

## **BEGBIES TRAYNOR GUIDE FOR SHAREHOLDERS.**

### **A GUIDE TO THE LIQUIDATORS FEES – ENGLAND AND WALES.**

(This guide has been produced based on the principles deriving from Statement Of Insolvency Practice 9, which is entitled 'Payments to insolvency office holders and their associates').

#### **1 Introduction**

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

#### **2 Liquidation Procedure**

2.1 Liquidation, (or 'winding up'), is the most common type of corporate insolvency procedure. Liquidation is the formal winding up of a company's affairs entailing the realisation of its assets and the distribution of the proceeds in a prescribed order of priority. Liquidation may be either voluntary, when it is instituted by its shareholders, or compulsory, when instituted by order of the court.

2.2 Voluntary liquidation is the more common of the two. A solvent voluntary liquidation is called a members' voluntary liquidation, (often abbreviated to an 'MVL'). In this type of liquidation, the members vote on the appointment of the liquidator at a meeting of members, or by passing written resolutions, and that appointed insolvency practitioner acts as liquidator throughout.

#### **3 Fixing the Liquidators Remuneration**

3.1 The basis for fixing the liquidators remuneration is set out in Rules 18.16, 18.17 and 18.19 of the Insolvency (England & Wales) Rules 2016. The Rules state that the fees must be fixed by either:

- A percentage of the value of the company's assets that are realised, distributed or both, by the liquidator
- By reference to the time properly given by the liquidator and his staff in attending to the matters arising in the liquidation, or.
- As a set amount

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

3.3 It is for the company in general meeting to determine the basis of remuneration. This may coincide with the members passing the resolutions to place the company into liquidation.

3.4 Members will determine which base(s) set out above is or are to be fixed and, (where appropriate), in what combination. They will determine the percentage or percentages (if any) to be fixed and the set amount, (if any) to be set.

3.5 Prior to determining the basis of fees, regard must be given to the anticipated complexity of the case, responsibilities of exceptional kind that they anticipate to deal with, detail the effectiveness with which they will carry out their duties and detail the nature and value of the property that they have to deal with.

#### **4 Review of remuneration**

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

#### **5 What information should be provided by the liquidator**

5.1 The liquidator should provide those responsible for approving his fees with sufficient and proportionate information to enable them to make an informed judgement about the reasonableness of the liquidators' request. The information should be presented in a manner which is transparent, consistent throughout the life of the case and useful to the members, whilst being proportionate to the circumstances of the case.

5.2 The liquidator should disclose:

- Payments, fees and expenses arising from the liquidation and paid to the liquidator or his associates.
- Any business or personal relationships with parties responsible for approving the liquidators' remuneration or who provide services to the liquidator in respect of the insolvency appointment where the relationship could give rise to a conflict of interest.

5.3 The liquidator should inform members of their rights under insolvency legislation, and should advise them how they may access suitable information setting out their rights within the first communication with them and in each subsequent report.

5.4 Where the liquidator sub-contracts out work that could otherwise be carried out by the liquidator or his staff, this should be drawn to the attention of members with an explanation of why it is being done.

#### **6 Key issues**

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

- The work the liquidator anticipates will be done, and why that work is necessary. The anticipated costs of the work including any expenses expected to be incurred in connection to it;
- Whether it is anticipated that the work will provide a financial benefit to the parties who have an interest, and if so, what anticipated benefit. (If no benefit, that it was required by statute);
- The work done and why it was necessary;
- The actual costs of the work, including connected expenses, against any estimate provided;
- Whether the work has provided a financial benefit, if so what benefit, (or if the work provided no benefit, that it was required by statute).

6.2 When providing information about payments, fees and expenses, the liquidator should do so in a way which facilitates clarity of understanding of these key issues, but the information given should be proportionate to the case.

6.3 When approval for a fixed amount or percentage basis is sought, the liquidator should explain why the basis requested is expected to produce a fair and reasonable reflection of the work anticipated to be undertaken by the liquidator.

## **7 Disbursements**

7.1 Costs met by and reimbursed to the liquidator in connection with the liquidation will fall into two categories:

- Category 1 disbursements: these are payments to independent third parties where there is specific expenditure directly referable to the liquidation. These can be drawn without prior approval, although the liquidator should be prepared to disclose information about them in the same way as any other expense.
- Category 2 disbursements: These are costs that are directly referable to the liquidation but not to a payment to an independent third party. They may include shared or allocated costs that may be incurred by the liquidator or their firm, and that can be allocated to the liquidation on a proper and reasonable basis. Category 2 disbursements require approval in the same manner as liquidator's fees.

7.2 When seeking approval of Category 2 disbursements, the liquidator should explain, for each cost, the basis on which the charge is being made. Once the liquidator has obtained approval for the basis of these Category 2 disbursements, that basis may continue to be used in sequential appointments where further approval of the basis of remuneration is not required, or where the liquidator is replaced.

7.3 The following are not permissible as disbursements:

- A charge calculated as a percentage of fees
- Recovery of basic overhead costs

## **8 Payment of pre -appointment expenses**

8.1 The members and the proposed liquidators may have discussed and agreed a fixed fee for advice provided to the company prior to appointment. If this is the case, the pre appointment fee will be based on the anticipated work involved in assisting with preparing the declaration of solvency and calling the general meeting/ preparing the written resolutions for members to pass to place the company into liquidation.

## **9 Realisations for secured creditors**

9.1 Where the liquidator realises an asset on behalf of a secured creditor and receives remuneration out of the proceeds, he should disclose the amount of that remuneration in any report that he sends to the members.

## **10 Progress reports and requests for further information**

10.1 The liquidator is required to send annual reports to members. In addition to the items described in 6.1 above, the reports must include:

- Details of the basis fixed for the fee of the liquidator (or if not fixed at the date of the report, the steps taken during the period to fix it);
- If the basis has been fixed, the fee charged during the period of the report irrespective of whether it was actually paid during the period (except where it is fixed as a set amount, in which case it may be shown as that amount without any apportionment for the period of the report);
- Details of the progress during the period of the report, including a summary of the receipts and payments during the period
- Details of what needs to be done
- A statement of the members' rights to request further information as explained in the next paragraph, and their rights to challenge the liquidators' fees and expenses.

10.2 Within 21 days of receipt of a progress report by a member (with at least 5% of voting rights of all the members having the right to vote at a general meeting of the company), the member can

make a written request to the office holder for further information about remuneration or expenses set out in that report.

- 10.3 Within 14 days, the liquidator must provide the requested information, unless he considers that:
- The time and cost involved in preparing the information would be excessive, or
  - Disclosure would be prejudicial to the conduct of the of the liquidation or may lead to violence against any person, or
  - The liquidator is subject to an obligation of confidentiality in relation to the information requested,

In which case he must give reasons for not providing all or some of the information.

- 10.4 The member may apply to the court within 21 days of the liquidators' refusal to provide the requested information, or the expiry of the 14 days' time limit for the provision of the information.

## **11 Provision of information – additional requirements**

- 11.1 The liquidator must provide certain information about the time spent on a case, free of charge upon request by any shareholder of the company.

- 11.2 The information which must be provided is –

- The total number of hours spent on the case by the liquidator or staff assigned to the case;
- For each grade of staff, the hourly rate at which they are charged out;
- The number of hours spent by each grade of staff in the relevant period.

- 11.3 The period for which the information must be provided is the period from appointment to the end of the most recent period of six months reckoned from the date of the liquidators' appointment, or where he has vacated, the date that he vacated.

- 11.4 the information must be provided within 28 days of receipt of the request by the liquidator, and requests must be made within two years from vacation of office.

## **12 What if a member is dissatisfied?**

- 12.1 If a member believes the liquidators fees are excessive, the basis is inappropriate, of the expenses incurred by the liquidator are in all the circumstances excessive he may, provided certain conditions are met, apply to the court.

- 12.2 Application may be made by members of the company with at least 10% of the total voting rights of all the members of the company having the right to vote at a general meeting of the company, or with permission of the court.

- 12.3 The application must be made no later that eight weeks after the receipt of the progress report or final report which first reports the charging of the remuneration or the incurring of the expenses in question.

- 12.4 If the court does not dismiss the application, the applicant must give the liquidator a copy of the application and supporting evidence at least 14 days before the hearing.

- 12.5 If the court considers the application to be well founded, it may order the fees to be reduced, the fixed rate or amount to be reduced, a change to the basis of the remuneration, or the expenses be disallowed or repaid. Unless the court orders otherwise, the costs of the application must be paid by the applicant and not out of the assets of the insolvent company.

## **13 What if the liquidator is dissatisfied?**

- 13.1 If the liquidator considers that the rate or the amount of remuneration fixed to be insufficient, or the basis fixed to be inappropriate, he can apply to court for an order increasing the amount or change the basis.

- 13.2 The office holder must deliver notice of the application at least 14 days before the hearing to the members, or such one or more of them as the Court may direct.
- 13.3 The members may nominate one or more of their number to appear or be represented and to be heard on the application.
- 13.4 The court may order the costs of the application to be paid out of the assets of the estate.

**14 Other matters relating to fees**

- 14.1 As detailed above, where the liquidator realises assets on behalf of a secured creditor, he is entitled to be remunerated out of the sales proceeds in accordance with a scale rate set out in the Rules. Usually however, the liquidator will agree the basis of his fee for dealing with charged assets with the secured creditor concerned.
- 14.2 Where two or more liquidators are appointed, it is for them to agree between themselves how the fee payable should be apportioned. Any dispute between them may be referred to the members or the court.
- 14.3 If a new liquidator is appointed in place of another, the determination, decision or court order which was immediately effective before the replacement, continues to have effect in relation to the remuneration of the new liquidator until a further determination, decision or court order is made.
- 14.4 Where the basis of the fee is a set amount, and the liquidator ceased to act before the time has elapsed or the work has been completed for which amount was set, application may be made for the determination of the amount that should be paid to the outgoing liquidator. The application must be made by the same body who approved the fees. Where the outgoing liquidator and the incoming liquidator are from the same firm, they will usually agree the apportionment between them.