

THE HIGH COURT

2010 2 COS

**IN THE MATTER OF MISSFORD LIMITED T/A RESIDENCE MEMBERS CLUB
AND IN THE MATTER OF THE COMPANIES (AMENDMENT) ACT 1990, AS AMENDED**

JUDGMENT of Mr. Justice Kelly delivered on the 17th day of June, 2010

Introduction

This is the application of Jim Stafford, the former Interim Examiner of Missford Limited (the Company). He asks the court to fix the remuneration due to him for the period from 5th January, 2010 to 20th January, 2010. The sum sought is €61,857.20 together with €741.15 in respect of expenses. Both figures are inclusive of VAT.

Mr. Stafford also seeks an order measuring the legal costs which he incurred for the same period in the sum of €50,600.65 inclusive of VAT.

Background

At a vacation sitting of the court on 5th January, 2010, Edwards J. appointed Mr. Stafford as Interim Examiner of the Company.

I heard the Company's petition on 13th January, 2010. At that hearing, Mr. Stafford presented a report setting out a summary of the work carried out by him from the time of his appointment.

I reserved my judgment on the application for a week. I delivered it on 20th January, 2010. ([2010] IEHC 11). For the reasons set out in that judgment, I dismissed the petition and withdrew the protection of the court from the Company.

Subsequently, Mr. Stafford brought this application. I was not satisfied to make the orders sought on the basis of the information then put before me. I afforded him a further opportunity to put additional material of his choosing before the court and this he did.

The Company

The Company was engaged in the business of running a form of private members club at St. Stephen's Green in Dublin. Although incorporated in November 2006, it only commenced trading in May 2008. It never traded profitably. At the time of the presentation of the petition, it was indebted to the Revenue Commissioners in the sum of €1.2m. It also owed Zurich Bank €2.3m. Trade creditors were owed in excess of €740,000 and lease financing creditors in excess of €200,000.

The decision of the Company to petition the court for the appointment of an examiner was precipitated by the Revenue Commissioners attaching the Company's bank account. Edwards J. did not confer any powers on Mr. Stafford over and above those that are given by statute. As the petition was dismissed, Mr. Stafford never acted as examiner of the Company.

The Legal Position

Section 29 of the Companies (Amendment) Act 1990, (the Act) deals with the costs and remuneration of examiners. Subsection 1 provides:-

"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."

Subsection 2 provides:-

"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)."

Subsection 3 in its amended form provides for the remuneration, costs and expenses which have been sanctioned by order of the court to be paid in full before any other claim, secured or unsecured.

Subsection 4 provides:-

"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."

Finally, subs. 5 provides that:-

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

Case Law

Section 29 makes it clear that the court should only make such orders as it thinks proper for payment of remuneration, costs and expenses of an examiner. The court is not a cipher to rubber stamp claims made by an examiner. That is clear from the observations of Hamilton C.J. in *Re Coombe Importers Limited* (22nd June, 1995) where he said:-

"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."

That vigilant scrutiny can only be carried out effectively if all the necessary information is placed before the court. Thus, it is not surprising to find that under O. 75A, r. 22, it is prescribed that an examiner seeking an order such as this is obliged to place affidavit evidence before the court setting forth "a full account of the work carried out by him to the date of the application and a full account of the costs and expenses incurred by him". That rule obliges him to vouch the costs and expenses and to set out the basis for the proposed remuneration which he seeks. He is also obliged to set out in the affidavit what use, if any, he made of the services of the staff or facilities of the Company to which he was appointed and the extent of such use.

In carrying out its vigilant scrutiny, the court must always be mindful of the limited functions of an examiner and a *fortiori* an interim examiner. As was pointed out by Murphy J. in *Re Eden Park Construction Limited* [1994] I.R. 126:-

"...an examiner appointed under the Companies (Amendment) Act 1990, does not as such have an executive role. He does not have functions akin to those of a receiver or liquidator. In the absence of some particular order of the High Court, he may not usurp the functions of the board of directors of the company over which he is appointed and it is the board or its officials who will continue to manage the business of the company during the period of protection and the continuance of the examinership. The important function which the examiner must perform during the strictly limited period of the statutory moratorium provided by the Act of 1990, is to examine the affairs of the company and to prepare and deliver a report containing the information specified in s. 16 of that Act...an executive role, if it may be so described, which is likely to fall to most examiners would be the duty to review at the request of the directors (or perhaps a potential creditor) liabilities intended to be incurred by the company during the protection period with a view to forming an opinion as to whether the survival of the company as a going concern during the protection period would be seriously prejudiced if such liabilities were not in fact incurred."

Thus, it is clear that the court must be astute to ensure that the examiner is remunerated only for work which falls properly within his remit. If he does work in excess of that he cannot be remunerated for it.

The powers of an examiner are circumscribed by the provisions of the legislation. These powers include (a) the same powers as inspectors appointed by the court to require the production of documents; (b) the same power as auditors enjoy relating to the supplying of information and cooperation by the officers of the company; (c) the power to convene, set the agenda for and preside at board meetings of the directors and general meetings of the company; (d) the power to propose resolutions and present reports at such meetings; (e) the right to attend board meetings and general meetings and to be given reasonable notice of them being held; and (f) the power to apply to the court for the determination of any question arising in the course of his office.

The powers of the directors of the company are kept intact during the examination unless a special order of the court is made divesting them of some or all of those powers in favour of the examiner. Such orders can be made under s. 9 of the Act.

In the absence of such an order, the powers of an examiner are those which are set out in s. 7 of the Act.

One of those powers is particularly relied upon in the present case. It is that which is provided for under Section 7(5). It states:-

"Where an examiner becomes aware of any actual or proposed act, omission, course of conduct, decision or contract, by or on behalf of the company to which he has been appointed, its officers, employees, members or creditors or by any other person in relation to the income, assets or liabilities of that company which, in his opinion, is or is likely to be to the detriment of that company, or any interested party, he shall, subject to the rights of parties acquiring an interest in good faith and for value in such income, assets or liabilities, have full power to take whatever steps are necessary to halt, prevent or rectify the effects of such act, omission, course of conduct, decision or contract."

The vigilant scrutiny of the court is not confined to a consideration of whether the work done by an examiner falls strictly within his powers. It also extends to a consideration of the actual remuneration which is sought to be recovered.

Nowadays many examiners compute the fees which they wish to charge by reference to an hourly rate of charge. That is so in the present case.

Although s. 29 does not prescribe any criteria to assist the court in determining what is reasonable remuneration, it clearly imposes an obligation upon the court which precludes it from simply approving an hourly charge-out rate without further ado.

I agree with the views expressed by Finlay Geoghegan J. in *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 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."

The Hourly Charge

Mr. Stafford has charged an hourly rate of €425. He was assisted by a supervisor, senior, semi-senior and junior. Their respective hourly rates were €210, €185, €150 and €100.

Mr. Stafford's rate of €425 has obtained since 1st January, 2007. It was increased on that date from a previous rate of €400. He says that he is aware of accountants in other firms charging a higher charge out rate. He says that the charge out rates are calculated to ensure recovery of salary costs, overheads and a return to the equity partners of the firm.

Mr. Stafford has twenty five years of insolvency experience. In that time, he has worked on over a thousand corporate insolvency assignments.

He pointed out that whilst his firm tries to maximise its fee income, it is involved in two areas of non-chargeable work. First, the firm prepares and provides a number of training courses on corporate recovery and insolvency for which it only obtains "modest payment". No details of this modest payment were provided. It also presents a number of training courses for the Association of

Chartered Certified Accountants and for the Institute of Certified Public Accountants for which it receives no fees.

He also pointed out that his firm carries out what he described as "a significant amount of pro bono work in respect of individuals facing personal bankruptcy and the loss of their family homes". His estimate was that he spends approximately 200 hours per annum on such work. His partner spends approximately 140 hours per annum on that work and the staff of the firm, a further 200 hours per annum.

Whilst the carrying out of "pro bono" work is to be admired the loss of the fee income incurred by it cannot be sought to be recovered with the approval of this Court by the charging of a greater fee than justified on fee paying work. The same applies in respect of voluntary work done for the Association or Institute of Accountants. Neither can work which attracts the "modest payment" referred to earlier be subsidised by a greater fee than appropriate being charged for more remunerative work.

When the firm accepts assignments on behalf of the Revenue Commissioners, an hourly rate of €390 is charged. This amounts to a discount of approximately 8%. That discount is granted because the recovery of fees is guaranteed when the work is carried out for the State.

At the conclusion of this examinership, Zurich Bank indicated that they were going to appoint Mr. Stafford as receiver over the Company and this has occurred. Payment of his fees in the instant case are therefore guaranteed.

No party has sought to oppose the claim made in respect of remuneration or legal costs.

The question arises as to whether the court ought to sanction a charge out rate of €425 which has remained unchanged since it was first introduced in January 2007.

There is no doubt but that the economic climate which obtains in 2010 bears little resemblance to that of early 2007. With one or two notable exceptions, it is common knowledge that professional fees have been substantially reduced across the board. Anecdotally and from personal experience one can discern that professional fees have been reduced in the order of one third from what they were in 2007. That such a reduction was necessary is borne out by the August 2009 Competitiveness Report produced by Forfás (the National Competitiveness Council). It stated:-

"Recent price falls in Ireland are a cyclical response to the downturn nationally and internationally (e.g. falling interest rates, international fuel and food prices) rather than structural changes in the Irish economy or changes in the provision of State provided goods and services...In order for the economy to make the necessary transition from a reliance on domestic demand to sustainable export led growth in the medium term, policies need to facilitate the convergence of Irish costs, charges, professional fees, rents and income/wages towards the level of our trading partners. Ultimately, a quick adjustment in the price level is preferable to a gradual decline over several years. While painful and deflationary in the short term, the alternative is a prolonged period of weak or negative growth, high unemployment and emigration of highly educated young Irish people."

In the private sector, wages and salaries have reduced by a substantial amount and that is so also in the public service. With such a downward pressure, it is difficult to conceive of clients accepting without demur a fee rate struck in January 2007.

Whilst I accept that current economic circumstances have given rise to an increase in the amount of insolvency work available, that, of itself, would be no justification for maintaining a January 2007 hourly charge out rate.

Anecdote or personal experience cannot be used as a benchmark to set an appropriate level of hourly rate charge. A comparator must be sought.

It is difficult to obtain a direct comparator particularly since there was no legitimus contradictor to this application. What has to be sought is a comparable professional doing work of similar importance and complexity operating in the current economic climate and in respect of whom there is no reduction in workload. A part of the legal profession provides a guide in this regard. There is no point in looking, for example, to that part of the profession that deals with conveyancing transactions. That area of practice is in acute distress because of lack of work. But another area of legal work is much more akin to the case in suit.

Just as there is no shortage of insolvency work, neither is there any shortage of criminal work available to members of the legal profession. Much of this is provided for by way of State payment. Since 2007, fees paid by the State in respect of both prosecution and defence work have been reduced by at least 16%. (Two reductions of 8% each.) There is an argument that in fact the reductions amounted to more than 16% but there is no dispute of this being the minimum. That is reflective of a general trend in professional fees with few exceptions. I believe it appropriate that the court ought to recognise this and apply a similar reduction in the hourly charge out rate in this case. I, therefore, propose to reduce the charge out rate in respect of all of the personnel involved in the examination by 16%. That equates much more to the realities of life in 2010 than fees struck three years ago.

Assignment of Staff

It was perfectly reasonable for Mr. Stafford to utilise members of his staff to assist him in his task. He has explained on affidavit how he divided up the work between those various persons having regard to the nature of the task being undertaken and the level of their experience.

In my view, no criticism can be made of Mr. Stafford in relation to this exercise.

Work Undertaken

I have already pointed out the limited functions of an examiner and that no additional powers were conferred on Mr. Stafford by Edwards J.

The Company's operations were relatively small and it operated from one location. There were, of course, different operations going on there. They included the operation of a public bar, a restaurant, a nightclub and membership subscriptions also had to be serviced.

I have already commented in my judgment of 20th January, 2010 upon the way in which the Company and its directors conducted their business. Mr. Stafford has told me that he suspected that the directors of the Company had little understanding of financial control, tax legislation or company law. Upon appointment as interim examiner, his suspicions in that regard were confirmed. He found that there was inadequate financial control, no regular stock takes being performed and no independent reconciliation of cash sales to till readings. Because of these difficulties, he decided that his staff would carry out a monitoring operation of the Company's day to

day operations. His staff were also required to review all purchasing decisions. That was maintained until his staff had *"built up clear lines of communication with the key managers of the business"*.

Mr. Stafford considered making an application to the court under s. 9 of the Act but made what he calls a *"judgment call"* that his daily monitoring of the Company's activities provided sufficient safeguard to the creditors of the Company. Whilst the creditors' interests may well have been protected by this decision, I do not think it was the correct one concerning his own powers.

I am not convinced that a part of the work that was carried out was justified by reference to the limited functions of an interim examiner. If management powers were sought to be exercised, directly or indirectly, then the appropriate thing to do was to apply to the court for an order under s. 9 of the Act. Either an examiner or interim examiner is just that with limited statutory powers or else he must seek leave from the court to take over executive control of the Company. He cannot be a hybrid. Nor can he seek to exercise executive powers, directly or indirectly, without leave of the court and then seek to be remunerated for carrying out work in excess of his actual powers.

In the present case, not merely did the examiner involve himself in the monitoring exercise to which I have referred but he also became involved in negotiations concerning a variety of issues which are identified in his second affidavit.

Even allowing for the entitlements given to an examiner by reference to s. 7(5) of the Act, I am of opinion that more work was undertaken in the present case than was justified by reference to the limited role of an interim examiner. I do not suggest any impropriety on the part of Mr. Stafford in so doing. He simply did more, with the best of motives, than his warrant permitted.

It is impossible to assess the quantum of that work with mathematical accuracy. I have been furnished with a large number of documents demonstrative of the work done. Without itemising them on an individual basis, which would lengthen this judgment by scores of pages, I have been able to form an overall view. I do not think I am being unfair to Mr. Stafford by concluding that at least 15% of the time was spent on fulfilling a role which was in excess of that conferred by the court order.

The result is therefore that the charge out rate is reduced by 16% and the overall sum to be allowed is reduced by 15%.

Result

The hourly rate of Mr. Stafford will be reduced by €68 to €357. The supervisor's rate will be reduced by €33.60 to €176.40. The senior's rate will be reduced by €29.60 to €155.40. The semi-senior's rate will be reduced by €24 to €126. The junior's rate will be reduced by €16 to €84.

Mr. Stafford told me that he spent 60 hours working on the examinership but was conscious that that seemed to be a large amount of time and he therefore reduced it to 56 hours by way of a discount. I propose to allow him the 60 hours which he said he actually worked rather than the lesser amount. Applying the 15% reduction, Mr. Stafford will be remunerated for 51 hours at the new hourly rate.

Mr. Foley, the supervisor has claimed for 47.75 hours. That will be reduced by 7.1 hours giving a total of 40.6 hours at the new rate. Mr. Hendrick, the senior, claimed for 91.25 hours. That will be reduced by 13.6 hours to 77.6 hours at the new hourly rate. Ms. McDonagh claimed for 1.25 hours. That will be reduced to 1.1 hours at the new rate. Ms. McCarrick, the junior claimed for 2.25 hours. That will be reduced by 0.33 of an hour giving 1.9 hours at the new rate.

The effect of these adjustments means that Mr. Stafford will be allowed a sum of €18,207. Mr. Foley, the supervisor will be allowed €7,161.84. Mr. Hendrick, the senior will be allowed €12,059.04. Ms. McDonagh will be allowed €138.60 and the junior, Ms. McCarrick, will be allowed €159.60. That gives a total of €37,726.08. To that must be added €741.15 in respect of expenses giving a grand total of €38,467.23.

Legal Costs

Insofar as the legal costs claimed are concerned, I propose to refer them to the Taxing Master. In taxing the bill, the Taxing Master ought to bear in mind the observations that I have made concerning charge out rates in respect of professional fees. He should also bear in mind that the only legal fees which are allowable are those which impact directly upon the work properly undertaken by the interim examiner by reference to his limited role. Legal fees cannot be recovered for work undertaken outside the scope of the strictly limited nature of Mr. Stafford's powers.