Neutral Citation Number: [2009] IEHC 377

THE HIGH COURT

2008 514 COS

IN THE MATTER OF SHARMANE LIMITED

AND IN THE MATTER OF THE COMPANIES ACTS 1963-2006

AND IN THE MATTER OF GUERNEVILLE LIMITED

AND IN THE MATTER OF THE COMPANIES ACTS 1963-2006

AND IN THE MATTER OF DREEMDALE LIMITED

AND IN THE MATTER OF THE COMPANIES ACTS 1963-2006

AND IN THE MATTER OF EATONCROFT LIMITED

AND IN THE MATTER OF THE COMPANIES ACTS 1963-2006

AND IN THE MATTER OF REDFONT LIMITED

AND IN THE MATTER OF THE COMPANIES ACTS 1963-2006

AND IN THE MATTER OF CHARDERMONT LIMITED

AND IN THE MATTER OF THE COMPANIES ACTS 1963-2006

AND IN THE MATTER OF PUB POOL LIMITED

AND IN THE MATTER OF THE COMPANIES ACTS 1963-2006

AND IN THE MATTER OF DREW INTERNATIONAL LIMITED

AND IN THE MATTER OF THE COMPANIES ACTS 1963-2006

AND IN THE MATTER OF LINCOLE LIMITED

AND IN THE MATTER OF THE COMPANIES ACTS 1963-2006

AND IN THE MATTER OF ATWELL HOLDINGS LIMITED

AND IN THE MATTER OF THE COMPANIES ACTS 1963-2006

AND IN THE MATTER OF JESTDALE LIMITED

AND IN THE MATTER OF THE COMPANIES ACTS 1963-2006

AND IN THE MATTER OF KIRKVALE LIMITED

AND IN THE MATTER OF THE COMPANIES ACTS 1963-2006

AND IN THE MATTER OF KADARAN LIMITED

AND IN THE MATTER OF THE COMPANIES ACTS 1963-2006

AND IN THE MATTER OF TOPART LIMITED

AND IN THE MATTER OF THE COMPANIES ACTS 1963-2006

AND IN THE MATTER OF FLORDITA (IRELAND) LIMITED

AND IN THE MATTER OF THE COMPANIES ACTS 1963-2006

(AS RELATED COMPANIES WITHIN THE MEANING OF SECTION 4(5) OF THE COMPANIES (AMENDMENT) ACT 1990)

(AS RELATED COMPANIES WITHIN THE MEANING OF SECTION 4(5) OF THE COMPANIES (AMENDMENT) ACT 1990)

AND IN THE MATTER OF THE COMPANIES (AMENDMENT) ACT 1990

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on 30th day of July 2009

1. On 4th December, 2008, Mr. Kieran McCarthy ("the Examiner") was appointed examiner of Sharmane Limited pursuant to s. 2 of the Companies (Amendment) Act 1990 ("the Act"). He was also appointed pursuant to s. 4(1)(a) of the Act, as examiner to each of the companies named in the title other than Guerneville Limited (the petitioner) and Floridita (Ireland) Limited. All those companies are related companies of Sharmane Limited within the meaning of s. 4(5) of the Act. Insofar as I refer to the related companies in this judgment, I am only referring to those related companies to which the Examiner was appointed.

2. On 23rd February, 2009, upon the application of the Examiner, the Court ordered pursuant to s. 26(1)(b) of the Act, that Eatoncroft Limited, Jestdale Limited, Kadaran Limited, and Topart Limited cease to have the protection of the Court and that they be wound up by the Court pursuant to the provisions of the Companies Acts 1963-2006. Mr. Anthony Weldon was appointed official liquidator of those four companies and the Examiner ceased to have any further function in relation thereto.

3. On 6th March, 2009, the Examiner presented his reports to the Court proposing schemes of arrangement in relation to each of the nine remaining companies in examinership. The reports were set down for consideration pursuant to s. 24 of the Act, on 13th March, 2009. Confirmation of the proposals for the schemes of arrangement was opposed by ACC Bank plc. and certain other parties.

4. On 20th March, 2009, in the course of the continued confirmation hearing, the Court was informed that the Examiner was no longer recommending that the Court confirm the schemes of arrangement. Difficulties had arisen with the investor whose investment was essential for the funding of the proposed schemes of arrangement.

5. By order of the High Court made on 20th March, 2009, pursuant to s. 26 of the Act, the protection period ceased for all remaining nine companies. ACC Bank plc. appointed a receiver over those companies or their assets. Ulster Bank Limited also appointed a receiver over certain assets of The Pub Pool Limited. In such circumstances no winding-up orders were made.

6. The Examiner now seeks pursuant to s. 29 of the Act, an order determining his remuneration, costs and expenses as both interim examiner and examiner of all the relevant companies. Certain creditors were put on notice and ACC Bank plc. and Ulster Bank Limited were represented at the hearing and opposed, in part, the orders sought by the Examiner.

7. The primary order sought by the Examiner was an order that all thirteen companies to which he was initially appointed be jointly and severally liable for such amount as may be determined in respect of his aggregate remuneration, costs and expenses as Examiner of the thirteen companies. In submissions this may have been altered to an order that all thirteen companies be jointly and severally liable up to 23rd February, 2009, and that the remaining nine companies be jointly and severally liable thereafter. Nothing turns on this distinction.

8. Both ACC Bank and Ulster Bank opposed any order on a basis of joint and several liability. They submitted, as a matter of principle, that the Court had no jurisdiction pursuant to s. 29 of the Act, to make an order that Sharmane Limited and either twelve or eight related companies be jointly and severally liable for the aggregate remuneration, costs and expenses incurred by the Examiner whilst appointed as examiner to Sharmane Limited and each of the related companies. They also opposed the *quantum* sought to be determined by the Examiner in respect of his own remuneration and his legal costs on the basis set out below.

9. At the end of the hearing, I had formed a clear view on the point of principle in dispute between the parties and gave my decision, indicating that I would give my reasons for my decision in a written judgment. The first part of this judgment sets out those reasons.

10. I concluded that s. 29 of the Act does not give the Court jurisdiction to make an order that all companies be jointly and severally liable for the aggregate remuneration costs and expenses as sought by the Examiner. My reasons for so concluding derive principally from the wording of s. 29 considered in the context of the entire Act.

11. Section 29 provides:

"(1) The court may from time to time make such orders as it thinks proper for payment of the remuneration and costs of, and reasonable expenses properly incurred by, an examiner.

(2) Unless the court otherwise orders, the remuneration, costs and expenses of an examiner shall be paid and the examiner shall be entitled to be indemnified in respect thereof out of the revenue of the business of the company to which he has been appointed, or the proceeds of realisation of the assets (including investments).

(3) The remuneration, costs and expenses of an examiner which have been sanctioned by order of the court (other than the expenses referred to in subsection (3A)) shall be paid in full and shall be paid before any other claim, secured or unsecured, under any compromise or scheme of arrangement or in any receivership or winding-up of the company to which he has been appointed.

(3A) Liabilities incurred by the company to which an examiner has been appointed that, by virtue of section 10(1), are treated as expenses properly incurred by the examiner shall be paid in full and shall be paid before any other claim (including a claim secured by a floating charge), but after any claim secured by a mortgage, charge, lien or other encumbrance of a fixed nature or a pledge, under any compromise or scheme of arrangement or in any receivership or winding-up of the company to which he has been appointed.

(3B) In subsections (3) and (3A) references to a claim shall be deemed to include references to any payment in a winding-up of the company in respect of costs, charges and expenses of that winding-up (including the remuneration of any liquidator).

(4) The functions of an examiner may be performed by him with the assistance of persons appointed or employed by him for that purpose provided that an examiner shall, insofar as is reasonably possible, make use of the services of the staff and facilities of the company to which he has been appointed to assist him in the performance of his functions.

(5) In considering any matter relating to the costs, expenses and remuneration of an examiner the court shall have particular regard to the proviso to subsection (4)."

12. The order for joint and several liability sought by the Examiner would have to be consistent with s. 29 and, in particular, sub-section (2) thereof.

13. Section 29 has to be considered in the context of the statutory scheme for the appointment of a person as examiner to a company and to related companies of that company. Section 2 provides for the appointment of a person as an examiner to a company "for the purpose of examining the state of the company's affairs and performing such duties in relation to the company as may be imposed by or under this Act". It is to be noted that the purpose for which a person is appointed an examiner to a company pursuant to s. 2(1) is confined to examining the state of that company's affairs and performing duties in relation to that company under the Act. There is no reference to functions in relation to related companies.

14. Section 4 of the Act, insofar as relevant, provides:

"(1) Subject to subsection (2), where the court appoints an examiner to a company, it may, at the same or any time thereafter,

make an order-

(a) appointing the examiner to be examiner for the purposes of this Act to a related company, or

(b) conferring on the examiner, in relation to such company, all or any of the powers or duties conferred on him in relation to the first-mentioned company.

(2) In deciding whether to make an order under subsection (1), the court shall have regard to whether the making of the order would be likely to facilitate the survival of the company, or of the related company, or both, and the whole or any part of its or their undertaking, as a going concern and shall not, in any case, make such an order unless it is satisfied that there is a reasonable prospect of the survival of the related company, and the whole or any part of its undertaking, as a going concern.

(3) A related company to which an examiner is appointed shall be deemed to be under the protection of the court for the period beginning on the date of the making of an order under this section and continuing for the period during which the company to which it is related is under such protection.

(4) Where an examiner stands appointed to two or more related companies, he shall have the same powers and duties in relation to each company, taken separately, unless the court otherwise directs."

15. The appointments herein of the Examiner as examiner to each of the related companies were made pursuant to section 4(1)(a). This obtained for those companies the protection of the Court pursuant to sub-section 3. No order was made by the Court to alter the provision in sub-section (4) that he have "the same powers and duties in relation to each company, taken separately".

16. The primary duty of an examiner is, of course, to examine the affairs of the company and then pursuant to s. 18 (1)(a) "as soon as practicable after he is appointed, formulate proposals for a compromise or scheme of arrangement in relation to the company concerned". That duty is owed to each company to which he is appointed as examiner. In these examinerships, the Examiner sought directions from the Court as to how he should discharge those duties and proposed that there be a separate scheme of arrangement for each company under the protection of the Court. By order of 13th January, 2009, the Court approved that proposal. The Examiner also proposed that each scheme of arrangement be inter-dependent on the others in that the ultimate approval of each scheme would be conditional on the ultimate approval of all the other schemes. That was necessary, on the facts of this group of companies, as there was a significant number of cross-guarantees and it may not have been possible to procure the survival of one company with an approved scheme of arrangement independently of other related companies.

17. Section 29 must thus be considered in the context of a statutory scheme which envisages the appointment of the same person as examiner to a company pursuant to s. 2(1) and also as examiner to each of one or more related companies pursuant to section 4(1)(a). However, s. 4(4) appears to emphasize that the examiner must discharge to each company separately the duties imposed on him under the Act. Nevertheless, as was submitted on his behalf, much of the work done by him in the course of his appointment as examiner to Sharmane Limited and to each of the related companies may have been simultaneously done for the purpose of formulating schemes of arrangement or otherwise performing his duties in relation to several of the companies. Nevertheless, it is equally obvious that the remuneration now sought by the Examiner and his expenses and, in particular, legal fees incurred, are significantly higher than they would have been if he had been appointed as examiner to only one of the thirteen companies. The effect of an order, as sought by the Examiner, against all the companies jointly and severally, would mean that he is entitled to look to any one of the companies to discharge the entire of his aggregate remuneration and legal expenses for acting as examiner to all thirteen companies. This appears to me to be contrary to the provisions of s. 29(2) and not to be permissible, having regard, in particular, to the priority given to remuneration, costs and expenses of an examiner under section 29(3).

18. First, as appears from the terms of s. 29(2), set out above, the normal rule, unless a Court otherwise orders, is that the remuneration of an examiner is to be paid out of "the revenue of the business of the company to which he has been appointed [emphasis added], or the proceeds of realisation of the assets [of that company]". It appears to me that in accordance with the plain meaning of the words used by the Oireachtas, unless the Court otherwise orders, it is only the remuneration, costs and expenses of an examiner incurred when acting as examiner to the relevant company which he is entitled to have discharged out of the revenue or assets of that company. It does not appear to me that there is any basis for construing the normal rule in s. 29(2) as permitting an examiner appointed to company A and a related company B to look to the assets or business of either company alone to discharge his aggregate remuneration, costs and expenses incurred while acting as examiner of both companies A and B. This is the effect of the order for joint and several liability sought by the Examiner.

19. This construction is reinforced by the priority given by s. 29(3) to the remuneration, costs and expenses sanctioned by the Court and payable in accordance with section 29(2). As appears, they are to be paid before any other claim, secured or unsecured, under any compromise or scheme of arrangement, or in any receivership or winding-up of the company to which he has been appointed. Sub-section (3B) means that where, following the appointment of an examiner, a company is wound up, the examiner's remuneration, costs and expenses rank in priority to any payment in a winding-up, including the remuneration of a liquidator.

20. The priority given in s. 29(3) is a potentially significant interference with the property rights of secured creditors. I accept the submission made on behalf of ACC Bank and Ulster Bank that such interference requires the Court to give a strict interpretation to the provisions of s. 29(2) in the sense of construing it as only permitting an examiner to recover from each of the companies (with the priority specified) the remuneration, costs and expenses expressly authorised to be recovered out of the assets of that company under section 29(2). That authorisation does not include remuneration, costs and expenses incurred as examiner of a related company.

21. The remaining issue is whether, even if the normal rule in s.29(2) does not provide for joint and several liability of all the companies to which the Examiner was appointed for his aggregate remuneration, costs and expenses, the opening phrase "[u]nless the Court otherwise orders" in s. 29(2) permits the Court to make such an order. Counsel for the Examiner submitted that the words do give the Court such a jurisdiction and primarily relied upon what he submitted was the normal rule that where a professional does work simultaneously for several persons, that all such persons are jointly and severally liable for the entire remuneration of the professional carrying out the work. He submitted that this was the starting point of any consideration, both for the remuneration of the Examiner in respect of the aggregate work done as examiner to all thirteen companies, and in respect of his legal costs incurred both for advices and applications to the Court as examiner to all thirteen companies in examinership.

22. Counsel for the Examiner did not refer to any authority in support of a normal rule of joint and several liability for which he contended. It does not appear to me that there is any such normal rule. If a professional person carries out work simultaneously for the benefit of several persons, then *prima facie* it appears to be a matter for agreement between the professional and his clients as

to the manner in which the fees incurred will be discharged. This agreement may be express or implied. The situation in relation to legal representation, in the absence of any authority to the contrary, appears to me to be the same.

23. The Examiner has not given any evidence of any express agreement reached between himself and the directors of any of the thirteen companies upon his appointment in relation to the manner in which, or level at which, his fees, as examiner, would be discharged. Insofar as the Examiner retained solicitors and, through them, counsel to act for him in his capacity as examiner to each of the companies, there is no evidence of any agreement reached as to how those fees should be apportioned or discharged. Whilst in many of the applications brought on his behalf during the course of the proceedings counsel and solicitor were acting for the Examiner, they were doing so in his separate and distinct capacity as examiner to each of Sharmane Limited and the related companies. Having regard to my conclusions on the statutory scheme established by the Act, it is not possible to imply an agreement for joint and several liability of each of the companies for the aggregate remuneration or legal costs of the Examiner as examiner to each of the companies.

Evidence has been given of an agreement reached between the Examiner, 'directors of the Group' and the investor on the *quantum* of his remuneration, costs and expenses in February 2009 (and is referred to below). However, there is no evidence of any agreement as to which of the related companies would pay same. They were to be discharged out of monies being introduced to the Group by the investor.

24. Construed in the context of the scheme of the Act, it does not appear to me that the opening phrase of s. 29(2) - "[u]nless the court otherwise orders" - permits the Court to make an order of the type sought now by the Examiner. Rather, its purpose is to give the Court jurisdiction to make an order that the remuneration, costs and expenses of an examiner are not to be paid out of the assets of the company to which he is appointed or that he is not entitled to be indemnified in respect thereof out of the revenue of the business of the company. Such an order will, of course, only be made in exceptional circumstances and normally where there is wrongdoing by an examiner. The decision of Costello J. in *Re. Wogan's (Drogheda) Limited* (unreported, High Court, 9th February, 1993) is one such example. No such circumstances arise in these proceedings. The Examiner is entitled pursuant to s. 29 to approval of such amount as may be determined by the court for his reasonable remuneration, costs and expenses in respect of the work done as examiner to each of the companies and it will then follow, as the Court will not be otherwise ordering, that he will be entitled to recover those fees out of the assets of each of the relevant companies in accordance with s. 29(2) in accordance with the priorities granted in sub-sections (3) and (3B).

25. While s. 29 requires the Examiner to identify separately the remuneration, costs and expenses claimed in respect of his appointment as examiner to Sharmane Limited and each of the related companies, this provision must also be applied in a common sense and workable way, where the same person is appointed as examiner to several related companies as in these proceedings. There are many different ways in which a a fair estimate may be made of how costs should be attributed to different companies where work was simultaneously done as examiner of several companies. The Examiner and his solicitors and counsel have prepared proposed apportionments of the total remuneration and legal fees sought to be sanctioned amongst the related companies. Those apportionments are not contested by ACC Bank or Ulster Bank. I am satisfied to accept the relative apportionments proposed by the Examiner, his solicitors and counsel. I now turn to the *quantum* of remuneration, costs and expenses of the Examiner sought to be sanctioned by the Court.

***Quantum* of remuneration, costs and expenses**

26. The Examiner's application for approval of the *quantum* of his remuneration and legal costs and the opposition thereto was done on the basis of aggregate figures. I propose dealing with them on this basis. However, in accordance with the first part of my decision, the amount approved will have to be apportioned.

27. The Examiner seeks approval for his own remuneration at €456,057.50 (plus outlay in respect of print and postage at €3,408) plus VAT. This is stated to be €554,109.86 (inclusive of VAT).

28. The Examiner also seeks an order measuring his legal costs in the sum of €518,016.76 (inclusive of VAT). This is made up of the solicitor's professional fee of €285,000 with outlays, including senior counsel's professional fees at €86,100 and junior counsel's professional fees at €54,500 (all exclusive of VAT), and other small general outlays (plus VAT) amounting to €912.76.

29. The main objection taken by the banks, as secured creditors, to the level of both the Examiner's remuneration and his legal professional fees, is on the basis of what had been agreed between the Examiner and the directors of the companies within the Group and the investor, in or around 23rd February, 2009, at the time of the formulation of the proposals for the schemes of arrangement. This agreement is explained by the Examiner in his first supplemental affidavit in this application sworn on 7th May, 2009, at paragraph 7 in the following terms:

"For the purpose of completeness I should say that the directors of the Group were advised of the ongoing costs of the Examinership throughout the period of protection. At the time of signing the agreement with the investor, in or around the 23rd February, 2009, I had indicated to the directors of the Group and the investor that my costs, remuneration and legal fees at that stage would be €580,000 exclusive of VAT. At the time this estimate was given, the further work required to complete these Examinerships was not foreseen and ultimately my firm and my legal advisors spent much more time on these Examinerships than we had originally anticipated."

30. In a subsequent written statement of the Examiner to the Court, he further explains that the figure of €580,000 comprised €300,000 in respect of his remuneration and €280,000 in respect of his legal fees. Excluding VAT on the relevant fees, the Examiner is now seeking, in respect of his own remuneration, €159,465.50 more than he had agreed to accept on 23rd February, 2009. In respect of his legal fees, again excluding VAT, he is now seeking €146,416.37 more than he agreed to accept on 23rd February, 2009. In addition, he is seeking a sum of €22,500 plus VAT in respect of his legal costs of this application.

31. The Examiner explains the difference in two ways. First, he states that he agreed to accept, as part of the schemes of arrangement, in effect, a discounted fee for remuneration and legal costs which would entail the non-recovery by him and his lawyers of certain of the time spent working on these examinerships. He says this was in the context of a desire to achieve a positive result and to preserve jobs and maximise dividend to creditors. He also states that the figures were agreed on the basis that the money would be available immediately at the conclusion of the examinership, which has not now happened.

32. Secondly, while the fees agreed were to be the total fees, including what was then a subsequent application for confirmation of the schemes of arrangement, the Examiner states that a very significant amount of extra work was carried out over than that envisaged at the time of the agreement, as additional issues arose and new objections were made to the proposals for the schemes of arrangement and extensive queries raised. In the course of the hearing, I asked that the Examiner and his lawyers estimate the

approximate percentage of the increases due to the discounted element and desire to achieve a positive result and that relative to the significant extra work which had not been envisaged. I was informed that each estimated that approximately 50% of the increased cost was attributable to each.

33. It is not in dispute that the Court must determine reasonable remuneration and legal expenses. Counsel for the banks submit that the starting point for the Court's consideration of what constitutes reasonable remuneration and the measurement of the Examiner's reasonable legal expenses should be the amount which the Examiner agreed to accept with the directors and the investor in February 2009, at the time of the formulation of the proposed schemes of arrangement. They submit that insofar as the Examiner claims that there was subsequently significant extra work then not envisaged, that the Examiner should not be entitled to recover same as in part, at least, it was caused by a lack of clarity on certain aspects of the proposed schemes of arrangement. Particular reference was made to the position of Ulster Bank and counsel for the Examiner disputed any responsibility of the Examiner for the issues which arose with Ulster Bank and referred to the lateness of Ulster Bank making its position clear.

34. In respect of these latter objections, I have had the benefit of dealing with all the relevant applications at the time of the proposed schemes of arrangement. Whilst these examinerships were undoubtedly complex, I have concluded that there is some merit in the submission made by counsel for the banks in relation to issues which arose on the schemes of arrangement. There were, in my view, aspects of the schemes of arrangement as formulated which lacked clarity and certainty and which contributed to the issues arising with Ulster Bank and certain of the landlords.

35. It is common case that the remuneration sanctioned by the Court pursuant to s. 29(1) must be reasonable remuneration in the sense that it must be reasonable both for the Examiner and for the companies to which he was appointed. The remuneration sought to be sanctioned is exclusively based upon the time spent by the Examiner and his colleagues working on the examinerships, each being costed out at the hourly rate applicable to them in the firm of Hughes Blake Chartered Accountants. Those hourly rates, I assume, in accordance with normal practice, include a profit element for the accountants.

36. There are no statutory criteria according to which the Court should determine what constitutes reasonable remuneration for the purpose of section 29. It does not appear to me that this can be determined by reference only to the total charge-out costs computed from the hours spent and relevant hourly rates for the Examiner and those working with him. This may, of course, comprise one element to be taken into account in determining what reasonable remuneration is. However, in my view, it should not be the only element, and in determining what is reasonable remuneration the Court must also have regard to the nature of the work carried out, the complexity of the work and the importance or value of the work to the client. These would be common elements taken into account by professionals charging or seeking to agree fees with clients.

37. It is difficult for the Court to determine what is reasonable remuneration for an examiner as it does not have full details of all the work done. It should have regard to any agreement which has been reached between the relevant persons who are better placed to assess same. For the purposes of s. 29, this would include any agreement reached by an examiner at the time of his appointment with the directors of the companies to which he is to be appointed, or the petitioner. There is no evidence of any such agreement on the facts of this application. There is, however, evidence of agreement reached when the greater part of the work had been done and proposals for schemes of arrangement prepared. It appears to me that the Court should have regard to that agreement. Whilst the Examiner has indicated that the agreement reached represented a discounted figure, having regard to the time spent, there is no suggestion that this was not an amount then regarded by the Examiner as reasonable remuneration for the total work then envisaged to be done to the completion of these examinerships.

38. Accordingly, I have concluded on the facts of this application, that the starting point for the Court's consideration as to what is reasonable remuneration should be the amount which the Examiner agreed to accept on 23rd February, 2009, as remuneration for the aggregate work done in these examinerships. However, I accept the evidence of the Examiner that in agreeing to this fee he did so in a context where it was agreed that he would be paid the full amount within a short period of time. The issue of apportionment had not arisen at that stage and, in the context of a schemes of arrangement and the intended survival of all the companies, it was envisaged that his full fees would be paid out of monies introduced by the investor. It is a matter of commonsense that persons will often accept a discounted fee on condition that it is to be paid in a short period of time. However, in so far as the Examiner may have discounted his remuneration to assist in the approval of the schemes of arrangement and survival of the companies it does not appear that there could be any basis for increasing the amount of his remuneration as the schemes have not been approved.

39. I also accept that there may have been some unanticipated work in respect of which it would be reasonable for the Examiner to recover extra remuneration over that agreed. However, for the reasons already stated, I do not accept that this would be to the full extent claimed by the Examiner.

40. In respect of his legal fees, the Examiner could have sought an order that he be entitled to such legal fees as might be determined on taxation. His solicitors have produced a letter from a cost accountant which supports the recovery of the full fees claimed as being fees which would be potentially recoverable on taxation. However the Examiner has not sought an order that his legal costs be taxed, but rather, has requested the Court to measure same. Whilst the cost accountant may be of the view that the total amount claimed would be recoverable on taxation, again, on the facts of this application, the evidence is that the Examiner, agreed to accept discounted legal expenses in February 2009. For reasons similar to those already stated, where the Court is asked to measure the legal expenses, it appears to me that this agreement must be the starting point for any consideration of the legal expenses which I would now allow as reasonable legal expenses for the Examiner.

41. Taking all of the above into account, I have concluded that I should allow, in respect of the Examiner's aggregate remuneration, solicitors' professional fees and counsels' fees, the amounts agreed in February 2009, increased by 25% plus VAT. These amounts are €375,000 plus VAT as the Examiner's aggregate remuneration and €350,000 plus VAT in respect of aggregate legal professional fees. I have determined the 25% increase by reason of the fact that the fees agreed in February 2009 represented discounted fees for immediate payment and also some allowable additional work over that originally envisaged. In addition, the Examiner is entitled to his postage and outlays in the sum of €3,408.00 and the solicitors to their incidental outlays (inclusive of VAT) of €912.76 both as claimed.

42. The remaining issue is the costs of this application. An examiner is obliged to have his costs approved pursuant to s. 29 where there is no agreement with the relevant persons. *Prima facie* he should be entitled to his reasonable legal costs of this application. Counsel for the banks oppose the Examiner's costs of the application as claimed on the basis that the primary issue was that of joint and several liability of the companies on which issue the Examiner was not successful. In addition, counsel for Ulster Bank Limited seeks an order against the Examiner for its costs.

43. I do not propose making any order in favour of Ulster Bank Limited against the Examiner, notwithstanding that he was not

successful on the issue of joint and several liability. It appears to me the Examiner was obliged to bring the application under s. 29 and Ulster Bank Limited has, in its own commercial interest, sought, albeit successfully, to oppose the joint and several liability of the companies and has succeeded in some reduction in the Examiner's fees.

44. There is however some merit in the submission that the Examiner should not be entitled to his full costs of the s. 29 application. I propose allowing a contribution to his costs of the s. 29 application measured at 60% of the professional fees claimed plus VAT. This amounts to €13,500 plus VAT.

45. The above aggregate remuneration, costs and expenses sanctioned by the Court must now be apportioned between the companies in the same relative proportions as the fees claimed, taking into account any appropriate apportionment in respect of the companies placed in liquidation on the 23rd February, 2009. The Examiner and his solicitors should carry out the apportionment and submit the final figures for each company for approval by Order of the Court. I will hear Counsel on the timing of this.