

THE HIGH COURT**2009 807 COS****2009 808 COS****IN THE MATTER OF ESG REINSURANCE IRELAND LIMITED (UNDER ADMINISTRATION) AND IN THE MATTER OF THE INSURANCE (NO. 2) ACT 1982 (AS AMENDED)****IN THE MATTER OF ACCENT EUROPE INSURANCE COMPANY LIMITED (UNDER ADMINISTRATION) AND IN THE MATTER OF THE INSURANCE (NO. 2) ACT 1983 (AS AMENDED)****JUDGMENT of Mr. Justice Kelly delivered on the 2nd day of November, 2010****Introduction**

Under the provisions of s. 3(4)(b) of the Insurance (No. 2) Act 1983, this Court is obliged to fix the costs, expenses and remuneration of an administrator of an insurance company whom it has appointed to that role. In common with a number of similar statutory provisions (e.g. Section 29 of the Companies (Amendment) Act 1990 dealing with the remuneration of an Examiner) the legislature has given no guidance as to the criteria to be applied by the court in exercising this jurisdiction.

The fixing of remuneration for court appointed liquidators and examiners has attracted a number of written judgments in recent times. This is the first such judgment dealing with an administrator's remuneration.

Background

On 18th December, 2009, Mr. Jim Luby was appointed as administrator to each of the companies (the companies). The appointments were made on an interim basis. On 12th January, 2010, an order for the administration of each of the companies was made and he was appointed administrator.

Mr. Luby has carried out his duties as administrator in respect of both companies and has put before the court detailed information as to the work undertaken by him in respect of those companies.

In the case of the first company (ESG) he seeks remuneration in respect of the period from 18th December, 2009 until 6th July, 2010 in the sum of €368,646.25 together with Value Added Tax thereon. He also seeks liberty to pay to his solicitors the sum of €35,394.15 plus Value Added Tax in respect of costs for the same period.

In the case of the second company (Accent), Mr. Luby seeks €222,680 plus Value Added Tax for remuneration in respect of the same period. He also seeks approval for the payment of €25,607.70 together with Value Added Tax in respect of solicitor's costs for the same period.

Certain ancillary orders are also sought pertaining to future payments which I will deal with later in this judgment.

Administrator's Functions

In his supplemental affidavits, filed pursuant to court direction, Mr. Luby highlights a number of features of an administrator which he says distinguish him from the position of a liquidator, examiner or receiver. He points out that he carries responsibility for running the business of the companies rather than having them wound up. That requires continuous assessment of the projected runoff outcome. He also points out that ESG is the first reinsurance company ever to be placed under administration in this jurisdiction. He avers that he has no entitlement to apply to the insurance compensation fund insofar as ESG is concerned to assist him in placing it back on a sound, commercial and financial footing.

The businesses of the companies have combined balance sheet liabilities of in excess of US\$85m and have business relationships in over twenty jurisdictions. Staff are located in Dublin and Lisbon. All management decisions in the runoff of the businesses of the companies are taken by him and he is responsible for ensuring that the companies continue to pay their debts as they fall due. Two members of the staff of his firm McStay Luby are present in the companies premises on an almost fulltime basis. Furthermore, he is responsible for ensuring that relationships are maintained with numerous cedants, creditors and brokers.

He also points out a number of international elements to his role as administrator. Some of the more significant issues involve assessing advice from Accent's lawyers in the Netherlands concerning an ongoing arbitration there. He also has had to assess the advice of lawyers in New York concerning the termination of a trust fund and in addition has had to engage with lawyers in the United Kingdom and Brazil to finalise an aspect of ESG's work. He is also the person responsible for compliance with the requirements of the Financial Regulator.

Whilst all of these features exist and do distinguish the work of an administrator from that of a liquidator, receiver or examiner, the particular skills which are brought to bear are essentially those of an insolvency expert. Thus, whilst I accept that there are aspects of the work which differ, the skills which are used by an administrator are derived from the same background and qualifications which are applicable to the all the other office holders which I have mentioned.

Mr. Luby points out that the work done by himself and his firm in the administrations has delivered significant value including a saving of €0.7m on rent and service charges and a further saving of at least \$6m in the case of ESG on commutation with an entity called Unimed.

Charges for Work

Mr. Luby tells me that the partners in his firm review and fix their standard hourly rates on a regular basis.

The following is the standard hourly charge-out rate in respect of relevant personnel in Mr. Luby's firm from November 2006 to date.

Partner

November 2006	€355
November 2007	€370
May 2008	€425

Senior Manager

November 2006	€225
November 2007	€240
March 2008	€250
November 2008	€260

Assistant Manager

June 2008	€195
November 2008	€235

From the above it can be seen that there has been a consistent increase in fees over the last few years with the latest increase occurring in May 2008 in the case of a partner and November 2008 in the case of a senior manager and assistant manager.

In the present case approval is sought for a higher than standard hourly rate at partner level. In the case of a partner, €450 per hour is sought to be charged. (See exhibit 'JL1' in the affidavit of Mr. Luby sworn on 13th July, 2010.) Senior managers and managers are sought to be paid at the standard rate.

Mr. Luby has told me on affidavit that the demand for experienced insolvency and corporate recovery experts has increased significantly in the current recession. He goes on to say that although charge out rates for what he describes as "standard" or "normal" voluntary and court liquidations are under pressure, larger scale more difficult and complex work has resulted in higher than standard rates being agreed.

Mr. Luby's standard charge-out rate has been reduced in respect of certain Revenue funded liquidations by 8%.

He goes on to point out that approximately 85% of the work in the present case is carried out by a senior manager and an assistant manager.

Finally, in the case of each of the companies their sole shareholder (a Bermudan company in liquidation) has, through its liquidator, expressed contentment with the fees sought here.

Additional Evidence

In the case of each of the companies, Ms. Jane Marshall, Solicitor, swore an affidavit which, *inter alia*, exhibited a schedule of fees paid to three accountants (not associated with the applicant and all with specialised insolvency experience) for larger cases undertaken by them. These cases were not insurance related but, in her view, could be regarded as comparable in some respects to the present cases.

Firm A had a partner charge-out rate of €425 per hour. That was applicable in a receivership, an examinership and a creditor's voluntary liquidation. Those fees had respectively been approved by the bank who appointed the receiver, the petitioner in the examinership and the creditors in the voluntary liquidation.

Firm B had a partner's charge-out rate of €560 per hour. That was in respect of a business review and a receivership where those fees were approved of by the relevant bank.

Firm C had a partner's charge-out rate of €400 per hour for a business review and €390 per hour for a receivership with again those fees being approved of by the relevant bank.

These figures demonstrate a very large difference in the fees being charged ranging from €560 per hour at the top level to €390 per hour at the bottom of the scale for essentially the same or very similar work.

Mr. Luby has also exhibited fees charged for other work done by his firm. He says that these are a representative indication of the levels of fees recovered for different types of work. Partners charge out rate per hour varied from €390 to €490.

In further support of his case, the applicant retained Mr. Rory O'Ferrall, Chartered Accountant, to express an independent expert view on the proposed basis and level of charging by him.

On the topic of the basis of charging he said this:-

"I have reviewed the basis of charging including the rates per hour and the work of a particular kind which is required of the administrator, which work has many of the aspects of corporate and commercial reorganisation, with which I am familiar. In my opinion they form an appropriate basis of charging in these administrations."

The Legal Position

As I have already pointed out, the legislature has charged the court with the obligation of fixing the costs, expenses and remuneration of an administrator of an insurance company.

That being so there is, to use the words of Hamilton C.J. in *Re Coombe Importers Limited* (Unreported, Supreme Court, 22nd June, 1995), an “obligation on the court to be vigilant in scrutinising an application for sanction of payment”.

That was the approach which I adopted in dealing with the remuneration of an interim examiner in *Re Missford Limited Trading as Residence Members Club and the Companies Acts* [2010] IEHC 240. My approach in that regard was subsequently approved of by Clarke J. in his decision of 29th July, 2010, *In the Matter of Marino Limited and the Companies Acts*.

In *Missford*, I agreed with the approach of 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 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.”

That approach of Finlay Geoghegan J. was likewise approved of by Clarke J. in *Marino Limited*.

In *Missford*, I noted that the charge-out rate at partner level of the examiner was €425 and had remained unchanged since January 2007. It was difficult to obtain a direct comparator but I did note that fees payable in respect of publicly funded criminal work in the legal profession (being the best comparison I could find) had been subjected to reductions of at least 16% since 2007. I therefore imposed such a reduction across the board.

In *Marino*, Clarke J. was dealing with an application for costs of an examiner where the charge-out rate at partner level was €560 per hour. He called attention to another examinership in which the fees at partner level were being charged at €300 an hour. There was obviously a huge discrepancy amounting to €260 per hour between the fees sought by one examiner and another.

Clarke J. considered the question of whether there should be a uniform rate which would be applied by the court. He took the view that it would be inappropriate to impose a single fixed hourly rate but also expressed the view that it is not appropriate for a court to countenance a very wide disparity in the rates of remuneration that should be paid to examiners. In that case, he allowed a rate of €375 per hour for those at partner level. He said “*I find it difficult to accept that, even in the case of the largest of firms with the highest overheads...it would be appropriate to allow a rate in excess of €375 per hour for those at partnership level*”.

I agree.

The Present Case

Whilst there are differences between the work undertaken by an administrator and that done by a receiver, liquidator or examiner, it is essentially the same set of skills and experience that are utilised. The standard hourly rate which is charged by Mr. Luby has not altered since May 2008 and in the case of senior managers and assistant managers since November 2008. Here, of course, the standard partner's rate is exceeded by €25 per hour.

The economic climate has radically altered since those dates and the observations which I made in *Missford* are equally applicable in this case.

I am also of opinion that the views expressed by Clarke J. in *Marino Limited* to the effect that it is not appropriate for a court to countenance a very wide disparity in the rates of remuneration that should be sanctioned by it. In this regard, I expressly exclude from consideration the fees which have been approved by Kearns P. in the *Quinn Insurance Administration*. Whilst they were mentioned in the course of argument before me, the administrations in suit are not comparable in scope or complexity to what was involved in *Quinn*. In any event, I understand that Kearns P. made it clear that the remuneration approved of by him was not to be used as a precedent for the setting of fees in other administrations.

I cannot see any legitimate basis for the court approving a partner's hourly charge out rate different to that which obtained in *Marino Limited*. Whilst that case involved an examinership, the skills and expertise utilised were those of a insolvency expert just as in this instance. Accordingly, I propose to allow an hourly charge out rate of €375 for a partner. This is a reduction of €75 per hour from the rate sought to be approved. That amounts to a reduction of 16.6%. A reduction of 16% will be applied to the charge out rate of the more junior staff.

Legal Fees

In the case of ESG, Mr. Luby seeks liberty to pay to his solicitors a sum of €35,394.15 in respect of costs and outlay incurred in the period in question together with Value Added Tax thereon. In the case of Accent, the figure sought for the same services is €25,607.70 together with Value Added Tax thereon.

A breakdown is given of the hours worked by the various members of the firm of McCann Fitzgerald. The partner involved has charged at an hourly rate of €475 per hour. A senior solicitor charged €380, an intermediate solicitor €320, a trainee solicitor €160 and a court clerk €30.

The original evidence was supplemented by an affidavit sworn by the partner involved giving details of her area of speciality and her experience in that regard. She says the fees were agreed subject to court approval after a discussion between Mr. Luby and herself as to what would be appropriate rates for cases of this size, duration and complexity.

Her firm reviews its standard rates annually. The rates are set or confirmed by the firm for budgeting and planning purposes. They are also used by partners of the firm as a guide when agreeing rates with clients for individual pieces of work or, as the case may be, for a stream of work over a period. She placed evidence before the court of the standard rates for the years 2006 – 2010, in respect of the individuals engaged in advising Mr. Luby in the present case.

This information demonstrates that the hourly rate charged for a partner has gone from €430 per hour in February 2006 to €495 per hour in February 2008. Here the fees charged are less than the standard rates applicable in this firm. In the case of a partner they

are some €20 per hour less.

I have also had placed before me a schedule of complex cases worked on by the insolvency team at this firm over the last three years. That schedule expresses itself as giving a representative indication of different types of work and the level of fees recovered and the variation in rates agreed with clients. The partner rate ranged from as high as €508 per hour to as low as €400 per hour.

From the information placed before the court it is clear that there has since February 2006 been a continuous rise in the hourly charge-out rate. The observations which I made earlier in this judgment and in my judgment in *Missford* and those of Clarke J. in *Marino Limited* apply here with equal force. The economic climate in this State has changed radically since February 2006 and the court cannot but be aware of substantial reductions in fees in the majority of professions. It is not open to the court to close its eyes to this reality in carrying out the statutory function entrusted to it.

I can see no good reason why a legal adviser to an administrator should be permitted to charge fees at a rate in excess of that which is applicable to the administrator himself. In these circumstances, I propose to approve an hourly charge out rate for the solicitor partner of €375 per hour. That is a reduction of €100 per hour. That is a 21% reduction. I propose to apply that across the board in respect of the charge out rates for more junior staff.

Effect of this Ruling

In the case of ESG, the fees are reduced from €368,646.25 to €309,238.95.

The administrator's fees in the case of Accent are reduced from €222,680 to €186,786.20.

To these combined sums there is also to be added €594.84 in respect of expenses. Thus the grand total in respect of administrator's fees, charges and expenses between the two companies amounts to €496,619.99.

The legal costs in the case of ESB are reduced to €27,961.38. In the case of Accent, they are reduced to €20,230.09.

At the conclusion of the hearing in this case I allowed payments on account as follows:-

ESG	-	€200,000 for administrator's fees
		€20,000 for legal fees
Accent	-	€150,000 for administrator's fees
		€12,000 for legal fees.

Credit must of course be given for those payments

The Future

In addition to the specific reliefs relating to fees already incurred, I am asked to grant the administrator liberty to invoice the companies quarterly in respect of future remuneration together with expenses incurred and Value Added Tax thereon and to retain those sums out of the assets of the company without further reference to the court. Similarly, I am asked to grant the administrator liberty to pay to his solicitors such further sums as may be invoiced quarterly and to discharge those without reference to the court.

I am not prepared to make such an order in the form in which it is sought. To do so would be to perpetuate the level of fees which I am prepared to sanction at present into the future without further review ever taking place. Given the uncertain economic climate which obtains at present and where there is, to put it at its lowest, a possibility of further reductions taking place in professional fees in the future, I am only prepared to sanction further payments without reference to the court at the levels which I have fixed until 30th September, 2011. Thereafter an application will have to be made to the court to approve the levels of remuneration and of the legal costs in the respect of administrations. Between now and then payments may be made at the rates sanctioned by the court subject of course to subsequent court approval as to quantum.