

PRACTICE DIRECTION No. 2/2003

(GCR O.1, r.12)

REMUNERATION OF OFFICIAL LIQUIDATORS

1. Introduction

- 1.1 The Court has responsibility under the Companies Law (2003 Revision) Section 107(2) for determining the remuneration of official liquidators.
- 1.2 The purpose of this practice direction is to set out the procedure by which the Court's responsibility will be discharged following the decision of the Court of Appeal published on 30th April, 2003.
- 1.3 This practice direction applies to all compulsory liquidations (including provisional orders) and all voluntary liquidations which are brought under the supervision of the Court, with effect from 1st January, 2004 (the "Commencement Date").
- 1.4 References to "Rules" shall mean the English Insolvency Rules 1986, subject to any necessary modification to the extent that such rules are inconsistent with the Companies Law (2003 Revision).

2. Winding-up Orders

- 2.1 Subject to paragraph 2.2, every winding up order and every order that a voluntary liquidation continue under the supervision of the Court shall contain a direction in the following terms:
 - (a) *The official liquidator(s) shall be entitled to receive remuneration for their services by reference to the time properly given by them and their staff in attending to matters arising in the winding-up; and*
 - (b) *The hourly rates and the amount of remuneration shall be determined in accordance with Rules 4.127 - 131.*
- 2.2. Nothing in this practice direction shall prevent the liquidation committee or the creditors from agreeing that the official liquidators' remuneration be fixed as a percentage of the value of the assets which are realised or distributed.

3. Establishment of Liquidation Committees

- 3.1 With effect from the Commencement Date it will be the practice of the Court to require that liquidation committees should be established in every case unless:-
- (a) the number of creditors or shareholders, as the case may be, is so small that the functions normally performed by the committee can be performed conveniently by the whole body of creditors or shareholders; or
 - (b) it is anticipated that the liquidation will be completed in less than six months.
- 3.2 Rules 4.151 to 4.171 shall apply subject to the following modifications:-
- (a) Rule 4.156 - "meetings" may take the form of telephonic conference calls;
 - (b) Rule 4.167 - nothing in this rule shall prevent communication by facsimile or email;
 - (c) Rule 4.169 - when "meetings" take the form of telephonic conference calls, the liquidator shall defray communication charges out of the assets.
- 3.3 In principle, the liquidation committee will comprise creditors if the company is insolvent or shareholders if the company is solvent, but the Court may direct that a liquidation committee comprise a combination of creditors and shareholders.
- 3.4 A liquidation committee shall be established by resolution of the creditors or shareholders (as the case may be) passed at a meeting convened by the liquidator as soon as reasonably practical and in no event later than 3 months after the commencement of the liquidation.
- 3.5 In appropriate cases, the Court will direct that a liquidation committee be established when liquidators are appointed provisionally.
- 3.6 The reasonable professional fees incurred by the liquidation committee in properly discharging its functions shall be treated as an expense of the liquidation to be paid out of the assets of the company.

4. Determination of Official Liquidators' Remuneration

- 4.1 If there is a liquidation committee, it will have responsibility for determining the scale of hourly rates (and any subsequent variation of the scale) and the amount

of remuneration in accordance with the criteria set out in Rule 4.127(4).

- 4.2 Whilst it is open to a liquidation committee to agree premium rates or insist upon discounted rates in respect of particularly complex or particularly simple matters, the normal effect of complexity or simplicity will be to increase or decrease the proportion of the time spent by the official liquidators personally and/or by their most senior staff.
 - 4.3 If there is no liquidation committee or the committee does not make the requisite determination, the official liquidators' remuneration may be fixed by a resolution of a meeting of creditors (in the case of an insolvent liquidation) or shareholders (in the case of a solvent liquidation).
 - 4.4 If the official liquidators' remuneration has been fixed by the liquidation committee and he considers the amount to be insufficient, he may request that it be increased by resolution of the creditors or shareholders as the case may be.
 - 4.5 If the official liquidator considers that the remuneration fixed for him by the liquidation committee or by resolution of the creditors or shareholders is insufficient, he may apply to the Court for an order increasing its amount or rate in accordance with Rule 4.130.
 - 4.6 In the event of an appeal to the Court:
 - (a) the Court may direct the obtaining of expert evidence; and
 - (b) the Court may make an inter partes order for costs in accordance with the general principles contained in GCR O.62, r.4.
 - 4.7 Any creditor (in the case of an insolvent liquidation) or shareholder (in the case of a solvent liquidation) may, with the concurrence of at least 25% in value of the creditors or shareholders (including himself), apply to the Court under Rule 4.131 for an order that the official liquidators' remuneration be reduced on the grounds that it is, in all the circumstances, excessive.
5. **Determination of Provisional Liquidators' Remuneration**
- 5.1 In cases where a winding-up order is made, the Court may direct that the liquidation committee established in accordance with paragraph 3.1 above shall have responsibility for determining retrospectively the scale of hourly rates and the amount of remuneration payable to the provisional liquidator and Rules 4.151 to 4.171 shall apply.
 - 5.2 In cases where a provisional winding-up order is made for the purpose of facilitating a reorganisation, the Court will consider directing the establishment of a provisional liquidation committee which will be given responsibility for

determining the scale of hourly rates and the amount of remuneration payable to the provisional liquidators, unless there is some other suitable arrangement approved by the Court.

- 5.3 In cases where the winding-up petition is dismissed, the provisional liquidators' remuneration will be determined by the Court.

6. Provision of information to Committees

- 6.1 When seeking agreement to his remuneration, the liquidator shall provide sufficient information to enable the committee to form a judgment as to whether the proposed fee is reasonable. In addition, each member of the committee shall be provided with a copy of the Creditors Guide to Liquidators' Fees.
- 6.2 If there is no committee, the same information should be provided to all the creditors or shareholders.
- 6.3 An application for approval of his remuneration may be presented in the form of a "fees report" or combined as part of a general report made in accordance with Rule 4.168.
- 6.4 The cost of preparing a fees report and providing information to the committee in support of the liquidator's application for approval of his remuneration shall be an expense of the liquidation to be paid out of the assets of the company.

7. Transitional provisions

- 7.1 To the extent that any winding-up order and/or direction made prior to the Commencement Date is inconsistent with the terms of this practice direction, the official liquidators shall apply no later than 28th February, 2004 for an order that it be varied.
- 7.2 On any such application, the Court will consider whether to direct the establishment of a liquidation committee or, if a liquidation committee has already been established, any appropriate variation of its powers.

Dated this 29th day of December, 2003.

The Hon. Anthony Smellie, QC, Chief Justice

A CREDITORS' GUIDE TO LIQUIDATORS' FEES

CAYMAN ISLANDS

1. Introduction

- 1.1 When a company goes into liquidation the costs of the proceedings are paid out of its 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 liquidator. The insolvency law and practice recognises this interest by providing mechanisms for creditors to fix the basis of the liquidator's fees and the amount of such fees.
- 1.2 This Guide is issued by the Grand Court Rules Committee. It is intended to help creditors be aware of their rights to approve and monitor fees and explains the basis on which fees are fixed.

2. 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. Voluntary liquidation may be brought under the supervision of the Court.
- 2.2 In a compulsory liquidation, the function of the liquidator is performed by a professional insolvency practitioner appointed by the Court upon the nomination of the party who presents the winding up petition.
- 2.3 The Court may also appoint a liquidator "provisionally". A provisional order can be made in two quite different circumstances. First, it may be made for the purpose of securing and preserving assets during a relatively short period pending adjudication of the petition. Second, it may be used as a mechanism for facilitating a restructuring.
- 2.4 Where a compulsory liquidation follows immediately on a controllership the court may appoint the former controller to act as liquidator.

3. The liquidation committee

- 3.1 In a liquidation (whether voluntary or compulsory) 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. The committee is usually established at the first creditors' meeting.

3.2 The liquidator 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 specified dates agreed by the committee, or when requested by a member of the committee, or when the liquidator decides he needs to hold one. The liquidator is required to report to the committee at least 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.

4. Fixing the liquidator's fees

4.1 The basis for fixing the liquidator's remuneration is set out in Rule 4.127 of the English Insolvency Rules 1986 which are incorporated into Cayman Islands law (subject to some modifications) by Order 102 of the Grand Court Rules and Practice Direction 2/2003. The Rule states that the remuneration shall be fixed either:

- (a) as a percentage of the value of the assets which are realised or distributed or both;
or
- (b) by reference to the time properly given by the liquidator and his staff in attending to matters arising in the insolvency.

It is for the liquidation committee (if there is one) to determine the scale of hourly rates or, if the remuneration is to be fixed as a percentage, to fix the percentage to be applied. Rule 4.127 says that in arriving at its decision the committee shall have regard to the following matters:

- (a) the complexity (or otherwise) of the case;
- (b) any responsibility of an exceptional kind or degree which falls on the liquidator in connection with the insolvency;
- (c) the effectiveness with which the liquidator appears to be carrying out, or to have carried out, his duties;
- (d) the value and nature of the assets which the liquidator has to deal with.

4.2 In cases where a Cayman Islands insolvency practitioner has been appointed jointly with a foreign practitioner, the liquidation committee should fix separate rates for work to be done in the Cayman Islands and work to be done overseas.

4.3 Liquidation committees should take steps to inform themselves about market rates, for which purpose they should consider taking professional advice. The reasonable cost of seeking and obtaining such advice may be paid out of the assets of the company as an expense of the liquidation.

4.4 If there is no liquidation committee, or the committee does not make the requisite determination, the liquidator's remuneration may be fixed by a resolution of a meeting of creditors. The creditors take account of the same matters as the committee would. A resolution specifying the terms on which the liquidator is to be remunerated must be put to the first creditors' meeting if, for whatever reason, a liquidation committee is not appointed. If the remuneration is not fixed in this way, it will be fixed by the Court.

4.5 The remuneration of a provisional liquidator is fixed in essentially the same way:-

- (a) If a winding up order is made, the liquidation committee will have responsibility for determining retrospectively the remuneration of the provisional liquidation;
- (b) If the provisional order has been made as a mechanism for facilitating a reconstruction the Court will consider directing the appointment of a liquidation committee, which will be charged with responsibility for determining the provisional liquidator's remuneration.

In any other circumstances, a provisional liquidators' remuneration will be fixed by the Court.

5. What information should be provided by the liquidators?

5.1 When seeking fee approval -

5.1.1 When seeking agreement to his fees the liquidator should provide sufficient supporting information to enable the committee or the creditors to form a judgment 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:

- (a) the nature of the approval being sought;
- (b) the stage during the administration of the case at which it is being sought;
and
- (c) the size and complexity of the case.

5.1.2 Where, at any creditors' or committee meeting, the liquidator 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.

5.1.3 Where the liquidator seeks agreement to his fees during the course of the liquidation, he should always provide an up to date receipts and payments account. Where the proposed fee is based on time costs the liquidator 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 liquidator has achieved and how it was achieved to enable the value of the exercise to be assessed (whilst recognising that the liquidator 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 4.1 above. To enable this assessment to be carried out it may be necessary for the liquidator 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 may be helpful to consider the following areas of activity as a basis for the analysis of time spent:

- (a) Administration and planning
- (b) Investigations
- (c) Realisation of assets
- (d) Trading
- (e) Creditors
- (f) Any other case specific matters

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

- (a) Partner
- (b) Manager
- (c) Other qualified professionals
- (d) 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 liquidator's own initial assessment, including the anticipated return to creditors. To the extent applicable it should also explain:

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

- (c) Any comments on any figures in the summary of time spent accompanying the request the liquidator wishes to make.
- (d) 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.
- (e) Any existing agreement about fees.
- (d) 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.

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

5.2 After fee approval

Where a resolution fixing the basis of fees is passed at any creditors' meeting held before he has substantially completed his functions, the liquidator should notify the creditors of the details of the resolution in his next report or circular to them. When subsequently reporting to creditors on the progress of the liquidation, 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 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 5.1.3. Where the fee is charged on a percentage basis the liquidator should provide the details set out in paragraph 5.1.4 above regarding work which has been sub-contracted out.

5.3 Expenses and disbursements

There is no statutory requirement for the committee or the creditors to approve the drawing of expenses or disbursements. However, best practice requires that, where the liquidator 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 liquidator'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.

5.4 Realisations for secured creditors

Where the liquidator realises an asset on behalf of a secured creditor and receives remuneration out of the proceeds (see paragraph 8.1 below), he should disclose the amount of that remuneration to the committee (if there is one), to any meeting of creditors convened for the purpose of determining his fees, and in any reports he sends to creditors.

5.5 Reporting in compulsory liquidations

It should be borne in mind that in compulsory liquidations there is no statutory requirement for the liquidator to report to creditors until the conclusion of the assignment. However, in most such cases, the Court will direct that reports be prepared and periodically distributed to creditors. It is open to the liquidation committee to ask for a report at any time.

6. What if a creditor is dissatisfied?

6.1 Except in cases where there is a liquidation committee it is the creditors as a body who have authority to approve the liquidator's fees. To enable them to carry out this function they may require the liquidator to call a creditors' meeting. In order to do this at least ten per cent in value of the creditors must concur with the request, which must be made to the liquidator in writing.

6.2 If a creditor believes that the liquidator'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 liquidator 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 assets of the insolvent company.

7. What if the liquidator is dissatisfied?

If the liquidator 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 is insufficient, he may apply to the court for it 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 liquidator'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 the liquidator realises assets on behalf of a secured creditor he is entitled to be remunerated out of the proceeds of sale in which case the liquidator will agree the basis of his fee for dealing with charged assets with the secured creditor concerned.
- 8.2 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, the committee or a meeting of creditors.
- 8.3 There may also 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, unless the Court directs that the funding be repaid to the creditors of the company's assets as any expense of the liquidation.

Dated: 29th December, 2003

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