

A CREDITORS' GUIDE TO REMUNERATION OF TRUSTEES IN BANKRUPTCY

SCOTLAND

1. Introduction

- 1.1 When an individual becomes bankrupt the costs of the bankruptcy proceedings are paid out of his or her assets in priority to creditors' claims. The creditors, who hope to recover some of their debts out of the assets, therefore have a direct interest in the level of costs, and in particular the remuneration of the insolvency practitioner appointed to act as trustee. The insolvency legislation recognises this interest by providing mechanisms for creditors to determine the basis of the trustee's remuneration. This guide is intended to help creditors to be aware of their rights to approve and monitor remuneration and outlays and explain the basis on which remuneration and outlays are fixed.

2. Sequestration procedure

- 2.1 Sequestration is the court procedure for the administration of the affairs of an insolvent individual by a trustee in the interests of his creditors generally. The trustee's role is to preserve the debtor's estate until the assets can be realised and distributed among the creditors in a prescribed order of priority. Sequestration proceedings commence when an Award of Sequestration is made by the court as a result of a petition to the court at the instance of a creditor or a Trustee, or an application to the Accountant in Bankruptcy at the instance of the debtor. The petition for sequestration may nominate a trustee who may be appointed as interim trustee, who must be a registered insolvency practitioner authorised by a recognised professional body or the Secretary of State, or the Accountant in Bankruptcy.
- 2.2 In certain cases no trustee is nominated in the petition or application for sequestration in which case the Accountant in Bankruptcy automatically becomes the trustee. The Accountant in Bankruptcy is an officer of the court appointed by the Secretary of State and will advise creditors within 60 days of the date award of sequestration as to whether he intends to call a statutory meeting.

3. Commissioner/s

- 3.1 At the statutory meeting of creditors, or any subsequent meeting of creditors, the creditors or their mandatories have the right to appoint from amongst themselves a commissioner or commissioners (not more than five) to represent their interests throughout the sequestration process.
- 3.2 The trustee may call a meeting of commissioners at any time but he must hold one when required to do so by an order of the court or when the Accountant in Bankruptcy or any commissioner asks for one.
- 3.3 The trustee is required to report to the commissioners every 6 months on the progress of the sequestration. This provides an opportunity for the commissioners to monitor and discuss progress made and the level of the trustee's fees.

4. Fixing the trustee's remuneration

- 4.1 The basis for fixing the trustee's remuneration and outlays is set out in Section 53 of the Bankruptcy (Scotland) Act 1985 (as amended) ("the Bankruptcy Act"). This section states that remuneration may be a commission calculated by reference to the value of the assets which are realised but that there shall be taken into account the work which, having regard to that value, was reasonably undertaken and the extent of the trustee's responsibilities in administering the estate.

- 4.2 If there are no commissioners, or the commissioners do not make the requisite determination, the level of the trustee's remuneration is determined by the Accountant in Bankruptcy.
- 4.3 In fixing the trustee's remuneration for the final period the commissioners will require to take into account the trustee's best estimate of work required to conclude the case. The commissioners may also take into account any adjustment necessary relative to remuneration fixed in respect of a prior period when fixing the remuneration for any period.
- 4.4 In cases where a replacement trustee is elected at the statutory meeting of creditors and subsequently that election is confirmed by the Sheriff, the remuneration and outlays of the original trustee are fixed by the Accountant in Bankruptcy in accordance with Sections 26 and 26A of the Bankruptcy Act.

5. What information should be provided by the trustee?

- 5.1 When seeking agreement to his remuneration and outlays, the trustee should provide sufficient supporting information to enable the commissioners or the Accountant in Bankruptcy to form a judgement as to whether the proposed remuneration and outlays are reasonable, having regard to all the circumstances of the case. The trustee should always make available an up to date receipts and payments account. Where the remuneration is to be charged on a time basis the trustee should be prepared to disclose the amount of time spent on the case and the charge-out value of the time spent, together with such additional information as may reasonably be required having regard to the size and complexity of the case. Where the remuneration is charged on a percentage basis, the trustee should provide details of any work which has been or is intended to be contracted out which would normally be undertaken directly by a trustee or his staff.
- 5.2 Where a trustee makes, or proposes to make, a separate charge by way of outlays to recover the cost of facilities provided by his own firm, such as room hire, document storage or communication facilities (category 2 disbursements), he should disclose those charges to the commissioners or the Accountant in Bankruptcy when seeking approval of his remuneration, together with an explanation of how those charges are made up and the basis on which they are arrived at.

6. What if a creditor is dissatisfied?

- 6.1 If a creditor believes the trustee's remuneration is too high, he may appeal it. The statutory time limits for appealing against the determination are contained within Section 53 of the Bankruptcy Act although it is common practice to give fourteen days in which to appeal from the date of advising creditors of the determination of remuneration. If the determination is made by a commissioner he must do so to the Accountant in Bankruptcy, whilst if a determination is made by the Accountant in Bankruptcy he must do so to the Sheriff. In both instances a simultaneous notice of appeal must be sent to the trustee.
- 6.2 If a creditor believes that the original trustee's remuneration is too high, he may appeal it within 14 days of the issue of its determination. The appeal must be made to the sheriff and the detailed provisions are contained within Sections 26 and 26(A) of the Bankruptcy Act.

7. What if the trustee is dissatisfied?

- 7.1 The appeal procedure for a trustee is identical to the procedure noted in paragraph 6.1 above in respect of creditor's appeals with the obvious exception regarding the simultaneous notice of appeal.
- 7.2 In cases where the original trustee does not himself become the trustee, both he and the trustee have a right of appeal on the same terms as creditors detailed in paragraph 6.2 above.

7.3 In cases where the Accountant in Bankruptcy was the original trustee and some other person becomes the trustee, the trustee (but not the original trustee) has a right of appeal on the same terms as creditors detailed in paragraph 6.2 above. This is because in such cases, the original trustee being the Accountant in Bankruptcy will have determined his remuneration in accordance with a set scale and there is therefore no need for a right of appeal by the original trustee.

8. Other matters relating to remuneration

8.1 There may be occasions when creditors will agree to make funds available themselves to pay for the trustee to carry out tasks which cannot be paid for out of the assets, either because they are deficient or because it is uncertain whether the work undertaken will result in any benefit to creditors. Arrangements of this kind are sometimes made to fund litigation or investigations into the bankrupt's affairs. Any arrangements of this nature will be a matter for agreement between the trustee and the creditors concerned and will not be subject to the statutory rules relating to remuneration.