

Remuneration of Insolvency Officeholders – Republic of Ireland

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Remuneration of Insolvency Officeholders – Republic of Ireland**INTRODUCTION**

1. This Statement of Insolvency Practice is one of a series issued by the Association of Chartered Certified Accountants to insolvency practitioners with a view to maintaining standards by setting out required practice and harmonising members' approach to particular aspects of insolvency practice.

2. The purpose of Statements of Insolvency Practice is to set out basic principles and essential procedures with which insolvency practitioners are required to comply. Departure from the standards set out in the Statements of Insolvency Practice is a matter

that may be considered by the Association for the purposes of possible disciplinary or regulatory action.

3. The purpose of this Statement is to:

(a) ensure that members are familiar with the statutory provisions relating to officeholders' remuneration;

(b) set out required best practice with regard to the observance of the statutory provisions; and

(c) set out required best practice with regard to the provision of information to those responsible for the approval of fees to enable them to exercise their rights under the relevant statutory provisions.

4. The Statement has been produced in recognition of the principle that those with a direct financial interest in the level of officeholders' fees should feel confident that those charged with responsibility for approval of fees have access to sufficient information about the basis of the fees charged to make an informed judgement about the level of remuneration in any particular case.

5. This Statement applies to the Republic of Ireland only.

6. Members should be aware that the drawing of remuneration otherwise than in accordance with the relevant statutory provisions will render them in breach of the law.

OVERVIEW OF STATUTORY REQUIREMENTS

7. In the Republic of Ireland there are no statutory provisions governing the bases on which the remuneration of an officeholder in a winding-up, receivership or examination is to be calculated. However, there are provisions governing who may fix the remuneration of officeholders and the main provisions relating to the most common types of appointment are summarised in the following paragraphs. The relevant statutory provisions are set out in the Appendix.

MEMBERS' VOLUNTARY LIQUIDATIONS

8. The manner in which the remuneration of a liquidator in a members' voluntary liquidation is fixed is set out in Section 258, Companies Act 1963, which provides that the members may fix the remuneration of the liquidator at the general meeting at which the liquidator is appointed.

9. Section 261(5), Companies Act 1963, deals with disputes in relation to the remuneration of the liquidator appointed in a members' voluntary liquidation in circumstances where it becomes necessary to change a members' voluntary winding-up to a creditors' voluntary winding-up. Provision is made for application to the Court.

10. The liquidator can vote any special proxies which he or she holds in favour of any resolution fixing his or her remuneration at the annual meeting or final meeting of members. The liquidator should not vote any general proxies which he or she holds in favour of such resolution.

11. Pending the fixing of the remuneration by the members of the company in general meeting, the liquidator may draw payments on account of his or her remuneration on a basis agreed in advance by the members. Accordingly, prior to the meeting at which he or she is to be appointed, the liquidator considers an appropriate form of resolution relating to the basis of his or her remuneration.

12. Where the liquidator's remuneration is not fixed by the members, the liquidator must apply to the Court to have the remuneration fixed.

CREDITORS' VOLUNTARY LIQUIDATIONS

13. The manner in which the remuneration of a liquidator in a creditors' voluntary liquidation is fixed is set out in Section 269, Companies Act 1963. This section provides that the Committee of Inspection appointed pursuant to Section 268, Companies Act 1963, may fix the remuneration of the liquidator. If there is no committee the remuneration may be fixed by a resolution of a meeting of creditors.

Within 28 days of the remuneration of the liquidator having been fixed as above, any dissatisfied creditor or contributory may apply to the Court to fix the liquidator's remuneration.

14. In order for the committee of inspection to fix the remuneration of the liquidator the requisite quorum for such a meeting must be present. The quorum provided in Section 233, Companies Act 1963 is a majority in number of the members of the committee. In practice such a quorum is often difficult to secure.

15. If the remuneration of the liquidator is to be fixed by a resolution of a meeting of creditors, the liquidator should not vote any general proxies he or she holds in favour of any resolution fixing the remuneration.

16. Pending the fixing of his or her remuneration, the liquidator may draw payments on account of the remuneration on a basis agreed in advance by the committee of inspection or if the resolution of the creditors permits.

17. Where the liquidator's remuneration is not quantified and agreed by either the committee of inspection or the creditors, the liquidator must apply to the Court to have the remuneration fixed: (Re: Amalgamated Syndicates Ltd (1901) 2 Ch 181).

WINDING-UP BY THE COURT

18. Practitioners acting as official liquidators should note that they are obliged to comply with the provisions of the Rules of the Superior Courts, with the terms of the Orders pursuant to which they are appointed and with the practice and directions of the Court. The manner in which the remuneration of the official liquidator in a winding-up by the Court is fixed is set out in Section 228(d), Companies Act 1963 and Rules 46 and 47 of Order 74 of the Rules of the Superior Courts, 1986 (S.I. 15 of 1986).

19. The Court adjudicates upon the liquidator's remuneration taking account of the circumstances particular to each appointment in the context of current practice. Factors which may be taken into account include the risk and complexity of the particular assignment and remuneration fixed in previous similar cases. The practitioner should consider taking advice prior to making the application to the Court. It is usual for an official liquidator to confirm, in an application to the Court to determine the remuneration or to seek payment on account of remuneration, that the official liquidator has applied the same method of charging and the same basis of charge as he or she would have done for any other commercial client for work of a similar nature.

20. The application to the Court to fix the remuneration of the official liquidator is grounded on affidavit. The affidavit of the official liquidator must set out in detail the progress of the liquidation and the work carried out by the official liquidator and his or her staff and should exhibit a specific breakdown of the fees to include the identity of the personnel involved, the hours worked and the hourly rates charged.

RECEIVERSHIPS

21. Typically the remuneration of a receiver appointed over property of a company under powers contained in a document of charge will be a matter for agreement between the receiver and the holder of the charge under which he or she is appointed. The document of charge is the contract between the company and the holder of the charge. Any terms in the deed of appointment with regard to the remuneration of the receiver must accord with the terms of the deed of charge.

22. There is provision in Section 318, Companies Act 1963 for the Court to fix the remuneration of a receiver of a company on application made to it by the liquidator of the company or by any creditor or member of the company. It was held in *Re: Potters Oils Limited (No. 2)* (1986) 1 WLR 201 [at p. 207] that the Court should only intervene where the remuneration "can clearly be seen to be excessive".

23. Section 24(1)(f) of the Conveyancing Act 1881 limits the receiver's remuneration, together with costs, charges and expenses, to an aggregate total of 5% of the value of the property subject to the charge. Most debentures exclude this provision, but practitioners should be aware of its ramifications and seek appropriate advice where it has not been excluded from the debenture agreement.

24. It may not always be possible to readily identify costs as applicable to assets subject to the fixed charge under which the receiver is appointed or to assets subject to a

floating charge. Apportionment of costs can be difficult, particularly in circumstances where trading is continued with a view to enhancing the realisation of assets in both categories. This issue is dealt with in greater detail in the Statement of Insolvency Practice “A Receiver’s Responsibility to Preferential Creditors” – S 14B.

EXAMINATIONS

25. The manner in which the remuneration of an examiner is fixed is set out in Section 29, Companies (Amendment) Act 1990, which provides that the remuneration may be fixed by the Court, which shall have particular regard to the proviso that an examiner shall, insofar as is reasonably possible, make use of the services of the staff and facilities of the company to which he or she has been appointed to assist him or her in the performance of his or her functions.

26. The examiner’s fees do not require approval by the Court where the Court has sanctioned the scheme and the company/business has been restructured and/or disposed of.

27. The examiner’s application to Court for approval of remuneration is grounded on affidavit. The affidavit should set out in detail the progress or outcome of the examination and the work carried out by the examiner and his or her staff. The examiner should exhibit an analysis of the fees claimed to include the identity of the personnel involved, the hours worked and the hourly rates charged. The examiner should also specify in the affidavit what use, if any, he or she has made of the services of the staff and/or facilities of the company in carrying out his or her functions.

28. While there is no specific statutory provision for payments on account of the remuneration of an examiner, Section 29(1), Companies (Amendment) Act 1990 appears to allow for more than one application. However, given the short timescale of examinations, it may be that applications for interim payments on account would not be entertained by the Court, other than in exceptional circumstances.

PROVISION OF INFORMATION

29. Insolvency practitioners should be mindful at all times of the rights accorded to creditors in relation to officeholders’ fees under the statutory provisions, and, when acting in an advisory capacity or as officeholder, should ensure that adequate steps are taken to bring those rights to their attention.

30. The particular nature of an insolvency officeholder’s position renders it of primary importance that all payments made to his or her own firm out of funds under his or her control should be disclosed and explained to those who are charged with the responsibility for approving the remuneration.

31. When seeking agreement to his or her fees, the officeholder should be prepared, if requested, to provide sufficient supporting information to enable those responsible for

approving the remuneration to form a judgement as to whether the proposed fee is reasonable having regard to all the circumstances of the case. An up to date receipts and payments account should always be available. Where the fee is based on time costs the officeholder should be prepared to disclose the time spent and the charge-out value in the particular case, together with such additional information as may reasonably be required having regard to the size and complexity of the case. Where the fee is charged on a percentage basis the officeholder should provide details of any work normally carried out by officeholders themselves which has been or is intended to be sub-contracted.

32. A receiver appointed in relation to a company should on request provide the information specified in paragraph 31 to the company's liquidator.

33. Where an officeholder makes, or proposes to make, a separate charge by way of expenses or disbursements to recover the costs of facilities provided by his or her own firm, such charges should be disclosed to those who are responsible for approving the remuneration, together with an explanation of how those charges are made up and the basis on which they are arrived at. Such charges should only be made where they represent expenses properly chargeable or incurred by the officeholder in dealing with the assets, or necessary disbursements of the officeholder in the course of his or her administration.

34. Payments to outside parties in which the officeholder or his or her firm or any associate has an interest should be treated in the same way as payments to his or her own firm.

35. In a liquidation, where the officeholder realises an asset on behalf of a secured creditor and receives remuneration out of the proceeds, he or she should disclose the amount of that remuneration to the committee of inspection (if there is one) and to any meeting of creditors at which the remuneration is to be fixed.

36. In an initially insolvent liquidation where realisations are sufficient for payment of creditors in full, it should be remembered that, notwithstanding the right of the creditors or the committee of inspection to fix the liquidator's remuneration, it will be the members who will have the principal financial interest in the level of fees. The liquidator should therefore on request provide the members of the company with information, in accordance with the principles set out in paragraphs 30 and 31 above, about how the remuneration of the liquidator has been calculated.

EFFECTIVE DATE

37. This Statement is effective from 1 May 2005.

APPENDIX

The following are the statutory provisions relating to the remuneration of officeholders in the various types of proceedings covered by this Statement of Insolvency Practice.

1. Members' Voluntary Liquidations

Fixing of remuneration of liquidator – Section 258(1), Companies Act 1963.

258. (1) The company in general meeting shall appoint one or more liquidators for the purpose of winding-up the affairs and distributing the assets of the company, and may fix the remuneration to be paid to him or them.

Disputes regarding remuneration of liquidator – Section 261(5), Companies Act 1963.

261(5) Where the creditors appoint a liquidator at a meeting called under this section and there is a dispute as to any or all of the costs, charges or expenses incurred by, including the remuneration of, the liquidator appointed by the members of the company, the liquidator appointed by the creditors, or any creditor, may apply to the Court to determine the dispute and the Court may, on such application, make such order as it deems fit.

2. Creditors' Voluntary Liquidations

Fixing of remuneration of liquidator – Section 269(1) and (2), Companies Act 1963.

269. (1) The committee of inspection, or if there is no such committee, the creditors, may fix the remuneration to be paid to the liquidator or liquidators.

(2) Within 28 days after the remuneration to be paid to the liquidator or liquidators has been fixed by the committee of inspection or by the creditors, any creditor or contributory who alleges that such remuneration is excessive may apply to the Court to fix the remuneration to be paid to the liquidator or liquidators.

3. Winding-Up by the Court

Fixing of remuneration of Official Liquidator – Section 228(d), Companies Act 1963.

228. The following provisions relating to liquidators shall have effect on a winding-up order being made.....

(d) A person appointed liquidator shall receive such salary or remuneration by way of percentage or otherwise as the Court may direct, and if more

such persons than one are appointed liquidators, their remuneration shall be distributed among them in such proportions as the Court directs.

The Rules of the Superior Courts 1986, Order 74: Winding-Up of Companies (S.I. 15 of 1986).

Rule 46. An official liquidator shall be allowed in his accounts or otherwise paid, such salary or remuneration as the Court may from time to time direct and in fixing such salary or remuneration the Court shall have regard to any necessary employment of accountants, assistants or clerks by him. Such salary or remuneration may be fixed either at the time of his appointment or at any time thereafter. Every allowance of such salary or remuneration, unless made at the time of his appointment or upon passing an account, may be made upon application for that purpose by the official liquidator on notice to such persons (if any) and shall be supported by such evidence as the Court shall require. The Court may from time to time allow such sum (if any) as the Court shall think fit to the official liquidator on account of the salary or remuneration to be thereafter allowed. The Court may direct that an inquiry be held by the Examiner or the Master as to the salary or remuneration of the official liquidator and that the Examiner or the Master (as the case may be) do report thereon to the Court. The Master shall have the same powers as the Examiner in conducting any such enquiry.

Rule 47. Where an official liquidator receives remuneration for his services as such, no payment shall be allowed in his accounts in respect of the performance by any other person of the ordinary duties which should have been performed by the official liquidator.

4. Receiverships

Power of Court to fix remuneration of receiver – Section 318, Companies Act 1963.

318. (1) The Court may, on an application made to it by the liquidator of a company or by any creditor or member of the company, by order fix the amount to be paid by way of remuneration to any person who, under the powers contained in any instrument, has been appointed as receiver of the property of the company notwithstanding that the remuneration of such receiver has been fixed by or under that instrument.

(2) Subject to subsection (3), the power of the Court under subsection (1) shall, where no previous order has been made in relation thereto under that subsection:

- (a) extend to fixing the remuneration for any period before the making of the order or the application therefor; and
- (b) be exercisable notwithstanding that the receiver has died or ceased to act before the making of the order or the application therefor; and

(c) where the receiver has been paid or has retained for his remuneration for any period before the making of the order any amount in excess of that fixed by the Court for that period, extend to requiring him or his personal representatives to account for the excess or such part thereof as may be specified in the order.

(3) The power conferred by paragraph (c) of subsection (2) shall not be exercised in relation to any period before the making of the application for the order unless in the opinion of the Court there are special circumstances making it proper for the power to be so exercised.

(4) The Court may from time to time on an application made by the liquidator or by any creditor or member of the company or by the receiver, vary or amend an order made under subsection (1).

(5) This section shall apply whether the receiver was appointed before, on, or after the operative date and to periods before, as well as to periods after, the operative date.

5. Examinations

Fixing of remuneration of examiner – Section 29, Companies (Amendment) Act 1990.

29(1) The Court may from time to time make such orders as it thinks proper for payment of the remuneration and costs of, and reasonable expenses properly incurred by, an examiner.

(2) Unless the Court otherwise orders, the remuneration, costs and expenses of an examiner shall be paid and the examiner shall be entitled to be indemnified in respect thereof out of the revenue of the business of the company to which he has been appointed, or the proceeds or realisation of the assets (including investments).

(3) The remuneration, costs and expenses of an examiner which have been sanctioned by order of the Court shall be paid in full and shall be paid before any other claim, secured or unsecured, under any compromise or scheme of arrangement or in any receivership or winding-up of the company to which he has been appointed.

(4) The functions of an examiner may be performed by him with the assistance of persons appointed or employed by him for that purpose provided that an examiner shall, insofar as is reasonably possible, make use of the services of the staff and facilities of the company to which he has been appointed to assist him in the performance of his functions.

(5) In considering any matter relating to the costs, expenses and remuneration of an examiner the Court shall have particular regard to the proviso to subsection (4).

The Rules of the Superior Courts (No. 3) 1991, Order 75A: Proceedings under the Companies (Amendment) Act 1990 (S.I. 147 of 1991).

Rule 22. An application by the examiner pursuant to Section 29 of the Act for payment to him of remuneration and costs and reasonable expenses properly incurred by him shall be made by application ex parte to the Court and upon an affidavit of the examiner in which he shall set forth a full account of the work carried out by him to the date of the application and a full account of the costs and expenses incurred by him and shall vouch same and of the basis for the proposed remuneration which he is seeking to be paid. The Court may, where it thinks fit, order that notice of the application be given to all such persons as the Court may direct, and may give directions as to the service of the said notice and fix a date for the hearing of the application of the examiner. The affidavit of the examiner shall also specify what use, if any, he has made of the services of the staff and/or of the facilities of the company to which he has been appointed and the extent of such use.