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Insolvency Practitioners' fees in England and Wales

The fees regime for Insolvency Practitioners (IPs) in England and Wales changed with effect from 1 October 2015 as a result of the Insolvency (Amendment) Rules 2015. The underlying reasons for the change include a perceived failure on the part of IPs properly to communicate the value of the work they did and apparent excesses by a minority of IPs.

Historically, the creditors' committee, the creditors or the court would approve the basis of an IP's remuneration. That basis was most likely to be time costs, although fixed fees and percentages were also permitted. Once the basis was approved, IPs paid themselves from the assets. The principal control was that affected parties could object to the level of the IP's fees by applying to court.

Now the regime is for the basis to be approved similarly, but with additional controls on the level of fees. The level of fixed fees is clearly subject to a control by initial agreement. Percentage based fees are also seen to be controlled, albeit proportionately rather than by absolute amount. The most significant new introduction is of a requirement that IPs produce a fee estimate if they propose to work on a time cost basis and the fee estimate will serve as a cap on their fees.

The second step of the regime change was the introduction of a new Statement of Insolvency Practice (SIP) 9 with effect from 1 December 2015. The new SIP essentially emphasises the paramount importance of IPs explaining to those who approve their fees what they propose to do and why, and what they have done, so that those approving the fees can identify the value that the IP has brought. Historically there were reasonably prescriptive disclosure requirements with tables of hours, rates and fees, and some additional narrative explanation. The new SIP is essentially principles based and focusses (although not exclusively) on narrative explanation.

Not all formal appointments taken by IPs are covered by the new regime. It applies to insolvent liquidations, administrations and bankruptcies. It does not apply to solvent liquidations, where directors and shareholders are better placed to control IPs' fees; to voluntary arrangements, where fees are agreed as part of the detailed arrangement terms; or to receiverships, which are contractual appointments rather than collective insolvency procedures.

A key issue highlighted by the regime change is the timing of the approval of fee proposals, which is dependent on the precise appointment mechanism in the different types of insolvency proceeding.

In bankruptcy the IP is typically appointed with no or very limited knowledge of the bankrupt's estate. The fee approval mechanism has for some time been for a newly appointed trustee to seek a remuneration resolution from creditors when notifying them of his appointment. The relevant changes under the new regime are the emphasis on narrative explanation and the estimate (and cap) that would accompany that post appointment notification which seeks a resolution.

The system in a compulsory liquidation is very similar to that in bankruptcy.

In an administration the administrator is required to put detailed proposals about the administration to creditors as soon as reasonably practical and in any event within eight weeks of being appointed. Those proposals are accompanied by an appropriate fee resolution. Under the new regime the narrative explanation of work done and to be done will be somewhat more prominent and to the extent that the fee proposal involves time costs it will include an estimate (and cap).

In creditors' voluntary liquidations, the most common English corporate insolvency procedure, IPs' fees resolutions have usually been passed at an initial creditors' meeting – the meeting at which the IP is appointed. The new regime changes that. The law requires the estimate to be given by the liquidator (which he cannot do without being appointed). He therefore cannot issue a fee estimate before the meeting. Although there have been suggestions that this was not intended or is not the effect of the amendment to the Rules, it is currently what the law provides. Moreover, the SIP emphasises the need for fee resolutions to be considered alongside information that those approving the remuneration have had the opportunity to assimilate. As the system is for information about the company's financial position, history and reasons for failure to be presented at that initial creditors' meeting it can therefore only be a reasonable time after that meeting that creditors would be in a position to approve the remuneration proposal. Accordingly, the effect of the new fees regime is to put creditors in a creditors' voluntary liquidation in the same position as in the other relevant forms of insolvency proceeding, namely that the IP will report subsequently to creditors – in this case on the outcome of the creditors' meeting – along with a remuneration resolution.

In fact, this change of insolvency fees regime is much deeper than the changes in process described above. Increased transparency and more efficiency are its key underlying objectives. Although the additional procedures the new regime introduces are likely overall to increase fees, because of the additional work required, I think that IPs will find the new regime an encouragement to move on from selling time to truly delivering value and being seen to so do. I suspect that cases will often come to be remunerated partly on the basis of fixed fees (e.g. statutory reporting/filing), partly on a percentage basis (e.g. asset realisations) and partly on the basis of time costs (e.g. investigation work).

IPs are increasingly becoming sophisticated thinkers, managers and communicators and that sophistication will be as evident in their remuneration arrangements as in their activities generally and the value they add.

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