

IP's remuneration in the news (again). All change in October 2015?

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The Case Study

Facts

Reliable Electronic Equipment Ltd is an English company. It is based in the South West of England, but it has a national presence. The Company's business involves the manufacture and sale of electronic equipment ("gadgets") to individuals and companies. Every time it sells a gadget, the Company offers a 2-year warranty to the relevant customer.

The Company relies heavily on bank finance. It has a banking relationship with ABC Bank Plc consisting of current accounts which have overdrafts. It also has some loans outstanding with ABC Bank Plc. The bank has a standard debenture over all of the company's assets. The bank has the benefit of a qualifying floating charge.

Trouble on the horizon

In the last year, a competitor company based abroad has started selling similar gadgets to those sold by the company, but at lower prices. This has placed some strain on the company's turnover since the company's sales have nosedived. ABC Bank plc is getting worried.

ABC Bank plc wishes to stress test the Company's business and so the bank is looking to appoint some insolvency practitioners to undertake an independent business review. The IBR will be undertaken with an eye on a possible appointment of insolvency practitioners as administrators under the bank's qualifying floating charge. Smith & John insolvency practitioners tender for the work. The tender is successful, and individuals at Smith & John are appointed as administrators. They are considering, with their lawyers, how to deal with their remuneration:

- Who will fix the administrators' remuneration?
- Do they need to do a fee estimate?

Fees estimate is wrong

Smith & John's fee estimate is approved. Smith & John have managed to sell the Company's business. In the meantime, customers who have bought gadgets and are worried about the strength of their warranties have been bombarding the administrators' staff with enquiries. The administrators quickly realise that their fee estimate is likely to turn out to be incorrect.

- What should they do?
- Who decides whether to approve the increased fees?
- Does it make a difference that the warranties were in existence at the time that the appointment was made?
- Does it make a difference if the administrators knew that there were 000s of warranty creditors, but that they were misinformed and there were in fact 0000s.
- Since their fees were approved, the administrators have identified new assets which they wish to investigate (e.g. causes of action against the directors, or equipment which hadn't been disclosed). How should they deal with that?
- Should the administrators wait to receive the approval before undertaking the work?

A subsidiary undertaking

It turns out that the Company has a subsidiary: Reliable Electronic Equipment (Marketing) Limited. The subsidiary is responsible for and undertakes all manner of marketing activities on behalf of the company. The subsidiary's principal source of income is based on fees paid by the company.

With the company's business now (finally) having been sold to a new and unconnected third party (which has its own internal marketing division), the subsidiary's role is obsolete. It is also insolvent. It is necessary for it to go into a formal process. Smith & John, who have general familiarity with the company and the subsidiary's business consider that the most appropriate process is a CVL. They take steps to call a creditors' meeting.

An angry creditor (of both the company and the subsidiary), Out of the Money Limited, is dissatisfied with the performance of Smith & John, and wishes to ensure that new and independent IPs are appointed over the subsidiary: Able, Brilliant and Cracking Insolvency Practitioners. Out of the Money Limited does not command 50% of the unsecured creditor vote in the subsidiary though. In order to get other creditors on board, it is necessary for Able, Brilliant and Cracking's fee quote to be competitive. They produce a fee quote. They don't have enough time to prepare a fee estimate though.

At the s.98 meeting, a sufficient quantity of creditors are impressed with the Able, Brilliant and Cracking's overall pitch and (very low) fee quote that they vote to appoint individuals from Able, Brilliant and Cracking as liquidators. The newly appointed liquidators very quickly realise that their fee quote was much too low, and when it comes to producing a fee estimate, the creditors (even those who voted for their appointment) reject the remuneration resolution.

- What should the liquidators do?
- If the court were to become seised of the remuneration issue, how is it likely to approach the fact that there is a discrepancy between the quote and the estimate, is it even relevant?

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Andy Beckingham (Leonard Curtis)
May 2015

2015 No. 443

INSOLVENCY, ENGLAND AND WALES

The Insolvency (Amendment) Rules 2015

Made

2nd March 2015

Laid before Parliament

3rd March 2015

Coming into force

for the purpose of Rules 1 and 13

6th April 2015

Remainder

1st October 2015

The Lord Chancellor has consulted the committee existing for the purposes of section 413 of the Insolvency Act 1986 (“the Act”).

The Lord Chancellor makes the following Rules in exercise of the powers conferred by sections 411 and 412 of the Act with the concurrence of the Secretary of State and with the concurrence of the Chancellor of the High Court (nominated by the Lord Chief Justice under section 411(7) of the Act) in relation to those Rules which affect court procedure.

Citation, commencement and interpretation

1.—(1) These Rules may be cited as the Insolvency (Amendment) Rules 2015.

(2) Rules 1 and 13 will come into force on 6th April 2015 and all other Rules will come into force on 1st October 2015.

(3) In these Rules “the 1986 Rules” means the Insolvency Rules 1986.

Amendments to the 1986 Rules

2. In Rule 2.47 (reports to creditors) of the 1986 Rules after paragraph (1)(dc) insert—

“(dd)a statement setting out whether as at the date of the report—

(i)the remuneration anticipated to be charged by the administrator is likely to exceed the fees estimate or any approval given under Rule 2.109AB,

(ii)the expenses incurred or anticipated to be incurred are likely to exceed, or have exceeded, the details given to the creditors prior to the determination of the basis of remuneration, and

(iii)the reasons for that excess;”.

3.—(1) Rule 2.106 (fixing of remuneration) of the 1986 Rules is amended as follows.

(2) In paragraph (2)(b)—

(a)omit “(as administrator)”, and

(b)for “arising in the administration” substitute “as set out in the fees estimate”.

(3) After paragraph (2) insert—

“(2A) Where the administrator proposes to take all or any part of the remuneration on the basis set out in paragraph (2)(b), the administrator must, prior to the determination of which of the bases set out in paragraph (2) are to be fixed, give to each creditor of the company of whose claim and address the administrator is aware—

(a)the fees estimate, and

(b)details of the expenses the administrator considers will be, or are likely to be, incurred.

(2B) The fees estimate and details of expenses given under paragraph (2A) may include remuneration anticipated to be charged and expenses anticipated to be incurred if the administrator becomes the liquidator where the administration moves into winding up.

(2C) Save where the administrator has given the information under paragraph (2A), the administrator must, prior to the determination of which of the bases set out in paragraph (2) are to be fixed, give to each creditor of the company of whose claim and address the administrator is aware, details of—

(a)the work the administrator proposes to undertake, and

(b)the expenses the administrator considers will be, or are likely to be, incurred.”.

(4) In paragraph (6), for “(3)” substitute “(3C)”.

4. After Rule 2.109A (review of remuneration) of the 1986 Rules insert—

“Exceeding the fees estimate

2.109AB.—(1) The administrator’s remuneration must not exceed the total amount set out in the fees estimate without approval.

(2) The request for approval must be made—

(a)where the creditors’ committee fixed the basis, to the committee;

(b)where the creditors fixed the basis, to the creditors;

(c)where the court fixed the basis, by application to the court;

and Rules 2.106 to 2.109 apply as appropriate.

(3) The request for approval must specify—

(a)the reasons why the administrator has exceeded, or is likely to exceed, the fees estimate;

- (b) the additional work the administrator has undertaken or proposes to undertake;
- (c) the hourly rate or rates the administrator proposes to charge for each part of that additional work;
- (d) the time that additional work has taken or the administrator anticipates that work will take;
- (e) whether the administrator anticipates that it will be necessary to seek further approval; and
- (f) the reasons it will be necessary to seek further approval.”.

5. After Rule 2.109C (apportionment of set fee remuneration) of the 1986 Rules insert—

“Application of Rules 2.109A, 2.109AB and 2.109C where a company subsequently can make a distribution to unsecured creditors

2.109D.—(1) This Rule applies where—

- (a) the basis of remuneration has been fixed in accordance with Rule 2.106(5A);
- (b) the administrator now thinks that the company has sufficient property to enable a distribution to be made to unsecured creditors other than by virtue of section 176A(2)(a); and
- (c) the administrator makes—
 - (i) a request under Rule 2.109A or 2.109AB; or
 - (ii) an application under Rule 2.109C.

(2) The request under Rules 2.109A and 2.109AB must be made—

- (a) where there is a creditors’ committee, to the committee; or
 - (b) where there is no creditors’ committee, to the creditors under Rule 2.106(5);
- and Rule 2.106(5A) will not apply.

(3) The application under Rule 2.109C must be made—

- (a) where there is a creditors’ committee, to the committee; or
 - (b) where there is no creditors’ committee, to the creditors under Rule 2.106(5);
- and Rule 2.106(5A) will not apply.”.

6. In Rule 4.49B (reports to creditors and members – winding up by the courts) of the 1986 Rules after paragraph (1)(f) insert—

“(fa) a statement setting out whether as at the date of the report—

- (i) the remuneration anticipated to be charged by the liquidator is likely to exceed the fees estimate or any approval given under Rule 4.131AB,
- (ii) the expenses incurred or anticipated to be incurred are likely to exceed, or have exceeded, the details given to the creditors prior to the determination of the basis of remuneration, and

(iii)the reasons for that excess;”.

7.—(1) Rule 4.127 (fixing of remuneration) of the 1986 Rules is amended as follows.

(2) In paragraph (2)(b) after “arising in the winding up” add “as set out in the fees estimate”.

(3) After paragraph (2) insert—

“(2A) Where the liquidator proposes to take all or any part of the remuneration on the basis set out in paragraph (2)(b), the liquidator must, prior to the determination of which of the bases set out in paragraph (2) are to be fixed, give to each creditor of the company of whose claim and address the liquidator is aware—

(a)the fees estimate, and

(b)details of the expenses the liquidator considers will be, or are likely to be, incurred.

(2B) Save where the liquidator has given the information under paragraph (2A), the liquidator must, prior to the determination of which of the bases set out in paragraph (2) are to be fixed, give to each creditor of the company of whose claim and address the liquidator is aware, details of—

(a)the work the liquidator proposes to undertake, and

(b)the expenses the liquidator considers will, or are likely to be, incurred.”.

8. After Rule 4.131A (review of remuneration) of the 1986 Rules insert—

“Exceeding the fees estimate

4.131AB.—(1) The liquidator’s remuneration must not exceed the total amount set out in the fees estimate without approval.

(2) The request for approval must be made—

(a)where the liquidation committee fixed the basis, to the committee;

(b)where the creditors fixed the basis, to the creditors;

(c)where the court fixed the basis, by application to the court;

and Rules 4.127 to 4.131 apply as appropriate.

(3) The request for approval must specify—

(a)the reasons why the liquidator has exceeded, or is likely to exceed, the fees estimate;

(b)the additional work the liquidator has undertaken or proposes to undertake;

(c)the hourly rate or rates the liquidator proposes to charge for each part of that additional work;

(d)the time that additional work has taken or the liquidator anticipates that work will take;

(e)whether the liquidator anticipates that it will be necessary to seek further approval; and

(f)the reasons it will be necessary to seek further approval.”.

9. After Rule 4.131C (apportionment of set fee remuneration) of the 1986 Rules insert—

“Application of Rules 4.131A, 4.131AB and 4.131C where a company subsequently can make a distribution to unsecured creditors

4.131D.—(1) This Rule applies where—

- (a) the basis of remuneration has been fixed in accordance with Rule 2.106(5A);
- (b) the liquidator now thinks that the company has sufficient property to enable a distribution to be made to unsecured creditors other than by virtue of section 176A(2)(a); and
- (c) the liquidator makes—
 - (i) a request under Rule 4.131A or 4.131AB; or
 - (ii) an application under Rule 4.131C.

(2) The request under Rules 4.131A and 4.131AB must be made—

- (a) where there was a creditors’ committee, to the liquidation committee; or
- (b) where there was no creditors’ committee, to the creditors under Rule 4.127(5).

(3) The application under Rule 4.131C must be made—

- (a) where there was a creditors’ committee, to the liquidation committee; or
- (b) where there was no creditors’ committee, to the creditors under Rule 4.127(5);”

10. In Rule 6.78A (reports to creditors) of the 1986 Rules after paragraph (1)(f) insert—

“(fa) a statement setting out whether as at the date of the report—

- (i) the remuneration anticipated to be charged by the trustee is likely to exceed the fees estimate or any approval given under Rule 6.142AB,
- (ii) the expenses incurred or anticipated to be incurred are likely to exceed, or have exceeded, the details given to the creditors prior to the determination of the basis of remuneration, and
- (iii) the reasons for that excess;”.

11.—(1) Rule 6.138 (fixing of remuneration) of the 1986 Rules is amended as follows.

(2) In paragraph (2)(b) after “arising in the bankruptcy” add “ as set out in the fees estimate”.

(3) After paragraph (2), insert—

“(2A) Where the trustee proposes to take all or any part of the remuneration on the basis set out in paragraph (2)(b), the trustee must, prior to the determination of which of the bases set out in paragraph (2) are to be fixed, give to each creditor of the company of whose claim and address the trustee is aware—

- (a) the fees estimate, and
- (b) details of the expenses the trustee considers will be, or are likely to be, incurred.

(2B) Save where the trustee has given the information under paragraph (2A), the trustee must, prior to the determination of which of the bases set out in paragraph (2) are to be fixed, give to each creditor of the company of whose claim and address the trustee is aware, details of—

- (a) the work the trustee proposes to undertake, and
- (b) the expenses the trustee considers will be, or are likely to be, incurred.”.

12. After Rule 6.142A (review of remuneration) of the 1986 Rules insert—

“Exceeding the fees estimate

6.142AB.—(1) The trustee’s remuneration must not exceed the total amount set out in the fees estimate without approval.

(2) The request for approval must be made—

- (a) where the creditors’ committee fixed the basis, to the committee;
- (b) where the creditors fixed the basis, to the creditors;
- (c) where the court fixed the basis, by application to the court;

and Rules 6.138 to 6.142 apply as appropriate.

(3) The request for approval must specify—

- (a) the reasons why the trustee has exceeded, or is likely to exceed, the fees estimate;
- (b) the additional work the trustee has undertaken or proposes to undertake;
- (c) the hourly rate or rates the trustee proposes to charge for each part of that additional work;
- (d) the time that additional work has taken or the trustee anticipates that work will take;
- (e) whether the trustee anticipates that it will be necessary to seek further approval; and
- (f) the reasons it will be necessary to seek further approval.”.

13. Rule 7.11(3) (general power of transfer) of the 1986 Rules is amended by the insertion after “may be commenced under the Act” of the words “or to the County Court at Central London”.

14. In Rule 13.13 (expressions used generally) of the 1986 Rules after paragraph 18 insert—

“(18A) “Fees estimate” means a written estimate that specifies—

- (a) details of the work the insolvency practitioner and his staff propose to undertake,
- (b) the hourly rate or rates the insolvency practitioner and his staff propose to charge for each part of that work,
- (c) the time the insolvency practitioner anticipates each part of that work will take,
- (d) whether the insolvency practitioner anticipates it will be necessary to seek approval or further approval under Rule 2.109AB, 4.131AB or 6.142AB, and

(e)the reasons it will be necessary to seek such approval under these Rules.”.

Transitional provisions

15.—(1) The amendments made by Rules 2 to 12 and Rule 14 apply where—

- (a)the appointment of an administrator takes effect,
- (b)a liquidator is nominated under section 100(2), or 139(3) of the Act (4),
- (c)a liquidator is appointed under section 139(4) or 140 of the Act,
- (d)a person is directed by the court or appointed to be liquidator under section 100(3) of the Act,
- (e)a liquidator is nominated or the administrator becomes the liquidator under paragraph 83(7) of Schedule B1(5) to the Act, or
- (f)a trustee of a bankrupt’s estate is appointed,

on or after 1st October 2015.

(2) Rule 4.127(5A) of the 1986 Rules does not apply where an administrator is appointed prior to 1st October 2015 and—

- (a)a company which is in administration moves into winding up under paragraph 83 of Schedule B1 to the Act and the administrator becomes the liquidator, or
- (b)a winding-up order is made immediately upon the appointment of an administrator ceasing to have effect and the court under section 140(1) appoints as liquidator the person whose appointment as administrator has ceased to have effect,

on or after 1st October 2015.

Signed by authority of the Lord Chancellor

Shailesh Vara
Parliamentary Under Secretary of State
Ministry of Justice

26th February 2015

I concur, by the authority of the Lord Chief Justice

Terence Etherton
Chancellor of the High Court

27th February 2015

I concur, on behalf of the Secretary of State

Jo Swinson
Parliamentary Under Secretary of State for Employment Relations and Consumer Affairs
Department for Business, Innovation and Skills

2nd March 2015

EXPLANATORY NOTE

(This note is not part of the Rules)

These Rules make amendments to the Insolvency Rules 1986 ([S.I. 1986/1925](#)) (the “1986 Rules”).

Rules 2, 6 and 10 insert a requirement into Rules 2.47, 4.49B and 6.78A (reports to creditors) of the 1986 Rules. They provide that an administrator, liquidator or trustee in bankruptcy must give a statement in their progress reports stating whether their remuneration as set out in the fees estimate or any approval to increase that estimate or their expenses are likely to exceed the details provided to the creditors and the reasons for this. A fees estimate is defined by Rule 13.13(18A).

Rules 3, 7 and 11 amend Rules 2.106, 4.127 and 6.138 (fixing of remuneration) of the 1986 Rules. Where an administrator, liquidator or trustee in bankruptcy proposes to take any part of their remuneration by reference to time and rate they must provide a fees estimate to each creditor and details of the anticipated expenses prior to the setting of that basis. Where they only propose to take their remuneration as a percentage of value of the assets or as a set amount they must give details of the work they propose to undertake for that fee and the anticipated expenses prior to the setting of the basis.

Rule 3 also makes a minor amendment to rule 2.106(6) to correct an omission.

Rules 4, 8 and 12 insert new Rules after Rules 2.109A, 4.131A and 6.142A of the 1986 Rules. An administrator, liquidator and trustee in bankruptcy must seek approval for remuneration in excess of the fees estimate. The rules set out the process and the information that must be provided to the creditors.

Rule 5 inserts a new Rule after Rule 2.109C of the 1986 Rules and Rule 9 inserts a similar Rule after Rule 4.131C. The new Rules apply where an administrator makes a request or application under Rules 2.109A, 2.109AB or 2.109C of the 1986 Act or a liquidator makes a request or application under Rules 4.131A, 4.131AB or 4.131C, the basis having previously been approved by the secured creditors or by the secured and preferential creditors under Rule 2.106(5A). If the administrator or liquidator considers that there are sufficient assets to make a distribution to the unsecured creditors in addition to their statutory entitlement, Rule 5 sets out to whom that request or application should be made notwithstanding the previous statement under paragraph 52(1)(b) of Schedule B1 to the Act.

Rule 13 amends Rule 7.11(3) of the 1986 Rules. Rule 7.11(1) of the 1986 Rules enables the High Court to transfer winding-up proceedings to a specified county court hearing centre. Rule 7.11(3) limits the hearing centres to which a transfer may be made to county court hearing centres in which proceedings to wind up companies may be commenced. This will enable winding up proceedings additionally to be transferred to the County Court at Central London.

Rule 14 inserts a definition of fees estimate into Rule 13.13 of the 1986 Rules.

Rule 15 makes transitional provisions.

A full impact assessment of the effect that the instrument will have on the costs of business and the voluntary sector is available from The Insolvency Service, 4 Abbey Orchard Street, London SW1P 2HT and is published on

The Insolvency Service website www.gov.uk/government/organisations/insolvency-service. It is also published with the Explanatory Memorandum alongside the instrument on www.legislation.gov.uk.

