[2018] IEHC 652

THE HIGH COURT

[Record No: 2011/219MCA]

In the Matter of Custom House Capital Limited (In Liquidation)

And In the Matter of Regulations 157 and 158 of the European Communities (Markets In Financial Instruments) Regulations 2007

And In the Matter of the Companies Acts 1963-2012

And In the Matter of the Investor Compensation Act 1998

On the Application of Kieran Wallace, Official Liquidator

Judgment of Ms. Justice Finlay Geoghegan delivered on the 21st day of November, 2018.

1. This judgment is given on an application brought by Kieran Wallace, Official Liquidator of Custom House Capital Limited (In Liquidation) ("the liquidator" and "CHC", respectively) on a notice of motion dated 29 March 2018 seeking inter alia an order measuring and determining the liquidator's remuneration, fees and expenses in connection with the liquidation of CHC for the period from 1 July 2016 to 31 December 2017 in the sum of €699,586.77, inclusive of professional fees, VAT and outlay. I heard the application sitting as an additional judge of the High Court pursuant to s. 2(5)(a)(i) of the Courts (Establishment and Constitution) Act 1961 as amended by s. 32 of the Court of Appeal Act 2014.

2. The notice of motion also sought directions in relation to the appointment of a *legitimus contradictor* and related matters in relation to the preparation and hearing of the substantive application. Initial directions were given at a hearing on 12 April 2018. At that point in time, there were two applications from clients of CHC who had participated in earlier applications to act as *legitimus contradictor*. Following consideration of the directions given, it was decided that Mr. Michael Nugent, a solicitor who was a client of CHC and has participated from the outset of this liquidation, should act as *legitimus contradictor*. He is represented by solicitor and counsel.

3. The application of the liquidator was grounded on an affidavit sworn by him on 28 March 2018, together with a report to the Court and other exhibits. The initial directions included fixing time for a request for further information by or on behalf of the *legitimus contradictor*, the reply thereto and the exchange of further affidavits and written submissions. This was done, albeit with some delay, and will be referred to in more detail below.

4. The application also included the determination of the legal costs of the liquidator for the period from 1 July 2016 to 31 December 2017. The application in that regard was grounded on a report from Behan & Company, cost accountants retained by the liquidator. The directions given included permitting the *legitimus contradictor* retain a cost accountant and significant progress was made in relation to the legal fees prior to the hearing of the application and is not the subject of this judgment.

5. In addition to the grounding affidavit of the liquidator and exhibits thereto, the Court has had and considered an affidavit of Michael Nugent sworn on 27 May 2018 and exhibits thereto, a second affidavit of the liquidator sworn on 1 June 2018, a second affidavit of Michael Nugent sworn on 8 June 2018 and exhibits thereto and an affidavit of Michael Murphy, solicitor of McCann Fitzgerald (which relates only to the legal costs), sworn on 13 June 2018 and an exhibit thereto. The Court has also had the benefit of written submissions delivered on behalf of the liquidator and the *legitimus contradictor* and oral submissions made by counsel on behalf of each.

6. These give rise to two sets of issues. The *legitimus contradictor* is not satisfied with the information furnished by the liquidator to the Court and made available to him in the course of this application and seeks certain directions from the Court in relation to the provision of further information and/or permitting inspection by the *legitimus contradictor* prior to the determination of the substantive application. The second set of issues relate to the determination of the remuneration sought. At the hearing, the Court heard oral submissions in relation to both sets of issues and reserved its decision.

Relevant Background

7. The order for the winding up of CHC was made by the High Court (Hogan J.) on 21 October 2011 and on the same date, the liquidator was appointed as official liquidator of CHC and also administrator of CHC for the purposes of s. 33A of the Investor Compensation Act 1998 (as amended). This followed the appointment by the High Court in July 2011, on the application of the Central Bank, of inspectors to CHC pursuant to the European Communities (Markets In Financial Instruments) Regulations 2007 (S.I. No. 60 of 2007) as amended ("the MiFID Regulations"). The report of the inspectors identified *inter alia* that "[t]here was a systematic and deliberate misuse of assets and cash belonging directly and indirectly to clients of CHC. This misuse was deliberately disguised by CHC through the use of false accounting entries and the issue of false and misleading statements to clients". At that point, it was estimated that the amount of money taken directly and indirectly from clients by CHC was in excess of €56 million.

8. This judgment is the fourth written reserved judgment which I have delivered in this liquidation: *Re Custom House Capital Ltd. (in liquidation)* [2012] IEHC 382, [2012] 3 I.R. 93 ("the 2012 judgment"); *Re Custom House Capital Ltd. (in liquidation)* (Unreported, High Court, Finlay Geoghegan J., 22 December 2014) ("the 2014 judgment"); and *Re Custom House Capital (in Liquidation)* [2017] IEHC 484 ("the 2017 judgment"). It is the third application for the determination of remuneration by the official liquidator. I have heard and determined the earlier two, the first being the subject of the 2014 judgment and the second the subject of an *ex tempore* judgment delivered on 17 November 2016. I have also, in the seven years during which this liquidation has been in existence, taken most of the further consideration hearings and dealt with a number of other matters by way of direction. There are certain other applications in the liquidation with which I have not dealt.

9. The *legitimus contradictor* appointed for this application has participated in many of the hearings in this liquidation. He was one of a group of clients who appeared on their own behalf in the applications which gave rise to the 2012 judgment and therein were referred to as "dissenting clients". As a practising solicitor, he took the lead and was helpful to the Court in that application. He subsequently participated in a committee which acted as the *legitimus contradictor* in the application seeking multiple reliefs and

directions, only one of which was the determination of the remuneration of the liquidator which gave rise to the 2014 judgment. He was separately represented at the very significant application with multiple complex issues which gave rise to the 2017 judgment. He is a person, therefore, who has been familiar with the work being done by the liquidator in this highly unusual and complex liquidation and the approach taken by the Court and the directions issued over many years.

10. The reason for which I set out both the prior involvement of the *legitimus contradictor* and the extent to which I have had heard and decided applications in this liquidation is that it is relevant to the determination of the issues relating to the adequacy of the information provided by the liquidator on this application, the approach he has taken to the recording of the work done by him and his staff and the manner in which he has presented this to the Court to justify the fees sought. The fact that I have continued to hear applications in this liquidation sitting as a High Court judge whilst a member of the Court of Appeal and now the Supreme Court is for the purpose of attempting to bring consistency of approach to the supervision of the liquidator and to seek to achieve as efficiently as is possible the finalisation of this highly unusual and complex liquidation.

11. The complexity and unusual nature of the liquidation has been fully set out in prior judgments and I do not propose repeating same here. Suffice it to say that in March 2011, CHC had assets in excess of €1.1 billion under management on behalf of its clients, €24 million in cash held in designated client accounts and approximately 1,500 clients, the majority of whom reside in Ireland. Further, since 2007, it had been authorised under Regulation 11 of the MiFID Regulations to operate as an investment firm and was an approved Qualifying Fund Manager in relation to the provision of Approved Retirement Funds and was also a PRSA provider for the purposes of the Pensions Act 1990. The client funds under management were collectively invested in many different investment vehicles, including exempt unit trusts, special purpose vehicles ("SPVs") established under the laws of various European countries and other complex products. The actual assets of CHC at the date of winding up were relatively small.

12. Prior to the order for winding up, CHC had sought help from Horwath Bastow Charleton ("HBC") and a sub-management agreement had been entered into. Following the winding up of CHC, a new sub-management agreement was entered into by the liquidator with Horwath Bastow Charleton Wealth Management (now Bastow Charleton Wealth Management Limited) ("BCWM") which, with some amendment, remains in place and pursuant to which during the liquidation, BCWM, as agent for CHC, has managed client assets previously managed by CHC.

13. In 2012, the role of the liquidator in relation to client funds was disputed by a group of clients, including the *legitimus contradictor*. In the 2012 judgment, I set out what I considered to be the necessary work to be undertaken by the liquidator in relation to client funds and revisited that issue again in the 2017 judgment, where my conclusions are summarised at paras. 17 to 21, by reference to the 2012 judgment. I do not propose repeating them here, but the decisions reached in the 2012 and 2017 judgments are relevant to work undertaken by the liquidator and the determination of his reasonable remuneration therefor. In prior judgments and rulings, I have already referred to the fact that the relative paucity of company assets as distinct from client assets does not appear to have been averted to by the liquidator when he accepted nomination by the Central Bank and the fact that there are no indemnity arrangements in place for the discharge of his reasonable costs which are not capable of being discharged out of company assets. I have also referred on several occasions to the fact that delays in the liquidation appear to have been caused by a lack of clarity as to how the complex work required in the liquidation, in particular in relation to client assets, is to be funded. The overall position is clarified by the 2017 judgment, which only permits recourse by the liquidator to a limited class of client assets and for a limited type of work to be done in relation to reconciliation, recovery and distribution of client assets. On the estimates provided in the applications giving rise to the 2017 judgment, it appears probable that the liquidator may not be able to recover all remuneration measured by the Court.

14. The factual context in which the application for remuneration is made is somewhat unusual given the complexity of this liquidation, the number of prior applications and directions given by the Court and the fact that the work which the liquidator is now doing is primarily work relating to what in summary may be stated to be the disengagement of CHC from client funds and the distribution of such funds to the persons who appear probably entitled following a limited reconciliation. The nature and extent of the reconciliation which is required to be done before any such disengagement or distribution has been set out in the prior judgments and is not being repeated. Notwithstanding these undoubtedly unusual factual matters, it is not suggested that the principles which should apply to the measurement of the liquidator's remuneration differ from the well-established and settled legal principles. These have to be applied, however, in the above factual context.

Legal Principles

15. There is no real dispute about the applicable legal principles. There are two judgments delivered since my 2014 judgment, in which I measured remuneration in accordance with the then applicable principles, by reference in particular to the principles set out in *Re Sharmane Ltd.* [2009] IEHC 377, [2009] 4 I.R. 285 ("*Sharmane*"). They are: *In the Matter of Mouldpro International Ltd. (In Liquidation)* [2018] IECA 88 ("*Mouldpro*") and *In the Matter of Denis Finn Limited (In Liquidation): Hughes v. Revenue Commissioners* [2016] IEHC 750 ("*Denis Finn*"). Counsel for the *legitimus contradictor* relies in particular on certain passages from each of these judgments in support of the application for directions as to the provision of additional information to be given by the liquidator. From those judgments, in addition to the earlier judgments of which they approved the following principles emerge.

16. First, the onus is on the liquidator to satisfy the Court, on the evidence put before it, that the amount he is seeking is reasonable remuneration for the work done by him. However, the Court, in determining whether or not a liquidator has put before the Court sufficient evidence or should be required either to produce additional evidence or have certain fees disallowed by reason of the absence of relevant evidence to justify same, should bear in mind the balance required which I identified in *Re Home Payments Ltd. (in liquidation)* [2013] IEHC 507, [2013] 4 I.R. 141 ("*Home Payments*") to provide the Court with "sufficient information" to enable it to "form a view as to the appropriate allowable fees whilst not adding unnecessarily to the cost of the liquidation".

17. That principle is not in dispute. Counsel for the *legitimus contradictor*, however, placed significant reliance upon the fact that, in application of those principles, Keane J. in the High Court in *Denis Finn* ordered the production of time sheets by the liquidator upon the application of the Revenue Commissioners, who were the *legitimus contradictor*. In doing so, Keane J. identified support from dicta in the judgment of Ferris J. in the Chancery Division of the High Court in England in *Mirror Group Newspapers plc v. Maxwell & ors* [1998] 1 BCLC 638, which has been referred to in a number of the earlier judgments in this jurisdiction. In that judgment, he stated at p. 648:-

> *"First, office-holders must expect to give full particulars in order to justify the amount of any claim for remuneration. If they seek to be remunerated upon, or partly upon, the basis of time spent in the performance of their duties they must do significantly more than list the total number of hours spent by them or other fee-earning members of their staff and multiply this total by a sum claimed to be the charging rate of the individual whose time was spent. They must explain the nature of each main task undertaken, the considerations which led them to embark upon that task and, if the task*

proved more difficult or expensive to perform than at first expected, to persevere in it. The time spent needs to be linked to this explanation, so that it can be seen what time was devoted to each task. The amount of detail which needs to be provided will, however, be proportionate to the case."

18. Reliance was also placed on what Ferris J. stated at p. 649:-

> *"Second, office-holders must keep proper records of what they have done and why they have done it. Without contemporaneous records of this kind they will be in difficulty in discharging their duty to account. While a retrospective reconstruction of what has happened may have to be looked at if there is no better source of information, it is unlikely to be as reliable as contemporaneous record. Office-holders whose records are inadequate are liable to find that doubts are resolved against them because they are unable to fulfil their duty to account for what they have received and to justify their claim to retain part of it for themselves by way of remuneration."*

19. Notwithstanding the acceptance as a matter of principle of an obligation on a liquidator to keep proper contemporaneous records, it is clear from the judgment of Keane J. in *Denis Finn* that it does not automatically follow that a liquidator is obliged to produce all such contemporaneous records on an application for measurement of remuneration. At para. 28 of the judgment in *Denis Finn*, Keane J. stated:-

> *"However, in each case the court must strike a balance between, on the one hand, requiring the provision of a level of information or documentation sufficient to permit a representative creditor (such as the Revenue) and, ultimately, the court to form a view on what is reasonable remuneration and, on the other, not imposing unnecessary requirements that will result in extra work and expense in the liquidation without any, or any proportionate, benefit for creditors or contributories."*

20. As is clear from the earlier part of his judgment, he was following an approach which I had set out in a number of judgments in identifying the necessity to strike such a balance on the facts of each case. I remain of the view that this is part of the function of the Court in these applications.

21. In *Mouldpro*, the Court of Appeal (Whelan J., Ryan P. and Hogan J. concurring) allowed in part an appeal from the determination I had made in the High Court of the remuneration of the liquidator in that liquidation. The Court of Appeal made further reductions in addition to those I had made in respect of certain periods in the liquidation. In doing so, I believe it is a fair reading of the judgment that the Court of Appeal approved of the approach outlined by me in the High Court in the context of examiner's fees in *Sharmane*. In *Mouldpro*, Whelan J.at para. 102, cites what had been stated in *Sharmane* at para. 36, in relation to the practise of seeking measurement of costs based upon hourly rates and hours worked:-

> *"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."*

22. Later at para. 124, Whelan J., having discussed a number of other relevant principles, stated "[h]ence the attraction of the multifaceted approach outlined by Finlay Geoghegan J. in *Sharmane* which represents good law in this state".

23. In *Mouldpro*, the Court of Appeal was not satisfied that there was an appropriate *legitimus contradictor* in relation to certain of the periods for which the measurement of the liquidator's remuneration was sought as part of the final orders. It also emphasised the obligation of the Court to be "vigilant in scrutinising the application". In this connection, it also referred to what had been stated by Kelly J. in *Re Missford Ltd. t/a Residence Members Club* [2010] IEHC 240, [2010] 3 I.R. 756, such that "[t]hat vigilant scrutiny can only be carried out effectively if all the necessary information is placed before the Court".

24. These are the principles I propose applying in determining this application.

Application

25. The application by the liquidator is grounded upon an affidavit, the Fee Report exhibited to the affidavit and a further affidavit. The liquidator at the hearing and in the submissions made relied strongly upon the fact that the information provided to the Court in the affidavits and report is similar to the information provided in earlier applications in this liquidation and specifically accords with certain directions given in earlier applications. In relation to certain criticisms, he also seeks to rely upon comments in the *ex tempore* ruling delivered by me on 17 November 2016, in relation to similar criticisms made in respect of the attribution of time to different work streams.

26. The initial information provided by the liquidator to the Court was the subject of further queries from the solicitor of the *legitimus contradictor* in a letter dated 23 April 2018. This was responded to by the solicitor for the liquidator by letter of 2 May 2018. The *legitimus contradictor* in his affidavit helpfully collated the information available to him and the Court following these exchanges, in a table exhibited to his affidavit. There is a second affidavit from the liquidator which gives certain further explanations. I have considered all of these carefully since the hearing, having regard to the submissions made and, in particular, the directions sought on behalf of the *legitimus contradictor* seeking certain further information. It is not feasible in this judgment to refer to the detail of all the information. I only propose doing so insofar as is relevant to my conclusions on the application for directions as to the provision of further information and the substantive measurement of the remuneration of the liquidator.

Directions Sought

27. The first direction sought on behalf of the *legitimus contradictor* is that the liquidator produce to him and the Court his contemporaneous time sheets. I have determined that I should not give such a direction on this application for the following reasons.

28. The liquidator in this application, as in previous applications, has explained that on an ongoing basis, he and his staff record time spent on this liquidation under three general codes, namely (1) general liquidation work, (2) segregated asset work and (3) pooled asset work. It appears from his first affidavit, at paras. 14 and 15, and his second affidavit, at paras. 18 to 23, following the contemporaneous recording of time spent on the liquidation under these three time codes, there is a retrospective allocation of the total time spent across 19 work streams which are set out in his Fee Report. At para. 21 of the second affidavit, he explained to the Court as follows:

> *"It bears emphasising that, for the purposes of the analysis provided in my Fee Report, the work streams are deemed to*

be mutually exclusive, in the sense that every recorded period of time is allocated to one and to only one work stream. Accordingly, no question arises of a duplication of the same recorded hours in two or more work streams. The total of recorded hours was not calculated by adding up the hours attributed to each work stream. On the contrary, the total of recorded hours was first established and these hours were then allocated across the work streams. "

29. In prior applications, I have indicated that I am prepared to accept that the liquidator, as an officer of the Court, has honestly provided the Court with the number of hours worked by him and his staff in this liquidation. For the reasons set out above in relation to the principles to be applied, it does not follow that he is entitled to be remunerated for the hours spent. The question is whether the timesheets would assist the Court in assessing the value of the work done for the liquidation or whether the time spent was necessary to achieve the work actually done or indeed whether that work was necessary for the particular aspect of the liquidation to which it related. It does not appear to me on the facts of this application that the production of the contemporaneous timesheets would assist in doing that. Accordingly, balancing the obligation of the Court to be vigilant in scrutinising the remuneration claimed by the liquidator and the potential cost and likely benefit to those who might stand to gain if such additional information resulted in a greater reduction of fees, I have determined on this application in this liquidation that a direction for the production of the contemporaneous time sheets is not warranted. Further, I have reread the *ex tempore* ruling given by me on 17 November 2016 and it is correct to say that I expressed a view that I was not then critical of the retrospective attribution of time spent to different work streams as has been done for this application.

30. The second direction sought on behalf of the *legitimus contradictor* was one that either he or an appropriate independent person would be permitted to inspect the work files of the official liquidator. Again, I have concluded that such a direction is simply not appropriate at this stage in this liquidation. Whilst the *legitimus contradictor* is prepared to spend time at no cost, it does not appear to me that he has the necessary expertise and inevitably it would give rise to time being spent by members of the liquidator's staff and is unlikely to achieve in a balanced way the provision of more information to the Court which would permit it to make a better judgment of what is the reasonable remuneration having regard to the work done in the liquidation. It was also submitted that BCWM might be an appropriate person to interrogate certain of the work done by or on behalf of the liquidator. Again, this does not appear to me appropriate, as BCWM were the sub-agent of the liquidator in the management of the assets which comprise certain of the client funds.

31. The third direction sought was to direct the liquidator to provide additional information in relation to certain of the work which he had completed and in particular, to provide a more detailed description of what exactly had been done, the complexity of the work done and even the alleged value of the work for the clients. The information available to the Court is essentially that contained in the narrative under the 19 work streams in the Fee Report. It is undoubtedly general in some instances, however, again given the extent of the work, the variety of the work done and in particular, the balancing factor to which I next refer, I have decided that I should not give any specific direction for additional information in relation to any particular work stream on this application, as I do not consider that any of the clients, who are the people concerned, are likely to benefit from such additional information to an extent that would be warranted by the additional costs involved.

32. A particular feature of this liquidation which I have taken into account in reaching the above conclusions is the fact that the persons potentially affected by the level of remuneration to be determined for the liquidator are the clients. They are not creditors of the Company, as would be the position in most liquidations. They are clients with an entitlement to client funds. As already stated, the probability is that the assets of CHC, the company assets, will not be sufficient to meet in full the remuneration measured for the liquidator in this liquidation. It must be recalled that the legal fees of his solicitors rank in priority to his own remuneration. Further, and of particular importance, is the decision given in the 2017 judgment. In that judgment, I have determined that only a very limited portion of the work done by the liquidator may, in the future, and subject to a further court order, be payable out of client funds. Further, I have determined that there is only a limited category of client funds out of which it should be payable. In this connection, the conclusions reached at para. 144(4) to (6), inclusive, of the 2017 judgment are relevant:-

> *"4. I have concluded that the only order which should now be made pursuant to Regulation 158 of the MiFID Regulations is one which would enable the liquidator, if exhaustion of company assets is proved, to have recourse to client assets in the form of recovered misappropriated monies which become available for distribution to clients, such recourse should be limited to discharge of some or all of his reasonable expenses in relation to necessary reconciliation, recovery and distribution of such misappropriated monies. Subject to that exception I have concluded that no order should be made for the purpose of enabling or permitting the liquidator (in the event of an ultimate proof of exhaustion of company assets) to have recourse to any other of the client assets identified in classes. A.2 – A.6 in his grounding affidavit.*
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> *5. The Court will, accordingly, now grant a declaration that it is satisfied that in the event that the assets of CHC are exhausted without discharge of the reasonable expenses of the liquidator incurred in the work done necessary for the reconciliation, recovery and distribution of misappropriated monies that the Court will make an order pursuant to Regulations 157 and 158 of the MiFID Regulations permitting the liquidator to have recourse to recovered misappropriated monies (or financial instruments representing sums due in respect of misappropriated monies) to discharge some or all of such reasonable expenses of the liquidator. Both the amount of the reasonable expenses potentially covered by this declaration and the percentage of same in respect of which recourse may be permitted remains for decision on a future application*
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> *6. In order to give effect to this declaration, it also appears necessary to direct that henceforth the liquidator should keep a separate record of the expenses incurred by him in such necessary reconciliation, recovery and distribution work of misappropriated monies."*

33. Notwithstanding the judgment delivered and the direction referred to at para. 144(6), it does not appear that from August 2017 until December 2017, within the fee period to which this application relates, the liquidator kept a separate record of the expenses incurred by him in such necessary reconciliation, recovery and distribution work of misappropriated monies, as is referred to in that judgment. In this application I am not being asked to decide nor am I deciding that any part of the work done by the liquidator is work which he is permitted, in accordance with the 2017 judgment, to seek to recover from client monies.

34. Accordingly, I am refusing the application made on behalf of the *legitimus contradictor* for further directions and have determined that I should measure the remuneration sought by the official liquidator in this period on the basis of the information now before the Court.

35. However, I wish to make clear to the liquidator and his advisors that in refusing the application for a direction that the liquidator provide additional information on this application, it is not intended that this indicate in any way that the information provided in this

application in relation in particular to the nature of the work done, its complexity and what that work achieved in the sense of value for clients should be considered as sufficient in an application where the liquidator seeks to have measured remuneration for work done in the "reconciliation, recovery and distribution of misappropriated monies" such that some part of such fees may ultimately be the subject of an application that they be paid out of "recovered misappropriated monies (or financial instruments representing sums due in respect of misappropriated monies)", as envisaged by the above decision. The measurement which the Court is making on this application is not a measurement of fees due in respect of such element of the work. The Court could not do so, as the liquidator has not kept a separate record of such expenses, as directed by the 2017 judgment. In saying this, I am conscious that when I raised a query in this regard during the hearing of this application, counsel for the liquidator submitted that the work done in relation to reconciliation of pooled accounts would come within this rubric. That is not an issue which could be decided on the information provided by the liquidator to the Court on this application.

36. It also appears appropriate to point out that the direction given in the 2017 judgment and order that the liquidator keep a separate record of the expenses incurred by him in the necessary reconciliation, recovery and distribution work of misappropriated monies probably requires greater contemporaneous records to be kept, identifying the work done which falls within this description and which will require to be produced to the Court when and if the liquidator seeks to have remuneration determined some or all of which he may also seek to recover from client funds in accordance with the 2017 judgment.

37. Finally, in not giving the directions sought on this application, I have taken into account that the measurement of fees on this application may impact indirectly on the extent to which any portion of fees incurred by the liquidator in carrying out the necessary reconciliation, recovery and distribution of misappropriated monies may be sought from client funds. In this connection, I would draw attention again to what I have stated on more than one occasion in relation to the approach taken in *Home Payments* in relation to the relative priorities between payment for work done by a liquidator which he is only entitled to recoup from company assets and work which, whilst forming part of the work in the liquidation, he seeks to have discharged from client funds. I simply draw attention to what I stated at paras. 113 to 115 in the 2017 judgment, in this connection:

> *"113. There is one further principle referred to by counsel for Mr Nugent which I applied in the judgment delivered in the matter of Home Payments Limited (in liquidation) [2013] IEHC 507. That judgment concerned an application by joint liquidators inter alia that their remuneration and costs associated with reconciliation and distribution of customer monies held in trust by the company in liquidation could properly be charged to or deducted from the customer funds. I determined that it was permissible to do so following the approach of the High Court in England in Re Berkeley Applegate (Investment Consultants) Limited [1988] 3 All E.R. 71 and subsequent judgments. A second question then arose relating to the relative priority between the payment of the remuneration, costs and expenses of the liquidators for company work and client work in relation to the reconciliation and distribution of client funds out of the assets of the company.*
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> *114. In that case the liquidators sought an order pursuant to s. 244 of the Companies Act 1963 that the costs and expenses incurred in the liquidation in relation to company work should in effect be given priority for payment out of the assets of the company. I refused that application whilst acknowledging that the Court had a discretion under s. 244 of the 1963 Act in the case of an insufficiency of assets to satisfy liabilities to make an order for the payment of costs, charges and expenses incurred in the winding up "in such order of priority as the court thinks just." I concluded on the facts of that case that both sets of costs and expenses, for company work and client work should be paid with equal priority out of the assets of the company. The practical effect was that the liquidators were left with a portion of the remuneration which had been assessed and allowed in relation to the company work incapable of being met out of the assets of the company. It also had the effect of reducing the amount which they were permitted to deduct from the client assets for client work as a portion of this was paid out of the assets of the company.*
>
> *115. This is a winding up to which s. 244 of the Act of 1963 applies, and similarly the Court has a discretion as to the order of priority in which costs, charges and expenses incurred in the winding should be paid out of the assets of CHC. At present there does not appear to me any basis upon which company work should be given any priority such that it be fully discharged out of company assets."*

Measure of Remuneration

38. I now turn to the question of measurement of the remuneration of the official liquidator upon the basis of the information provided to the Court and apply thereto the principles set out above which, as indicated, are the same principles as I applied in prior fee applications in this liquidation, with an additional emphasis on the need for vigilant scrutiny, in accordance with the Court of Appeal judgment in *Mouldpro*. In reaching the decisions set out below, I have taken into account the concerns and criticisms raised by the *legitimus contradictor* and the knowledge which I have of both the work required to be done and the progress of this liquidation from the prior applications. I propose to follow the divisions set out in the report of the liquidator in relation to the streams of work identified. I am also referring to VAT exclusive figures. Where I do not comment on the amount claimed under a particular work stream, I do not intend any adjustment made to the amount claimed.

39. The total amount claimed by the liquidator in respect of general liquidation work is €223,891, broken down as follows:

Statutory/General €51,246.30

Stakeholder Communication €27,041.65

Auditors €9,569.95

Bank €6,750.39

Section 150/160 €5,483.20

Asset Realisations/Management €49,178.17

Central Bank €14,626.74

Legal/Court Reporting/Fees Application €59,994.60

TOTAL €223,891.00

40. It was contended that the amount sought for stakeholder communication is not warranted, as it has not provided value for the clients. In my view, there is some justification in this objection. It is connected with the Central Bank directions and the remuneration claimed in respect of communications with the Central Bank. I have previously criticised the continued role of the Central Bank and the time spent in communication with the Central Bank and have determined that the amounts claimed under these headings should be reduced from €27,041.65 to €20,000 and from €14,642.74 to €10,000, respectively.

41. While some criticism was made in respect of the amounts claimed in relation to the s. 150/160 proceedings, bank reconciliation and the consideration of proceedings against the auditors, all of those amounts appear to me to be justified. It was necessary and appropriate work and the amounts claimed are reasonable. Similarly, whilst criticism is made of the amount claimed in relation to asset realisations/management, which relates primarily to liaison with BCWM in relation to Destiny syndicated property funds and other European SPVs and also engagement with shareholders of Custom House Asset Management GmbH. I accept that it was probably necessary for the liquidator to have a continuing role in relation to these matters during this fee period. I note from the detail of the claim that the persons who worked on these matters in the general liquidation work stream were primarily at partner and director level. It therefore appears that the liquidator was not doing routine work which was properly being done by BCWM, and to a more limited extent, Savills, and accordingly propose allowing the amount sought. I am also doing this having regard to reduction made for similar type work relating to pooled assets.

42. I am not satisfied that the liquidator has justified a figure for remuneration of €59,994.60 in respect of legal/court reporting/fees applications in relation to the general work in the liquidation, particularly having regard to the separate amount claimed in respect of the MiFID application. I am reducing this amount to €45,000.

43. Accordingly, I will allow a total of €197,228.01 as the VAT exclusive amount of remuneration for the work done in the general liquidation work stream, to which should be added the expenses/outlay of €3,457.81.

44. The amounts claimed in respect of the pooled client asset work stream are:

MiFID/Directions application €124,467.75

Reconciliation €64,798.50

Management Agreement €30,569.00

Legal €23,123.38

Client Communication €16,200.63

Distributions €11,447.95

Simple Reconciliation €26,870.30

TOTAL €297,477.51

45. The amount claimed in respect of the work done in connection with the MiFID/Directions Application is very significant. The detail given in relation to it is limited:

> *"MiFID / Directions application*
>
> *- Directions application in relation to the distribution of pooled assets and recovery of misappropriated monies and a MiFID application dealing with the distribution of pooled assets.*
>
> *- Analysis of the various approaches to reconciliation and distribution or recovered monies necessary to bring the directions application dealing with the methodology to be used in distributing assets and an application under the MiFID rules.*
>
> *- Liaising with McCann Fitzgerald in relation to application."*

46. The MiFID/Directions application was a combined application. The MiFID aspect of it was in part for the benefit of the liquidator, though I recognise he is given an entitlement by the MiFID Regulation to apply for payment of fees out of client funds in certain circumstances. However, of perhaps more relevance to this application is the fact that in the 2017 judgment I decided, as stated at para. 93;-

> *"… the Court has not been assisted in this application by lack of clarity in the facts upon which the directions were being sought by the liquidator and the change in position taken by him or on his behalf in relation to certain matters".*

That comment is further explained in the subsequent paragraphs and also by reference to para. 41 and the fact that I had sought clarifications which resulted in a letter dated 29 June 2017 from McCann Fitzgerald to the Court with further facts and explanations, the truth of which was confirmed by the liquidator in his evidence.

47. These matters and the outcome in relation to MiFID form part of the reason for which I only permitted the liquidator recover 75% of his costs in connection with the MiFID/Directions application. Similarly, it appears to me that not all of the work done by the liquidator in connection with that application can be considered to have been either necessary or for the benefit of the clients. Accordingly, I propose reducing the amount allowable under this heading to a sum of €90,000.

48. The amount claimed under the heading of Client Communication is subject to the same criticism as that already stated in respect of Stakeholder Communication in the general liquidation work stream. Whilst I accept that some client communication is necessary in respect of client assets, it appears to me that there is justification in the criticism of the lack of value during some periods to the clients. Accordingly, I propose reducing the amount allowable under this heading to €12,000.

49. I am also of the view that there should be some reduction in the amount claimed under the heading of Management Agreement,

which included liaising with BCWM to obtain regular status updates on the properties, as appears both under this heading and under Reconciliation. Such liaison also forms part of the general liquidation work, as does liaising with Savills. Whilst I accept that the liquidator has apportioned the total time to different work streams, nevertheless it appears to me, given what I next say in relation to reconciliation and the fact that I have noted that the work done under this heading in respect of pooled assets includes many hours by persons at a lower level than that which I allowed in full in the general liquidation work, I propose reducing the amount under this heading to a sum of €20,000.

50. Criticism was made on behalf of the *legitimus contradictor* of the lack of specific information in relation to what is claimed under a heading "Reconciliation" and "Simple Reconciliation". However, from a consideration of the information provided in Appendix 2 to the liquidator's report, I am satisfied that the aggregate of these amounts is reasonable, having regard to the progress achieved in the reconciliation and distribution of certain of the assets which had formed part of pooled client assets and I propose allowing this amount.

51. It follows that the total to be allowed in respect of pooled client asset work is €248,240.13 (plus VAT).

52. The total remuneration claimed in respect of the segregated client asset work stream is €44,590. Having regard to the progress made in the transfer of segregated assets between June 2016 and December 2017, I am satisfied that this is a reasonable sum in respect of the related work and do not propose making any deduction.

53. Accordingly, there will be an order measuring and determining the official liquidator's remuneration, fees, expenses and outlay in connection with the liquidation for the period from 1 July 2016 to 31 December 2017 in the sum of €493,515.95, plus VAT.

Legal Costs

54. At the time of the hearing the appropriate amount for legal costs was almost agreed between Behan & Associates and Reed Legal Costs. I heard no submissions in relation to these, as it was hoped that the cost accountants might reach agreement on the small amounts remaining in dispute. If this was not so, I directed that following a meeting between the cost accountants on their own, they should lodge with the Court a document setting out on what they were agreed and matters in respect of which they remained in dispute and the reasons therefor.

55. Subsequent to the hearing there has been submitted to the Examiner's office a letter from Behan & Associates, dated 20 June 2018, and a letter from Reed Legal Cost Accountants ("Reed"), dated 18 June 2018. These set out between them the matters upon which agreement has been reached and the matters in dispute. I have now considered these and the affidavit sworn by Michael Murphy, solicitor of McCann Fitzgerald, on 13 June 2018 and have reached the following conclusions.

56. There appear to have been four objections raised by Reed to the recommendations of Behan & Associates in relation to the solicitors' professional fees. These related to:

1. Interaction with Behan & Associates.

2. Time recorded as "for evaluation".

3. Dual attendances by solicitors in court and at consultations.

4. The hourly rates for Ms. Áine Murphy, the second solicitor working alongside Mr. Michael Murphy, the partner with responsibility for the liquidation.

57. It appears from the two recent letters that agreement has been reached between the cost accountants that the appropriate reduction in respect of items 1 and 2 is a sum of €16,500.

58. They remain of differing views in relation to the dual attendances. The letters indicate firstly that Reed had suggested a total reduction of €21,938 from the solicitors' professional fee on the basis of allowing only one solicitor attending at court dates and consultations. Whilst the letter from Reed refers to a figure of €27,500, they further explain it would appear that as the dual attendance relates to the MiFID/Directions application where there has been a deduction of 25% in respect of the allowable costs the appropriate deduction to be made from the amount now being sought is €21,938.

59. Behan & Associates acknowledge that the Taxing Master has made deductions to solicitors' professional fees in the past and allowed only one solicitor for attending court and consultations. This is the basis upon which Reed seeks the further deduction. The continuing objection of Reed in their letter of 18 June 2018 is primarily based upon what they contend was the view expressed by Behan & Associates in their earlier advices that the fees recommended make allowance for having only one solicitor at court dates. However, Behan & Associates in their letter of 20 June 2018 express a view to the effect that "there is a strong argument to warrant the inclusion of two solicitors attending on court dates and the consultations".

60. It is not possible to resolve this dispute on paper. The amount at issue does not warrant a further hearing. Given the complexity of the MiFID/Directions, it appears to me that some dual attendances may be justified but not necessarily all. Hence the fair way of approaching this dispute is on an approximate 50/50 basis and therefore I propose deciding that there should be a deduction of €11,000 from the professional fee under this heading.

61. The second issue which remains in dispute relates to an increase in the hourly charge out rate for Ms. Áine Murphy during the relevant period from €285 to €300. This is in a context where, since 2014, Ms. Murphy's hourly rates have increased from €175. The objection made to this by Reed is primarily based upon deductions made by me in the High Court in *Mouldpro* in respect of an hourly charge out rate for persons in the liquidator's firm who were promoted during the period of the liquidation. On the facts of that case, I determined that the hourly increases in question were not objectively justified in the context of the work being done by the persons in the liquidation.

62. In the case of Ms. Áine Murphy, both Mr. Michael Murphy in his affidavit and Behan & Associates from their review of the files make the point that by reason of the experience gained by Ms. Áine Murphy and her increased seniority over the period, she has been able to relieve Mr. Michael Murphy (whose charge out rate is obviously higher) from certain of the work in the liquidation. Behan & Associates stated in their letter that "this has meant that she [Ms. Áine Murphy] is in a position to take on a much greater workload thus reducing the workload of the Senior Partner and reducing the number of hours charged at a higher rate". That appears to me to provide objective justification for the element of professional fee attributable to work done by Ms. Áine Murphy being considered at the increased charge out rate. Accordingly, I have decided there should be no reduction under this heading.

63. The total fee now recoverable for legal costs should be computed in accordance with the above agreement and decisions.

Summary of Conclusions

64. For the reasons set out in this judgment in summary the conclusions reached are as follows.

1. The directions sought on behalf of the *legitimus contradictor* that the liquidator produces contemporaneous time sheets; for inspection of the liquidator's records and for a more detailed description of certain of the work done are refused.

2. However, in refusing the directions sought in this application the judgment draws attention to the direction given in Re Custom House Capital (In Liquidation) [2017] IEHC 484 that the liquidator should henceforth keep a separate record of the expenses incurred by him in the necessary reconciliation, recovery and distribution work of misappropriated monies referred to in that judgment. As stated, at paragraphs 35 and 36 above it is not intended that the refusal of the directions in this application indicate, in any way, that the information provided in this application in relation to such work should be considered as sufficient in a future application where the liquidator seeks to have measured remuneration which he may also seek to have paid out of client funds.

3. The amount allowed for the official liquidator's remuneration, fees, expenses and outlay in connection with the liquidation for the period from 1 July, 2016 to 31 December, 2017 is measured and determined in the sum of €493,515.95 plus VAT. The reasons for the deductions made to the amount claimed are set out in full in the judgment.

4. The recommendations of the cost accountants retained by the liquidator and the *legitimus contradictor* in relation to the legal costs insofar as agreed are accepted by the Court and allowed as reasonable. Following the hearing in June, 2018 there remained two issues in dispute. The Court has considered the further letters from the cost accountants filed and determined that an additional deduction of €11,000 should be made in respect of some but not all of the dual attendances of two solicitors at consultations and court. The Court has not directed any further deduction to be made and the total amount computed in accordance with the judgment is allowed.