

LIQUIDATION - A MEMBERS' GUIDE TO INSOLVENCY PRACTITIONERS' FEES IN ENGLAND AND WALES

1 Introduction

- 1.1 When a Company goes into Members' Voluntary Liquidation, the costs of the proceedings are usually paid out of its assets. A declaration of solvency is sworn by the directors indicating that the creditors will be paid in full with statutory interest from the Company's assets, with the remaining assets being distributed to the members. As a result, it is the members who 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 a mechanism for members to fix the basis of the Liquidator's fees. This guide is intended to help members be aware of their rights to approve and monitor fees, explains the basis on which 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 resolution of the shareholders, or compulsory, when it is instituted by order of the Court.
- 2.2 Voluntary Liquidation is the more common of the two. A solvent voluntary liquidation is called a Members' Voluntary Liquidation (often abbreviated to 'MVL'). In this type of liquidation an Insolvency Practitioner acts as Liquidator throughout and the members appoint the Liquidator at a general meeting of the Company or by Written Resolutions.
- 2.3 In an MVL all creditors must be paid in full with statutory interest within the period stated in the declaration of solvency otherwise the Liquidator will have to convene a meeting of creditors and convert it to a Creditors' Voluntary Liquidation, i.e. an insolvent liquidation.

3 Fixing the Liquidator's remuneration

3.1 Basis

The basis for fixing the Liquidator's remuneration is set out in Rule 18.16 of The Insolvency (England and Wales) Rules 2016. The Rule states that the remuneration shall be fixed:

- as a percentage of the value of the assets which are realised or distributed or both,
- by reference to the time properly given by the Liquidator and his staff in attending to matters arising in the liquidation, or
- as a set amount.

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

3.2 Who fixes the remuneration?

Rule 18.19 indicates that it is for the members at a general meeting of the Company or by Written Resolutions, to determine on which of these bases, or combination of bases, the remuneration is to be fixed. Where it is fixed as a percentage, it is for the members to determine the percentage or percentages to be applied and Rule 18.16(9) says that in arriving at their decision the members shall have regard to the following matters:

- the complexity (or otherwise) of the case;
- any responsibility of an exceptional kind or degree which falls on the Liquidator in connection with the winding up;
- the effectiveness with which the Liquidator appears to be carrying out, or to have carried out, his or her duties; and
- the value and nature of the assets with which the Liquidator has to deal.

3.3 A resolution specifying the terms on which the Liquidator is to be remunerated may be taken at the general meeting of the Company which appoints the Liquidator or by Written Resolutions.

3.4 If the remuneration is not fixed as above, it will be fixed by the Court on application by the Liquidator, but the Liquidator may not make such an application unless he has first tried to get his or her remuneration fixed by the members as described above, and in any case not later than 18 months after his or her appointment.

4 Review of remuneration

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

5 What information should be provided by the Liquidator?

With effect from 1 April 2021 the principles of SIP 9 do not apply to an MVL appointment unless those paying for the fees requires such disclosure.

General principles of SIP 9

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

5.2 The Liquidator should disclose:

- payments, remuneration and expenses arising from the administration paid to the Liquidator or his or her associates;
- any business or personal relationships with parties responsible for approving the Liquidator's 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.

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.

- 5.3 Where the Liquidator sub-contracts out work that could otherwise be carried out by the Liquidator or his or her staff, this should be drawn to the attention of members with an explanation of why it is being done.
- 5.4 The key issues of concern to the shareholders, who have a financial interest in the level of payments from the estate, will commonly be:
- the work the Liquidator anticipates will be done, and why that work is necessary;
 - the anticipated cost of that work, including any expenses expected to be incurred in connection with it;
 - whether it is anticipated that the work will provide a financial benefit to members, and if so what benefit (or if the work provided no direct financial benefit, but was required by statute);
 - the work actually done and why that work was necessary;
 - the actual costs of the work, including any expenses incurred in connection with it, as against any estimate provided;
 - whether the work has provided a financial benefit to members, and if so what benefit (or if the work provided no direct financial benefit, but was required by statute).

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. Narrative explanations should be provided to support any numerical information supplied.

- 5.5 When approval for a fixed amount or a percentage basis is sought, the Liquidator should explain why the basis requested is expected to produce a fair and reasonable reflection of the work that the Liquidator anticipates will be undertaken.

6 Expenses

- 6.1 An expense is a directly attributable cost to the estate which is neither an office holder's remuneration nor a distribution to creditors or members. Expenses can include disbursements, payments met by the office holder and subsequently recovered from the estate, and are divided into those that do not need approval before they are charged to the estate (category 1) and those that do (category 2).
- 6.2 Category 1 expenses are payments to independent third parties and do not have to be approved prior to payment, but when reporting to the creditors committee and creditors during the course of the Administration the actual expenses incurred will be compared with the original estimate provided with any material difference explained (e.g. where legal costs rise due to escalated recovery action).
- 6.3 Category 2 expenses are payments to associates, or parties with a professional or personal relationship, or payments which have an element of shared costs. These expenses require approval in the same manner as an office holder's remuneration. This will include any case related travel or subsistence incurred by staff working on

this case. Where it is necessary for staff to travel from the office, business mileage may be charged at the HMRC rate of 45p per mile.

The following are not permissible as disbursements:

- a charge calculated as a percentage of remuneration;
- an administration fee or charge additional to the Liquidator's remuneration;
- recovery of basic overhead costs such as office and equipment rental, depreciation and finance charges.

7. Progress reports and requests for further information

7.1 The Liquidator is required to send annual progress reports to members. The reports must include:

- details of the basis fixed for the fee of the liquidator (or if not fixed at the date of the report, the steps taken during the period of the report to fix it);
- if the basis has been fixed, the fee charged during the period of the report, irrespective of whether it was actually paid during that period (except where it is fixed as a set amount, in which case it may be shown as that amount without any apportionment for the period of the report);
- if the report is the first to be made after the basis has been fixed, the fee charged during the periods covered by the previous reports, together with a description of the things done during those periods, irrespective of whether payment was actually made during the period of the report;
- a statement of the expenses incurred by the liquidator during the period of the report, irrespective of whether payment was actually made during that period;
- details of progress during the period of the report, including a summary of the receipts and payments during the period;
- details of what remains to be done;
- where appropriate, a statement setting out whether, at the date of the report:
 - the expenses incurred or expected to be incurred are likely to exceed, or have exceeded, the details given to the members prior to the determination of the basis of fees; and
 - the reason for that excess.
- a statement of the members' rights to request further information, as explained in paragraph 7.2, and their right to challenge the Liquidator's fees and expenses.

7.2 Within 21 days of receipt of a progress report, a member may request the Liquidator to provide further information about the remuneration and expenses set out in the report. A request must be in writing, and may be made by a member or members representing at least 5% in value of the total voting rights of members (including himself), or any member with the permission of the Court.

7.3 The Liquidator must provide the requested information within 14 days, unless he or she considers that:

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

in which case he must give the reasons for not providing the information.

7.4 Any member may apply to the Court within 21 days of the Liquidator's refusal to provide the requested information, or the expiry of the 14 days' time limit for the provision of the information.

8. Provision of information – additional requirements

8.1 The Liquidator must provide certain information about the time spent on the case, free of charge, upon request in writing by any creditor, director or member of the Company. The information which must be provided is –

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

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

8.3 The information must be provided within 28 days of receipt of the request by the Liquidator, and requests must be made within two years from vacation of office.

9 What if a member is dissatisfied?

9.1 If a member believes that the basis of the Liquidator's remuneration is inappropriate, or the remuneration charged or expenses incurred by the Liquidator are in all the circumstances excessive he may, provided certain conditions are met, apply to the Court.

9.2 Application may be made to the Court by any member or members representing at least 10 per cent in value of voting rights (including himself), or by any member with the permission of the Court. Any such application must be made within 8 weeks of the applicant receiving the Liquidator's progress report in which the charging of the remuneration or incurring of the expenses in question is first reported (see paragraph 6.1 above). If the Court does not dismiss the application (which it may if it considers that insufficient cause is shown), the applicant must give the Liquidator a copy of the application and supporting evidence at least 14 days before the hearing.

9.3 If the Court considers the application well founded, it may order that the remuneration be reduced, the basis be changed, or the expenses be disallowed or repaid. Unless the Court orders otherwise, the costs of the application must be paid by the applicant and not out of the assets of the Company being wound up.

10. What if the Liquidator is dissatisfied?

- 10.1 If the Liquidator considers that the remuneration fixed by the members is insufficient or that the basis used to fix it is inappropriate, he or she may apply to the Court for the amount or rate to be increased or the basis changed.
- 10.2 If he or she decides to apply to the Court he must give at least 14 days' notice to the members, or such one or more of the members as the Court may direct, to appear or be represented at the Court hearing. The Court may order the costs of the application or of any member appearing at the Court hearing to be paid out of the assets.

11. Other matters relating to remuneration

- 11.1 Where two (or more) joint Liquidators are appointed, it is for them to agree between themselves how the remuneration payable should be apportioned. Any dispute between them may be referred to the Court or a meeting of members.
- 11.2 If a new Liquidator is appointed in place of another, any determination or Court order which was in effect immediately before the replacement continues to have effect in relation to the remuneration of the new Liquidator until a further determination by the members, or Court order, is made.
- 11.3 Where the basis of the remuneration is a set amount, and the Liquidator ceases to act before the time has elapsed or the work has been completed for which the amount was set, application may be made for a determination of the amount that should be paid to the outgoing Liquidator. The application must be made to the same body as approved the remuneration, i.e. either to the members or the Court. Where the outgoing Liquidator and the incoming Liquidator are from the same firm, they will usually agree the apportionment between themselves.
- 11.4 There may also be occasions when members will agree to make funds available themselves to pay for the Liquidator to carry out tasks which cannot be paid for out of the assets, because they are deficient. Any arrangements of this nature will be a matter for agreement between the Liquidator and the members concerned and will not be subject to the statutory rules relating to remuneration.

12. Effective date

This guide applies where a Liquidator is appointed on or after 1 October 2015, or where information is provided by the Liquidator about fees and expenses after 1 April 2021.