SIP9 Guide to Trustees' Fees (E & W)

A CREDITORS' GUIDE TO FEES CHARGED BY TRUSTEES IN BANKRUPTCY ENGLAND AND WALES

1 Introduction

1.1 When an individual becomes bankrupt the costs of the bankruptcy proceedings are paid out of his or her assets. 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 fees. This guide is intended to help creditors be aware of their rights to approve and monitor fees, explains the basis on which fees are fixed and how creditors can seek information about expenses incurred by the trustee and challenge those they consider to be excessive.

2 Bankruptcy procedure

2.1 Bankruptcy is the administration of the affairs of an insolvent individual by a trustee in the interests of his creditors generally. The trustee's function is to realise the assets and distribute them among the creditors in a prescribed order of priority. Bankruptcy proceedings commence with the making of a bankruptcy order by the court. Immediately on the making of the order an official called the official receiver becomes receiver and manager of the bankrupt's estate pending the appointment of a trustee. The official receiver is an officer of the court and an official belonging to The Insolvency Service. Where there are significant assets an insolvency practitioner will usually be appointed to act as trustee, either by a meeting of creditors or by The Insolvency Service on behalf of the Secretary of State. Where no insolvency practitioner is appointed, or where there is a vacancy in the office of trustee, the official receiver acts as trustee.

3 The creditors' committee

3.1 The creditors have the right to appoint a committee, with a minimum of 3 and a maximum of 5 members, to monitor the conduct of the bankruptcy and approve the trustee's fees. The committee may be established at the creditors' meeting which appoints the trustee or at a meeting convened for the purpose by the trustee after his appointment.

3.2 The trustee must call the first meeting of the committee within 6 weeks of its establishment (or his appointment if that is later), and subsequent meetings must be held either at dates agreed by the committee, or when a member of the committee asks for one, or when the trustee decides he needs to hold one. The trustee is required to report to the committee at least every 6 months on the progress of the bankruptcy, unless the committee directs otherwise. This provides an opportunity for the committee to monitor and discuss the progress of the insolvency and the level of the trustee's fees.

4 Fixing the trustee's remuneration

4.1 The basis for fixing the trustee's remuneration is set out in Rules 6.138 - 6.139 of the Insolvency Rules 1986. 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 trustee and his staff in attending to matters arising in the bankruptcy, 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 trustee. Where the remuneration is fixed as a percentage, different percentages may be used for different things done by the trustee. It is for the committee (if there is one) 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 committee to determine the percentage or percentages to be applied. Rule 6.138 says that in arriving at its decision the committee shall have regard to:

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

4.2 If there is no committee, or the committee does not make the requisite determination, the trustee's remuneration may be fixed by a resolution of a meeting of creditors. The creditors must take account of the same matters as apply in the case of the committee. A resolution specifying the basis on which the trustee is to be remunerated may be taken at the meeting which appoints the trustee. If the remuneration is not fixed in any of these ways within 18 months of the trustee's appointment, it will be fixed in accordance with a scale set out in the Rules.

5 Review of remuneration

Where there has been a material and substantial change in circumstances since the basis of the trustee's remuneration was fixed, the trustee may request that it be changed. The request must be made to the same body as initially approved the remuneration, and the same rules apply as to the original approval.

6 What information should be provided by the trustee?

6.1 When seeking remuneration approval

6.1.1 When seeking agreement to his fees the trustee should provide sufficient supporting information to enable the committee or the creditors to form a judgement as to whether the proposed fee is reasonable having regard to all the circumstances of the case. The nature and extent of the supporting information which should be provided will depend on:

- the nature of the approval being sought;
- the stage during the administration of the case at which it is being sought; and
- the size and complexity of the case.

6.1.2 Where, at any creditors' or committee meeting, the trustee seeks agreement to the terms on which he is to be remunerated, he should provide the meeting with details of the charge-out rates of all grades of staff, including principals, which are likely to be involved on the case.

6.1.3 Where the trustee seeks agreement to his fees during the course of the bankruptcy, he should always provide an up to date receipts and payments account. Where the proposed fee is based on time costs the trustee should disclose to the committee or the creditors the time spent and the charge-out value in the particular case, together with, where appropriate, such additional information as may reasonably be required having regard to the size and complexity of the case. The additional information should comprise a sufficient explanation of what the trustee has achieved and how it was achieved to enable the value of the exercise to be assessed (whilst recognising that the trustee must fulfil certain statutory obligations that might be seen to bring no added value for creditors) and to establish that the time has been properly spent on the case. That assessment will need to be made having regard to the time spent and the rates at which that time was charged, bearing in mind the factors set out in paragraph 4.1 above. To enable this assessment to be carried out it may be necessary for the trustee to provide an analysis of the time spent on the case by type of activity and grade of staff. The degree of detail will depend on the circumstances of the case, but it will be helpful to be aware of the professional guidance which has been given to insolvency practitioners on this subject. The guidance suggests the following areas of activity as a basis for the analysis of time spent:

- Administration and planning
- Investigations
- Realisation of assets
- Trading
- Creditors
- Any other case-specific matters

The following categories are suggested as a basis for analysis by grade of staff:

- Partner
- Manager
- Other senior professionals
- Assistants and support staff

The explanation of what has been done can be expected to include an outline of the nature of the assignment and the trustee's own initial assessment, including the anticipated return to creditors. To the extent applicable it should also explain:

Any significant aspects of the case, particularly those that affect the amount of time spent.

The reasons for subsequent changes in strategy.

Any comments on any figures in the summary of time spent accompanying the request the trustee wishes to make.

The steps taken to establish the views of creditors, particularly in relation to agreeing the strategy for the assignment, budgeting, time recording, fee drawing or fee agreement.

Any existing agreement about fees.

Details of how other professionals, including subcontractors, were chosen, how they were contracted to be paid, and what steps have been taken to review their fees.

It should be borne in mind that the degree of analysis and form of presentation should be proportionate to the size and complexity of the case. In smaller cases not all categories of activity will always be relevant, whilst further analysis may be necessary in larger cases.

6.1.4 Where the fee is charged on a percentage basis the trustee should provide details of any work which has been or is intended to be sub-contracted out which would normally be undertaken directly by a trustee or his staff.

6.2 After remuneration approval

Where a resolution fixing the basis of fees is passed at any creditors' meeting held before he has substantially completed his functions, the trustee should notify the creditors of the details of the resolution. When subsequently reporting to creditors on the progress of the bankruptcy, or submitting his final report, he should specify the amount of remuneration he has drawn in accordance with the resolution (see further paragraph 7.1 below). Where the fee is based on time costs he also should provide details of the time spent and charge-out value to date and any material changes in the rates charged for the various grades since the resolution was first passed. He should also provide such additional information as may be required in accordance with the principles set out in paragraph 6.1.3. Where the fee is charged on a percentage basis the trustee should provide the details set out in paragraph 6.1.4 above regarding work which has been sub-contracted out.

6.3 Disbursements and other expenses

There is no statutory requirement for the committee or the creditors to approve the drawing of expenses or disbursements, but there is provision for the creditors to challenge them, as described below. Professional guidance issued to insolvency practitioners requires that, where the trustee proposes to recover costs which, whilst being in the nature of expenses or disbursements, may include an element of shared or allocated costs (such as room hire, document storage or communication facilities provided by the trustee's own firm), they must be disclosed and be authorised by those responsible for approving his remuneration. Such expenses must be directly incurred on the case and subject to a reasonable method of calculation and allocation.

6.4 Realisations for secured creditors

Where the trustee realises an asset on behalf of a secured creditor and receives remuneration out of the proceeds (see paragraph 11.1 below), he should disclose the amount of that remuneration to the committee (if there is one), to any meeting of creditors convened for the purpose of determining his fees, and in any reports he sends to creditors.

7 Progress reports and requests for further information

7.1 The trustee is required to send annual progress reports to creditors. The report must include:

- details of the basis fixed for the remuneration of the trustee (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 remuneration 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 remuneration charged during the periods covered by the previous reports, together with a description of the work 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 trustee during the period of the report, irrespective of whether payment was actually made during that period;
- a statement of the creditors' rights to request further information, as explained in paragraph 7.2, and their right to challenge the trustee's remuneration and expenses.

7.2 Within 21 days of receipt of a progress report (or 7 business days where the report has been prepared for the purposes of a meeting to receive the trustee's resignation) a creditor may request the trustee to provide further information about the remuneration and expenses set out in the report. A request must be in writing, and may be made either by a secured creditor, or by an unsecured creditor with the concurrence of at least 5% in value of unsecured creditors (including himself) or the permission of the court.

7.3 The trustee must provide the requested information within 14 days, 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 bankruptcy or might be expected to lead to violence against any person, or
- the trustee 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.
Any creditor may apply to the court within 21 days of the trustee'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

The trustee must provide certain information about time spent on the case, free of charge, upon request by the bankrupt or any creditor. The information which must be provided is –

- the total number of hours spent on the case by the trustee 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.

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 trustee's appointment, or where he has vacated office, the date that he vacated office.

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

9 What if a creditor or the bankrupt is dissatisfied?

9.1 Except in cases where there is a committee it is the creditors as a body who have authority to approve the trustee's fees. To enable them to carry out this function they may require the trustee to call a creditors' meeting. In order to do this at least ten per cent in value of the creditors must concur with the request, which must be made to the trustee in writing.

9.2 If a creditor believes that the trustee's remuneration is too high, the basis is inappropriate, or the expenses incurred by the liquidator are in all the circumstances excessive he may, provided certain conditions are met, apply to the court.

9.3 Application may be made to the court by any secured creditor, or by any unsecured creditor provided at least 10 per cent in value of unsecured creditors (including himself) agree, or he has the permission of the court. Any such application must be made within 8 weeks of the applicant receiving the trustee's progress report in which the charging of the remuneration or incurring of the expenses in question is first reported (see paragraph 7.1 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 trustee a copy of the application and supporting evidence at least 14 days before the hearing.

9.4 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 must be paid by the applicant and not out of the bankrupt's assets.

9.5 The bankrupt also has the right to challenge the trustee's remuneration or expenses.

10 What if the trustee is dissatisfied?

10.1 If the trustee considers that the remuneration fixed by the committee is insufficient or that the basis used to fix it is inappropriate he may request that the amount or rate be increased, or the basis changed, by resolution of the creditors. If the trustee considers that the remuneration fixed by the committee or the creditors or in accordance with the statutory scale is insufficient or that the basis used to fix it is inappropriate, he may apply to the court for the amount or rate to be increased or the basis changed. If he decides to apply to the court he must give at least 14 days' notice to the members of the committee and the committee may nominate one or more of its members to appear or be represented at the court hearing. If there is no committee, the trustee's notice of his application must be sent to such of the creditors as the court may direct, and they may nominate one or more of their number to appear or be represented. The court may order the costs to be paid out of the assets.

11 Other matters relating to remuneration

11.1 Where the trustee realises assets on behalf of a secured creditor he is entitled to be remunerated out of the proceeds of sale in accordance with a scale set out in the Rules. Usually, however, the trustee will agree the basis of his fee for dealing with charged assets with the secured creditor concerned.

11.2 Where joint trustees 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, the committee or a meeting of creditors.

11.3 If the trustee is a solicitor and employs his own firm to act in the insolvency, profit costs may not be paid unless authorised to act as an Insolvency Practitioner in the UK by the committee, the creditors or the court.

11.4 If a new trustee is appointed in place of another, any determination, resolution or court order which was in effect immediately before the replacement continues to have effect in relation to the remuneration of the new trustee until a further determination, resolution or court order is made.

11.5 Where the basis of the remuneration is a set amount, and the trustee 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 trustee. The application must be made to the same body as approved the remuneration. Where the outgoing trustee and the incoming trustee are from the same firm, they will usually agree the apportionment between them.

11.6 There may also 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.

12 Effective date

This guide applies where the bankruptcy order is made on a petition presented on or after 6 April 2010.