

THE HIGH COURT

[2009 No. 404 COS]

IN THE MATTER OF HAYDON PRIVATE CLIENTS LIMITED T/A HAYDON INVESTMENTS (IN LIQUIDATION)

AND

IN THE MATTER OF THE COMPANIES ACTS 1963-2009

JUDGMENT of Ms. Finlay Geoghegan delivered on the 23rd day of November, 2012

1. This judgment is concerned with an application by the Official Liquidator of Haydon Private Clients Limited for the measurement of his remuneration for two distinct periods, the first being from 20th July, 2009, to 12th November, 2010, and the second from 13th November, 2010, to 13th November, 2011. Orders have already been made permitting payments on account to the Liquidator of part of the remuneration sought in respect of each period and orders are also now sought for the payment of balancing figures in accordance with the sums sought to be measured.

2. The notice of motion upon which this application was made is dated 7th December, 2011, and also included applications in respect of the measurement and payment of sums to the solicitors for the Official Liquidator. Prior to the final hearing, agreement was reached with the notice party in respect of the solicitors' fees.

3. The Official Liquidator is Mr. David van Dessel, an experienced insolvency practitioner in the firm of Kavanaghfennell. He was appointed provisional Liquidator of Haydon Private Clients Ltd. ("the Company") on 20th July, 2009, and as Official Liquidator on the making of the winding up order on 23rd October, 2010. The Company had been incorporated in 2006 and was engaged in property investment activities. In particular, it had invited investors to participate in an indirect acquisition of a property at Frunze Street, Kiev in the Ukraine. A sum in excess of €9 million was received from investors and placed in five separate accounts. The investment in the Frunze Street property was unsuccessful and is described as having been the subject of a "corporate raid". Prior to the appointment of the Provisional Liquidator, two sets of proceedings had been issued against the Company in this jurisdiction by investors, including Quotumas Investments Limited ("Quotumas"), in the Frunze Street property claiming to be entitled to monies standing to the credit of two bank accounts of the Company, both with Allied Irish Banks plc. The total amount was in the order of €1.9 million.

4. The Liquidator brought a motion pursuant to s. 280 of the Companies Acts 1963-2009, seeking directions as to whether the monies held in the bank accounts were the Company's monies or whether they were held on trust for the investors in the Frunze Street property as contended for in the proceedings. The investors appointed a Steering Committee (the "Steering Committee"). Ultimately, in July 2011, the Liquidator reached a settlement with the Steering Committee and Quotumas of the issues in the s. 280 motion and the proceedings which was approved by the Court. Pursuant to the agreement, a sum of €640,000 was paid to the Steering Committee and Quotumas (in 90% and 10% proportions, respectively) and there was agreement as to the amount for which the investors and Quotumas were to be admitted as unsecured creditors in the winding up. It was envisaged at the time of the settlement that there would be a percentage dividend for the unsecured creditors.

5. The present application was brought on notice to the Steering Committee which was represented by solicitor and counsel. One of the members of the Steering Committee, Ms. Rita McDonagh, has sworn two affidavits in response to the affidavits sworn by the Liquidator.

6. In this application, the Liquidator seeks the measurement of his remuneration in the following amounts:

(i) For the period from 20th July, 2009, to 12th November, 2010, in the sum of €128,024.96 (inclusive of VAT and outlays); and

(ii) For the period from 13th November, 2010, to 13th November, 2011, in the sum of €42,097.75 plus outlay of €711.98 and VAT of €8,990.04, amounting in total to €51,799.77.

7. In respect of the first period to 12th November, 2010, the Liquidator had previously brought an application grounded on an affidavit filed on 14th December, 2010, and exhibiting a report in respect of that period, upon which an order was made on 7th February, 2011, giving him liberty to retain on account a sum of €90,000 (inclusive of VAT). No determination was made at that time, as is normal, in relation to the measurement of the fees sought. There remained unpaid a balance of €38,024.96 (inclusive of VAT) in respect of the amount of fees sought for that first period which is relevant to the issues in this application.

8. Similarly, the application grounded on the affidavit filed on 14th December, 2010, sought liberty to make payments to the Liquidator's solicitors and a payment on account of €30,000 (inclusive of VAT) was made to them. The legal costs in respect of that period were claimed at €74,062.45 (inclusive of outlay and VAT). Similarly, there was an unpaid balance of €44,062.45 in respect of the amount claimed.

9. Subsequent to the commencement of this application, agreement was reached between the Official Liquidator and the Steering Committee in respect of the measurement of the legal costs for the two periods ending on 13th November, 2011, which the Court was told involved a reduction from the amounts claimed.

10. The Liquidator's application is, consistent with current practice, based upon his reports in relation to the work done and includes in appendices the breakdown of the time spent by him and those in his firm working on the liquidation with their relevant hourly charge out rates. The Liquidator, in his grounding affidavit, has set out in some detail the work done in the liquidation. The Liquidator also deposes that he delegated work to persons having the appropriate skills to deal with same; and that the fees represent charges which his firm makes in the ordinary course of its professional practice to its clients for services of the type required. Further, he deposes that "the charge out rates in respect of each member of staff who has worked on this liquidation have been reduced in line with the reductions approved by the Court in the cases of *Re Missford Ltd. t/a Residents Members Club* [2010] IEHC 240, [2010] 3 I.R. 756, and *Re ESG Reinsurance Ireland Ltd.* [2010] IEHC 365".

11. The Steering Committee objected to the amount of the remuneration being sought, particularly in respect of the second period.

The Steering Committee does so, firstly, by reason of an estimate of fees and costs to completion of the liquidation which was given to it by the Liquidator, initially in April 2011, and repeated in June 2011, in the context of the settlement negotiations. The total figure for Liquidator's remuneration and legal costs to completion of the liquidation was then estimated at €125,000. It is common case that at the time, no breakdown between the Official Liquidator's remuneration and the legal costs had been given. However, shortly prior to this application, a breakdown was furnished by the Liquidator's solicitors according to which the estimate of legal costs to completion included €85,000 and Liquidator's remuneration was €40,000. That breakdown is not disputed by the Liquidator. The figures used are VAT exclusive.

12. Ms. McDonagh, in the second affidavit sworn by her on 1st March, 2001, contends that the comparable figure in this application to the estimate of €40,000 furnished by the Liquidator in April and June 2011 in respect of his fees to completion of the liquidation is a sum of €98,523.34 (exclusive of VAT) made up as follows:

- (i) A sum of €31,425.59 as the balance of unpaid fees for the period from 20th July, 2009, to 12th November, 2010. This is the total amount of fees sought for that period (exclusive of VAT) less the payment on account of the VAT-inclusive sum of €90,000;
- (ii) €42,097.75 in respect of remuneration for the period 13th November, 2010, to 13th November, 2011;
- (iii) an estimate of future fees of €25,000 in an updated estimated outcome at Exhibit DVD1 of the Liquidator's affidavit of 23rd February, 2012.

13. The Liquidator deposes that he inadvertently failed to include fees incurred in the early part of the liquidation in the estimate given in June 2011. This appears as a matter of probability to relate to the unpaid element of his remuneration up to 12th November, 2010, i.e. €31,425.59 (exclusive of VAT). Counsel for the Liquidator submitted that the aggregate of items (ii) and (iii) above, which total €67,097.75, is the comparable figure to the previously given estimate of €40,000. The Liquidator seeks to explain the difference by additional work which had not been envisaged at the time of the estimate.

14. There does appear, unfortunately, to have been an error made in the communication between the Liquidator and the Steering Committee in the estimates given in April and June, 2011 in the context of the settlement negotiations. It is clear from the affidavit of Ms. McDonagh that the Steering Committee understood the estimate of €125,000 furnished on behalf of the Liquidator to be the total amount (exclusive of VAT) which would subsequently have to be paid out of the liquidation in respect of the Liquidator's remuneration and legal costs to the completion of the liquidation. However, the Liquidator and his solicitors only appear to have included the fees and remunerations to be claimed from 13th November, 2010, and overlooked the unpaid element of the fees and remuneration claimed for the period from 20th July, 2009, to 12th November, 2010.

15. Secondly, the Steering Committee object to the overall amount of the fees claimed upon the basis that the charges were too high. This is considered in more detail below.

16. In a judgment delivered on 9th October, 2012, in the matter of *Re Mouldpro International Ltd. (In Liquidation)* [2012] IEHC 418, I set out the principles applicable to the determination of an official liquidator's remuneration having regard to a number of High Court decisions including in *Re Car Replacements Ltd.* (Unreported, High Court, Murphy J. 15th December, 1999), *Re Sharmane Ltd. & Others* [2009] IEHC 377, [2009] 4 I.R. 285, *Re Missford Ltd.* [2010] IEHC 240, [2010] 3 I.R. 756, *ESG Reinsurance Ireland Ltd.* [2010] IEHC 365, [2011] 1 I.L.R.M. 197, *Re Marino Ltd.* [2010] IEHC 394, and *Re Redsail Frozen Foods Ltd. (In Receivership)* [2006] IEHC 328, [2007] 2 I.R. 361, particularly in the context of the current practice of official liquidators seeking to have remuneration fixed by reference to the hourly charge out rates applicable to individuals and the time spent. I do not propose repeating those principles in this judgment. I summarised the position in *Mouldpro* at para. 14 as being that:

"... the court, in determining the remuneration of persons appointed as examiners, administrators or official liquidators, will not determine the reasonable remuneration by reference only to the total charge-out costs computed from the hours spent and relevant hourly rates, but will also have regard to:

- (i) the nature of the work carried out; and
- (ii) the complexity of the work; and
- (iii) the importance or value of the work 'to the client'."

17. In *Mouldpro*, I also drew attention to the distinction to be made between the value of work done and the cost of rendering it and to what was said by Ferris J. in the English High Court in *Mirror Group Newspapers plc. v. Maxwell* (No.2) [1998] 1 B.C.L.C. 638, at p.652, where, in the context of fixing remuneration of receivers appointed to the MGN Group in relation to hourly rates and times spent, he stated:

"... time spent represents a measure not of the value of the service rendered, but of the cost of rendering it. Remuneration should be fixed, so as to reward value, not so as to indemnify against cost."

My own conclusion, as expressed, which is relevant to this application, is that in determining an official liquidator's remuneration, it is appropriate to have regard to the value of the work and also, separately, to the cost of rendering it. The computation of the remuneration claimed in accordance with time spent and hourly charge out rates is the cost of rendering the service by the official liquidator and his firm. Cost in this sense also includes a profit element for the firm in question.

18. In this application, the above are the primary principles according to which the Court must determine the amount of the remuneration for the Official Liquidator. The amount must also be reasonable both for him and for the creditors of the Company. There is an added special consideration on the facts herein. The Court should have regard to the estimate given by the Official Liquidator in April and June 2011. This was an estimate given in the course of the liquidation upon which the Steering Committee was entitled to rely. For the reasons already stated, I accept that there was, through error, an underestimate in respect of the unpaid element of the Liquidator's remuneration and legal costs up to 12th November, 2010. I propose taking that error into account in any comparison between the estimate given and fees which the Court is asked to measure. However, insofar as the Liquidator gave, lastly, in June 2011, an estimate intended to cover monies which would have to be paid out in respect of work done since November 2010, to the completion of the liquidation, the Court should have regard to same. I am not satisfied on the affidavits that there is evidence of any significant work which was required to be done between November 2010, and November 2011 which was not predictable by the Liquidator in June 2011.

19. Counsel for the Steering Committee also submitted that whilst her clients accepted that the Liquidator should receive reasonable remuneration for the work done, they consider that the amounts being charged are too high. The Court enquired, in the course of the application (prior to the final hearing), having considered the charge out rates, and in particular, the significant increases in charge out rates for three persons working on the liquidation between the years 2010 and 2011, as to the cause of same. The Liquidator, in a further affidavit, explained in respect of Mr. Leydon, whose charge out rate was increased from €210 per hour in 2010 to €320 per hour in 2011, that he had been promoted to director (from manager) in May 2010, and that his firm did not wish to change the charge out rate mid-year and only did so as of 1st January, 2011. He further pointed out that there were 53.25 hours charged for Mr. Leydon at a manager rate of €220 per hour from 1st May, 2010, to 31st December, 2010, when his firm could have sought to charge Mr. Leydon out as a director at €320 per hour. He also deposed that, since Mr. Leydon's promotion, there has been a reduction in the time spent by him, as a partner at a higher charge out rate, on the liquidation.

20. In addition to Mr. Leydon, there were two further individuals who worked significant hours in 2011 and who appear to have also been promoted with substantial increases in charge out rates. They were not referred to by the Liquidator in his further affidavit.

21. In the course of the hearing, the Liquidator gave oral evidence to the Court. He explained his firm's practice of keeping people working on a liquidation who are familiar with it, notwithstanding that they may have been promoted within the firm. He also gave evidence of the periods during which individuals within his firm progress from being a junior or trainee on joining the firm from college, to a semi-senior after two to three years and to a senior after three years or more and then a manager after five years or more. In a liquidation which lasts a few years, it is foreseeable that a person at a relatively junior level working on the liquidation may be promoted in the course of the liquidation. The Liquidator, in his oral evidence, also confirmed, as is apparent from the appendices to his reports, that whilst a reduction was made in the charge out rate applicable to him as a partner in 2011, following the decisions of the High Court in *Re Missford Ltd.* and *Re ESG Reinsurance*, from €385 per hour to €357 per hour, there were no reductions made in the charge out rates applicable to other members of staff (save in respect of a junior with a reduction of €90 per hour to €84 per hour). In those decisions, the Court applied a percentage reduction to charge out rates for all staff members.

22. Whilst I accept, having regard to the evidence of the Liquidator, that it may be efficient in the management of a liquidation to retain people working in the liquidation who have been promoted within the firm, it does not appear to me that a decision by the firm to promote an individual automatically justifies remuneration for the Liquidator based upon the full increased charge out rate which the firm now attributes to such persons by reason of their promotion. That is the cost to the firm of the work being carried out. It does not appear a decision by the firm to promote an individual automatically increases to the same extent the value of the work being carried out in the liquidation. Presumably, at the time the person commenced working in the liquidation, he was considered fit to carry out the particular tasks.

23. In this liquidation, the increased charge out rates are significant, as are the relative number of hours worked by these individuals in 2011. Collectively, the three promoted persons worked a total of 134 hours out of the total of 166 hours worked by the Liquidator and his staff in 2011 up to 13th November, 2011. The relevant increases and hours worked included in the appendix to the Liquidator's report are:

Position	2010 Hourly Rate	2011 Hourly Rate	% Increase	2011 Hours
Manager	220	320	45	53
Senior	165	200	21	50
Semi-Senior	90	126	40	31

24. On the facts of this liquidation, it appears to me that the above increases in charge out rates by the persons who, together worked 134 hours out of the total of 166 hours in the period to November, 2011 contributed in a way which is not reasonable to the total remuneration claimed by the Liquidator, and accordingly, that I should make some reduction in respect of same. As I stated in *Re Mouldpro International Ltd. (In Liquidation)* [2012] IEHC 418, it may be appropriate that the firm be entitled to reflect a promoted person's ability and, presumably, efficiency in carrying out the work of the liquidation and in giving added value by some increase in charge out rates. However, the very significant increase in charge out rates applicable to three persons doing the major work in this liquidation does not appear objectively justified. The increased rates added upon my calculation €8,166 to the remuneration claimed in 2011.

Conclusions

25. As it appears in para. 6 of this judgment, I am asked to determine the remuneration in respect of two distinct periods. The first period is from 20th July, 2009, to 12th November, 2010, in which the sum sought for remuneration inclusive of VAT and outlay is €128,226.74. It appears from the papers that the amount of remuneration sought exclusive of VAT and outlay is €103,778.75 of which €31,425.59 (exclusive of VAT) remains unpaid to the Liquidator. This is the amount which, in error, was omitted from the Liquidator's estimates. I propose determining the remuneration for this period in the sum of €93,778.75 plus the outlays as claimed of €2,193.76 plus VAT. This is a reduction of €10,000 in the net remuneration sought. I have made this reduction essentially for two reasons. Firstly, the period includes 2010, the year during which the remuneration claimed in a number of decisions in the High Court was reduced by differing percentages. The partner charge out rate claimed in this liquidation for 2010 is in excess of the amount allowed in *Re Missford Ltd.* [2010] IEHC 240, [2010] 3 I.R. 756, and *Re ESG Reinsurance Ltd.* [2010] IEHC 365, [2011] 1 I.L.R.M. 197. Secondly, whilst the unpaid balance of €31,425.59 was excluded from the estimates given in error, it represents, in the context of this liquidation, a relatively significant additional sum which the Liquidator is now seeking to have paid out of the liquidation and thereby reducing the distribution available for unsecured creditors, including those persons involved in the Steering Committee. It appears that I should have some regard to this albeit on the basis that it was a genuine error.

26. In respect of the period from 13th November, 2010, to 13th November, 2011, the Liquidator seeks to have his remuneration determined at €42,097.75 plus outlay and VAT. I propose determining the remuneration for this period at €27,097.75 plus outlay and VAT as claimed i.e. making a reduction of €15,000. I have done this in accordance with the principles set out above and having regard to the estimate given by the liquidator for the following reasons.

27. The estimate given, at latest in June, 2011 for remuneration to completion of the liquidation was €40,000. I have concluded on the affidavits that there was not significant work in the intervening period prior to November, 2011 which could not have been envisaged by the Liquidator. The liquidator in an estimated outcome for the liquidation as of 23rd February, 2012, estimates the remuneration to completion presumably for the period after 13th November, 2011, at €25,000. Taking into account that the Liquidator's figure of €40,000 was an estimate, it appears to me that an increase of approximately 20% might have been reasonable in the absence of any clearly identified unenvisaged additional work, taking the estimated figure to circa €50,000. Allowing for the further €25,000 estimated to completion in February 2012, this would leave €25,000 for the period up to 13th November, 2011. I have

allowed slightly in excess of that.

28. The second reason for which I have made the deduction is that objectively it appears to me having regard to the value of the work done that it was being charged by the Liquidator at excessive charge out rates, having regard both to the promotion of three individuals working in the liquidation and the fact that no reductions were made in the relevant charge out rates for directors, managers, seniors and semi-seniors following the High Court decisions in 2010.

Relief

29. I will hear counsel on the precise orders which require to be made on the notice of motion to give effect to this judgment and permit payment out of balances in respect of the liquidator's remuneration and if not already done so the legal costs.