

A SHAREHOLDER'S GUIDE TO LIQUIDATORS' FEES IN A SOLVENT LIQUIDATION

1 Introduction

When a company goes into solvent liquidation the costs of the proceedings may be paid out of its assets. The shareholders, who hope to receive a capital distribution 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 liquidator. The insolvency legislation recognises this interest by providing mechanisms for shareholders to fix the basis of the liquidator's fees. This guide is intended to help shareholders be aware of their rights to approve and monitor fees and explains the basis on which fees are fixed and how shareholders can seek information about expenses incurred by the liquidator and challenge those they consider to be excessive.

2 The liquidation procedure

- 2.1 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. An insolvent voluntary liquidation is called a creditors' voluntary liquidation (often abbreviated to 'CVL'). In this type of liquidation, an insolvency practitioner acts as liquidator throughout and the creditors can consider the appointment of the liquidator by participating in an initial decision process.
- 2.3 A solvent liquidation is called a members' voluntary liquidation (often abbreviated to 'MVL'). It is initiated by the directors either calling a general meeting ('GM') of the shareholders or issuing written resolutions to the shareholders. The shareholders then decide whether to place the company into liquidation and vote on the appointment of the liquidator.

3 Fixing the liquidator's fees

- 3.1 The basis for fixing the liquidator's remuneration in an MVL is set out in Rules 18.16, 18.17 and 18.19 of the Insolvency (England and Wales) Rules 2016. This states that the remuneration shall be fixed either:
 - 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.

In an MVL, it is for the shareholders to determine on which of these bases the remuneration is to be fixed, and if it is to be fixed as a percentage, to fix the percentage to be applied. The rules state that in arriving at their decision, the shareholders 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 liquidation;
- the effectiveness with which the liquidator appears to be carrying out, or to have carried out, his duties; and
- the value and nature of the assets which the liquidator has to deal with.

3.2 A resolution specifying the terms on which the liquidator is to be remunerated may be considered at the time the liquidator is appointed. If the remuneration is not fixed in any of these ways by the shareholders, the liquidator can apply to have the basis of his remuneration fixed by the court instead.

4 Review of remuneration

4.1 Where there has been a material and substantial change in circumstances since the basis of the liquidator's remuneration was fixed, the liquidator 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.

5 What information should be provided by the liquidator?

5.1 When fixing the bases of remuneration

5.1.1 The liquidator should provide those responsible for approving the basis of remuneration sufficient information to enable them to make an informed judgement about the reasonableness of the liquidator's request. The information should be presented in such a manner which is transparent, consistent throughout the life of the case, while being proportionate to the circumstances of the case.

5.2 Estimate of fees where remuneration is based on time costs

5.2.1 Although the provisions contained within the insolvency legislation regarding fee estimates do not apply to MVLs, if any part of the remuneration is sought on a time costs basis, the liquidator should provide sufficient information to the shareholders about the anticipated cost of the work he expects to do, based on information provided by the directors of the company at the outset, together with information about any anticipated expenses.

5.2.2 If the scope of the work the liquidator anticipates changes, he will liaise with the shareholders during the liquidation to provide an update on the likely costs associated with winding up the company's affairs.

5.3 Other

5.3.1 When reporting, the liquidator should disclose:

- Payments, remuneration and expenses arising from the liquidation paid to the liquidator or any associates; and
- 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 shareholders of their rights under insolvency legislation and should advise them how they may access suitable information setting out their rights, within the first communication and in each subsequent report.

Where the proposed charge is calculated on a time costs basis, the liquidator should disclose the time spent and the average charge-out rates, in larger cases split by grades of staff and analysed by appropriate activity. The liquidator should also provide details and the cost of any work that has been sub-contracted out that could otherwise be carried out by the liquidator or his or her staff.

5.4 After the bases of remuneration have been fixed

- 5.4.1 The liquidator is required to send progress reports to shareholders at specified intervals (see paragraph 6.1 below). When reporting periodically to shareholders, in addition to the matters specified in paragraph 6.1, the liquidator 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.
- 5.4.2 Shareholders should be able to understand whether the remuneration charged is reasonable in the circumstances of the case (whilst recognising that the liquidator must fulfil certain statutory obligations and regulatory requirements that might be perceived as bringing no added value for the estate).

5.5 Expenses

5.5.1 Costs met by and reimbursed to the liquidator in connection with the liquidation should be appropriate and reasonable. Such costs will fall into two categories:

- Category 1 expenses: These are costs where there is specific expenditure directly referable both to the liquidation and a payment to an independent third party. These may include, for example, advertising, room hire, storage, postage, telephone charges, travel expenses, and equivalent costs reimbursed to the liquidator or his or her staff.
- Category 2 expenses: 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 can be allocated to the liquidation on a proper and reasonable basis, for example, business mileage.

Category 1 expenses 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 expenses may be drawn if they have been approved in the same manner as the liquidator's remuneration. When seeking approval, the liquidator should explain, for each category of expense, the basis on which the charge is being made.

5.5.2 The following are not permissible:

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

5.6 Realisations for secured creditors

5.6.1 Where the liquidator realises an asset on behalf of a secured creditor and receives remuneration out of the proceeds, he should disclose the amount of that remuneration to shareholders when determining his fees, and in any reports he sends to shareholders.

6 Progress reports and requests for further information

6.1 The liquidator is required to send annual progress to shareholders. The reports must include:

- details of the basis fixed for the remuneration 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 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 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 receipts and payments during the period;
- details of what remains to be done; and
- a statement of the shareholders' rights to request further information, as explained in paragraph 6.2, and their right to challenge the liquidator's remuneration and expenses.

6.2 Within 21 days of receipt of a progress report a shareholder may request the liquidator to provide further information about the remuneration and expenses set out in the report. Any request must be in writing.

6.3 The liquidator 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 liquidation; or
- the liquidator is subject to an obligation of confidentiality in relation to the information requested.

Any shareholder 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.

7 What if a shareholder is dissatisfied?

7.1 It is the shareholders as a body who have the authority to approve the liquidator's fees. To enable them to carry out this function they may require the liquidator to call a shareholders' meeting. In order to do this at least 10% in value of the shareholders must concur with the request, which must be made to the liquidator in writing.

7.2 If a shareholder believes that the remuneration charged by the liquidator is too high, the basis of his remuneration 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.

8 What if the liquidator is dissatisfied?

- 8.1 If the liquidator considers that the remuneration fixed by the shareholders is insufficient, or that the basis used to fix it is inappropriate, the liquidator may apply to the court for the amount or rate to be increased or the basis changed.
- 8.2 If the liquidator decides to apply to court, he must give at least 14 days' notice of his application to the shareholders, or such one or more of them 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

9 Other matters relating to fees

- 9.1 Where the liquidator 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 liquidator will agree the basis of his fee for dealing with charged assets with the secured creditor concerned.
- 9.2 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 shareholders.
- 9.3 If the appointed liquidator is a solicitor and employs his own firm to act in the liquidation, profit costs may not be paid unless authorised by the shareholders or the court.
- 9.4 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 remuneration of the new liquidator until a further determination, resolution or court order is made.
- 9.5 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. Where the outgoing liquidator and the incoming liquidator are from the same firm, they will usually agree the apportionment between them.