

A CREDITORS' GUIDE TO REMUNERATION FOR A TRUSTEE ACTING UNDER A TRUST DEED SCOTLAND

1 Introduction

1.1 When a debtor grants a trust deed the costs of the proceedings are paid out of the debtor's assets in priority to creditors' claims. The creditors, who hope to recover some of their debts out of the assets, therefore have a direct interest in the level of costs, and in particular the remuneration of the insolvency practitioner appointed to act as trustee. The insolvency legislation recognises this interest by providing mechanisms for creditors to fix the basis of the trustee's remuneration. This guide is intended to help creditors be aware of their rights to approve and monitor remuneration, and explains the basis on which remuneration is fixed.

2 Trust deed procedure

2.1 A trust deed is a deed granted by or on behalf of the debtor whereby his estate is conveyed to the trustee for the benefit of his creditors generally. It tends to be less formal and less expensive than a sequestration.

2.2 Under the deed, the debtor conveys his entire estate to a trustee, who is empowered to sell and dispose of all the assets, and to carry on any business formerly conducted by the debtor. The trustee will distribute the balance of funds available after the payment of expenses to the creditors, following which the trustee will obtain his discharge from the creditors.

2.3 Accession of creditors is an essential part of the procedure, as without it there may be problems in discharging the deed. Unless a majority of creditors or not less than one third in value object to the trust deed, the creditors are presumed to have acceded and it becomes a protected trust deed. Once a trust deed has become protected, a creditor who has been notified of but who has not acceded to the trust deed will have no higher right to recover his debt than a creditor who has acceded. It should be noted that if a creditor receives notification of, but does not object to a trust deed, he is deemed to have acceded.

2.4 If a trust deed remains unprotected, creditors can still take action to recover their debts. This covers the various forms of diligence available to them including petitioning for sequestration.

3 Fixing the Trustee's Remuneration

3.1 The remuneration of a trustee will be determined by the trust deed. However, there is provision in the insolvency legislation for the formation of a committee of creditors to assist the trustee, audit his accounts and fix his remuneration.

3.2 Whether or not this provision is included in the deed, Schedule 5 of the Bankruptcy (Scotland) Act 1985 (as amended) ("the Bankruptcy Act") states that on application of the debtor, the trustee, or any creditor, the Accountant in Bankruptcy is specifically authorised to audit the trustee's accounts and fix his remuneration. Schedule 5 also provides that the Accountant in Bankruptcy may, at any time, audit the trustee's accounts and fix his remuneration. The Accountant in Bankruptcy is an officer of the court appointed by the Scottish Ministers.

3.3 The trustee under a protected trust deed, or the debtor, or any creditor may appeal to the sheriff by way of summary application against any determination by the Accountant in Bankruptcy fixing the remuneration to the trustee. A debtor or creditor may appeal only if able to satisfy the sheriff that he or she has, or is likely to have, a pecuniary interest in the outcome of the appeal.

4 What information should be provided by the trustee?

4.1 There are no specific requirements under Schedule 5 of the Bankruptcy Act for the provision of information by the trustee.