation of the policy adopted in relation to the fixing or calculation of such rates;
  - (ii) in relation to charges in respect of secretarial, administrative and cashiering services (and/or such other charges as might also otherwise be regarded as an overhead cost forming a component part of the rates charged by the appointee and members of his staff), an explanation as to why (where this is the case) such costs are to be or have been charged for separately together

with confirmation that where such work is to be or has been charged for separately such work will not or has not also been charged for as part of the rates that are to be or have been charged by the appointee and/or members of his staff;

- (iii) a description of the manner in which the appointee and members of his staff record the nature of the work they will undertake or have undertaken in respect of which the fixing and approval of remuneration is sought and the manner in which the amount of time spent in carrying out such work is recorded. This explanation should include, in circumstances where time is charged for on the basis of a unit of time a description of such unit and the practice and policy applied in recording time spent by reference to that unit. As regards sub-paragraphs (i) to (iii) of this paragraph (7) only sub-paragraph (iii) shall apply to applications to which paragraph 5.3 applies.
- (8) Where the application for the fixing and approval of remuneration is in respect of a period of time during which the charge out rates of the appointee and/or members of his staff engaged in work in respect of the appointment have increased, provide an explanation of the nature, extent and reason for such increase and the date when such increase took effect. This paragraph (8) does not apply to applications to which paragraph 5.3 applies.
- (9) Provide details of any remuneration previously fixed and approved in relation to the appointment (whether by the court or otherwise) including in particular the amounts that were previously sought to be fixed and approved and the amounts that were in fact fixed and approved and the basis upon which such amounts were fixed and approved.
- (10) In order that the court may be able to consider the views of those persons which the appointee considers have an interest in the assets that are under his control, provide details of:
  - (i) what (if any) consultation has taken place between the appointee and those persons and if no such consultation has taken place an explanation should be given as to the reason why; and
  - (ii) the number and value of the interests of the persons consulted including details of the proportion (by number and by value) of the interests of such persons by reference to the entirety of those persons having an interest in the assets under the control of the appointee.
- (11) Provide such other relevant information as the appointee considers, in the circumstances, ought to be provided to the court.

5.3 This paragraph applies to applications where the remuneration of the appointee is to be fixed and approved on the basis of a percentage of the value of the assets realised and/or distributed. On such applications in addition to the matters referred to in paragraph 5.2 (as applicable) the appointee shall:

- (1) Provide a full description of the basis of and reasons for his remuneration being sought to be fixed and approved by reference to a percentage of the value of the assets realised and/or distributed.
- (2) Provide a full explanation of the basis upon which the percentage rates to be applied to the values of the assets realised and/or distributed have been chosen.

- (3) Provide a statement that to the best of the appointee's belief the percentage rates which are sought to be applied are similar to the percentage rates that are applied or have been applied in respect of other appointments of a similar nature.
  - (4) By reference to the matters contained in paragraph 5.2 (as applicable), provide a comparison of the amount to be charged by reference to a percentage of the value of the assets realised and/or distributed and an estimate of the amount that would otherwise have been charged if the remuneration was to be fixed by reference to the time properly given by him and his staff.
  - (5) Provide a comparison between the amounts to be charged by reference to a percentage of the value of the assets realised and/or distributed using the percentage rates sought to be fixed and approved by the court and the percentage rates provided for by the scale of fees referred to in Insolvency Rules Schedule 6 to the Insolvency Rules.
- 5.4 If and insofar as any of the matters referred to in paragraph 5.2 or 5.3 (as appropriate) are not addressed in the evidence placed before the court on the hearing of an application for the fixing and approval of the remuneration of an appointee an explanation for why this is the case should be included in such evidence.
- 5.5 Notwithstanding that the expenses and disbursements of the appointee and his staff are not required to be approved by the court on any application by the appointee for the fixing and approval of his remuneration, a summary of the amount and nature of such expenses and disbursements incurred during the relevant period should be provided as should an explanation of the steps taken by the appointee to subject such expenses and disbursements to critical scrutiny.
- 5.6 There should be included in the evidence placed before the court by the appointee in respect of any application for the fixing and approval of the remuneration of an appointee the following documents:
  - (1) A copy of the most recent receipts and payments account;
  - (2) Copies of any reports by the appointee to the persons having an interest in the assets under his control relevant to the period for which the remuneration sought to be fixed and approved relates;
  - (3) Schedules or such other representations of the information referred to in paragraphs 5.2 and 5.3 such as are likely to be of assistance to the court in fixing and approving the remuneration of the appointee.
  - (4) Evidence of consultation with those persons having an interest in the assets under the control of appointee in relation to the fixing and approval of the remuneration of the appointee.
- 5.7 On any application for the fixing and approval of remuneration of an appointee the court may make an order permitting payments of remuneration to be made on account subject to final approval whether by the court or otherwise.
- 5.8 Unless otherwise ordered by the court (or as may otherwise be provided for in any enactment or rules of procedure) the costs of and occasioned by an application for the fixing and/or approval of the remuneration of an appointee shall be paid from the assets under the control of the appointee.