

A CLIENT AND CREDITOR'S GUIDE TO SPECIAL ADMINISTRATORS' FEES - ENGLAND AND WALES

1. Introduction

1.1 When a company enters Special Administration, unless the fees and costs are paid by a third party, the costs are paid out of either the Company's assets or deducted from the client assets it holds in specific circumstances. The clients and creditors, who hope to recover amounts or assets due to them, therefore, have a direct interest in the level of costs charged and, in particular, the remuneration of the insolvency practitioner appointed to act as Special Administrator.

The relevant insolvency legislation recognises this interest by providing mechanisms for both clients and creditors to fix the basis of the Special Administrator's fees depending on the nature of the fees incurred. This guide is intended to help clients and creditors be aware of their rights to approve and monitor fees, explains the basis on which fees are fixed and how clients and creditors can seek information about expenses incurred by the Special Administrator and challenge those they consider to be excessive.

In Special Administration there are three administration objectives:

- Objective 1 being to ensure the return of client asset as soon as is reasonably practicable;
- Objective 2 is to ensure timely engagement with market infrastructure bodies and the financial Authorities; and
- Objective 3 is to either rescue the company as a going concern or wind it up in the best interests of the creditors.

Remuneration in pursuit of Objective 1 is to be paid from the client assets. Remuneration in pursuit of Objectives 2 & 3 is to be paid from the company's estate. The basis for remuneration in respect of all 3 objectives is for determination by the creditors' committee. However, where there is no creditors' committee or the committee makes no determination the basis of remuneration will be determined by a) the clients in respect of Objective 1, and b) the clients and creditors in respect of Objectives 2 and 3.

2. Special Administration procedure

2.1 Special Administration involves either rescue of the company as a going concern or the formal winding up of a company's affairs in the best interests of creditors, entailing the realisation of its own assets and the distribution of the proceeds in a prescribed order of priority. In addition, the Special Administrator is obliged to gather in and return client assets to individual clients with entitlements.

2.2 An insolvency practitioner acts as Special Administrator throughout and is appointed following a court order.

3. Fixing the Special Administrator's remuneration

3.1 Insolvency legislation states that the remuneration for all three Objectives shall be fixed:

- as a percentage of the value of the assets which are realised, distributed or both,
- by reference to the time properly given by the Special Administrator and his staff in attending to matters arising in the administration, or
- as a set amount.

Any combination of these bases may be used to fix the remuneration, and different bases may be used for different things done by the Special Administrator. Where the remuneration is fixed as a percentage, different percentages may be used for different things done by the Special Administrator.

It is for the creditors' committee (if there is one) to determine on which of these bases, or combination of bases, the remuneration is to be fixed. In the absence of a creditors' committee or where no determination is made the bases of remuneration will be for the clients in respect of Objective 1 and the creditors and clients in respect of Objectives 2 and 3. Where it is fixed as a percentage, it is for the committee or clients and creditors as appropriate to determine the percentage or percentages to be

applied. In arriving at its decision the committee or clients and creditors 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 Special Administrator in connection with the insolvency;
- the effectiveness with which the Special Administrator appears to be carrying out, or to have carried out, his duties;
- the value and nature of the assets which the Special Administrator has to deal with.

3.2 A resolution specifying the terms on which the Special Administrator is to be remunerated may be taken at the meeting to consider the Special Administrator's proposals.

3.3 In the event of the bases of remuneration not having been fixed by either the creditors' committee or the clients and creditors as appropriate, then the administrator can apply to Court for determination.

3.4 Where there are joint administrators, it is for them to agree between themselves as to how the remuneration payable should be apportioned

4. Review of remuneration

4.1 Where there has been a material and substantial change in circumstances since the basis of the Special Administrator's remuneration was fixed, the Special Administrator may request that it be changed. The request must be made to the same body as initially approved the remuneration, and the same rules apply as to the original approval.

4.2 Where the Special Administrator considers the rate or amount to be insufficient or the bases to be inappropriate then he can make an application to court.

5. What information should be provided by the Special Administrator?

5.1 When fixing bases of remuneration

5.1.1 When seeking agreement for the basis or bases of remuneration, the Special Administrator should provide sufficient supporting information to enable the committee or the clients and creditors to make an informed judgement as to whether the basis sought is appropriate having regard to all the circumstances of the case. The nature and extent of the information provided will depend on the stage during the conduct of the case at which approval is being sought. The appendix to this guide sets out a suggested format for the provision of information.

When providing information about payments, fees and expenses to clients and creditors, the Special Administrator should do so in a way that facilitates clarity of understanding of the key issues. Narrative explanations should be provided to support any numerical information supplied. Where it is practical to do so, the Special Administrator should provide an indication of the likely return to clients and creditors when seeking approval for the basis of his fees.

The key issues of concern to the clients and creditors will commonly be:

- a) the work the Special Administrator anticipates will be done and why that work is necessary;
- b) the anticipated cost of that work, including any expenses expected to be incurred in connection with it;
- c) whether it is anticipated that the work will provide a financial benefit to clients and creditors and, if so, what anticipated benefit (or if the work provides no direct, financial benefit but is required by statute);
- d) the work actually done and why that work was necessary;
- e) the actual costs of the work, including any expenses incurred in connection with it, as against any estimate provided; and
- f) whether the work has provided a financial benefit to clients and creditors and, if so, what benefit (or if the work provided no direct financial benefit but was required by statute).

5.1.2 The Special Administrator should also provide details and the cost of any work that has been or is intended to be sub-contracted out that could otherwise be carried out by the Special Administrator or his or her staff.

5.1.3 If work has already been carried out, the Special Administrator should state the proposed charge for the period to date and provide an explanation of what has been achieved in the period and how it was achieved, sufficient to enable the progress of the case to be assessed and whether the proposed charge is reasonable in the circumstances of the case.

5.1.4 If approval for a fixed amount of a percentage basis is sought, the Special Administrator should explain why the basis requested is expected to produce a fair and reasonable reflection of the work that the office holder anticipates will be undertaken.

Where the proposed charge is calculated on a time costs basis, the Special Administrator should disclose the time spent and the average charge-out rates, in larger cases split by grades of staff and analysed by appropriate activity. The Special Administrator should also provide details and the cost of any work that has been sub-contracted out that could otherwise be carried out by the Special Administrator or his or her staff.

5.2 After the bases of remuneration have been fixed

The Special Administrator is required to send progress reports to clients and creditors at specified intervals (see paragraph 6.1 below). When reporting periodically to clients and creditors, in addition to the matters specified in paragraph 6.1, the Special Administrator should provide an explanation of what has been achieved in the period under review and how it was achieved, sufficient to enable the progress of the case to be assessed.

Clients and creditors should be able to understand whether the remuneration charged is reasonable in the circumstances of the case (whilst recognising that the Special Administrator must fulfil certain statutory obligations and regulatory requirements that might be perceived as bringing no added value for the estate).

Where any remuneration is on a time costs basis, the Special Administrator should disclose the charge in respect of the period, the time spent and the average charge-out rates, in larger cases split by grades of staff and analysed by appropriate activity. If there have been any changes to the charge-out rates during the period under review, rates should be disclosed by grades of staff, split by the periods applicable. The Special Administrator should also provide details and the cost of any work that has been sub-contracted out that could otherwise be carried out by the Special Administrator or his or her staff.

5.3 Disbursements and other expenses

5.3.1 Costs met by and reimbursed to the Special Administrator in connection with the administration should be appropriate and reasonable. Such costs will fall into two categories:

- Category 1 disbursements: These are costs where there is specific expenditure directly referable both to the special administration and a payment to an independent third party. These may include, for example, advertising, room hire, storage, postage, telephone charges, travel expenses, and equivalent costs reimbursed to the Special Administrator or his or her staff.
- Category 2 disbursements: These are costs that are directly referable to the special administration but not to a payment to an independent third party. They may include shared or allocated costs that can be allocated to the administration on a proper and reasonable basis, for example, business mileage.

Category 1 disbursements can be drawn without prior approval, although the Special Administrator should be prepared to disclose information about them in the same way as any other expenses. Category 2 disbursements may be drawn if they have been approved in the same manner as the Special Administrator's remuneration. When seeking approval, the Special Administrator should explain, for each category of expense, the basis on which the charge is being made.

5.3.2 The following are not permissible:

- a charge calculated as a percentage of remuneration;

- an administration fee or charge additional to the Special Administrator's remuneration;
- recovery of basic overhead costs such as office and equipment rental, depreciation and finance charges.

6. Progress reports and requests for further information

6.1 The Special Administrator is required to send progress reports to clients and creditors every six months. The reports must include:

- details of the basis fixed for the remuneration of the Special Administrator (or if not fixed at the date of the report, the steps taken during the period of the report to fix it);
- if the basis has been fixed, the remuneration charged during the period of the report, irrespective of whether it was actually paid during that period (except where it is fixed as a set amount, in which case it may be shown as that amount without any apportionment for the period of the report);
- if the report is the first to be made after the basis has been fixed, the remuneration charged during the periods covered by the previous reports, together with a description of the work done during those periods, irrespective of whether payment was actually made during the period of the report;
- a statement of the expenses incurred by the Special Administrator during the period of the report, irrespective of whether payment was actually made during that period. The statement must contain a break down of expenses incurred in respect of Objective 1;
- a statement of the clients and creditors' rights to request further information, as explained in paragraph 6.2, and their right to challenge the Special Administrator's remuneration and expenses;
- a statement of pre-appointment costs, including the date approval was given and the amounts approved.

6.2 Within 21 days of receipt of a progress report a secured creditor, clients and unsecured creditors with at least 5% concurrence of the other clients and unsecured creditors as applicable may request the Special Administrator to provide further information about the remuneration and expenses set out in the report.

6.3 The Special Administrator must provide the requested information within 14 days, unless he considers that:

- the time and cost involved in preparing the information would be excessive, or
- disclosure would be prejudicial to the conduct of the special administration or might be expected to lead to violence against any person, or
- the Special Administrator is subject to an obligation of confidentiality in relation to the information requested, in which case he must give the reasons for not providing the information.

Any clients and creditor may apply to the court within 21 days of the Special Administrator's refusal to provide the requested information, or the expiry of the 14 days time limit for the provision of the information.

7. Provision of information - additional requirements

The Special Administrator must provide certain information about the time spent on the case, free of charge, upon request by any clients and creditor, director or shareholder of the company.

The information which must be provided is -

- the total number of hours spent on the case by the Special Administrator or staff assigned to the case;
- for each grade of staff, the average hourly rate at which they are charged out;
- the number of hours spent by each grade of staff in the relevant period.

The period for which the information must be provided is the period from appointment to the end of the most recent period of six months reckoned from the date of the Special Administrator's appointment, or where he has vacated office, the date that he vacated office.

8. What if a client or creditor is dissatisfied?

8.1 If a client or creditor believes that the Special Administrator's remuneration is too high, the basis is inappropriate, or the expenses incurred by the Special Administrator are in all the circumstances excessive he may, provided certain conditions are met, apply to the court for any of the following:

- an order reducing the amount of remuneration which the special administrator was entitled to charge;
- an order fixing the basis of remuneration at a reduced rate or amount;
- an order changing the basis of remuneration;
- an order that some or all of the remuneration or expenses in question be treated as not being expenses of the administration;
- an order that the administrator or the administrator's personal representative pay to the investment bank the amount of the excess remuneration or expenses or such part of the excess as the court may specify.

Unless the court orders otherwise, the costs of any application are borne by the applicant and are not payable as an expense of the special administration.

9. What if the Special Administrator is dissatisfied?

If he considers that the remuneration fixed by the creditors' committee, or by the clients and creditors as appropriate is insufficient, or that the basis used to fix it is inappropriate, he may apply to the court for the amount or rate to be increased or the basis changed.

If he decides to apply to the court he must give at least 14 days' notice to the clients and creditors or the committee, if there is one. The clients and creditors or the committee, if there is one, and the creditors may nominate one or more individuals to appear or be represented on their behalf at the court hearing. The court may order the costs to be paid out of the assets.

10. Other matters relating to remuneration

10.1 Where the Special Administrator realises assets on behalf of a secured creditor he is entitled to be remunerated out of the proceeds of sale in accordance with a scale set out in the Rules. Usually, however, the Special Administrator will agree the basis of his fee for dealing with charged assets with the secured creditor concerned.

10.2 Where two (or more) joint Special Administrators 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 clients and creditors.

10.3 If the appointed Special Administrator 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 clients and creditors or the court.

10.4 If a new Special Administrator is appointed in place of another, any 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 Special Administrator until a further determination, resolution or court order is made.

10.5 Where the basis of the remuneration is a set amount, and the Special Administrator ceases to act before the time has elapsed or the work has been completed for which the amount was set, application may be made for a determination of the amount that should be paid to the outgoing Special Administrator. The application must be made to the same body as approved the remuneration. Where the outgoing Special Administrator and the incoming Special Administrator are from the same firm, they will usually agree the apportionment between them.

Appendix

Suggested format for the provision of information

Professional guidance issued to insolvency practitioners sets out the following suggested format for the provision of information when seeking approval of remuneration. However, the level of disclosure suggested below may not be appropriate in all cases, and will be subject to considerations of proportionality. In larger or more complex cases the circumstances of each case may dictate the information provided and its format.

Narrative overview of the case

In all cases, reports on remuneration should provide a narrative overview of the case. Matters relevant to an overview are:

- the complexity of the case;
- any exceptional responsibility falling on the Special Administrator;
- the Special Administrator's effectiveness;
- the value and nature of the property in question

The information provided will depend upon the basis or bases being sought or reported upon, and the stage at which it is being provided. An overview might include:

- an explanation of the nature, and the Special Administrator's own initial assessment, of the assignment (including the anticipated return to clients and creditors) and the outcome (if known);
- initial views on how the assignment was to be handled, including decisions on staffing or subcontracting and the appointment of advisers;
- any significant aspects of the case, particularly those that affect the remuneration and cost expended;
- the reasons for subsequent changes in strategy;
- the steps taken to establish the views of clients and creditors, particularly in relation to agreeing the strategy for the assignment, budgeting, and fee drawing;
- any existing agreement about remuneration;
- 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;
- in a larger case, particularly if it involved trading, considerations about staffing and managing the assignment and how strategy was set and reviewed;
- details of work undertaken during the period;
- any additional value brought to the estate during the period, for which the Special Administrator wishes to claim increased remuneration.

Time cost basis

Where any part of the remuneration is or is proposed to be calculated on a time costs basis, requests for and reports on remuneration should provide:

- an explanation of the Special Administrator's time charging policy, clearly stating the units of time that have been used, the grades of staff and rates that have been charged to the assignment, and the policy for recovering the cost of support staff. There is an expectation that time will be recorded in units of not greater than 6 minutes.
- a description of work carried out, which might include:
 - details of work undertaken during the period, related to the table of time spent for the period;
 - an explanation of the grades of staff used to undertake the different tasks carried out and the reasons why it was appropriate for those grades to be used;
 - any comments on any figures in the summary of time spent accompanying the request the Special Administrator wishes to make.
- time spent and charge-out summaries, in an appropriate format.

It is useful to provide time spent and charge-out value information in a tabular form for each of the time periods reported upon, with work classified (and sub-divided) in a way relevant to the circumstances of the case

The following areas of activity are suggested as a basis for the analysis of time spent:

- Administration and planning
- Investigations
- Realisation of assets
- Trading
- Clients and 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 level of disclosure suggested above will not be appropriate in all cases, and considerations of proportionality will apply:

- where cumulative time costs are, and are expected to be, less than £10,000 the Special Administrator should, as a minimum, state the number of hours and average rate per hour and explain any unusual features of the case;
- where cumulative time costs are, or are expected to be, between £10,000 and £50,000, a time and charge-out summary similar to that shown above will usually provide the appropriate level of detail (subject to the explanation of any unusual features);
- where cumulative time costs exceed, or are expected to exceed, £50,000, further and more detailed analysis or explanation will be warranted.