

Blood, Sweat and Fees



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Offshore centres, particularly in the Caribbean, have seen a number of large, high-profile, cross-border insolvencies. With these comes a corresponding focus on the professional fees of practitioners charged with safeguarding and overseeing the affairs of the estate. As transparency becomes not just a buzz word, but a goal of greater global regulation of financial advisors and the professionals entrusted with the care of financial assets, it is not surprising that insolvency practitioners are also facing significant scrutiny of and pressure on their professional fees and out of pocket expenses.

Who reviews insolvency fees?

In the Cayman Islands, the requirements for approval of liquidators' remuneration and approved rates are set out in Parts III and IV of the Insolvency Practitioners Regulations 2008 ("the Regulations"). According to the Regulations, an official liquidator is not entitled to receive remuneration out of the assets of a company in provisional or official liquidation without prior approval of the Court. However, an official liquidator may receive payment on account of up to 80% of their remuneration before seeking approval from the Court of all remuneration. The approval of the Liquidation Committee ("LC") must be sought before applying to Court.

The primary role of the LC, made up of contributories or creditors (depending on whether the entity is solvent, insolvent or of doubtful solvency), is to review and approve liquidators' fees. In most instances, the Liquidator will have arrangements in place with the LC, which may set out the information required by the LC to conduct the fee review, including information to assist their understanding of the tasks performed, the purpose for undertaking the task and the associated time and costs of the professional who undertook the task.

In high-profile, complex matters, where senior legal and insolvency professionals spend a substantial amount of time undertaking their duties to protect and distribute an estate's assets, this can place a significant burden on the LC. Increasingly complex financial products and fund

structures contribute to a more costly winding up process. Novel issues and complexities mean more time and effort is required by senior level professionals to resolve those issues. Given the sophistication of investors in offshore investment vehicles, the members of the LC are often experienced, sophisticated professionals with a reasonable understanding of professional work. However, there is a tipping point where members, who are not paid for their time, may not have the resources or capacity to undertake what is required to perform a detailed review and satisfy themselves as to the reasonableness of such fees.

Unfortunately, there is no provision under Cayman Islands legislation, as there is in some other jurisdictions, for the appointment of an independent fee consultant or assessor to assist the LC or Court in the fee review process.

Fee Consultants

In England and Wales, the remuneration of an Insolvency Practitioner is assessed under Statement of Insolvency Practice 9. The principle is that the liquidators' remuneration should be fair and reasonable for the work properly undertaken. In the UK there is scope for the appointment of a fee consultant by the Court to assist in the review process. While it is not provided for under Cayman Islands law, there has been a recent matter in which the LC's request for a fee consultant was approved by the Court.

The Cayman Court concluded that a fee consultant could be appointed in appropriate cases and within appropriate parameters by relying on section 18(2) of the Grand Court Law. It provides that where there are important gaps in local rules, practice and procedure from the High Court in England can be adopted in similar matters and shall apply so far as local circumstances permit and subject to any directions which the Court may give.

Is there value or benefit to a fee consultant?

Given that the Cayman Court has now determined it has authority to appoint a fee consultant, the question is whether the Court or the LC would benefit from such an appointment. Liquidators, who have a duty to protect and realise the assets of the estate for the beneficiaries, must consider when charging their fees whether they have acted properly in undertaking the tasks and whether the cost or time spent is such that *a reasonably prudent man faced with the same circumstances in relation to his own affairs, would lay out or hazard his own money on doing what the office-holder [has] done.*¹ It could be considered in complex cases that the Court, or the LC, might find there

¹ Re Mirror Group Newspapers [1998] BCC324

is value in having an independent party review the fees to benefit from the additional expertise. Further, an independent party can provide transparency to the fee review process

When considering the fees incurred, it is important to look at the tasks performed and the reasons they were considered necessary at the time. In a complex liquidation involving significant asset values and investor claims, which may also be contentious, the liquidator must ensure that the interests of all stakeholders are carefully balanced. This involves greater consultation with the LC than in a more routine matter. This is commensurately more expensive. There are foreseeable difficulties for a fee consultant who does not have the background knowledge of the particular engagement or has had any participation in the matter to adequately assess the benefit of the work performed.

On complex and long running matters, not only is there a significant burden on the fee consultant in reviewing voluminous fee reports, but they can also face issues understanding the relevant industry, the type of work conducted in other jurisdictions (particularly litigation) and appreciating the extent of the records that will be available. A fee consultant with the necessary skills, experience and knowledge is not easily found.

Some of the practical downsides to the appointment of a

fee consultant include the added cost burden to the estate, particularly because the consultant will not be involved in the day to day activity on a complex case. Getting the fee consultant "up to speed" with the factual background of a complex matter or understanding the reasons for the work performed requires time and effort. These costs could be significant and should be agreed with the LC and the Court, prior to the appointment. A full line by line audit, accompanied with staff interviews to understand why each task was carried out and by whom would not be commercially beneficial. Conversely, a broad brush approach to the review could result in a lack of understanding on the part of the consultant and inaccurate recommendations.

In addition, consideration must be given as to how to treat sensitive (and perhaps privileged and confidential) information and how it is to be shared with the fee consultant, particularly where the liquidator is involved in litigation to recover assets.

Ultimately, there is a balance to be struck. Liquidators are in a position of trust and it is important that the fee review and approval process is transparent and the proper level of scrutiny applied. If handled correctly, the appointment of a consultant in larger, more complex cases could streamline the fee review process and provide greater comfort and transparency to the LC and Court. 🌐



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