

LIQUIDATION: A GUIDE FOR CREDITORS ON INSOLVENCY PRACTITIONER FEES

SCOTLAND

1 Introduction

- 1.1 When a company goes into liquidation the costs of the proceedings are paid out of its assets. Therefore, the creditors, who hope to recover some of their debts out of the assets, have a direct interest in the level of costs and, in particular, the remuneration of the insolvency practitioner appointed to act as liquidator. Insolvency legislation recognises this interest by providing mechanisms for creditors to fix the basis of the liquidator's fees (also referred to as remuneration). This guide is intended to help creditors be aware of their rights under the legislation to approve and monitor fees. It explains the basis on which fees are fixed and how creditors may challenge fees they consider to be excessive.
- 1.2 This guide applies where a liquidator is appointed, or where information is provided by the liquidator about fees, expenses or other payments after 1 April 2021.

2 Liquidation procedure

- 2.1 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. Liquidation may be either voluntary, when it is instituted by resolution of the shareholders, or court, when it is instituted by order of the court.
- 2.2 Voluntary liquidation and court liquidation are equally common in Scotland. 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 participate in the appointment of the liquidator. A solvent liquidation is called a members' voluntary liquidation (often abbreviated to 'MVL'). It should be noted that this guide does not extend to MVLs as the fees in those cases are not determined by the creditors.
- 2.3 In a court liquidation an insolvency practitioner may be appointed to act as provisional liquidator until the making of the winding up order. In all court liquidations, an insolvency practitioner is appointed to act as interim liquidator from the making of the winding up order until the appointment of the liquidator by decision of creditors.
- 2.4 Where a court liquidation follows immediately on from an administration, the court may appoint the former liquidator to act as liquidator. An administrator may also subsequently act as liquidator in a CVL.

3 The liquidation committee

- 3.1 In a liquidation (whether CVL or court) the creditors have the right to appoint a committee called the liquidation committee, with a minimum of 3 and a maximum of 5 members, to monitor the conduct of the liquidation and approve the liquidator's fees. An invitation to decide on whether a committee is to be established must be sent to creditors:
- in a CVL, where any decision is sought from the creditors.
 - in court liquidation, at the same time as a decision is sought from the creditors on the appointment of a liquidator.
- 3.2 In cases where a liquidation follows immediately on an administration, a creditors' committee established for the purposes of the liquidation will continue in being as the liquidation committee.

- 3.3 The liquidator must call the first meeting of the committee within 6 weeks of its establishment and subsequent meetings must be held either at specified dates agreed by the committee, when requested by a member of the committee, or when the liquidator decides that a meeting needs to be held. The liquidator is required to report to the committee at least once every 6 months on the progress of the liquidation, 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 liquidator's fees.
- 3.4 All meetings may be attended remotely and the liquidator may seek the agreement of the committee to a resolution by way of correspondence.

4 Fixing the liquidator's fees

4.1 Basis

4.1.1 The basis for fixing the liquidator's fees must be fixed:

- as a percentage of the value of the company's assets which are realised by the liquidator;
- by reference to the work which was reasonably undertaken by the liquidator and the liquidator's staff in attending to matters arising in the winding up; or
- as a set amount.

4.1.2 Any combination of these bases may be used to fix the fees, and different bases may be used for different things done by the liquidator. Where the fee is fixed as a percentage, different percentages may be used for different things done by the liquidator.

4.1.3 In relation to fixing the fees of the provisional liquidator, the basis for fixing the amount of the remuneration payable may only be a commission calculated by reference to the value of the company's assets with which the provisional liquidator has had to deal. But there is in any event to be taken into account the work which, having regard to that value, was reasonably undertaken by the provisional liquidator and the extent of the provisional liquidator's responsibilities in administering the company's assets.

4.2 Who fixes the fees?

4.2.1 It is for the liquidation committee (if there is one) to fix the liquidator's remuneration and approve outlays (expenses). If there is no liquidation committee, or the committee does not make the requisite determination, the liquidator's remuneration is fixed by the court.

4.2.2 In arriving at its decision the committee may wish to have regard to the following matters:

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

4.2.3 The remuneration of a provisional liquidator can only be fixed by the court.

5 What information should be provided by the liquidator?

5.1 General principles

5.1.1 The liquidator should provide those responsible for approving payments from an estate with sufficient information to enable them to make an informed judgement about the reasonableness of the liquidator's requests. The information should be presented in a manner that is transparent, consistent throughout the life of the appointment and useful to creditors and other interested parties, while being proportionate to the circumstances of the appointment.

5.1.2 The liquidator should disclose:

- all payments, arising from the liquidation appointment to the liquidator or the liquidator's associates.
- the form and nature of any professional or personal relationships between the liquidator and the liquidator's associates.

5.1.3 The liquidator should inform creditors and other interested parties of their rights under insolvency legislation. Creditors should be advised how they may access suitable information setting out their rights within the first communication with them and in each subsequent report.

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

5.2 Key issues

5.2.1 The key issues of concern to creditors and other interested parties will commonly be:

- the work the liquidator 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 provides no direct financial benefit, but is required by statute);
- the work actually done and why that work was necessary;
- the actual payment for the work;
- 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).

5.2.2 When providing information about payments from the liquidation, the liquidator should do so in a way that 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 the liquidator's role and the work the liquidator intends to undertake, or has undertaken, in accordance with the key issues.

5.2.3 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.

5.3 Expenses

5.3.1 Expenses are any payments from the estate that are neither the liquidator's remuneration nor a distribution to a creditor or a member. Expenses also includes disbursements. Disbursements are payments which are first met by the liquidator, and then reimbursed to, the liquidator from the estate.

5.3.2 Expenses are divided into those that do not need approval before they are charged to the 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 liquidator. 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 the liquidator's remuneration. Category 2 expenses require approval whether paid directly from the estate or as a disbursement.

When seeking approval of category 2 expenses, the liquidator should explain for each expense the basis on which the expense is being charged to the estate.

5.3.3 Any shared or allocated payments incurred by the liquidator or the liquidator's firm are to be treated as category 2 expenses and approval sought before payment. This is irrespective of whether the payment is being made to an associate because the liquidator will be deciding how the expenses are being shared or allocated between insolvency appointments. Requiring approval of these payments enables those who are approving the expenses to confirm that the approach being taken by the liquidator is reasonable.

5.3.4 If the liquidator has obtained approval for the basis of category 2 expenses, 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.

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

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

5.4 Payment of pre-appointment expenses

5.4.1 The following categories of expenses may be paid out of the company's assets, either before or after the commencement of the winding up, as an expense in a CVL:

- any reasonable and necessary expenses of preparing the statement of affairs; and
- any reasonable and necessary expenses of the decision procedure or deemed consent procedure to seek a decision from the creditors on the nomination of liquidator.

5.4.2 If payment has not been made before the commencement of the liquidation, payment may not be made to the liquidator or any associate of the liquidator, otherwise than with the approval of the liquidation committee, creditors or the court.

5.4.3 Disclosure should be made of amounts already paid to the liquidator in respect of pre-appointment costs, giving the amounts paid, the name of payor, their relationship to the insolvent estate and the nature of the payment.

5.4.4 Disclosure should follow the principles and standards as set out in this guidance.

5.5 Realisations for secured creditors

5.5.1 If the liquidator realises an asset on behalf of a secured creditor and receives remuneration out of the proceeds, the amount of that remuneration should be disclosed in any reports to creditors.

6 Progress reports and requests for further information

6.1 The liquidator is required to send annual progress reports to creditors. In addition to the items discussed above the reports must contain:

- identification details for the insolvency proceedings;
- identification and contact details for the liquidator;
- the date of appointment of the liquidator and any changes in the liquidator
- details of progress during the period of the report, including a summary account of receipts and payments during the period of the report;
- in respect of any accounting period ending during, or coinciding with the end of, the period of the report after the end of which the liquidator has made or intends to make a claim for the outlays reasonably incurred and for the liquidator's remuneration, copies of:
 - the liquidator's accounts of the liquidator's intromissions with the company's assets.
 - the claim for the outlays reasonably incurred by the liquidator and for the liquidator's remuneration (where the liquidator intends to submit such a claim in respect of that accounting period).
 - where funds are available after making allowance for contingencies, a scheme of division of the divisible funds (assuming such payment is not to be postponed).
- in respect of any accounting period ending during, or coinciding with the end of, the period of the report after the end of which the liquidator has not made and is not making a claim for the outlays reasonably incurred and for the liquidator's remuneration:
 - a statement of the nature and amounts of the liquidator's outlays during the accounting period.
 - an estimate of the remuneration due to the liquidator during the accounting period and the basis or bases on which the estimate is based.
- details of what assets remain to be realised;
- where a distribution is to be made in respect of an accounting period, the scheme of division; and
- any other information of relevance to the creditors.

7 What if a creditor is dissatisfied?

7.1 If a creditor believes that the liquidator's remuneration is too high the creditor may, where that remuneration has been fixed by a liquidation committee, apply to the court for an order that it be reduced. If the court considers the application to be well-founded, it shall make an order fixing the remuneration at a reduced amount or rate. Notice must be delivered to the liquidator of an intention to appeal.

7.2 Unless the court orders otherwise, the expenses of the application shall be paid by the applicant, and are not payable as an expense of the liquidation.

7.3 If the liquidator's remuneration has been fixed by an order of the court there is no specific provision in the insolvency legislation to give creditors the right of appeal against the court's determination. Consequently, if a creditor is dissatisfied, any appeal must be made to the appropriate court in accordance with court rules. This applies to all remuneration of a provisional liquidator, which can only be fixed by the court.

8 What if the liquidator is dissatisfied?

8.1 If the liquidator considers that the remuneration fixed by the liquidation committee is insufficient, the liquidator may request that it be increased by a decision of the creditors. The liquidator may also apply to the court for an order increasing its amount or rate, either before or after recourse to the creditors.

8.2 If the liquidator decides to apply to the court, at least 14 days' notice of the application must be given to the members of the liquidation committee and the committee may nominate one or more of its members to appear or be represented at the court hearing.

- 8.3 If there is no committee, the liquidator's notice of an application to court 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.
- 8.4 The court may, if it appears to be a proper case, order the expenses of the liquidator's application, including the expenses of any member of the liquidation committee appearing or being represented on it, or any creditor so appearing or being represented, to be paid as an expense of the liquidation.
- 8.5 See [Appendix 1](#) for an overview of rights of appeal.

9 Other matters relating to fees

- 9.1 Where the liquidator realises assets on behalf of a secured creditor, the basis of remuneration for dealing with charged assets will usually be agreed with the secured creditor concerned.
- 9.2 Where there are joint liquidators it is for them to agree between themselves how the fee payable should be apportioned. Any dispute arising between them may be referred to the court, the liquidation committee or a decision of creditors.
- 9.3 If a new liquidator is appointed in place of another, any decision, 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 decision, determination, resolution or court order is made.
- 9.4 There may be occasions when creditors 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, 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 affairs of the insolvent company. Any arrangements of this nature will be a matter for agreement between the liquidator and the creditors concerned and will not be subject to the statutory rules relating to remuneration.

Whilst every care has been taken in its preparation, this guide is intended for general guidance only, and does not constitute legal advice.

Appendix 1 - Appeals against determination of remuneration and outlays

Determination by	Appeal by	Appeal by	Appeal by
	<u>Liquidator</u>	<u>Creditor</u>	<u>Contributory</u>
Committee	<p>Right of appeal within 14 days of determination of fee fixed after end of accounting period (or any interim claim).</p> <p><u>Recourse to creditors</u></p> <p>The liquidator may request an increase from the creditors by a decision procedure.</p> <p><u>Recourse to court</u></p> <p>(2) The liquidator may apply to court for an increase.</p>	<p>(1) Right of appeal within 14 days of determination of fee fixed after end of accounting period (or any interim claim).</p> <p><u>Recourse to court</u></p> <p>Any creditor or creditors representing 25% in value may apply to court for a reduction.</p>	<p>(1) Right of appeal within 14 days of determination of fee fixed after end of accounting period (or any interim claim).</p>
Resolution of creditors	<p><u>Recourse to court</u></p> <p>(2) The liquidator may apply to Court for an increase</p>		
Court	No specific provision in insolvency legislation for appeals. Court rules apply.		
Expenses of application to court	The court may order the expenses of the liquidator's application to be paid as an expense of the liquidation.	Unless the court orders otherwise, the expenses of the application must be paid by the applicant, and are not payable as an expense of the liquidation.	

(1) Must give notice to the liquidator of intention to appeal

(2) The liquidator must give at least 14 days' notice of the liquidator's application to the members of the liquidation committee, or if there is no committee, to one or more of the company's creditors as the court may direct.