Neutral Citation Number: [2010] IEHC 394

THE HIGH COURT

2009 524 COS

IN THE MATTER OF MARINO LIMITED

AND IN THE MATTER OF THE COMPANIES ACTS 1963 – 2009

AND IN THE MATTER OF PERFECT PIES LIMITED

AND IN THE MATTER OF THE COMPANIES ACTS, 1963 – 2009

AND IN THE MATTER OF VIKRAM LIMITED

AND IN THE MATTER OF THE COMPANIES ACTS 1932 – 2009

AND IN THE MATTER OF MOUNT STREET PUB LIMITED

AND IN THE MATTER OF THE COMPANIES ACTS 1963 – 2009

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

JUDGMENT of Mr. Justice Clarke delivered the 29th July, 2010

1. Introduction

1.1 The Companies named in the title of these proceedings form part of the Capital Bars Group of Companies ("Capital Bars"). Kieran Wallace of KPMG was appointed as an interim Examiner of Capital Bars on the 18th September, 2009. Subsequently, on the 6th October, 2009, Mr. Wallace was confirmed as Examiner of Capital Bars.

1.2 The examinership continued, with various extensions of time being granted, right down to the wire. However, for reasons which are not relevant to the issue which I now have to decide, the examinership process in respect of Capital Bars ultimately failed.

1.3 On that basis, the appointment of Mr. Wallace as Examiner was terminated and the protection of Capital Bars under the Companies (Amendment) Act 1990 ("the 1990 Act") ended. Thereafter, Mr. Wallace applied, under s. 29 of the 1990 Act, to the court for an order for the payment of his remuneration and costs together with his reasonable expenses. By the time that application came to be heard, a receiver had been appointed to Capital Bars. The receiver suggested, through counsel, that the rate of fees being charged by Mr. Wallace was too high and suggested a reduction to which I will refer in due course. The fees sought were based on a number of different hourly rates depending on the seniority of the personnel involved.

1.4 At or around that time, Kelly J. had reserved judgment in a similar application in *Re Missford Limited T/A Residents Members Club and the Companies Acts*. I, therefore, indicated to the parties that I wished to consider the judgment which Kelly J. was due to deliver in that case, but that I would afford the parties a further opportunity to be heard in the light of that judgment. I am of the view, which I expressed at the time, that there is an obligation on the courts to ensure reasonable consistency in the approach adopted to applications for the payment of examiners costs. It was for that reason that I wished to have the opportunity to consider the views then to be expressed by Kelly J. in *Missford*.

1.5 Thereafter, judgment was delivered on the 17th June by Kelly J., *(Missford Limited T/A Residents Members Club & the Companies Acts* [2010] IEHC 240). I subsequently afforded the parties an opportunity to make further submissions on the matter. This judgment is directed towards the conclusions which I have reached. I should turn first to the decision in *Missford*.

2. *Missford*

2.1 In a review of the case law in *Missford*, Kelly J. quoted the observations of Hamilton C.J. in *Re Coombe Importers Limited* (Unreported, Supreme Court, Hamilton C.J., 22nd June, 1995), where the following was stated:-

> "There is no doubt that the court has jurisdiction to review and disallow the remuneration, costs and expenses of the Examiner and in view of the priority given to such remuneration, costs and expenses there is an obligation on the court to be vigilant in scrutinising an examiner's application for sanction of payment."

It should be pointed out that one of the issues which arose in *Missford* was as to whether some of the work in respect of which costs were being sought by the examiner in that case, was work which was properly required of an examiner in the context of the examinership concerned. There is no equivalent issue in this case. I indicated at the initial hearing of the application that I was satisfied that the amount of work being claimed for by Mr. Wallace was reasonable, having regard to the course of the examinership. As is normal practice, the examinership remained with one judge for almost its entire course (that judge being me), with only a number of minor matters being dealt with by another judge due to my unavailability on one occasion. I was, therefore, fully familiar with the course of the examinership and have no doubt but that the volume of work specified in the Examiner's bill in this case is fully justified. In addition, counsel on behalf of the receiver did not seek to suggest that the volume of work being charged for was in any way inappropriate.

2.2 While the issues in *Missford*, therefore, turned not only on the rate of remuneration but also on the amount of work to which that rate should be applied, the issues in this case concentrated solely on the rate of remuneration. While agreeing fully with the comments of Kelly J. concerning the need for the court to apply scrutiny to the question of the volume of work being charged for when determining the appropriate costs of an examiner, I am satisfied that no such issues arise on the facts of this case.

2.3 Like Kelly J., I also agree with the views expressed by Finlay Geoghegan J. in *Re Sharmane Limited* [2009] IEHC 377, where she said:-

> "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 rate 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."

2.4 The examiner's costs in *Missford* were based, as is common practice and the case in this application, on an hourly rate, differentiated having regard to the seniority of personnel involved. As noted by Kelly J. at p. 10, the examiner in *Missford* charged an hourly rate of €425.00. Other staff had respective charge out rates ranging downwards from €210.00 to €100.00 per hour.

2.5 The principal conclusions of Kelly J. commenced by noting that the charge out rate at partner level of the examiner in that case of €425.00 had remained unchanged since January, 2007. Having searched for a comparator, Kelly J. noted that fees payable in respect of publicly funded criminal work in the legal profession had been subjected to reductions of, at least, 16% since 2007. Kelly J., therefore, imposed such a reduction across the board leading to a rate of €357.00 in respect of the examiner, with rates ranging down from €176.40 to €84.00 for other staff.

2.6 In addition to *Missford*, I raised with counsel for Mr. Wallace another practical example of costs of an examiner which had, as it happens, come before me in the period between the initial application for the approval of costs in this case and the final hearing. The case in question involved the examinership of *B.A. Engineering*. In that case the examiner and a member of the examiner's firm of accountants, at partner level, operated a charge out level of €300.00 with one manager level member of the same firm being charged out at €125.00. It is in the context of the rates approved in *Missford* and *B.A. Engineering*, that I must approach the hourly rates sought in this case. The rates sought for persons at partner level are €560.00, while rates for other members of the firm range downwards from €405.00 for an Associate Director to €100.00 for a Trainee Accountant.

2.7 Against that general background and in the light of submissions made by counsel on behalf of Mr. Wallace, I should turn first to the general principles applicable.

3. General Principles

3.1 As pointed out by Kelly J. in *Missford* and Finlay Geoghegan J. in *Sharmane*, the statutory scheme does not give any guidance as to the criteria to be taken into account in assessing fees of an examiner. However, as pointed out by Hamilton C.J. in *Coombe Importers*, the court has an obligation to be vigilant in scrutinising any application for costs. The reason identified by Hamilton C.J. for the obligation on the court to be particularly vigilant in such scrutiny stems from the fact that the fees of an examiner are given an exceptional level of priority as to payment under the provisions of s. 29(3) of the 1990 Act. That subsection provides that the remuneration, costs and expenses of an examiner, which have been sanctioned by order of the court, are to be paid "before any other claim, secured or unsecured", and whether arising under a scheme of arrangement or in the event of a failed examinership in any receivership or winding up of the relevant company.

3.2 A number of points need to be addressed. First, it should be noted that the question of the level of examiner's fees is only likely, in practice, to be a matter for the court in cases of a failed examinership. Where the examinership succeeds, with a scheme of arrangement being approved by the court, then it is inevitable that the arrangements for which provision has to be made, in the context of that scheme of arrangement, must include the costs of the examiner. In order for a viable scheme to be put in place, it is necessary that there be sufficient funds to meet whatever liabilities of the company are to be paid on foot of the scheme and to provide the relevant company with sufficient funds to enable it to have a viable prospect of survival post examinership. Clearly the equation which presents itself at such a time involves there being sufficient funds to pay whatever has to be paid to the examiner as part of such an arrangement. Indeed, it was quite properly noted by counsel on behalf of Mr. Wallace (on Mr. Wallace's instructions) that it was not unusual, in practice, for negotiations to take place, as a potentially viable scheme of arrangement began to emerge, during which the relevant examiner might be required to negotiate a reduced level of costs to enable the sums to add up. Indeed, such a practice is one with which most lawyers will be familiar in the context of the settlement of litigation, where it is a not infrequent occurrence that a defendant wishes to fix its total liability (including any liability for costs) at the time of settlement. In such circumstances either a global amount inclusive of costs or two separate sums for damages and costs are often negotiated. In either case, it is not uncommon for lawyers to have to make some reduction in what might otherwise be their fees in order to facilitate a settlement.

3.3 Indeed, based on the fact that it was accepted on behalf of Mr. Wallace that such arrangements were not unusual, it was intimated on his behalf that a reduction of 10% in the overall level of fees sought on an hourly basis might not be unreasonable to reflect the fact that arrangements of that type would not be uncommon as part of the finalisation of a scheme of arrangement in the case of a successful examinership.

3.4 There are, however, other consequences of the statutory regime. In the case of failed examinership it is almost inevitable that the company will either be placed into liquidation or go into receivership (or, indeed, both). The company concerned is, by definition, insolvent or else it could not have been admitted into examinership in the first place. In those circumstances, it is the creditors of the company who, in practice, have to bear the costs of the examinership. While the precise creditors on whom such a burden may fall may vary from case to case depending on just how insolvent the relevant company is, it remains the case that it is one or more class of creditors who will ultimately end up having to forego payment because of the super priority given to the examiner's costs. It was, indeed, for that reason that the receiver was the obvious *legitimus contradictor* in this case.

3.5 However, it also follows that there are some similarities between party and party costs of litigation and the costs of examiners in the case of a failed examinership. Like all analogies it should not be pushed too far. However, the reason for exercising scrutiny is broadly the same. In litigation the successful party is entitled to have its costs paid on a party and party basis by the loser. It follows that the amounts which it may be reasonable to impose on that losing party need to be scrutinised. On the one hand parties should be entitled to incur reasonable expense in bringing successful cases to court and should not be unduly penalised by not allowing proper recovery of those costs in the event that they should succeed and have costs awarded to them. On the other hand, there must always be significant scrutiny in cases where one person is being expected to pay sums incurred by someone else. Like considerations apply in an examinership. While the examiner is appointed by the court, it will almost inevitably be the case that the examiner will be nominated by whoever petitions the court (almost always the company or its principals). In the case of a failed examinership, it is, as was argued by counsel for the receiver, the creditors who will end up paying for costs incurred at the instigation of the company or its principals.

3.6 It is next necessary to deal with some specific points made by counsel on behalf of Mr. Wallace as a commentary on the judgment of Kelly J. in *Missford*. Kelly J. made the point that customers generally of an insolvency practitioner who acts as an examiner cannot

be expected to subsidise *pro bono* work done by that examiner or other work done at a reduced rate for, for example, professional bodies, no matter how praiseworthy undertaking such work may be. While not questioning that proposition, counsel made the point that insolvency practitioners generally do suffer risk as to payment.

3.7 It certainly is the case that there are liquidations where the insolvency practitioner appointed as liquidator, either is not paid at all, or can only obtain a significantly reduced payment because of the lack of funds coming into the company concerned. Like most areas of professional life there is some risk that an insolvency practitioner will, in the course of a year, undertake work for which he or she will not be paid or will be paid, in practice, at a rate far below what might be described as "the going rate". There can be little doubt that, as with any form of commercial enterprise, such practitioners are likely to "price in" the fact that they may, on average, not recover everything that they might theoretically be entitled to, when deciding their general rates. That is not a cross subsidy. Rather it is a general condition of the market place in which such practitioners have to operate. In substance, it is no different from a supermarket having to take into account the fact that it will suffer some wastage, in calculating the mark up which it needs to charge in order to make a profit at the end of the day.

3.8 While accepting that point, it does not seem to me that it either undermines anything said by Kelly J. in *Missford* or, indeed, is of particularly great significance in respect of an examinership. It is, of course, possible that an examiner might not be paid for his work. However, having regard to the very high level of priority which is given to the payment of examiner's costs, it does not seem to me that the payment of examiner's fees carries with it a particularly high level of risk of non payment. Indeed, as was noted by Kelly J. in *Missford*, it was the practice of the examiner in that case to charge a lower level of fees when nominated by the Revenue Commissioners to reflect the fact that there was a certainty of recovery.

3.9 It is true to say that Kelly J. placed some reliance on the fact that the examiner in *Missford* had also been appointed as receiver over that company. That is not the case here, in that Mr. Wallace has no continuing formal role in respect of Capital Bars. I am not, however, convinced of the significance of the distinction for the issue which I have to decide.

3.10 Next counsel queried the appropriateness of the comparator used by Kelly J. involving criminal lawyers. The point was made that payment under the Criminal Legal Aid Scheme or from the Director of Public Prosecutions is guaranteed. That is true so far as it goes. Next it was pointed out that the market for the services of insolvency practitioners is counter cyclical, with there being more work when times are bad. On that basis, it was suggested that the market would not be likely to lead to the same fall off in the fees of insolvency practitioners as might be encountered in other areas. While there may be some overall validity in that point I am, for the reasons which I have sought to analyse, faced with having to strike a balance involving the legitimate interests of creditors who are now being asked to foot the bill, in practice, for a process that they did not instigate. As pointed out by Finlay Geoghegan J. in *Sharmane*, the exercise of scrutinising the fees of an Examiner is not confined to identifying that the hours charged for were actually worked and were necessary, and that the rates per hour are as per the relevant professionals normal charge out rates. Rather the court is required to take an overall view as to whether the costs being imposed on the creditors are, in all the circumstances of the case, reasonable. While the normal rates charged in the marketplace and the normal rates charged by the individual practitioner are significant factors, those rates are not the only matters to be taken into account. I am not, therefore, satisfied that there is any proper basis for departing from the views of Kelly J. as expressed in *Missford*.

3.11 Counsel did also make a point which, in my view, has some merit. The practice has evolved of the question of examiner's costs coming to be fixed well after the examinership has been completed. As I have already pointed out it is likely, in the context of a successful examinership, that such costs will be agreed at the stage of the finalisation of the scheme of arrangement, for that scheme will need to make provision for those costs in any event. However, in the case of failed examinerships, the costs are normally only fixed after the event. It was pointed out by counsel that that practice can be somewhat unfair, in that a person is being asked to take on work without any agreement as to their rate of pay. Speaking for myself, I would be more than happy, in the future, to fix the basis on which the remuneration of an examiner is to be determined at a much earlier stage of the process, for example, at the original petition hearing or even, if it should prove practicable, on the occasion of the appointment of an interim examiner. In that context I should, however, emphasise the comments made by Finlay Geoghegan J. in *Sharmane* to the effect that appropriate costs are not necessarily determined solely by applying an hourly charge at various rates, depending on the seniority of the personnel concerned. As there may well be discussion between the company and/or its principals with a possible examiner prior to appointment I would welcome the disclosure of the results of any such discussions relating to costs at an early stage.

3.12 It is clear that there are very significant variations in the hourly rates which are apparently charged by examiners or partner level colleagues who work with the examiner concerned. The rate of €560.00 per hour sought in this case is, I am satisfied, Mr. Wallace's normal charge out rate. Even before the reductions imposed by Kelly J. in *Missford*, the relevant charge out rate for partner level personnel in that case was €425.00. As I have pointed out, the partner level rate sought and obtained in *B.A. Engineering* was €300.00 per hour. Counsel for the receiver suggested a reduction of €100 per hour across the board which would lead to a rate of €460 per hour for those at the highest level. Given the obligation to ensure that costs are reasonable to all concerned and against that factual background, it is next necessary to say something about the extent to which it is appropriate for the court to allow different rates in different cases.

4. Should there be a Uniform Rate

4.1 In the course of debate, the point was made by counsel on behalf of Mr. Wallace that there may be valid explanations for variations in the rates charged by different practitioners. Sometimes the payment of an hourly rate is presented as the most transparent way of determining an appropriate level of remuneration for professionals. While such a method of charging has its merits, it is, in my view, possible to exaggerate the extent to which it may provide an entirely transparent way of charging. In that context I am not dealing with questions as to whether the hours claimed were actually worked, for as I have pointed out, there is no question in this case but that the relevant hours were actually worked. However, persons of different experience and expertise may well be able to do the same work in very different periods of time. Doubtless the differential rates charged by different personnel within the same firm, at least in part, reflects that fact. There can be little doubt but that large firms, which may have a significant level of expertise in different areas available within the same firm, may be able to bring efficiencies to bear on the conduct of work which would not be available to a smaller firm. On the other hand, large firms typically have higher overall overheads not otherwise recovered from clients. It does need to be recalled that a charge out rate by a professional in a firm is not the same as that person's pay. Those overheads of the firm which are not directly charged to clients need to be met out of the fees charged. It is possible that a large firm may not cost more at the end of the day if higher hourly rates might be offset by lower number of hours. However, even that factor is itself variable for not all work is of a type which can be shortened by expertise or experience.

4.2 Having regard to the variety of factors that could legitimately be taken into account, it does not seem to me that it would be appropriate to impose a single fixed hourly rate, nor to insist that the hourly rate method is the only means by which the level of remuneration of examiners should be calculated. On the other hand, while recognising that there may be legitimate factors which may lead to different rates being charged by different firms, it seems to me that, in the context of a process where an examiner is

appointed by the court and where the court is under a duty to carefully scrutinise the costs of the examiner because those costs are ultimately going to be paid by someone other than those who are directly or indirectly involved in the appointment of the examiner in the first place, it is not appropriate for a court to countenance a very wide disparity in the rates of remuneration that should be paid to examiners.

5. Conclusions

5.1 Having regard to the rate fixed by Kelly J. in *Missford*, the rate sought and approved in *B.A. Engineering*, and the rate suggested by the receiver, I find it difficult to accept that, even in the case of the largest of firms with the highest of overheads (with, it must be assumed, corresponding efficiencies leading to a reduction in the amount of hours being charged for), it would be appropriate to allow a rate in excess of €375.00 per hour for those at partnership level.

5.2 On that basis, I propose allowing €375.00 per hour for those at partner level in this case. On the same basis, it seems to me that the rate for Associate Director should be €300.00 per hour, that for Manager €260.00 per hour, that for Senior Accountant €200.00 per hour, and that for Trainee Accountant €80.00. When a calculation as to the precise total amount due on that basis has been made, I will approve the examiner's costs and expenses in that sum together with the other items of the examiner's costs which are not in contention in this hearing. I have conducted a rough calculation on that basis and am satisfied that the total that would be determined as a result of that calculation would meet the broad criteria of being reasonable having regard to difficulty, importance and value identified by Finlay Geoghegan J. in *Sharmane*.

J.