

Liquidation - A members' guide to insolvency practitioners' fees (England and Wales)

Introduction

When a company goes into liquidation the costs of the proceedings are paid out of its assets. The members (or shareholders) 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 liquidator's fees (also referred to as remuneration). 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 additional information.

Liquidation procedure

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. A solvent liquidation is called a Members' Voluntary Liquidation (often abbreviated to 'MVL') and is where the directors of a company believe that the company has surplus assets available to be distributed to its shareholders.

Fixing the liquidator's fees

The basis for fixing the liquidator's fees is set out in the Insolvency (England & Wales) Rules 2016, which state that the fees must 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 their 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 fees and different bases may be used for different tasks undertaken by the liquidator. Where the remuneration is fixed as a percentage, different percentages may be used for different tasks undertaken by the liquidator.

Who fixes the fees?

It is for the members of the company to determine on which of these bases, or combination of bases, the fees are to be fixed. Where it is to be fixed as a set amount or as a percentage, it is for members to fix the amount or percentage(s) to be applied. The members shall have regard to the following matters in arriving at a decision:

- the complexity (or otherwise) of the case
- any responsibility of an exceptional kind or degree which falls on the liquidator in connection with the company's affairs
- the effectiveness with which the liquidator appears to be carrying out, or to have carried out, their duties, and
- the value and nature of the assets with which the liquidator has to deal.

A resolution specifying the terms on which the liquidator is to be remunerated may be taken at the meeting which appoints the liquidator. If the remuneration is not fixed in any of these ways, it will be in accordance with the scale laid down for official receivers.

Review of fees

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 same body as initially approved the fees, and the same rules apply as to the original approval.

What information should be provided by the liquidator?

General principles

The liquidator should provide those responsible for approving the fees with sufficient information to enable 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 member, while being proportionate to the circumstances of the case.

The liquidator should disclose:

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

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

Key issues

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 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, 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, 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. Where it is practical to do so, the liquidator should provide an indication of the likely return to creditors when seeking approval for the basis of their fees.

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.

Disbursements

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. Category 1 disbursements can be drawn without prior approval, although the liquidator should be prepared to disclose information about them in the same way as any other expenses.
- 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 the liquidator's fees.

When seeking approval, the liquidator should explain, for each category of cost, the basis on which the charge is being made. If the liquidator 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 liquidator is replaced.

The following are not permissible as disbursements:

- a charge calculated as a percentage of fees

- 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.

Progress reports and requests for further information

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 work undertaken by the liquidator 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 needs to be done
- a statement of the members' rights to request further information and their right to challenge the liquidator's remuneration and expenses.

Within 21 days of receipt of a progress report, a member may request the liquidator to provide further information about the fees and expenses set out in the report. A request must be in writing and may be made by members with at least 5% of the total voting rights of all the members having the right to vote at general meetings of the company or by any member with the permission of the court.

The liquidator must provide the requested information within 14 days, unless he considers that:

- the time or cost of preparation of the information would be excessive, or
- disclosure would be prejudicial to the conduct of the liquidation or might reasonably 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 the liquidator must give the reasons for not providing the information.

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.

Provision of information – additional requirements

The liquidator must provide certain information about the time spent on the case, free of charge, upon request by any creditor, director or shareholder 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.

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.

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.

What if a member is dissatisfied?

If a member believes that the liquidator's fees are excessive, the basis is inappropriate, or the expenses incurred by the liquidator are in all the circumstances excessive they may, provided certain conditions are met, apply to the court.

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

Any such application must be made within eight weeks of the applicant receiving the liquidator's progress report in which the charging of the fees or incurring of the expenses in question is first reported. 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.

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.

Other matters relating to fees

Where the liquidator realises assets on behalf of a secured creditor they are entitled to be remunerated out of the proceeds of sale in accordance with the scale laid down for the official receivers. Usually, however, the liquidator will agree the basis of their fee for dealing with charged assets with the secured creditor concerned.

Where two (or more) joint 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 court, or a meeting of members.

If a new liquidator 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 fees of the new liquidator until a further determination, resolution or court order is made.

Where the basis of the fee 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 fees. Where the outgoing liquidator and the incoming liquidator are from the same firm, they will usually agree the apportionment between them.

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. 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.

Whilst every care has been taken in its preparation, this statement is intended for general guidance only.