

A CREDITORS' GUIDE TO ADMINISTRATORS' FEES
NOTE FOR CASES COMMENCED ON OR AFTER 27 MARCH 2006

1. The rules applicable in administration depend on whether the proceedings are based on a petition presented before 27th March 2006. If they are, then the rules as they stood before changes introduced by the Insolvency (Amendment) Rules (Northern Ireland) 2006 – S.R 47 of 2006 – continue to apply. In all other cases the rules substituted by the 2006 Rules will apply. As far as remuneration is concerned the two sets of rules are in identical terms, with the exception of the qualification regarding creditors' resolutions noted in paragraph 5 below.

2. The basis for fixing the administrator's remuneration is set out in old Rule 2.51 for cases where the petition was presented before 27th March 2006 and new Rule 2.107 for all other cases. The rules state that it shall be fixed either:

- as a percentage of the value of the property which the administrator has to deal with, or
- by reference to the time properly given by the administrator and his staff in attending to matters arising in the administration.

3. It is for the creditors' committee (if there is one) to determine on which of these bases the remuneration is to be fixed, and if as a percentage to determine what percentage is to be applied. In arriving at its determination 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 administrator;
- the effectiveness with which the administrator appears to be carrying out, or to have carried out, his duties;
- the value and nature of the property which the administrator has to deal with.

4. If there is no creditors' committee, or the committee does not make the requisite determination, the administrator's remuneration may be fixed by a resolution of a meeting of creditors using the same criteria as would apply if fixed by the committee. If the remuneration is not fixed in any of these ways, it will be fixed by the Court on application by the administrator.

5. If the administrator has stated in his proposals that the company has insufficient property to enable a distribution to be made to unsecured creditors, except out of the reserved fund set aside out of floating charge assets, then a resolution of the creditors shall be taken as passed if (and only if) passed with the approval of –

- Each secured creditor of the company; or
- If the administrator has made or intends to make a distribution to preferential creditors –
 - each secured creditor of the company; or
 - preferential creditors whose debts amount to more than 50% of the preferential debts of the company, disregarding debts of any creditor who does not respond to an invitation to give or withhold approval.

6. In cases where the petition is presented, or the appointment made, on or after 27th March 2006, a resolution of creditors may be taken by correspondence.

7. It should be noted that both rules 2.51 and 2.107 stipulate that the administrator's remuneration shall be fixed either on a percentage basis or on a time cost basis. Any resolutions purporting to allow the administrator to be remunerated on whichever basis he chooses or whichever yields the higher remuneration will not be in accordance with the rule.

A CREDITORS' GUIDE TO ADMINISTRATORS' FEES

WHERE PETITION PRESENTED BEFORE 27TH MARCH 2006 NORTHERN IRELAND

Introduction

1. When a company goes into administration the costs of the proceedings are paid out of its assets. The creditors, who hope eventually 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 administrator. The insolvency legislation recognises this interest by providing mechanisms for creditors to determine the basis of the administrator's fees. This guide is intended to help creditors be aware of their rights under the legislation to approve and monitor fees and explains the basis on which fees are fixed.

The nature of administration

2. Administration is a procedure which places a company under the control of an insolvency practitioner and the protection of the High Court in order to achieve one or more of the following statutory purposes:
 - the survival of the company and its business in whole or in part;
 - the approval of a company voluntary arrangement;
 - the sanctioning of a compromise or arrangement under Article 418 of the Companies (Northern Ireland) Order 1986;
 - a better realisation of assets than would be possible in a liquidation.

Administration may be followed by a company voluntary arrangement or liquidation.

The Creditors' Committee

3. The creditors have the right to appoint a committee with a minimum of 3 and a maximum of 5 members. One of the functions of the committee is to determine the basis of the administrator's remuneration. The committee is established at the meeting of creditors which the administrator is required to hold within 3 months of the administration order to consider his proposals. The administrator must call the first meeting of the committee within 3 months of its establishment, and subsequent meetings must be held either at specified dates agreed by the committee, or when a member of the committee asks for one, or when the administrator decides he need to hold one. The committee has power to summon the administrator to attend before it and provide such information as it may require.

Fixing the administrator's fees

4. The basis for fixing the administrator's remuneration is set out in Rule 2.51 of the Insolvency Rules (Northern Ireland) 1991, which states that it shall be fixed either:
 - as a percentage of the value of the property which the administrator has to deal with, or
 - by reference to the time properly given by the administrator and his staff in attending to matters arising in the administration.
5. It is for the creditors' committee (if there is one) to determine on which of these bases the remuneration is to be fixed, and if it is fixed as a percentage fix the percentage to be applied. Rule 2.51 says that in arriving at its decision the committee 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 administrator;
 - the effectiveness with which the administrator appears to be carrying out, or to have carried out, his duties;
 - the value and nature of the property which the administrator has to deal with.
6. If there is no creditors' committee, or the committee does not make the requisite determination, the administrator's remuneration may be fixed by a resolution of a meeting of creditors having regard to the same matters as the committee would. If the remuneration is not fixed in any of these ways, it will be fixed by the court on application by the administrator.

What information should be provided by the administrator?

When seeking fee approval

7. When seeking agreement to his fees the administrator 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 nature and extent of the supporting information which should be provided will depend on:
 - the nature of the approval being sought;
 - the stage during the administration of the case at which it is being sought; and
 - the size and complexity of the case.
8. Where, at any creditors' or committee meeting, the administrator seeks agreement to the terms on which he is to be remunerated, he should provide the

meeting with details of the charge-out rates of all grades of staff, including principals, which are likely to be involved on the case.

9. Where the administrator seeks agreement to his fees during the course of the administration, he should always provide an up to date receipts and payments account. Where the proposed fee is based on time costs the administrator should disclose to the committee or the creditors the time spent and the charge-out value in the particular case, together with, where appropriate, such additional information as may reasonably be required having regard to the size and complexity of the case. The additional information should comprise a sufficient explanation of what the administrator has achieved and how it was achieved to enable the value of the exercise to be assessed (whilst recognising that the administrator must fulfil certain statutory obligations that might be seen to bring no added value for creditors) and to establish that the time has been properly spent on the case. That assessment will need to be made having regard to the time spent and the rates at which that time was charged, bearing in mind the factors set out in paragraph 4 above. To enable this assessment to be carried out it may be necessary for the administrator to provide an analysis of the time spent on the case by type of activity and grade of staff. The degree of detail will depend on the circumstances of the case, but it will be helpful to be aware of the professional guidance which has been given to insolvency practitioners on this subject. The guidance suggests the following areas of activity as a basis for the analysis of time spent:

- Administration and planning
- Investigations
- Realisation of assets
- Trading
- Creditors
- Any other case-specific matters

The following categories are suggested as a basis for analysis by grade of staff:

- Partner
- Manager
- Other senior professionals
- Assistants and support staff

The explanation of what has been done can be expected to include an outline of the nature of the assignment and the administrator's own initial assessment, including the anticipated return to creditors. To the extent applicable it should also explain:

- Any significant aspects of the case, particularly those that affect the amount of time spent.
- The reasons for subsequent changes in strategy.

- Any comments on any figures in the summary of time spent accompanying the request the administrator wishes to make.
- The steps taken to establish the views of creditors, particularly in relation to agreeing the strategy for the assignment, budgeting, time recording, fee drawing or fee agreement.
- Any existing agreement about fees.
- Details of how other professionals, including subcontractors, were chosen, how they were contracted to be paid, and what steps have been taken to review their fees.

It should be borne in mind that the degree of analysis and form of presentation should be proportionate to the size and complexity of the case. In smaller cases not all categories of activity will always be relevant, whilst further analysis may be necessary in larger cases.

10. Where the fee is charged on a percentage basis the administrator should provide details of any work which has been or is intended to be sub-contracted out which would normally be undertaken directly by an administrator or his staff.

After fee approval

11. Where a resolution fixing the basis of fees is passed at any creditors' meeting held before he has substantially completed his functions, the administrator should notify the creditors of the details of the resolution in his next report or circular to them. In all subsequent reports to creditors the administrator should specify the amount of remuneration he has drawn in accordance with the resolution. Where the fee is based on time costs he should also provide details of the time spent and charge-out value to date and any material changes in the rates charged for the various grades since the resolution was first passed. He should also provide such additional information as may be required in accordance with the principles set out in paragraph 9. Where the fee is charged on a percentage basis the administrator should provide the details set out in paragraph 10 above regarding work which has been sub-contracted out.

Expenses and disbursements

12. There is no statutory requirement for the committee or the creditors to approve the drawing of expenses or disbursements. However, professional guidance issued to insolvency practitioners requires that, where the administrator proposes to recover costs which, whilst being in the nature of expenses or disbursements, may include an element of shared or allocated costs (such as room hire, document storage or communication facilities provided by the administrator's own firm), they must be disclosed and be authorised by those responsible for approving his remuneration. Such expenses must be directly incurred on the case and subject to a reasonable method of calculation and allocation.

What if a creditor is dissatisfied?

13. If a creditor believes that the administrator'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 administrator 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 as an expense of the administration.

What if the administrator is dissatisfied?

14. If the administrator considers that the remuneration fixed by the creditors' 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 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 creditors' committee and the committee may nominate one or more of its members to appear or be represented on the application. If there is no committee, the administrator's notice of his application must be sent to such of the company's 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 as an expense of the administration.

Other matters relating to fees

15. Where there are joint administrators it is for them to agree between themselves how the remuneration payable should be apportioned. Any dispute arising between them may be referred to the court, the creditors' committee or a meeting of creditors.
16. If the administrator is a solicitor and employs his own firm to act on behalf of the company, profit costs may not be paid unless authorised by the creditors' committee, the creditors or the Court.