

Pre-Appointment Remuneration and Expenses An Update

Whether an insolvency practitioner (“IP”) can be remunerated (as of right) out of estate assets for work carried out prior to his or her appointment has remained a contentious issue.

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Under the relevant provisions of the Insolvency Rules 1986 (Rule 2.106 for administrations and Rule 4.127 for liquidations), it would appear that any work carried out pre-appointment cannot be recovered subsequently by the officeholder as remuneration. If such an interpretation is correct, any fees outstanding at the date of appointment would merely remain unsecured, thereby creating a distinct possibility that the IP will not receive any fees for his pre-appointment work. This was also the position and interpretation adopted by the Insolvency Service in “Dear IP” in September 2005.

Over a period of time, there have, however, been a number of court decisions within this jurisdiction which have, in effect, been much kinder to the IP. In delivering his judgment in *A V Sorge & Co Limited* (1986) 2 BCC 99, Mr Justice Hoffman drew no distinction between the words “costs in the winding up” and phrases like, “costs of and incidental to the winding up”. Mr Justice Hoffman was concerned that if no priority were to attach to the costs and expenses of obtaining advice prior to the passing of a resolution to wind up a company, companies in financial difficulties could find it difficult to obtain appropriate advice. Accordingly, he concluded that pre-resolution costs incurred, whether through a solicitor or otherwise, so as to enable the company to pass the winding up resolution and take other statutorily-required steps are costs “incurred in the winding up”. In concluding that a rigid temporal cut off was altogether too mechanistic, Mr Justice Hoffman adopted a purposive interpretation of the legislation, rather than a literal one.

In addition, it was recognised by Registrar Baister in *Cabletel Installations Limited* that some pre-administration work was to be carried out and paid for as an administration expense. Accordingly, within this jurisdiction, there has been a gradual alleviation of the severity of the legislation for IPs on the issue of pre-appointment remuneration and expenses.

There has, however, been a differing trend in a number of foreign jurisdictions. In Australia, in the case of *Skaforp Limited v Jarol PTY Limited* (17 December 2002), the court concluded that an IP could not be remunerated for work carried out prior to his appointment as administrator. Even if the creditors had passed a resolution authorising the officeholder to be

paid for his pre appointment work, this would not be sufficient to enable the IP to be remunerated accordingly. The IP would merely rank as an unsecured creditor for any such remuneration.

In the recent Irish case of *Compustore Limited* [2006] IEHC 52, the Irish High Court took the opportunity to reconsider the approach of Mr Justice Hoffman in *A V Sorge* referred to above. The wording of the Irish legislation reflected that of its English counterpart; namely, that “all costs, charges and expenses properly incurred in the winding up, including the remuneration of the liquidator, shall be payable out of the assets of the company in priority to all other claims”. The court was asked to adjudicate on a claim by solicitors for recovery of their fees and expenses which had been incurred in preparing for the winding up of an Irish company as an expense of its liquidation.

Mr Justice Laffoy determined that the costs and expenses at issue were not incurred in the winding up; they were incurred *prior* to the winding up. In adopting a strict, literal interpretation of the legislation, he concluded that the words “costs, charges and expenses properly incurred in the winding up” referred to costs, charges and expenses properly incurred “while the winding up is in being, that is to say, after the resolution to wind up the company has been passed”. Furthermore, Mr Justice Laffoy was of the opinion that the legislator specifically intended that there would be a rigid, temporal cut-off at the time of the passing of the resolution to wind up voluntarily. Accordingly, any fees and expenses incurred for pre-resolution advice and services are not “expenses properly incurred in the winding up of the company”.

Although the Irish judgment is not binding in this jurisdiction, it is possible that the English courts will take the opportunity to revisit this issue. Insolvency practitioners can only hope that courts do not adopt a similar approach to that of Mr Justice Laffoy.

As the issue of pre-appointment remuneration and expenses remains a distinctly grey area, legal advice should always be sought when determining whether an officeholder can be remunerated in respect of any of his pre-appointment work (as of right) out of estate assets.