
**GUIDANCE
FOR MEMBERS
OF
CREDITORS' COMMITTEES IN
BANKRUPTCY**

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1. INTRODUCTION

1.1 General

1.1.1 This guide has been produced to help members of creditors' committees to be aware of:

- the duties and functions of the committee
- their rights as members of the committee
- the procedural rules relating to committee business

1.1.2 This introduction gives a brief description of the role of the trustee in bankruptcy, and summarises the principal functions of the committee and the trustee's main duties in relation to it. Detailed provisions are set out in the remaining sections of the guide.

1.1.3 The margin references are to the Insolvency Act 1986, the Insolvency Rules 1986 (as amended), the Insolvency Practitioners Regulations 2005, the Insolvency Regulations 1994, and Statements of Insolvency Practice 9 and 15 issued to all authorised insolvency practitioners.

1.2 The Trustee in Bankruptcy

Bankruptcy is the administration of the estate of an insolvent individual by a trustee in the interests of his creditors generally. The trustee in bankruptcy has wide powers which are set out in the Insolvency Act 1986. He may use these powers at his discretion, except where the exercise of any power specifically requires sanction, as explained in paragraphs 2.1.1 to 2.1.4 below.

1.3 The Creditors' Committee

s.301 1.3.1 A general meeting of the bankrupt's creditors may appoint a creditors' committee. The purpose of the committee is to represent the interests of the creditors as a whole, not just the interests of its individual members. The principal functions of the committee are to sanction the exercise of certain of the trustee's powers and to fix his remuneration. In addition to its statutory functions the committee may also serve to assist the trustee generally and act as a sounding board for him to obtain views on matters pertaining to the bankruptcy.

1.3.2 The trustee is required to report to the committee on matters relating to the bankruptcy and to submit copies of his accounts when required. Meetings are generally held when determined by the trustee, and voting is by majority in number. Votes may also be taken by post.

1.3.3 Committee members are not entitled to remuneration, but they may be reimbursed for reasonable travelling expenses incurred on committee business.

1.3.4 Although the trustee should normally have regard to the views of the creditors' committee, he may always refer matters of contention to a general meeting of creditors or to the court. It has been held, in a liquidation case, that the court has a residual discretion not to follow the wishes of a committee where the special circumstances of the case warrant it.

Re BCCI (No 3),
[1993] BCLC 1490

2. THE FUNCTIONS OF THE COMMITTEE

2.1 Control of Trustee's Powers

s.314(1)
sch.5

2.1.1 The trustee may, with the sanction of the committee or the court, exercise any of the following powers:

- (a) Carry on any business of the bankrupt so far as may be necessary for winding it up beneficially and so far as the trustee is able to do so without contravening any statutory requirements.

Note: The bankrupt's business may only be carried on if the trustee bona fide and reasonably forms the opinion that this is necessary (in other words, highly expedient) for its beneficial winding up, for example to achieve a higher price for the assets used in the business.

- (b) Bring, institute or defend any action or legal proceedings relating to the property comprised in the bankrupt's estate.

Note: Where legal proceedings are proposed the committee should consider the probable benefit to the estate before giving permission. If permission is given, the committee should ensure that it is kept informed of the progress of the proceedings in case it should become necessary to consider their discontinuance.

- (c) Bring legal proceedings for the estate to be recompensed where the bankrupt has:

- disposed of property for no, or inadequate, consideration;
- has done something to put one of his creditors in a better position than he would otherwise have been; or
- has entered into a transaction to put assets beyond the reach of his creditors.

- (d) Accept as the consideration for the sale of any property comprised in the bankrupt's estate a sum of money payable at a future time subject to such stipulations as to security or otherwise as the creditors' committee or the court thinks fit.

- (e) Mortgage or pledge any part of the property comprised in the bankrupt's estate for the purpose of raising money for the payment of his debts.

- (f) Where any right, option or other power forms part of the bankrupt's estate, to make payment or incur liabilities with a view to obtaining, for the benefit of the creditors, any property which is the subject of the right, option or power.

- (g) Refer to arbitration, or compromise on such terms as may be agreed, any debts, claims or liabilities subsisting or supposed to subsist between the bankrupt and any person who may have incurred any liability to the bankrupt.

- (h) Make such compromise or other arrangement as may be thought expedient with creditors, or persons claiming to be creditors, in respect of bankruptcy debts.

- (i) Make such compromise or other arrangement as may be thought expedient with respect to any claim arising out of or incidental to the bankrupt's estate made or capable of being made on the trustee by any person or by the trustee on any person.
- (j) Appoint the bankrupt -
- to superintend the management of his estate or any part of it
 - to carry on his business (if any) for the benefit of his creditors, or
 - in any other respect to assist him in administering the estate in such manner and on such terms as the trustee may direct.
- s.314(2)
- 2.1.2 The trustee may, with the permission of the committee, divide in its existing form among the bankrupt's creditors, according to its estimated value, any property which from its peculiar nature or other special circumstances cannot be readily or advantageously sold.
- s.326(1)
- 2.1.3 A permission given for the exercise for any of the above powers must not be a general permission, but must relate to a particular proposed exercise of the power in question.
- s.314(3)
s.326(2)
- 2.1.4 Where the trustee has done anything which requires the committee's permission without having first obtained it, the committee or the court may, for the purposes of enabling him to meet his expenses out of the bankrupt's estate, ratify what he has done. However, it should not do so unless it is satisfied that the trustee has acted in a case of urgency and has sought its ratification without undue delay.
- s.314(4)
s.326(3)
- 2.2 Acts requiring Notice to the Committee**
- Where the trustee -
- s.314(6)
- (a) disposes of any property comprised in the bankrupt's estate to any associate of the bankrupt, or
- (b) employs a solicitor,
- he must give notice to the committee of that exercise of his powers.
- 2.3 Trustee's Remuneration**
- The committee is responsible for fixing the trustee's remuneration. For details reference should be made to the explanatory note, 'A Creditors' Guide to Fees Charged by Trustees in Bankruptcy', which is appended to Statement of Insolvency Practice 9 (Remuneration of Insolvency Office Holders) and should be provided by the trustee.
- 2.4 Expenses and Disbursements**
- There is no statutory requirement for the committee or the creditors to approve the drawing of expenses or disbursements. However, professional guidance issued to insolvency practitioners requires that, where the trustee proposes to recover costs which, whilst being in the nature of expenses or disbursements, may include an element of shared or allocated costs (such as room hire, document storage or communication facilities provided by the trustee's own firm), they must be disclosed and be authorised by those responsible for approving his remuneration. Such expenses must be directly incurred on the case and subject to a reasonable method of calculation and allocation.
- SIP 9

2.5 Court Assessment of Costs

r.7.34 2.5.1 Where any costs, charges or expenses are payable out of a bankrupt's estate (for example agent's or legal fees), the trustee may agree them with the person entitled to payment. However, if the committee resolves that any such costs, charges or expenses should be determined by the court, the trustee must require the person entitled to payment to deliver their bill of costs for assessment.

2.5.2 Where such costs, charges or expenses are to be assessed, this does not preclude the trustee from making payments on account against an undertaking from the payee to repay any amount which proves, on assessment, to have been overpaid.

2.6 Review of Trustee's Security

r.12.8 The trustee is required to have in place security for the proper performance of his functions (see Appendix). It is the duty of the committee to review the adequacy of the trustee's security from time to time.

3. TRUSTEE'S OBLIGATIONS TO COMMITTEE

r.6.152 3.1 The trustee has a duty to report to the committee all such matters as appear to him to be, or as they have indicated to him as being, of concern to them with respect to the bankruptcy.

3.2 The trustee need not comply with any request for information where it appears to him that the request is frivolous or unreasonable, or the cost of complying would be excessive having regard to the relative importance of the information, or there are insufficient funds in the estate to enable him to comply.

3.3 Where the committee has come into being more than 28 days after the appointment of the trustee, he must report to the members in summary form what actions he has taken since his appointment and answer such questions as they may put to him regarding the conduct of the bankruptcy. A person who becomes a member of the committee at any time after its first establishment is not entitled to require a report to him by the trustee, otherwise than in summary form, of any matters previously arising.

3.4 Nothing in these provisions disentitles the committee or any member of it from access to the trustee's records of the bankruptcy, or from seeking an explanation of any matter within the committee's responsibility.

r.6.163 3.5 The trustee must, as and when directed by the committee (but not more than once every two months), send a written report to every member of the committee setting out the position generally as regards the progress of the bankruptcy, and matters arising in connection with it, to which the trustee considers the committee's attention should be drawn. In the absence of such directions by the committee the trustee must send such a report not less than once every six months.

SIP 15 3.6 The trustee should, at their first meeting with him, discuss with committee members their requirements for reports and obtain their directions. He should also discuss with committee members at that meeting the types of matters which they wish have to have reported to them so that matters of particular concern to them are identified.

4. TRUSTEE'S ACCOUNTS

- reg.24 I Regs **4.1** The trustee must prepare and keep financial records in relation to the bankruptcy, and such supporting documents as are necessary to explain the receipts and payments entered in the records, including an explanation of the source of any receipts and the destination of any payments, and must obtain and keep the bank statements relating to any local bank account in the name of the bankrupt.
- reg.26 I Regs **4.2** If the bankrupt's business is carried on, the trustee must also keep a separate trading account including, where appropriate, details of all local bank account transactions. The total weekly amounts of trading receipts and payments must be incorporated into the financial records.
- reg.24 I Regs **4.3** The trustee must submit the financial records to the committee as and when the committee requires them for inspection, and if the committee is not satisfied with their contents it may so inform the Secretary of State (giving the reasons for its dissatisfaction). The Secretary of State may then take such action as he thinks fit.

5. ESTABLISHMENT OF THE COMMITTEE

- 5.1 Formalities of Establishment**
- r.6.151 5.1.1 The committee does not come into being, and accordingly cannot act, until the trustee has issued a certificate of its due constitution.
- 5.1.2 The trustee will not issue the certificate until at least three of the persons elected to be members of the committee have agreed to act. Such agreement may be given by the creditor's proxy-holder at the meeting establishing the committee, unless the proxy specifically precludes such agreement being given.
- 5.2 Formal Defects**
- s.377
r.6.156 The acts of the committee are valid notwithstanding any defect in the appointment, election or qualifications of any committee member or the representative of any committee member.

6. MEMBERSHIP

- 6.1 General**
- r.6.150 6.1.1 The creditors' committee must consist of not less than three, and not more than five, members. All the members of the committee must be creditors of the bankrupt and any creditor (other than one whose debt is fully secured) may be a member, so long as -
- r.6.151 (a) he has lodged a proof of his debt,
(b) his proof has neither been wholly disallowed for voting purposes nor wholly rejected for the purposes of distribution or dividend, and
(c) he has agreed to act as a member of the committee.
- r.6.150(3) 6.1.2 It is the creditors themselves who are the members of the committee, not the individuals who represent them. Thus a company which is a creditor may be a member of the committee but can only act through a representative appointed in accordance with paragraph 6.2 below.

6.2 Representatives

r.6.156 6.2.1 A member of the committee may be represented by another person duly authorised by him. Such representative must hold a letter of authority entitling him so to act (either generally or specially) signed by or on behalf of the committee member, and for this purpose any proxy in relation to any meeting of creditors of the bankrupt shall, unless it contains a statement to the contrary, be treated as such a letter of authority to act generally signed by or on behalf of the committee member. The chairman at any meeting of the committee may call on a person claiming to act as a committee member's representative to produce his letter of authority, and may exclude him if it appears that his authority is deficient.

6.2.2 No member may be represented by -

- a body corporate,
- an undischarged bankrupt,
- a person who is subject to a bankruptcy restrictions order or undertaking, or
- a disqualified director.

6.2.3 No person may act as representative of more than one committee member, or both as a member and as a representative of another member, on the same committee.

6.2.4 Where the representative of a committee member signs any document on the member's behalf, the fact that he so signs must be stated below his signature.

6.3 Resignation and Termination of Membership

r.6.157 6.3.1 A member of the creditors' committee may resign by notice in writing delivered to the trustee. A person's membership of the committee is automatically terminated if -

r.6.158

- (a) he becomes bankrupt, or
- (b) at three consecutive meetings of the committee he is neither present nor represented (unless at the third of those meetings it is resolved that this rule is not to be applied in his case), or
- (c) he ceases to be, or is found never to have been, a creditor.

6.3.2 However, if the cause of termination is the member's bankruptcy, his trustee in bankruptcy replaces him as a member of the committee.

r.6.159 6.3.3 A member of the committee may be removed by resolution at a meeting of creditors, provided at least 14 days' notice has been given of the intention to move that resolution.

6.4 Vacancies

r.6.160 If there is a vacancy in the membership of the committee it need not be filled if the trustee and a majority of the remaining committee members so agree, provided the number of members does not fall below three. If another member is to be appointed he can be appointed either by the trustee (provided the majority of the remaining committee members agree to the appointment and the creditor consents to act) or by a resolution passed at a duly convened meeting of creditors, after at least 14 days' notice of the resolution has been given.

7. PROCEEDINGS

7.1 Chairman

r.6.154 The chairman at any meeting of the committee will be the trustee, or a person appointed by him in writing to act. A person so nominated must be either -

- (a) one who is qualified to act as an insolvency practitioner in relation to the bankrupt, or
- (b) an employee of the trustee or his firm who is experienced in insolvency matters.

7.2 Quorum

r.6.155 A meeting of the committee is duly constituted if due notice of it has been given to all members and at least two members are present or represented.

7.3 Meetings

7.3.1 General

r.6.153 The committee will meet where and when determined by the trustee, subject as follows:

7.3.2 First meeting

r.6.153 The trustee must call the first meeting to take place within 3 months of his appointment or of the committee's establishment (whichever is the later).

7.3.3 Subsequent meetings

r.6.153 Subsequent meetings of the committee must be called by the trustee -

- (a) if so requested by a member of the committee or his representative - the meeting must then be held within 21 days of the request being received by the trustee - and
- (b) for a specified date, if the committee has previously resolved that a meeting be held on that date.

7.4 Notice of Venue

r.6.153 The trustee must give 7 days' notice in writing of the venue of any meeting to every member of the committee (or his representative, if designated for that purpose), unless this requirement has been waived by or on behalf of any member. Such waiver may be signified either at or before the meeting.

7.5 Voting Rights and Resolutions

r.6.161 At any meeting of the committee each member (whether present himself or by his representative) has one vote, and a resolution is passed when a majority of the members present or represented have voted in favour of it.

ANNEXE C

7.6 Records of Meetings

r.6.161

Every resolution passed must be recorded in writing, either separately or as part of the minutes of the meeting. The record must be signed by the chairman and kept with the records of the bankruptcy.

7.7 Postal Resolutions

r.6.162

7.7.1

It is possible for resolutions to be passed by post. The trustee must send to every member (or his representative designated for the purpose) a copy of any proposed resolution on which a decision is sought, which must be set out in such a way that agreement with, or dissent from, each separate resolution may be indicated by the recipient on the copy so sent.

7.7.2

However, any member of the committee may, within 7 business days from the date of the trustee sending out a resolution, require the trustee to summon a meeting of the committee to consider the matters raised by the resolution. In the absence of such a request, the resolution is deemed to have been carried in the committee if and when the trustee is notified in writing by a majority of the members that they concur with it.

7.7.3

A copy of every resolution so passed, and a note that the concurrence of the committee was obtained, must be kept with the records of the bankruptcy.

8. CONFIDENTIALITY OF DOCUMENTS

r.12.13

8.1

Where the trustee considers that any document forming part of the record of the bankruptcy -

- (a) should be treated as confidential, or
- (b) is of such a nature that its disclosure would be calculated to be injurious to the interests of the creditors,

he may decline to allow it to be inspected by a person (including a member of the committee) who would otherwise be entitled to inspect it.

8.2

A person refused inspection may apply to the court for the refusal to be overruled.

9. CHARGES FOR COPY DOCUMENTS

r.12.15A

r.13.11

Where the trustee is requested by a member of the committee to supply copies of any documents, he is entitled to make a charge as follows:

15 pence per A4 or A5 page
30 pence per A3 page

10. EXPENSES OF COMMITTEE MEMBERS

r.6.164

Any reasonable travelling expenses directly incurred by committee members or their representatives either in attending meetings of the committee or otherwise on the committee's business will be paid by the trustee out of the bankrupt's estate in the due order of priority.

11. DEALINGS BY COMMITTEE MEMBERS AND OTHERS

- r.6.165 **11.1** The position of all committee members is fiduciary and they must careful not to expose themselves to a conflict between their duty as members of the committee and their personal interest. Accordingly, no member of the committee, or his representative, or any person who is an associate of a committee member or his representative, or any person who has been a committee member at any time in the previous twelve months, can enter into a transaction whereby he -
- (a) receives out of the bankrupt's estate any payment for services given or goods supplied in connection with the administration of the bankruptcy, or
 - (b) obtains any profit from the administration of the bankruptcy, or
 - (c) acquires any asset forming part of the estate,
- unless -
- (a) he first obtains the leave of the court to the transaction, or
 - (b) he enters into the transaction as a matter of urgency or by way of performance of a contract in force before the date of the bankruptcy order and he obtains the leave of the court, having applied for such leave without undue delay, or
 - (c) he enters into the transaction with the prior sanction of the committee where the committee is satisfied (after full disclosure of the circumstances) that he will be giving full value in the transaction.
- 11.2** Where a resolution is proposed in the committee that sanction be given to such a transaction, no member of the committee, and no representative of a member, can vote on the resolution if he is to participate directly or indirectly in the transaction.
- 11.3** The costs of obtaining the leave of the court are not payable out of the bankrupt's estate unless the court so orders.
- 11.4** Circumstances may occasionally arise where a legal action or dealing involving a member of the committee or a person connected with him make it inappropriate for him to attend discussions on the subject in the committee. In such circumstances the member may be asked not to attend a meeting, or part of a meeting, at which the matter is discussed.

APPENDIX

Trustee's Security

s.390(3)
reg.12 & sch 2, IP Regs

The trustee is required to have in place security for the proper performance of his functions. The security takes the form of a bond which provides that -

- a surety undertakes to be jointly and severally liable with the trustee for losses caused by the fraud or dishonesty of the trustee whether acting alone or in collusion with one or more persons, or the fraud or dishonesty of any person committed with the connivance of the trustee;
- the liability of the surety and the trustee is to be in both a general penalty sum and a specific penalty sum in respect of the individual case;
- any claims are to be paid first out of the specific penalty sum, then, if that is insufficient, out of the general penalty sum;
- a cover schedule containing the name of the insolvent and the value of the insolvent's assets is to be submitted to the surety within a specified period.

The general penalty sum must be £250,000 and the specific penalty sum must be at least equal to the estimated value of the bankrupt's assets, but ignoring the value of any assets charged to a third party to the extent of any amount which would be payable to that party, or held on trust to the extent that any beneficial interest in those assets does not belong to the bankrupt.

The minimum specific penalty sum is £5,000 and the maximum £5,000,000. In estimating the value of the assets the trustee must have regard to the value of the assets as disclosed in any statement of affairs, and any comments of creditors or the official receiver on that statement. If, at any time, the trustee forms the opinion that the value of the assets is higher than the penalty sum under the current specific penalty he must obtain a further specific penalty to bring the penalty sum equal to that value (subject to the maximum limit of £5,000,000).