INSIDE LINE

compliance with value added Autumn 2015

Getting fees estimates (safely) approved for S.98 appointments

The new requirement to provide fees estimates comes into force from 1 October this year. There has been a lot of confusing comment on what you can't do, especially that **you can't safely issue fees estimates with the section 98 notice**, but not much on what, you can do. So, after a long chat with my long time legal friend Guy Thomas of Taylor Walton; here is a "brief" guide -

First, the theory –

- In all cases starting from 1 October*, you must give creditors an estimate of your fees and expenses, sufficiently in advance to allow proper consideration.
- As under the existing rules, you can apply any one of time costs, fixed fees or a percentage (on recoveries and/or distributions) and

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More in this issue

Fees, fees, and more fees

And, on the website -

- Paperless operations - a guide to step by step changes.
- What? No SIP 8!!
- A suggested template for fee estimates

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Welcome to the first issue of Inside Line, my new newsletter aimed at providing sound advice on the practicalities of insolvency practice.

And don't forget –

- Good news for trading or winding down - **PESO 2015, The Insolvency (Protection of Essential Supplies) Order 2015** comes into force on 1 October, too, extending the definition of essential supplies. Of most use for retail and online businesses; for more detail on this, see Russell Hill's article for Squire Patton Boggs at http://www.esquireglobalcrossings.com/2015/08/water-into-wifi-a-modern-definition-of-essential/
- Another reminder about the fact that you need to ensure pre-redundancy consultations are done by clients and prospective clients, ir make sure you have a very clear written record that you gave the advice.
- IP records will no longer be necessary after 1 October 2015, so I cam finally reveal that certain RPB reviewers used not to raise queries on them anyway.
- And as if you haven't had enough reminders direct— no more paper filing of RP forms after 1 September.

mix them according to preference, even on one activity.

- Whatever you propose, you must indicate what it is you expect to do to earn those fees, regardless of whether time costs are, in any part, involved.
- But if you use time costs, your estimate will act as a fee cap and every progress report will have to report on your accruing costs, as you go (but not as much as you might think – see below).
- And, according to most of the experts, you can only rely on your fee proposal, if you send it out as office-holder, **SO….. you can't just issue the fee estimate with your section 98 notice.**

It is that last point, first raised by my friends Michelle Butler and Compliance on Call, which is giving us all the problems. Of course, not everyone agrees; my sources suggest that this is unintended and the RPBs wont penalise you, if you go this route – we might even get a Dear IP clarification before long (anyone holding their breath, here?). In the alternative, John Cullen at Menzies is recommending a fresh look at Centrebinds—see my article on page 3 about the pro's and cons of that idea.

So, what do I recommend?

Well, after a few cups of tea and much learned discussion about Centrebinds, adjournments, conversations with nameless officials, and poring over legal tomes with Guy, I recommend -

1. **If you have good cause to get appointed early, to protect assets, etc. then by all means go for a "Centrebind**" and issue the fees estimate with the section 98 notice. But do realise that creditors still need reliable information on which to base their decision, so you will need to give some indication of likely asset values, anticipated issues for recoveries and your expectations for investigations. For a more detailed review of the issues, see page 3.
2. **If there isn't a good reason to "Centrebind" your safest approach really is to convene a separate meeting to consider remuneration, after appointment.** Our recommendation is that you enclose the notice of this further meeting, with your letter reporting on the section 98 meeting. And don't forget to gazette the meeting. It's an annoying extra cost, but at least the result will be 100% acceptable to regulators and courts, alike.
3. **If you don't mind risking having to go back to creditors later on for a further resolution, you could still try sending in the fees estimate with your section 98 notice.** But at the present time, I think it is a big risk and you would be better to do otherwise.
4. There is a fourth possible alternative and one which I think may sort out at least a few of these problems, but Guy isn't so sure, so the research continues…..

That said, for a view on how to prepare your first fees estimates see

http://baselineinsolvency.com/technical-resources/guidance-notes-for-fees-estimates/

(*but maybe not all cases; the transitional provisions don't actually mention appointments by the SoS in WUCs, and so for the moment, it seems you won't have to give estimates to get a valid fee resolution on them)

Guy Thomas, insolvency partner at **Taylor Walton LLP**, is a specialist in sports and particularly football related insolvency, defender of troubled IPs and allegedly a great golfer…. Look him up at

http://www.taylorwalton.co.uk/our-people/guy-thomas-insolvency-solicitor/

Editorial comment

Thank you for taking the time to read this far. I know that this is probably the fourth newsletter giving opinions about the incoming Rules, but here I try to talk a little less about the technical details and more about the practical implications.

These new Rules are intended to change the whole way we work and they will. Those who don't move steadily towards streamlined reporting, electronic meeting formats and even paperless offices will come under more and more pressure on regulations and fees than ever before.

With further issues of this newsletter and back up blogs on my website, I hope to help smooth the way for my clients and professional friends.
August 2015

About "Centrebinds"

Even as I write this, I can't help feeling it's wrong – thirty years of castigating the process as an invention of the devil is difficult to give up. But following John Culllen of Menzies' prodding at the recent SPG seminars, I accept it is time to think again.

So…. the original Centrebind decision was made in 1966 – long before the current legislation. For various reasons, the Court decided there was no inherent reason why a Liquidator could not be appointed by the members immediately - well before the creditors meeting, if circumstances warranted – to deal with perishable goods, a tricky contract term, etc. So the Centrebind process was

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Interpreting the new SIP 9 on estimates

To accompany the 2015 rules, the JIC has now issued the new SIP 9 in draft. While there may be some changes I expect it will remain much the same, so I think this Is a good time to comment. I am not going to go into detail on the new provisions themselves; the new draft is sufficiently readable to be, well, readable. However, there are a number of details which look innocent enough, but could cause a lot of grief with the regulators and the courts. Here are some opening thoughts -

- **Both fees estimates and subsequent reports should be tailored to the kind of case AND the kind of stakeholder** . Not just the content, but arguably, the structure should be flexed, meaning that reliance on a template has to be limited.
- **At the same time, reports should be structured so they are consistent with the original estimate, so** they can be followed throughout. So some form of template is surely a practical necessity.
- **Proposals should tell creditors what we anticipate doing and give a reasoned view of the costs and benefits** likely to accrue, but "may not be presented on the basis of alternative scenarios and/or provide a range of estimated charges".
- Creditors must also receive enough explanation to show that either a fixed or percentage fee is actually reasonable.
- In an effort to be helpful, the SIP suggests that **one may use "blended rates"** (a rate for the whole class of work, based on an average hour) **but you must then report on subsequent time accordingly**. However, if subsequent rates differ from the estimate, you are going to need to explain. Given the

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born. But it rapidly fell into disrepute because certain firms used the process to get an immediate appointment, sell the assets back to the directors and take huge SA fees, long before the Creditors' meeting. The results were some pretty rough meetings and yes, I am old enough to remember jugs of water being tipped over heads, and directors being chased down Chancery Lane, etc.

In response to this, when the "new" Act came out in 1986, we got sections 165 and 166, restricting what an early appointee may do without sanction, and requiring him to report all his dealings to the meeting. But even now, because of its history, any Centrebind appointment will still get a close look from the RPBs and others.

But perhaps it is time we got over it. Here are some of the arguments for change -

- Although future meetings will be mainly remote, sections 165 and 166 will remain. Given that the power to set remuneration will still be with the Creditors, the worst of the pre-1986 sharp practice will remain outlawed.
- We have now had many years of Administration appointments made direct by the Company; having later meetings to hear proposals appears to have done no harm, in itself.
- The 1986 Act, combined with POCA and the AML regulations have created a very different legal climate. At least on paper, there are many more weapons to use against the delinquent Liquidator.
- And last, but not least, we do have a licensed profession now, that most of us think has done a pretty good job of gradually excluding all those naughty people from the past.

In brief, like John Cullen, I can see that there is no actual statutory stricture against an early appointment. As we are all now trustworthy and the government is encouraging us to save money, where is the harm?

But against all this, there remains a deep suspicion about early appointments. On smaller cases, where creditor apathy is arguably at its greatest, former colleagues of mine worry that early appointments present creditors with a sense of fait-accompli.

And there does remain an underlying guiding principle; British insolvency law is intended to be "creditor-led". Voluntary liquidation of an insolvent company is only accepted as an alternative to a Court administered process (e.g. CML or ADM) if it is controlled from the outset by the Creditors. Yes, the ADM process might allow the company to control the initial appointment, but it is still regarded as a rescue vehicle suitable only to exceptional circumstances, limited in its duration and subject to close oversight by the courts.

And so, for now, I think RPBs will continue to view Centrebinds with suspicion and you should limit their use accordingly. But John Cullen is a persistent man and so I suspect he may give all of us more to think about on the subject, before long.

Planned for coming issues / blogs

- Big cost savings in support offices.
- Hot compliance issues.
- Progress reporting under the new rules.
- Alternates agreements that actually work.
- Understanding QAD.
- Secure voting for remote meetings.

accuracy of internal fee estimates that I have seen in the past – I think we will be explaining quite a lot. So, even if you give a blended rate, you would be wise to give the detail too, somewhere.

In an effort to understand the background thinking on all this and try to anticipate what RPB reviewers might expect, I phoned a friend. The resulting conversation confirmed a lot of my suspicions, but at least gives me some idea of what to do.

According to my very well placed friend, the whole idea of the SIP is to make the reporting process more transparent and easier for creditors to understand. Fair enough, one might say, but I couldn't help feeling that, the old expectation that your reader is adult in both education and attention must be replaced by an assumption that he/she is a six year old "Sun" reader.

So here are my tips for what to do between now and the end of September –

- While we may not be able to rely on templates as much as we did, you should **work out some standard texts to fit different sizes and complexities of case.**
- Even if you are intending never to use time costs again, **do a benchmarking exercise on the average time you take on different classes of common work.**
- **Create a standard cost estimating grid, maybe as part of your case review/management package.** (If you want some help, my own management template has already been road-tested by clients and pronounced satisfactory).
- **Develop an outline structure for an introduction to the fees proposal** summarising critical information, including total expected recoveries, costs and prospects for distributions, leaving the rest of the report to fill in the detail.
- **Develop standard appendices to carry more detailed information for your charge-out rates and fees estimates.** But don't just continue using appendices you had before. RPB reviewers will notice and may think you are not taking things seriously enough.
- And finally, **consider creating more policy documents to explain the use of different approaches** to different types of work and reporting, different mixes of fees, etc. RPB reviewers, courts and the like are likely to be much more amenable to the use of standardised approaches where you can show that the approach adopted followed a clear *a-priori* line of thinking that balances cost, benefit and risk.

For more on this subject including my outline template, visit http://baselineinsolvency.com/technical-resources/guidance-notes-for-fees-estimates/