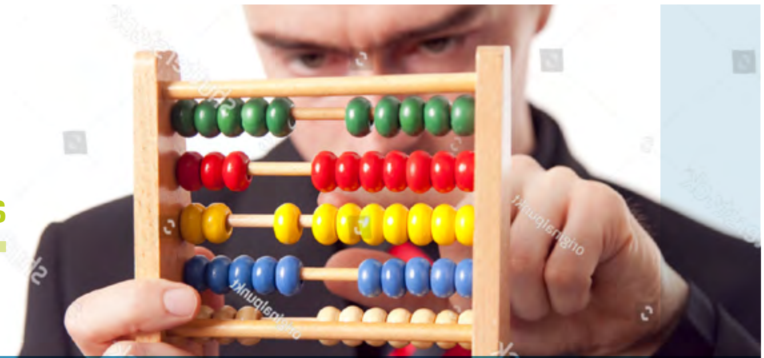
Julian Dobson SOLICITORS

Insolvency Lawyers



Trustees in bankruptcy - Remuneration

Introduction

The rules relating to trustees remuneration have been the subject of change in recent years. The requirement for trustees to provide an estimate to creditors has resulted in some cases where the value of the work carried out greatly exceeds the estimate given to creditors or the amounts agreed as remuneration. To avoid being 'left out of pocket' trustees may consider asking the creditors for more using a decision procedure, or making an application to court.

In this article we look at the options available to a trustee and identify some of the relevant considerations in deciding what to do.

How is a trustee's remuneration fixed?

A trustee's remuneration must be fixed as a percentage of assets realised and/or distributed by the trustee or by reference to time properly given by the office holder and his staff or as a set amount. The basis of remuneration may be a combination of the above bases. **(Rule 18.16) (Insolvency (England and Wales) Rules 2016) ("Insolvency Rules")**. Before the basis of remuneration is determined the office holder must give creditors a fees estimate and details of expenses that will be or are likely to be incurred. The estimate must contain details of the proposed work that the office holder will undertake. In fixing the basis of remuneration regard must be had to the complexity of the case, any responsibility of an exceptional kind or degree, the effectiveness with which the office holder carries out his/her duty and the value and nature of the property to be dealt with. The trustee must also have regard to the provisions of **Statement of Insolvency Practice 9 (SIP9)** which stipulates professional requirements for office holders remuneration. In giving a fee estimate it must represent a snap-shot of the position as at the time of the estimate and may not be given in anticipation of various alternative scenarios. More importantly where remuneration is in a fixed amount or percentage then the office holder must also explain why that basis would produce a fair and reasonable reflection of the work that the office holder anticipates he/she will carry out.

Who fixes a trustee's remuneration initially?

The determination of the trustee's remuneration is the duty of the creditors committee. If the creditors committee does not fix the basis of remuneration or there is no committee, then the basis of the trustee's remuneration may be fixed by the creditors by a decision procedure.

What if the basis of remuneration is not fixed?

Rule 18.22 provides that if creditors were asked to fix remuneration and failed to do so or the basis of remuneration is not fixed within 18 months of the trustee's appointment, then the trustee will be entitled to remuneration under the scales set out schedule 11. They are the same as the old schedule 6 scale fees contained within the **Insolvency Rules 1986**.

The net result is that the trustee's remuneration will be fixed by one method or another no later than 18 months after he or she is appointed. Whilst scale rates can provide a fair and reasonable remuneration for a trustee in bankruptcy in many cases, there will be occasions when they are not considered to be sufficient.

In such cases **Rule 18.24** provides an opportunity for a trustee who considers the rate or amount of remuneration fixed to be insufficient or the basis to be inappropriate to request creditors to increase the rate or change the basis. Alternatively, the trustee can apply to court.

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However a request to creditors to change the basis or increase the amount of their remuneration is subject to **Rule 18.25**. This provides that a trustee may only make a request to creditors to increase the rate of remuneration or change the basis using a decision procedure, where the basis of the office holder's remuneration was originally fixed by the creditors' committee. If the trustee's remuneration was not determined by a creditors' committee but merely by creditors or by default under scale, then the trustee cannot utilise a creditors' decision procedure. If the basis of the trustee's remuneration was not originally fixed by the committee then this leaves only the following remaining avenues available.

Application to court

A trustee may apply for an increase in the rate of remuneration or change of basis to the court in circumstances where his/her remuneration was originally fixed;

(a) by the committee and the trustee requested that the amount be increased or the basis changed by a decision of creditors but the creditors have not changed it; or

(b) by a decision of creditors (by decision procedure); or

(c) under **Rule 18.22** (scale fees by default)

Rule 18.28 sets out the procedural requirements for any application to court. In addition the **Practice Direction: Insolvency Proceedings [2018] BCC 241 ("Practice Direction")** also applies to any such application which contains detailed requirements.

Request to creditors – "material and substantial change"

Rule 18.29 enables a trustee where his remuneration has already been fixed to apply to creditors for the basis of remuneration to be changed. However, any such request may only be made where there is a 'material and substantial change in the circumstances which were taken into account in fixing' the remuneration in the first instance.

In practical terms this presents a significant hurdle to be overcome by any trustee wishing to change the basis of their remuneration. In identifying what were the circumstances taken into account in fixing the remuneration originally, that task will be made easier where the remuneration was originally fixed either by the creditors' committee or by creditors. This is because as part of that process the trustee would have had to have provided a fees estimate with details of the work that was anticipated. Where the actual work required to be undertaken is very different from that envisaged in the estimate then that comparison will be the analysis that will determine whether or not there has been a material and substantial change in the circumstances.

Where the trustee's remuneration was fixed by default under **Rule 18.22** i.e, after 18 months had elapsed from appointment, then it will be more difficult to identify exactly what circumstances were taken into account at the point at which the remuneration was determined under that Rule. Practitioners have successfully used **Rule 18.29** to change the basis of an office holder's remuneration where such remuneration had been determined by default under Schedule 6 scale rates. Creditors have been requested and have approved a fixed fee in addition to scale fees previously paid to the office holder.

Limitation on Rule 18.29

Even where it is possible to demonstrate a material and substantial change in circumstances, any change in the basis of remuneration will only apply from the date on which creditors are requested to approve such a change and not for any earlier period. This means that even if an office holder is successful in changing the basis of remuneration to time costs, they will not get approval for time

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costs incurred prior to the date of the request. They will only be entitled to time costs incurred after the request has been approved by creditors. In practical terms this has meant that office holders seeking a change in the basis of remuneration have tended to seek a fixed fee approval from creditors and not time costs.

Conclusion

Trustees seeking a change in the basis of their remuneration will need to consider carefully whether they fall within the relevant provisions of the **Insolvency Rules**. A trustee not being able to satisfy the specific requirements of the Insolvency Rules to achieve a change in basis of remuneration may contemplate making an application to the court. Whilst such applications are clearly contemplated by the Rules, and can be successful, careful consideration should be given to the **Practice Direction** in formulating any application for an increase in remuneration or change of basis to court.

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