

BANKRUPTCY

A CREDITORS' GUIDE TO INSOLVENCY PRACTITIONERS' FEES

Amended for changes introduced by

The Insolvency (England and Wales) Rules 2016 (Version 1 April 2021)

BANKRUPTCY:

A CREDITORS' GUIDE TO INSOLVENCY PRACTITIONER FEES ENGLAND AND WALES

1. Introduction

1.1 When an individual becomes bankrupt, the costs of the bankruptcy proceedings are paid out of the individual's 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 (also referred to as remuneration). 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 the individual's 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. On the making of the order an official called the official receiver becomes trustee of the bankrupt's estate (unless an individual voluntary arrangement is in force in which case the court may, on the making of the order, appoint the supervisor of the arrangement as trustee). The official receiver is an officer of the court and an official belonging to The Insolvency Service. The official receiver will remain as trustee unless:

- The majority of creditors, by value, seek the appointment of an insolvency practitioner ("IP") to replace the official receiver as trustee.
- 25% of creditors requisition a decision making procedure and the official receiver is replaced as trustee.
- The official receiver considers that the skills of an IP are required and steps are taken to appoint an IP as trustee.

2.2 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 Where the official receiver is not acting as trustee, 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. Creditors will be invited to form a committee when any decision of the creditors is sought.

3.2 The trustee must call the first meeting of the committee within 6 weeks of its establishment 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 they need 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 Basis

- 4.1.1 The basis for fixing the trustee's remuneration is set out in Rule 18.16 of the Insolvency (England and Wales) Rules 2016. The Rule states that the basis of remuneration must be fixed: • As a percentage of the value of the assets which are realised or distributed or both, by the trustee • By reference to the time properly given by the trustee and their staff in attending to matters arising in the bankruptcy, or • As a set amount.
- 4.1.2 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.
- 4.1.3 Where remuneration is sought on more than one basis by the trustee, it should be clearly stated to which part of the trustee's activities each basis relates.
- 4.1.4 Payments to a trustee from a bankrupt's estate should be fair and reasonable reflections of the work necessarily and properly undertaken in respect of the trustee's appointment. These payments should not be approved by any party with whom the trustee has a professional or personal relationship which gives rise to a conflict of interest. Those responsible for approving payments from a bankrupt's estate to a trustee or their associates should be provided with sufficient information to enable them to make an informed judgement about the reasonableness of the trustee's requests.
- 4.1.5 Information provided by the trustee should be presented in a manner which is transparent, consistent throughout the life of the appointment and useful to creditors and other interested parties, whilst being proportionate to the circumstances of the appointment.

4.2 Advance information where remuneration not based on time costs

- 4.2.1 Prior to the determination of the basis of remuneration, the trustee must give the creditors details of the work the trustee proposes to undertake and the expenses they consider will be, or are likely to be, incurred.

4.3 Fees estimates where remuneration to be based on time costs

- 4.3.1 Where the trustee proposes to take remuneration based on time costs, they must first provide the creditors with detailed information in the form of a 'fees estimate'. A fees estimate is a written estimate that specifies:
- Details of the work the trustee and their staff propose to undertake;
 - The hourly rate or rates the trustee and their staff propose to charge for each part of that work;
 - The time the trustee anticipates each part of that work will take;
 - Whether the trustee anticipates it will be necessary to seek approval or further approval under the Rules; and
 - The reasons it will be necessary to seek such approval.
- 4.3.2 When providing a fees estimate, the trustee should supply that information in sufficient time for creditors (including when acting through a committee) to be able to make an informed judgement about the reasonableness of the trustee's requests. Fees estimates should be based on all of the information available to the trustee at the time that the estimate is provided.

4.3.3 In addition, the trustee must give the creditors details of the expenses they consider will be, or are likely to be, incurred.

4.4 Who fixes the remuneration?

4.4.1 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 set amount or a percentage, it is for the committee to determine the amount, percentage or percentages to be applied. Rule 18.16 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, their duties;
- the value and nature of the assets which the trustee has to deal.

4.4.2 If there is no committee, or the committee does not make the requisite determination, the trustee's remuneration may be fixed by a decision of the creditors. The creditors must take account of the same matters as apply in the case of the committee. 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 Schedule 11 to the Rules.

5. Review of remuneration

5.1 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 General principles

6.1.1 The trustee should provide those responsible for approving the fees with sufficient information to enable them to make an informed judgement about the reasonableness of the trustee's request. The information should be presented in a manner which is transparent, consistent throughout the life of the case and useful to creditors, while being proportionate to the circumstances of the case.

6.1.2 The trustee should provide an indication of the likely return to creditors when seeking approval for the basis of their remuneration. Bankruptcy: A Guide for Creditors on Insolvency Practitioner Fees (Version 1 April 2021) Whilst every care has been taken in its preparation, this guide is intended for general guidance only, and does not constitute legal advice.

6.1.3 The trustee should disclose: a) all payments, arising from the insolvency appointment to the trustee or their associates; b) the form and nature of any professional or personal relationships between the trustee and their associates.

6.1.4 The trustee should inform creditors 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.

6.1.5 Where the trustee sub-contracts work that could otherwise be carried out by the trustee or their staff, this should be drawn to the attention of creditors and other interested parties with an explanation of why it is being done, what is being done, and how much it will cost.

6.2 Key issues

6.2.1 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 trustee anticipates will be done, and why that work is necessary;
- The anticipated payment for that work;
- Whether it is anticipated that the work will provide a financial benefit to creditors, and if so what anticipated 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 payment for the work, as against any estimate provided;
- Whether the work has provided a financial benefit to creditors, and if so what benefit (or if the work provided no direct financial benefit, but was required by statute).

6.2.2 When providing information about payments from the bankrupt's estate, the trustee should do so in a way which clearly explains the key issues. Narrative explanations should be provided to support any numerical information supplied. Such an approach allows creditors and other interested parties to better recognise the nature of a trustee's role and the work they intend to undertake, or have undertaken, in accordance with the key issues.

6.2.3 When approval for a set fee or a percentage basis is sought, the trustee should explain why the basis requested is expected to produce a fair and reasonable reflection of the work that the trustee anticipates will be undertaken. Where a set amount or a percentage basis is being used, an explanation should be provided of the direct costs included. The trustee should not seek to separately recover sums already included in a set amount or percentage basis fee and should be transparent in presenting any information.

6.3 Fee estimates

6.3.1 When providing a fees estimate of time to be spent, creditors and other interested parties may find a blended rate (or rates) and total hours anticipated to be spent on each part of the anticipated work more easily understandable and comparable than detail covering each grade or person working on the appointment. The estimate should also clearly describe what activities are anticipated to be conducted in respect of the estimated fee.

6.3.2 The information provided in the fees estimate may not be presented on the basis of alternative scenarios or provide a range of estimated charges. However for other payments that the trustee anticipates will be, or are likely to be, made, it is acceptable to provide a range or repeat a range quoted by a third party, for example legal costs in litigation in any expense estimates.

6.4 Expenses

6.4.1 Expenses are any payments from the bankrupt's estate which are neither a trustee's remuneration nor a distribution to a creditor or a member. Expenses also include disbursements. Disbursements are payments which are first met by the trustee, and then reimbursed to the trustee from the bankrupt's estate.

6.4.2 Expenses are divided into those that do not need approval before they are charged to the bankrupt's estate (category 1) and those that do (category 2).

- Category 1 expenses: These are payments to persons providing the service to which the expense relates who are not an associate of the trustee. Category 1 expenses can be paid without prior approval.
- Category 2 expenses: These are payments to associates or which have an element of shared costs. Before being paid, category 2 expenses require approval in the same manner as a trustee's remuneration. Category 2 expenses require approval whether paid directly from the estate or as a disbursement.

6.4.2 When seeking approval of category 2 expenses, the trustee should explain, for each expense, the basis on which the expense is being charged to the bankrupt's estate. If the trustee has obtained approval for the basis of Category 2 disbursements, that basis may continue to be used in a sequential appointment where further approval of the basis of remuneration is not required, or where the trustee is replaced.

6.4.3 Omitted

6.4.4 Any shared or allocated payments incurred by the trustee or their firm are to be treated as category 2 expenses and approval sought before payment.

6.4.5 The following are not permissible as either remuneration or an expense:

- a) an expense or any other charge calculated as a percentage of remuneration;
- b) an administration fee or charge additional to a trustee's remuneration;
- c) the recovery of any overheads other than those absorbed in the charge out rates.

6.5 Realisations for secured creditors

6.5.1 Where the trustee realises an asset on behalf of a secured creditor and receives remuneration out of the proceeds, they should disclose the amount of that remuneration to the committee (if there is one) and in any reports they send to creditors.

7. Exceeding the amount set out in the fees estimate

7.1 Remuneration cannot be drawn in excess of the fees estimate without approval by the body which fixed the original basis of the remuneration. The request for approval must specify:

- The reason why the trustee has exceeded, or is likely to exceed, the fees estimate;
- The additional work the trustee has undertaken or proposes to undertake;
- The hourly rate or rates the trustee proposes to charge for each part of that additional work;
- The time that additional work has taken or the trustee anticipates that work will take;
- Whether the trustee anticipates that it will be necessary to seek further approval; and
- The reasons it will be necessary to seek further approval.

8. Progress reports and requests for further information

8.1 The trustee is required to send annual progress reports to creditors. In addition to the items described above and especially those in paragraph 6.2.1 the reports 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;
- If fees have been fixed on a time costs basis, the actual hours and average rate (or rates) of the costs charged for each part of the work; • 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;
- Where appropriate, a statement –
 - That the remuneration anticipated to be charged is likely to exceed the fees estimate or any approval given for remuneration exceeding the estimate;
 - That 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
 - The reason for that excess.
- A statement of the creditors' rights to request further information, as explained in paragraph 8.2, and their right to challenge the trustee's remuneration and expenses.

8.2 Within 21 days of receipt of a progress report, 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 themselves) or the permission of the court.

8.3 The trustee must provide the requested information within 14 days, unless they consider 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 the trustee must give the reasons for not providing the information.

8.4 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.

9. Provision of information – additional requirements

- 9.1 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.
- 9.2 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 trustee's appointment, or where they have vacated office, the date that they vacated office.
- 9.3 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.
- 9.4 Requests for additional information about payments should be viewed upon their individual merits and treated by the trustee in a fair and reasonable way. The provision of additional information should be proportionate to the circumstances of the appointment.

10. What if a creditor or the bankrupt is dissatisfied?

- 10.1 Except in cases where there is a committee it is the creditors as a body who have authority to approve the trustee's fees.
- 10.2 If a creditor believes that the trustee's fees are excessive, the basis is inappropriate, or the expenses incurred by the trustee are in all the circumstances excessive, the creditor may, provided certain conditions are met, apply to the court.
- 10.3 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 themselves) agree, or they have the permission of the court. Any such application must be made within 8 weeks of the applicant receiving the trustee's progress or final report in which the charging of the remuneration or incurring of the expenses in question is first reported (see paragraph 8.1 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.
- 10.4 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.
- 10.5 The bankrupt also has the right to challenge the trustee's remuneration or expenses with the permission of the court.

11. What if the trustee is dissatisfied?

- 11.1 If the trustee considers that the remuneration fixed by the committee is insufficient or that the basis used to fix it is inappropriate, the trustee may request that the amount or rate be increased, or the basis changed, by decision 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, they may apply to the court for the amount or rate to be increased or the basis changed. If the trustee decides to apply to the court, they 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 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.

12. Other matters relating to remuneration

- 12.1 Where the trustee realises assets on behalf of a secured creditor, the trustee 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 their fee for dealing with charged assets with the secured creditor concerned.
- 12.2 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 the creditors.
- 12.3 If a new trustee is appointed in place of another, any determination, decision 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, decision or court order is made.
- 12.4 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.
- 12.5 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.
- 12.6 Where realisations are sufficient for creditors to be paid in full with interest, the creditors will not have the principal financial interest in the level of payments from the estate. Once this has been established by the trustee, they should provide the beneficiaries of the anticipated surplus, on request, with information in accordance with the principles and standards set out above.

13. Effective date

- 13.1 This guide applies where an insolvency practitioner is appointed as trustee in bankruptcy on or after 1 October 2015, or where information is provided by the trustee about fees, expenses or other payments on or after 6 April 2017.
- 13.2 ***Please note that insolvency practitioners were subject to different regulatory requirements prior to 1 April 2021. Therefore, information provided by insolvency practitioner prior to that date may vary slightly to the information required as set out in this guide.***