

A CREDITORS' GUIDE TO FEES CHARGED BY TRUSTEES IN BANKRUPTCY NORTHERN IRELAND

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.

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 High Court and a member of The Insolvency Service, a branch of the Consumer and Corporate Affairs Division of the Department of Economic Development. Official receivers charge their fees on the basis of a statutory scale laid down by the Insolvency Regulations 1994. 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 Department of Economic Development. 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 3 months 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. This provides 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 Fees

- 4.1 The basis for fixing the trustee's remuneration is set out in Rule 6.135 of the Insolvency Rules (Northern Ireland) 1991. The Rule state that the remuneration shall be fixed either:
- as a percentage of the value of the assets which are realised or distributed or both, or
 - by reference to the time properly given by the trustee and his staff in attending to matters arising in the insolvency.

It is for the committee (if there is one) 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. Rule 6.135 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 the committee would. 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, it will be in accordance with the scale laid down for official receivers.

5 What information should be provided by the trustee?

5.1 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 trustee should always make available an up to date receipts and payments account. Where the fee is to be charged on a time basis the trustee should be prepared to disclose the amount of time spent on the case and the charge-out value of the time spent, together with such additional information as may reasonably be required having regard to the size and complexity of the case. 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 contracted out which would normally be undertaken directly by a trustee or his staff.

5.2 The payment of the trustee's expenses and disbursements is not subject to approval by the committee or the creditors. However, where a trustee makes, or proposes to make, a separate charge by way of expenses and disbursements to recover the cost of facilities provided by his own firm, he should disclose those charges to the committee or the creditors when seeking approval of his fees, together with an explanation of how those charges are made up and the basis on which they are arrived at.

5.3 Where a resolution fixing the basis of fees is passed at any creditors meeting held before he has substantially completed his administration the trustee should immediately 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. 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 since the resolution was first passed. Where the fee is charged on a percentage basis the trustee should provide the details set out in paragraph 5.1 above regarding work which has been subcontracted out.

5.4 Where the trustee 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 the committee (if there is one), to any meeting of creditors convened for the purposes of determining his fees, and in any reports he send to creditors.

6 What if a Creditor is Dissatisfied?

- 6.1 If a creditor believes that the trustee's remuneration is too high he may, if at least 25 per cent in value of the creditors (including himself) agree, apply to the court for an order that it be reduced. 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. Unless the court orders otherwise, the costs must be paid by the applicant and not out of the bankrupt's assets.

7 What if the Trustee is Dissatisfied?

- 7.1 If the trustee considers that the remuneration fixed by the committee is insufficient he may request that it be increased by resolution of the creditors. If he considers that the remuneration fixed by the committee or the creditors or in accordance with the official receiver's scale is insufficient, he may apply to the court for it to be increased. 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.

8 Other Matters Relating to Fees

- 8.1 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. If the trustee is a solicitor and employs his own firm to act in the insolvency, profit costs may not be paid unless authorised by the committee, the creditors or the court.
- 8.2 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.