

ADMINISTRATION: A GUIDE FOR CREDITORS ON INSOLVENCY PRACTITIONER FEES

SCOTLAND

1 Introduction

- 1.1 When a company goes into administration the costs of the proceedings are paid out of its assets. Therefore, the creditors, who hope to recover some of their debts out of the assets, have a direct interest in the level of costs and, in particular, the remuneration of the insolvency practitioner appointed to act as administrator. Insolvency legislation recognises this interest by providing mechanisms for creditors to fix the basis of the administrator's fees (also referred to as remuneration). This guide is intended to help creditors be aware of their rights under the legislation to approve and monitor fees. It explains the basis on which fees are fixed and how creditors may challenge fees they consider to be excessive.
- 1.2 This guide applies where an administrator is appointed, or where information is provided by the administrator about fees, expenses or other payments after 1 April 2021.

2 The nature of administration

- 2.1 Administration is a procedure that places a company under the control of an insolvency practitioner and the protection of the court with the following objective:

- rescuing the company as a going concern, or
- achieving a better result for the creditors as a whole than would be likely if the company were wound up without first being in administration,

or, if the administrator thinks neither of these objectives is reasonably practicable:

- realising property in order to make a distribution to secured or preferential creditors.

3 The creditors' committee

- 3.1 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. An invitation to decide on whether a committee is to be established will be sent to creditors at the same time as a decision is sought on the administrator's proposals. The administrator must call the first meeting of the committee within 6 weeks of its establishment, and subsequent meetings must be held either at specified dates agreed by the committee, when a member of the committee asks for one, or when the administrator decides that one needs to be held. The committee has power to summon the administrator to attend before it and provide information about the exercise of the administrator's functions. All meetings may be attended remotely and the administrator may seek the agreement of the creditors' committee to a resolution by way of correspondence.

4 Fixing the administrator's fees

4.1 Basis

- 4.1.1 The basis for fixing the administrator's fees must be fixed:

- as a percentage of the value of the company's property with which the administrator has to deal;
- by reference to the work that was reasonably undertaken by the administrator and the administrator's staff in attending to matters arising in the administration; or
- as a set amount.

4.1.2 Any combination of these bases may be used to fix the fees, and different bases may be used for different things done by the administrator. Where the fee is fixed as a percentage, different percentages may be used for different things done by the administrator.

4.2 Who fixes the fee?

4.2.1 It is for the creditors' committee (if there is one) to fix the administrator's remuneration and approve outlays (expenses).

4.2.2 In arriving at its decision the committee may wish to have regard to the following matters:

- the complexity (or otherwise) of the case;
- any responsibility of an exceptional kind or degree that falls on the administrator;
- the effectiveness with which the administrator appears to be carrying out, or to have carried out, the administrator's duties;
- the value and nature of the property with which the administrator has to deal.

4.2.3 If there is no creditors' committee, or the committee does not make the requisite determination, the administrator's fee may be fixed by a decision of the creditors by a decision procedure, having regard to the same matters as apply in the case of the committee. If the fee is not fixed in any of these ways, it will be fixed by the court following an application by the administrator, but the administrator may not make such an application without first having tried to get the fees fixed by the committee or creditors as described above.

4.2.4 There are special rules about creditors' decisions in cases where the administrator has stated in the statement of proposals that the company has insufficient property to enable a distribution to be made to unsecured creditors except out of the prescribed part that may have to be set aside out of floating charge assets.

4.2.5 In such circumstances, if there is no creditors' committee, or the committee does not make the requisite determination, the basis of the administrator's fees may be fixed by –

- the approval of each of the secured creditors of the company; or
- if the administrator has made or intends to make a distribution to preferential creditors –
 - the approval of each of the secured creditors of the company; and
 - a decision of the preferential creditors in a decision procedure.

4.2.6 See [Appendix 1](#) for an overview of the remuneration approval process.

5 Approval of pre-administration costs

5.1 Sometimes the administrator may need to seek approval for the payment of costs in connection with preparatory work incurred before the company went into administration, but which remain unpaid. Such costs may relate to work done either by the administrator or by another insolvency practitioner. Disclosure of such costs must be included in the administrator's proposals.

5.2 Where there is a creditors' committee, it is for the committee to determine whether, and to what extent, such costs should be approved for payment. If there is no committee or the committee does not make the necessary determination, or if it does but the administrator, or other insolvency practitioner who has incurred pre-administration costs, considers the amount agreed to be insufficient, approval may be given by creditors via a decision procedure. The determination may be made by the same creditors as approve the administrator's fees, as set out at paragraph 4.2.

5.3 The administrator must convene a meeting of the committee or seek a decision of the creditors by a decision procedure for the purposes of approving the payment of pre-administration costs if requested to do so by another insolvency practitioner who has incurred such costs. If there is no determination under these provisions, or if there is but the administrator or other insolvency practitioner considers the amount agreed to be insufficient, the administrator may apply to the court for a determination.

6 What Information should be provided by the administrator?

6.1 General principles

6.1.1 The administrator should provide those responsible for approving payments from an estate with sufficient information to enable them to make an informed judgement about the reasonableness of the administrator's requests. The information should be presented in a manner that is transparent, consistent throughout the life of the appointment and useful to creditors and other interested parties, while being proportionate to the circumstances of the appointment.

6.1.2 The administrator should disclose:

- all payments, arising from the administration appointment to the administrator or the administrator's associates;
- the form and nature of any professional or personal relationships between the administrator and the administrator's associates

6.1.3 The administrator should inform creditors and other interested parties of their rights under insolvency legislation. Creditors should be advised how they may access suitable information setting out their rights within the first communication with them and in each subsequent report.

6.1.4 Where the administrator sub-contracts work that could otherwise be carried out by the administrator or the administrator's staff, this should be drawn to the attention of creditors with an explanation of why it is being done.

6.2 Key issues

6.2.1 The key issues of concern to creditors and other interested parties will commonly be:

- the work the administrator anticipates will be done and why that work is necessary;
- the anticipated payment for that work;
- whether it is anticipated that the work will provide a financial benefit to creditors, and if so what anticipated benefit (or if the work provides no direct financial benefit, but is required by statute);
- the work actually done and why that work was necessary;
- the actual payment for the work;
- whether the work has provided a financial benefit to creditors, and if so what benefit (or if the work provided no direct financial benefit but was required by statute).

6.2.2 When providing information about payments from the administration, the administrator should do so in a way that clearly explains the key issues. Narrative explanations should be provided to support any numerical information supplied. Such an approach allows creditors and other interested parties to better recognise the nature of the administrator's role and the work the administrator intends to undertake, or has undertaken, in accordance with the key issues.

6.2.3 When approval for a fixed amount or a percentage basis is sought, the administrator should explain why the basis requested is expected to produce a fair and reasonable reflection of the work that the administrator anticipates will be undertaken.

6.3 Expenses

6.3.1 Expenses are any payments from the estate that are neither the administrator's remuneration nor a distribution to a creditor or a member. Expenses also includes disbursements. Disbursements are payments which are first met by the administrator, and then reimbursed to, the administrator from the estate.

6.3.2 Expenses are divided into those that do not need approval before they are charged to the estate (category 1) and those that do (category 2).

- Category 1 expenses: These are payments to persons providing the service to which the expense relates who are not an associate of the administrator. Category 1 expenses can be paid without prior approval.
- Category 2 expenses: These are payments to associates, or which have an element of shared costs. Before being paid, category 2 expenses require approval in the same manner as the administrator's remuneration. Category 2 expenses require approval whether paid directly from the estate or as a disbursement.

When seeking approval of category 2 expenses, the administrator should explain for each expense the basis on which the expense is being charged to the estate.

6.3.3 Any shared or allocated payments incurred by the administrator or the administrator's firm are to be treated as category 2 expenses and approval sought before payment. This is irrespective of whether the payment is being made to an associate because the administrator will be deciding how the expenses are being shared or allocated between insolvency appointments. Requiring approval of these payments enables those who are approving the expenses to confirm that the approach being taken by the administrator is reasonable.

6.3.4 If the administrator has obtained approval for the basis of category 2 expenses, that basis may continue to be used in a sequential appointment where further approval of the basis of remuneration is not required, or where the administrator is replaced.

6.3.5 The following are not permissible as either remuneration or an expense:

- an expense or any other charge calculated as a percentage of remuneration;
- an administration fee or charge additional to the administrator's remuneration;
- the recovery of any overheads other than those absorbed in the charge out rates.

7 Progress reports and requests for further information

7.1 The administrator is generally required to send a progress report to creditors at 6-monthly intervals (unless the administration accounting periods, to which progress reports are linked, have been altered by approval of the creditors' committee or, where there is no creditors' committee, the court).

7.2 In addition to the items discussed above the report must include:

- details of progress during the period of the report, including a summary of the receipts and payments during the period stating what assets of the company have been realised,
- for what value, and what payments have been made to creditors.
- details of what assets remain to be realised

7.3 Where the administrator has not submitted a fee for approval in respect of an accounting period, or has submitted a fee that has yet to be approved, the progress report must include an estimate of the remuneration due to the administrator during the accounting period together with the basis or bases set on which the estimate is based.

8 What if a creditor is dissatisfied?

- 8.1 If the administrator's fees have been fixed by the creditors' committee or by the creditors and a creditor believes that the administrator's fees or expenses are, in all the circumstances, excessive then, provided certain conditions are met, an application may be made to the court.
- 8.2 Application may be made to the court by any creditor or creditors of the company representing in value at least 25% of the creditors. Any such application must be made not later than 8 weeks after the end of an accounting period.
- 8.3 If the court considers the application well founded, it may order fixing the fees at a reduced amount or rate. The court may order the costs of the application to be paid as an expense of the administration.

9 What if the administrator is dissatisfied?

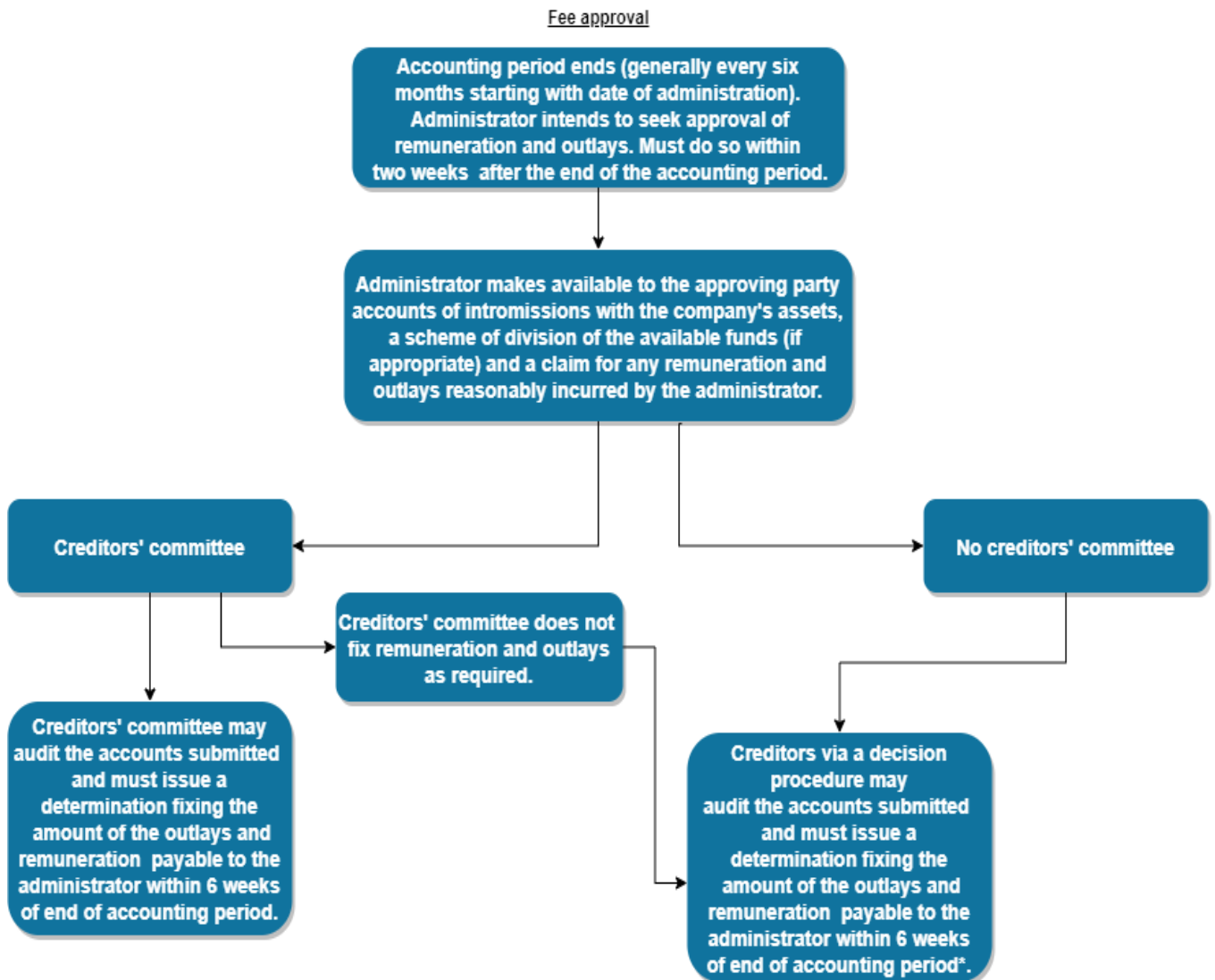
- 9.1 If the administrator considers that the fees fixed by the by the creditors' committee, or by decision of the creditors, is insufficient or that the basis used to fix the fees is inappropriate, an application may be made to the court for the amount or rate to be increased or the basis changed. If the administrator decides to apply to the court, 14 days' notice must be given 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 an 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 of the application to be paid as an expense of the administration.

10 Other matters relating to fees

- 10.1 Where there are joint administrators it is for them to agree between themselves how the fee payable should be apportioned. Any dispute arising between them may be referred to the court, the creditors' committee or a decision of creditors.
- 10.2 If a new administrator is appointed in place of another, any decision, determination, resolution or court order that was in effect immediately before the replacement continues to have effect in relation to the remuneration of the new administrator until a further decision, determination, resolution or court order is made.
- 10.3 Where the basis of the fee is a set amount, and the 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 administrator. The application must be made to the same body as approved the fees. Where the outgoing administrator and the incoming administrator are from the same firm, they will usually agree the apportionment between them.

Whilst every care has been taken in its preparation, this guide is intended for general guidance only, and does not constitute legal advice.

Appendix 1 – Administration fee approval process



*If the administrator has stated in the statement of proposals that the company has insufficient property to enable a distribution to be made to unsecured creditors except out of the prescribed part that may have to be set aside out of floating charge assets then approval is required only from each secured creditor and a decision of the preferential creditors in a decision procedure.

