

A CREDITORS' GUIDE TO INSOLVENCY PRACTITIONERS' FEES

This document contains two (2) sections

- SECTION A – Individual Voluntary Arrangements (IVA's)
- SECTION B – Scottish Protected Trust Deed's (PTD's)

SECTION A – Individual Voluntary Arrangements (IVA's)

1 Introduction

- 1.1 In a voluntary arrangement, as in other types of insolvency, the amount of money available for creditors is likely to be affected by the level of costs, including the remuneration of the insolvency practitioner appointed to implement the arrangement. This guide explains how fees are fixed in voluntary arrangements, how the creditors can affect the level of fees, and the information which should be made available to them regarding fees.

2 The voluntary arrangement procedure

- 2.1 Voluntary arrangements are available to both companies and individual debtors. Company voluntary arrangements are often referred to as CVAs, and individual voluntary arrangements as IVAs.
- 2.2 The procedure is similar for both CVAs and IVAs and enables the company or individual to put a proposal to their creditors for a composition in satisfaction of their debts or a scheme of arrangement of their affairs. A composition is an agreement under which creditors agree to accept a certain sum of money in settlement of the debts due to them. A CVA may be used as a stand-alone procedure or as an exit route from an administration. It may also be used where a company is in liquidation, but this is extremely rare. The proposal will be made by the directors, the administrator or the liquidator, depending on the circumstances. A proposal for an IVA may be made by a debtor whether or not he is already subject to bankruptcy proceedings. The proposal will be considered by creditors at a meeting convened for that purpose. The procedure is extremely flexible and the form which the voluntary arrangement takes will depend on the terms of the proposal agreed by the creditors. In both CVAs and IVAs the proposal must provide for an insolvency practitioner to supervise the implementation of the arrangement. Until the proposal is approved by the creditors, the practitioner is known as the nominee. If the proposal is approved, the nominee (or if the creditors choose to replace him, his replacement) becomes the supervisor.

3 Fees, costs and charges - statutory provisions

- 3.1 The fees, costs, charges and expenses which may be incurred for the purposes of a voluntary arrangement are set out in the Insolvency Rules 1986 (rule 1.28 for CVAs and rule 5.33 (previously 5.28) for IVAs). They are:
- any disbursements made by the nominee prior to the arrangement coming into effect, and any remuneration for his services agreed between himself and the company (or the administrator or liquidator, as the case may be) or the debtor (or the official receiver or trustee, where the debtor is subject to bankruptcy proceedings);
 - any fees, costs, charges or expenses which:
 - are sanctioned by the terms of the arrangement (see below), or
 - would be payable, or correspond to those which would be payable, in an administration, winding up or bankruptcy (as the case may be).

- 3.2 The rules also require the following matters to be stated or otherwise dealt with in the proposal (rule 1.3 for CVAs and rule 5.3 for IVAs):
- The amount proposed to be paid to the nominee (as such) by way of remuneration and expenses, and
 - The manner in which it is proposed that the supervisor of the arrangement should be remunerated and his expenses defrayed.

4 The role of the creditors

- 4.1 It is for the creditors' meeting to decide whether to agree the terms relating to remuneration along with the other provisions of the proposal. The creditors' meeting has the power to modify any of the terms of the proposal (with the consent of the debtor in the case of an IVA), including those relating to the fixing of remuneration. The nominee should be prepared to disclose the basis of his fees to the meeting if called upon to do so. Although there are no further statutory provisions relating to remuneration in voluntary arrangements, the terms of the proposal may provide for the establishment of a committee of creditors and may include among its functions the fixing of the supervisor's remuneration.

5 What information should the creditors receive?

5.1 When fixing bases of remuneration

- 5.1.1 When seeking agreement for the basis or bases of remuneration, the voluntary arrangement proposal or the supervisor (where fees and disbursements are subject to agreement after approval of the arrangement) should provide sufficient supporting information to enable the creditors (or the committee of creditors where applicable) to make an informed judgement as to whether the basis sought is appropriate having regard to all the circumstances of the case. The nature and extent of the information provided will depend on the stage during the conduct of the case at which approval is being sought. The appendix to this guide sets out a suggested format for the provision of information.
- 5.1.2 If any part of the remuneration is sought on a time costs basis, the proposal or the supervisor should provide details of the minimum time units used and current charge-out rates, split by grades of staff, of those people who have been or who are likely to be involved in the time costs aspects of the case.
- 5.1.3 The proposal or the supervisor should also provide details and the cost of any work that has been or is intended to be sub-contracted out that could otherwise be carried out by the supervisor or his or her staff.

5.2 After the bases of remuneration have been fixed

5.2.1 The supervisor is required to send reports to creditors at specified intervals in accordance with rule 5.31A. When reporting to creditors, in addition to the matters specified in rule 5.31A, the supervisor should provide an explanation of what has been achieved in the period under review and how it was achieved, sufficient to enable the progress of the case to be assessed. Creditors should be able to understand whether the remuneration charged is reasonable in the circumstances of the case (whilst recognising that the supervisor must fulfil certain statutory obligations and regulatory requirements that might be perceived as bringing no added value for the estate). Where any remuneration is on a time costs basis, the supervisor should disclose the charge in respect of the period, the time spent and the average charge-out rates, in larger cases split by grades of staff and analysed by appropriate activity. If there have been any changes to the charge-out rates during the period under review, rates should be disclosed by grades of staff, split by the periods applicable. The supervisor should also provide details and the cost of any work that has been sub-contracted out that could otherwise be carried out by the supervisor or his or her staff.

5.3 Disbursements and other expenses

5.3.1 Costs met by and reimbursed to the supervisor in connection with the voluntary arrangement should be appropriate and reasonable. Such costs will fall into two categories:

- Category 1 disbursements: These are costs where there is specific expenditure directly referable both to the voluntary arrangement and a payment to an independent third party. These may include, for example, room hire, storage, postage, telephone charges, travel expenses, and equivalent costs reimbursed to the supervisor or his or her staff.
- Category 2 disbursements: These are costs that are directly referable to the voluntary arrangement but not to a payment to an independent third party. They may include shared or allocated costs that can be allocated to the voluntary arrangement on a proper and reasonable basis, for example, business mileage.

Category 1 disbursements can be drawn without prior approval, although the supervisor should be prepared to disclose information about them in the same way as any other expenses. Category 2 disbursements may be drawn if they have been approved in the same manner as the supervisor's remuneration. When seeking approval, the supervisor should explain, for each category of expense, the basis on which the charge is being made.

5.3.2 The following are not permissible:

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

6 Provision of information – additional requirements

6.1 The nominee or supervisor is required to provide certain information about the time spent on the case, free of charge, upon request by specified persons. The persons entitled to ask for this information are:-

- any creditor;
- where the arrangement relates to a company, any director or member of that company; and
- where the arrangement relates to an individual, that individual.

The information which must be provided is:-

- the total number of hours spent on the case by the insolvency practitioner 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 nominee's or supervisor'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 nominee or supervisor, and requests must be made within two years from vacation of office.

7 What if a creditor or debtor is dissatisfied?

7.1 Where a creditor or the debtor is dissatisfied the terms of the voluntary arrangement proposal may provide what action can be taken. In the absence of such a provision a creditor or a debtor who is dissatisfied by any act, omission or decision of the supervisor may apply to the court. (s.263 Insolvency Act 1986).

8 Effective date

8.1 This guide applies where the nominee in relation to the arrangement agrees to act on or after 1 November 2011.

SECTION B – Scottish Protected Trust Deed (PTD)

1 Introduction

1.1 When a debtor grants a trust deed the costs of the proceedings are paid out of the debtor's 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 fix the basis of the trustee's remuneration. This guide is intended to help creditors be aware of their rights to approve and monitor remuneration, and explains the basis on which remuneration is fixed.

2 Trust Deed Procedure

- 2.1 A trust deed is a deed granted by or on behalf of the debtor whereby his estate is conveyed to the trustee for the benefit of his creditors generally. It tends to be less formal and less expensive than a sequestration.
- 2.2 Under the deed, the debtor conveys his entire estate to a trustee, who is empowered to sell and dispose of all the assets, and to carry on any business formerly conducted by the debtor. The trustee will distribute the balance of funds available after the payment of expenses to the creditors, following which the trustee will obtain his discharge from the creditors.
- 2.3 Accession of creditors is an essential part of the procedure, as without it there may be problems in discharging the deed. Unless a majority of creditors or not less than one third in value object to the trust deed, the creditors are presumed to have acceded and it becomes a protected trust deed. Once a trust deed has become protected, a creditor who has been notified of but who has not acceded to the trust deed will have no higher right to recover his debt than a creditor who has acceded. It should be noted that if a creditor receives notification of, but does not object to a trust deed, he is deemed to have acceded.
- 2.4 If a trust deed remains unprotected, creditors can still take action to recover their debts. This covers the various forms of diligence available to them including petitioning for sequestration.

3 Fixing the Trustee's Remuneration

- 3.1 The remuneration of a trustee will be determined by the trust deed. However, there is provision in the insolvency legislation for the formation of a committee of creditors to assist the trustee, audit his accounts and fix his remuneration.
- 3.2 Whether or not this provision is included in the deed, Schedule 5 of the Bankruptcy (Scotland) Act 1985 (as amended) ("the Bankruptcy Act") states that on application of the debtor, the trustee, or any creditor, the Accountant in Bankruptcy is specifically authorised to audit the trustee's accounts and fix his remuneration. Schedule 5 also provides that the Accountant in Bankruptcy may, at any time, audit the trustee's accounts and fix his remuneration. The Accountant in Bankruptcy is an officer of the court appointed by the Scottish Ministers.
- 3.3 The trustee under a protected trust deed, or the debtor, or any creditor may appeal to the sheriff by way of summary application against any determination by the Accountant in Bankruptcy fixing the remuneration to the trustee. A debtor or creditor may appeal only if able to satisfy the sheriff that he or she has, or is likely to have, a pecuniary interest in the outcome of the appeal.

4 What Information should be Provided by the Trustee?

- 4.1 There are no specific requirements under Schedule 5 of the Bankruptcy Act for the provision of information by the trustee.