THE HIGH COURT

[2015 No. 225 COS]

IN THE MATTER OF THE COMPANIES ACTS 1963-2013 AND
IN THE MATTER OF LUCCA FOOD TRADING COMPANY LIMITED (IN VOLUNTARY LIQUIDATION)
AND IN THE MATTER OF SECTION 280 OF THE COMPANIES ACT 1963

BETWEEN

ANTHONY J. FITZPATRICK IN HIS CAPACITY AS LIQUIDATOR OF LUCCA FOOD TRADING COMPANY LIMITED (IN VOLUNTARY LIQUIDATION)

APPLICANT

AND
REVENUE COMMISSIONERS

RESPONDENTS

JUDGMENT of Mr. Justice Allen delivered on the 18th day of January, 2019

1. Lucca Food Trading Company Ltd ("*the company*") was incorporated on 24th June, 2010 and commenced trading on 2nd January, 2011. The company carried on a pizza and pasta restaurant business from two locations in Salthill, County Galway. The business was purchased by the company from the promoters, who became the directors of the company.

2. The company ceased trading on 1st March, 2012 and on 15th March, 2012 resolved that by reason of its liabilities it could no longer continue trading and should be wound up. The applicant (to whom I will refer as the liquidator) was appointed liquidator.

3. On a date which is not apparent save that it was shortly before the liquidation, the company agreed to sell all of its assets and undertaking for €100,000, payable by instalments. The first instalment of €25,000 was said to have been placed in a safe in one of the premises from which the company had carried on business. There was, apparently, a written contract but the liquidator did not get this until shortly before 12th October, 2012 when he wrote to the Insolvency Unit of the Revenue Commissioners that he had "*finally obtained a copy of the sale contract*".

4. By email of 1st June, 2012 the liquidator confirmed to the Revenue that he had received the €25,000 and the first monthly payment.

5. By letter of 12th October, 2012 the liquidator confirmed to the Revenue that he had collected a total of €50,000. He observed that it was commercially unwise to have a sale price payable by instalments over a protracted period of time, but intended to keep the pressure on to collect the full amount.

6. By email of 31st March, 2014 the liquidator confirmed to the Revenue that he had collected €55,000 between May and November 2012 and another €10,000 in January 2014 and was still trying to collect the balance, but would be surprised if any further amounts came in.

7. The liquidator convened the final meeting of the company for 26th August, 2014 when he presented his final report.

8. At chapter 5 of the report the liquidator summarised the work undertaken by him since the date of his appointment.

> 1. The liquidator reported that he had filed the forms in relation to the resolution to wind up and notice of his appointment as liquidator. He said that he had "*now recently prepared for submission the required interim annual and biannual returns to the Companies Registration Office*".
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> 2. The liquidator reported that he had given notice of his appointment to the directors, the auditors, the Revenue, a leasing company, the company's bank, and the rates office of Galway City Council.
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> 3. The liquidator reported that the company had total tax liabilities of €197,950. He reported that he had liaised with the creditors in relation to the validity of their claims. He did not give any figures for the other creditors. There were some leased assets and the liquidator had arranged for the collection of these.
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> 4. The liquidator did not register for VAT for the company in liquidation.
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> 5. The liquidator reported that subsequent to his appointment he took control of the company's books and records which appeared to have been "*reasonably well written up to the date of the liquidation*".
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> 6. The liquidator reported that the main asset in the directors' estimated statement of affairs was the debtor of €100,000 which arose from the sale of the assets and goodwill of the company. The contract for sale was said to have provided for a "*deposit*" of €25,000 and the balance on a scheduled basis over the following 15 months. The liquidator reported that he had received €55,000 between May and November, 2012; nothing in 2013; and "*with significant time and effort involved*" another €25,000 in full and final settlement of the balance. The business was said to have ceased trading and the operators to have returned to Italy so that he had "*few options*" other than to accept the remaining €25,000 in full and final settlement.
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> 7. The liquidator reported that he had submitted a s. 56 report to the office of the Director of Corporate Enforcement on the conduct and actions of the directors, both of whom were subsequently restricted by the High Court.
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> 8. As to fees, the liquidator reported that "*as is normal in insolvency assignments, a fee will be calculated on a time/charge-out rate basis*". He set out the charge out rates for himself and his staff. He reported that the value of the work completed during the course of the liquidation came to €64,847.57, inclusive of VAT but that his fee was limited to €59,324.64, inclusive of VAT, which was said to be the full amount of the funds available.

9. In appendix 2 of his final report the liquidator set out a final receipts and payments account. This showed that he had collected €80,000 from debtors and €19,565.65 in respect of employee claims; which latter sum he had duly paid out to the employees. Besides some small payments for advertising and the like, the final account showed payments of €9,790.80 for "*consultancy*"; €10,080.83 for "*legal and professional fees*"; and €59,324.64 for "*liquidator fee*".

10. In appendix 3 the liquidator set out what was said to be a breakdown of the work in progress figure. This was a spreadsheet on a single page suggesting that the liquidator and his staff had worked for a total of 312.25 hours which resulted in a claim for €59,632.50 exclusive of VAT. With odds and ends of outlay, the total work in progress was €74,638.37, inclusive of VAT, from which was deducted a figure of €9,790.80 for "*payments to consultants*", to get to €64,847.57, which was cut back to €59,324.64, because that was all there was.

11. A representative of the Revenue attended the final meeting and protested that the claim for remuneration was "*far in excess of the normal level of remuneration in a liquidation of this size and complexity*" and the Revenue's position was confirmed in correspondence on the following day.

12. By letter dated 16th October, 2014 (there having been no response in the meantime) the Revenue wrote suggesting that the appropriate remuneration, based on the information provided to the creditors meeting, was €36,000; and protesting that the Revenue was not satisfied that the legal costs and consultancy costs were costs properly incurred in the liquidation. The liquidator was invited to apply to the High Court to fix his remuneration at an appropriate level and to include in his application a direction in relation to the legal and consultancy fees claimed. The Revenue observed that there might be an adequate explanation for the high level of legal and consultancy fees but suggested that no such explanation had been provided.

13. This application was eventually issued on 29th May, 2015 and was originally returnable for 29th June, 2015. Along the way there were a number of glitches on which I will not dwell but it was particularly unfortunate that the hotly contested proposed final account was filed in the Companies Registration Office on 26th November, 2014 resulting in the dissolution of the company, which later had to be revived.

14. The "*breakdown of work in progress*" presented to the creditors' meeting was no more than an indication of the total number of hours said to have been worked by the liquidator and his staff over the course of the liquidation; the charge out rates for each staff member; and the total charges in respect of each staff member, and altogether. It gave no indication of what work was done, or when, or by whom. There was no breakdown or explanation of the €9,790.80 for "*payments to consultants*" or the sum of €10,080.83 for "*legal and professional fees*".

15. On this application, the liquidator exhibited a document entitled "analysis of work completed" setting out 27 headings of work and showing against each heading the number of hours said to have been spent on the work and by whom: but not the dates on which the work was done.

16. At the time of the liquidation, the company had 23 employees. These employees had statutory entitlements. The liquidator and his staff filled out and filed the forms necessary to make the claims and, when the money came in, paid it out to the staff.

17. The "*analysis of work completed*" suggests that a the liquidator and a senior staff member, and an accounts administrator between them spent 13.5 hours "*…to deal with employees and advise on staff entitlements and arrange to issue various forms to them*"; 9 hours on "*open liquidation bank account and process any receipts and payments through same*"; 15 hours to "*obtain details of employees*"; 25 hours to "*complete forms in relation to employee claims*"; and 18.5 hours for "*dealing with redundancy claims and subsequent employee and Department queries on foot of these completed forms*". My tot is 81 hours, which is more than 3.5 hours per staff member, and most of those hours are billed at €160 per hour plus VAT. The fees claimed for work in processing the statutory employee claims comes to about two thirds of the total amount received and paid out to the staff.

18. Some of the items of work on the "*analysis of work completed*" appear to have taken a surprisingly long time. For example, the work of taking control of company assets, keys, books and records is said to have taken 4 hours and the filing of the notice of the liquidator's appointment is said to have taken 4.5 hours. The later "*update and completion of CRO forms*" (possibly including the form erroneously filed) took 5.5 hours; followed by 3.5 hours said to have been spent on "*review of CRO forms, attendance at Commissioner for Oaths to have same executed and subsequent filing of same*". There appears to me to have been double counting of this work with the work of "*processing various CRO returns as required from time to time*" which is said to have taken 15.25 hours and "*update and completion of report for final creditors and members' meeting*", which is said to have taken 21.5 hours. My tot is 50.25 hours.

19. The biggest element by far of the "*analysis of work undertaken*" relates to the preparation of the s. 56 report and the High Court application to have the directors restricted. After the directors had been interviewed and issued with questionnaires and the completed questionnaires analysed and assessed (6.5 hours), and after the liquidator had liaised with the directors in relation to "*general issues arising as a consequence of the liquidation*" (6 hours), 24 hours are said to have been spent to "*review the affairs of the company and prepare schedules needed in order to conduct this review for the purpose preparing s. 56 report for submission to ODCE*"; 50.5 hours on "*investigation work carried out in ascertaining and examining the information necessary to underpin the s. 56 report and opinion on the responsibility/honesty of the directors compiling and completion of s. 56 report and submission of same to OCDE*"; 3 hours on "*engaging with solicitors and instructing them to restrict the directors*"; 11 hours on "*preparation of draft affidavit paragraphs in this connection and sending same to solicitors and upon receipt of the solicitor's affidavit, proofreading same and arranging to have same sworn by liquidator and filed"; 5.5 hours on "attending with solicitor and barrister re s. 150 restriction*"; and then 10 hours "*attending at court with solicitor and barrister to apply for s. 150 restriction*".

20. On my tot (ignoring any issue of double counting) the liquidator claims to have spent on the s. 56 report and the resriction application, 40 hours of his own time at €290 plus VAT per hour and 64.5 hours of the time of a liquidation senior, charged out at €210 and €160 per hour plus VAT. In money, this comes to a claim for €11,600 plus VAT for the liquidator's own time and €13,545 plus VAT for the liquidation seniors.

21. This was a company which traded for about fourteen months. The books and records were reasonably well written up. The company made one VAT return for January/February 2011 and PAYE/PRSI returns for January and February 2011 and, thereafter, made payments against some of the Revenue's assessments.

22. The substantial cause of the insolvency was the fact that the company paid the promoters for the business rather than its trade creditors and the Revenue. This much must have been obvious from the reasonably well written up books and records.

23. I can see no conceivable justification for the hours said to have been lavished on the s. 56 report; for poring over the plain and simple facts; and least of all ten entirely idle and useless hours said to have been spent attending court on an uncontested s. 150 application which, in the event, was a consent application.

24. This application comes before the court on a notice of motion originally issued on 29th May, 2015 and returnable for 29th June,

2015. The notice of motion does not (as the Revenue had previously suggested in correspondence it should) expressly ask the court for directions in relation to the claims in respect legal and consultancy fees but it was agreed that these claims needed to be dealt with.

25. The application was grounded on an affidavit of the liquidator sworn on 28th May, 2015.

26. The grounding affidavit suggests that the company's books and records "*exhibited some shortcomings*" but not what was wrong with them. It will be recalled that the final report had said that the books and records appeared to have been reasonably well written up to the date of the liquidation. It seems to me to follow that whatever shortcomings there may have been cannot have been terribly serious.

27. It was said that the company had failed to make VAT returns and that the estimates raised by the Revenue for VAT were not reflective of the correct VAT liability. The liquidator said that he and his staff had to "*substantially examine and review the company's records and history in order to draft accounts to reflect the true VAT liability*". It makes perfect sense to me that the liquidator and his staff needed to examine the books and records and establish the correct VAT liability but I do not understand why accounts might have had to be drafted to do this. It is not said that returns were ever made showing the correct liabilities. Rather, all that is shown for this work is an increase in the total figure for Revenue liabilities from €71,710 in the estimated statement of affairs to €197,950 in the draft final account.

28. In or towards justification of the time he personally spent on the case, the liquidator, at para. 5 of his grounding affidavit, said this:-

> "*As both directors in this liquidation are non-Irish nationals (both were Italian) and English is not their first language, I would like the court to take account of the fact that the majority of meetings I held with the directors took place in Galway and lasted a minimum of 2.5 hours including travel. This time included in the analysis of work completed for the completion of the directors' questionnaire is 3.5 hours and the total time included for me of 74.5 hours represents a write down on the amount of hours actually incurred, as travel to any meetings I attended in Galway of approximately two hours is not included. Both directors are elderly and were very distressed at the situation they had found themselves in at this point in their lives. I spent considerable time speaking with the directors in person and to their son (who is mildly retarded) by telephone and in person discussing their concerns and worries in relation to the liquidation process. Their son was quite volatile and needed careful handling.*"

29. The "*analysis of work completed*" shows that a liquidation senior spent one hour and an accounts administrator spent one hour writing to the directors and secretary to advise of the liquidator's appointment. A total of 6.5 hours was spent on the director's questionnaire and another six hours liaising with the directors in relation to general issues arising as a consequence of the liquidation of the company.

30. I do not understand the relevance of the passage from para. 5 of the liquidator's affidavit which I have just quoted. If the directors were (as they may very well have been) Italian and if English was not (as it very well may not have been) their first language, the liquidator does not say that they were not perfectly fluent English speakers. If the directors were very distressed at the situation they had found themselves in, it does not appear to me that they were entitled to much sympathy. After all, the cause of the deficiency was that they had preferred themselves to the Revenue and the company's suppliers. It seems to me that if the directors needed meetings or telephone calls to discuss their "*concerns and worries*" the creditors of the company ought not to be asked to pay for it. I fail utterly to understand what business the liquidator had with the directors' son.

31. The liquidator, at para. 6 of his grounding affidavit, says that the reconciliation of the PAYE and PRSI involved substantial additional time for him and his staff having to retrospectively ascertain the correct PAYE and PRSI position. This, however, is not supported by the "*analysis of work completed*".

32. The liquidator says that he and his staff completed the statutory claims for entitlement of the 23 employees and processed and paid the claims. This process is said to have been more complicated than usual because of unspecified shortcomings in the company records. It is said that, like the directors, many of the staff were non-Irish nationals and that English was not their first language: but again, it is not said that the staff did not speak perfectly good, or at least perfectly adequate, English.

33. The liquidator, at para. 8 of his grounding affidavit, says that he reviewed the transactions between the company and its directors, the first of which was the transfer of the business into the company and the second of which was the sale of the business immediately prior to the liquidation for €100,000. It would have been perfectly proper for the liquidator to look first at the purchase by the company of the business and then the sale by the company of the business, but the suggestion in the liquidator's affidavit that he did either is not borne out by the "*analysis of work completed*". If it was part of the work of assessing the implications for the liquidation of the answers to the directors' questionnaire, or the liaising with the directors in relation to general issues arising as a consequence of the liquidation of the company, it cannot have accounted for a great deal of the 12.5 hours claimed to have been spent on both those tasks. The voluminous papers which this application has generated do not disclose how much the company agreed to pay, or did pay, for the business. Neither is there any indication as to whether the €100,000 for which the company agreed to sell the business (even if it had been paid) was a fair price. In fact that papers show that the liquidator ratified the sale of the company's business six or seven months before he even had sight of the contract.

34. In support of his claim for remuneration, the liquidator referred to an extract from the Institute of Chartered Accountants Practice Provisions SIP S17 B which suggests that the liquidator's remuneration is usually fixed by reference to the time properly given by the liquidator and his or her staff in attending to matters arising in the winding up.

35. The liquidator, at para. 11 of his grounding affidavit, says that he incurred significant consultancy costs in relation to the engagement by him of Mr. Robert Gloster, Chartered Accountant and a Specialist Insolvency Consultant, in relation to the preparation of the s. 56 report. The hours spent by Mr. Gloster were said to come to a total of 68, which the liquidator did not believe to be excessive. He said that payments to this liquidation consultant were duly subtracted from the total value of work in progress as could be seen in appendix 3 to the final report of 26th August, 2014.

36. I do not believe that appendix 3 shows what the liquidator says it shows. The analysis of hours identifies Mr. Gloster as a member of the liquidator's staff who is said to have spent a total of 68 hours on the liquidation at €210.00 plus VAT per hour. It does not give any indication of what work it is alleged that Mr. Gloster was doing. Appendix 3 does show a credit of €9,790.80 for "*payments to consultants*" but there is nothing to link this deduction with the charge for Mr. Gloster's time.

37. Throughout this application the liquidator uses a mix of VAT inclusive and VAT exclusive figures. The analysis of hours shows Mr. Gloster's time charged at €210.00 per hour, exclusive of VAT, a total of €14,280.00, exclusive of VAT. The credit for "*payments to consultants*" (which was rather belatedly explained to be a payment to Mr. Gloster as a consultant) is €9,790.80 inclusive of VAT, which is €7,960 exclusive of VAT. I find it very peculiar to see Mr. Gloster charged out as an employee but paid as a consultant. Perhaps more to the point, it is clear that the liquidator is seeking to recover in respect of Mr. Gloster's work, nearly twice what he paid for it.

38. The liquidator offers in support of his claim for fees a report from one of his colleagues, Mr. John McCann. Mr. McCann's report suggest that he was given access to the liquidator's files: which the Revenue and the court were not.

39. Mr. McCann says that due to the failure of the company to submit PAYE/PRSI and VAT returns, significant time was required to carry out a comprehensive examination of the company's trading. In my view this is a non sequitur. An absence of books and records might very well give rise to the need for a comprehensive examination of the company's trading but not a failure to make returns.

40. Mr. McCann reported that the liquidator had established that substantial (unquantified) sums were paid to the directors as payment for the business at a time when it was obvious, or should have been obvious, to the directors that the company's cash flow was insufficient and that the payments would be to the detriment of creditors. It seems to me that if these matters were, or should have been, obvious to elderly Italian restauranteurs, it cannot have taken much time or effort for an expert liquidator to establish them.

41. Mr. McCann expressed the view that the recorded time was both justified and necessary. If Mr. McCann was shown time records, the Revenue and the court were not. Mr. McCann looks at the average time per month over the period of the liquidation. I am quite satisfied that this is no measure of the value or necessity of the work or even of the reasonableness of the time allegedly spent.

42. Mr. McCann asserts that "*The time based method of measuring fees applied is well established by way of legal precedent*." For the reasons to which I shall come, I accept the argument made on behalf of the Revenue that this is too simplistic.

43. The liquidator in his grounding affidavit explained very briefly the payment of €9,790.80 to Mr. Gloster. He did not address at all the payment of €10,080.83 for "*legal and professional fees.*"

44. In a supplemental affidavit sworn on 30th October, 2018 the liquidator provided what he characterised as "*further clarification of legal and professional services*" but what was in fact the first explanation of the charge for €10,080.83. It is made up of €5,535.00 for "*a professional fee paid to Fiducial Accounting, the company's former accountants, who provided accounting assistance in this liquidation*", €2,700.33 for "*legal fee*", and €1,845.00 for "*legal fee amount paid in error*". It appears from the liquidator's final report that Fiducial were the company's auditors. There is not the merest scintilla of evidence as to what work they allegedly did for the purposes of the liquidation or when. At the end of the hearing of this application the Revenue admitted (it having not been proved by the liquidator) that this sum of €5,535.00 had been paid, but that was as far as the concession went. The €2,700.33 had been more or less accidentally vouched by the fact that the liquidator had exhibited the solicitor's and counsel's fee notes with his grounding affidavit. The liquidator on this application persisted in standing over a figure of €10,080.33 for legal and professional fees which included a payment of €1,845.00 which had nothing whatsoever to do with this liquidation and which was plainly paid out of the liquidation account in error.

45. From the time of the final meeting the Revenue's position was that the remuneration claimed by the liquidator was unjustified and unjustifiable. The Revenue proposed that the liquidation might retain a total sum of €36,000.00 plus VAT. That figure was taken from a scale or remuneration structure used by the Revenue when engaging liquidators, which took account of the liquidator's statutory duties, the number of employees, payment for asset realisations, uncontested s. 150 applications, and legal fees. Some of the liquidator's grounding affidavit and much of his several supplemental affidavits were directed to the Revenue's proposal as to what he might be paid.

46. The Revenue's proposal was said not to be realistic by reference to the amount of work done. The Revenue's remuneration structure was said to be "*bereft of any known generally accepted conventional computational formulation*" and to be part of an attempt by Revenue to cap liquidators' fees without regard to the individual complexities of each specific liquidation. It was also suggested that liquidators appointed by the Revenue do not take any commercial risk as their fees are underwritten by the Revenue.

47. Incidentally, I do not believe that the liquidator's criticism of the remuneration structure is entirely justified. More fundamentally it seems to me that the liquidator missed the point of the open offer of settlement of his claim for remuneration. It was never suggested that the Revenue scale was to be the basis by reference to which the value of the liquidator's work was to be measured. Rather what was said that the claim was unjustified and unjustifiable; that in the opinion of the Revenue the maximum that might be justified was €36,000; that the Revenue was prepared to allow the liquidator to deduct that amount; and that if he persisted in the claim which he had made and fell short of that amount, the Revenue would urge the court to fix him with the costs.

48. There is something in the liquidator's argument that the remuneration structure is intended to form the basis of framework agreements to endure for up to four years, so that panel liquidators might reasonably hope for more than one instruction. There is something also, in principle, in the argument that the scale guarantees payment and so does not factor in commercial risk, although in this case the liquidator, before he accepted the appointment, knew that there was €25,000 available in cash and a contract for the payment of another €75,000 by monthly instalments. I think that the liquidator is probably quite right that part of the purpose of the scale was to cap fees for routine work, so as to forestall disputes as to how long it took, or how long it should have taken, to fill in routine forms and to make routine returns. As I have said, however, the issues on this application are the amount at which the court should fix the liquidator's remuneration, and whether the liquidator is entitled to be reimbursed from the company's assets for the money he has paid out.

49. Save in one respect, to which I shall come, there was agreement at the bar as to the applicable legal principles.

50. Counsel for the respondents on this application anchors his submission on the fiduciary capacity of a liquidator. He refers to a passage from the decision of the High Court of England in *Mirror Group Newspapers plc v. Maxwell and Others* [1998] 1 BCLC 638, at p. 648 which was cited with approval by Gilligan J. in *Re: Cherryfox Ltd*. [2018] IEHC 260 and by Whelan J. in *Re Mouldpro International Limited* [2018] IECA 88:-

> *"Office-holders are nowadays not normally expected to act gratuitously. It is salutary to remember, however, that the rule that a trustee must not profit from his trust is a rule that applies to all kinds of persons who are in fiduciary position (see Snell's Principles of Equity (28th Edn., 1982, Sweet & Maxwell) pp. 249 – 252). The allowance of remuneration in*

particular cases represents an exception to this rule, but it inevitably involves conflict between the interest of the fiduciary who is to receive such remuneration and the interests of those to whom the fiduciary duties are owed, who will bear whatever remuneration is allowed. A consequence of this is that it must be for the office-holder who seeks to be remunerated at a particular level to justify his claim. As I see it this is simply one aspect of his obligation to account. What he retains for himself out of the property which comes into his hands as office-holder is not available for those towards whom he is a fiduciary. He cannot therefore account for it by paying it over. The only other way in which he can account for it is by showing that he ought to be allowed to retain it for himself. But this is necessarily a matter for him to establish.

Certain more particular consequences follow from what I have said so far. 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 lead 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.

…

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 a 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.

Third, the test of whether office holders have acted properly in undertaking particular tasks at a particular cost in expenses or time spent must be whether a reasonably prudent man, faced with the same circumstances in relation to his own affairs, would lay out or hazard his own money in doing what the office-holders have done. It is not sufficient, in my view, for office-holders to say that what they have done is within the scope of the duties or powers conferred on them. They are expected to deploy commercial judgment, not to act regardless of expense. This is not to say that a transaction carried out at a high cost in relation to the benefit received, or even an expensive failure, will automatically result in the disallowance of expenses or remuneration. But it is to be expected that transactions having these characteristics will be subject to close scrutiny."

51. In *Re Sharmane Ltd*. [2009] 4 I.R. 285, at p. 297 Finlay Geoghegan J. considered the basis upon which the reasonable remuneration of an examiner should be determined:-

"There are no statutory criteria according to which the court should determine what constitutes reasonable remuneration for the purpose of s. 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."

52. In *Re Mouldpro International Ltd*. [2012] IEHC 418, Finlay Geoghegan J. noted that the principles she had laid down in *Re: Sharman Ltd*. had been followed in *Re Missford Ltd*. [2010] 3 I.R. 756 and *Re Marino Ltd*. [2010] IEHC 394 in relation to fixing the remuneration of an examiner, and in *ESG Reinsurance Ireland Ltd*. [2010] IEHC 365 in relation to the remuneration of an administrator, and applied the same principles to the fixing of the remuneration of an official liquidator. At para. 14 she said:

"Since the delivery of the judgment in Re Sharmane Ltd, it has been clear that the Court, in determining the remuneration of persons appointed as examiners, administrators or official liquidators, will not determine the reasonable remuneration by reference only to the total charge-out costs computed from the hours spent and relevant hourly rates, but will also have regard to:

(i) *the nature of the work carried out;*

(ii) *the complexity of the work;*

(iii) *the importance or value of the work 'to the client'.*

In Re Sharmane Ltd,, the client was the company as an examiner was appointed to it on the basis that it was a company with a reasonable prospect of survival as a going concern. In a liquidation, the client is not the company. Insofar as the primary obligation of a liquidator in most liquidations is the realisation of the assets of the company and their distribution to those entitled on a winding up in accordance with the relevant priorities, it appears to me that in the sense used, the 'client' in the liquidation are those persons entitled on the distribution of the assets of the company in accordance with statutory priorities."

53. *Re: Mouldpro International Ltd*. [2012] IEHC 41 and [2018] IECA 88 concerned the fixing of the remuneration of an official liquidator. On this application, the parties were (correctly) agreed that there is no difference in principle between the remuneration of an official and a voluntary liquidator.

54. The written submissions filed on behalf of the liquidator, having referred to the relevant modern authorities, including *Re Sharmane Ltd and Re Mounldpro International Ltd.* concluded with a number of quite startling propositions. The first was that the practice of the court is to determine remuneration on the basis of hours worked by the liquidator and his staff. The second was that the Revenue had not established that the fee charged was unreasonable. The third was that Revenue had not questioned the number of hours worked.

The fourth was that Revenue had not proposed an alternative valid methodology. And the fifth was that the standard one size fits all approach to liquidation fees taken by the Revenue did not take into account the variable degrees of work and time spent on a liquidation from one company to another. All of these propositions, insofar as they were propositions of law, were plainly wrong, and insofar as they were propositions of fact were contrary to the evidence and they were, all of them, quite rightly, abandoned.

55. It is common case that the onus is on the liquidator to establish that his claim for remuneration is reasonable. It is accepted on behalf of the liquidator that to do that he must give full particulars, explaining the nature of each task undertaken and the basis upon which he embarked on each such task. It is accepted that the liquidator is obliged to keep proper records, ideally contemporaneous records, and that in the absence of such records doubts may be resolved against him.

56. In this case, despite the Revenue's protests from the outset, the liquidator has not produced any contemporaneous time records or any work product beyond a few forms which were filed. Not even the s. 56 report has been produced so as to allow any assessment to be made as to whether it is worth what is claimed for it.

57. In my judgment the liquidator has not established that the time said to have been spent working on this liquidation was properly spent. By reference to the list of hours and the "*analysis of work completed*" it seems to me that far too long was spent on routine tasks. If those doing the work spent as long doing it as they are said to have spent, they are not sufficiently skilled and efficient to justify the rates per hour claimed.

58. The liquidator's claims, in the narrative on his affidavits, of novelty, difficulty and complexity are not borne out by the "*analysis of work completed*". The liquidator in his affidavits, and counsel on his behalf in argument, took exception to the characterisation by the Revenue of this liquidation as a "*pre-pack*" liquidation. In my view it was just that, and the liquidator took it on and concluded it on that basis. I record here for the avoidance of doubt that the Revenue made no criticism of the manner in which the liquidation was conducted, or of anything the liquidator did or did not do, but confined the argument to trying to establish what he did do and what the value of that was.

59. Immediately before the liquidator was appointed all of the company's assets and undertaking were sold off for €100,000, payable by instalments. The statement of affairs showed preferential creditors of €130,938 and unsecured creditors of €168,383, of whom the largest by far was Sandro Pieri, who was one of the directors, at €119,523. The liquidator established that the true value of the preferential creditors was €197,950. If, as is said to be the case, the cause of the insolvency and the deficit was that the company preferred the promoters to the Revenue and trade creditors, it seems to follow that the price which the company agreed to pay the promoters for the business was upwards of €200,000. If the liability shown in the statement of affairs to Sandro Pieri was the balance of the purchase price of the business, and about €200,000 had been paid, that purchase price must have been upwards of €300,000. If any assessment was made of the adequacy of the price for which the business was sold, that is not apparent from the evidence. If any reasoned assessment was made of the ability of the purchasers to pay the balance of the instalments, that is not apparent from the evidence.

60. The evidence is that the liquidator adopted the contract for the sale of the company's business, collected what he could, processed the employees' claims, wrote and filed the s. 56 report, made the s. 150 application, and made the requisite returns. What was, perhaps, out of the ordinary was that the Revenue liabilities were greater than shown on the statement of affairs but if (as they were said to be) the books and records were reasonably well written up, it cannot have taken a great deal of work to establish the true extent of the liabilities. In any event the suggestion that a good deal of work was done on that is unsupported by the evidence and inconsistent with the "*analysis of work completed*". Even if it had been established that such work had been done, it seems to me that the liquidator would have had enormous difficulty in meeting the requirement of showing that a reasonably prudent man would have laid out his own money to carefully calculate the amount by which the Revenue liabilities exceeded 130% of the maximum amount that could be collected.

61. The paucity of the evidence as to what work was done, the disproportion between the tasks said to have been done and the hours said to have been spent doing them, the inconsistencies between the narrative account of the work allegedly done and the particulars (in the "*analysis of work completed*") of the work said to have been done makes it very difficult to assess the fair value of the work properly done. On one view, at least, any attempt by the court to go behind a claim which was not established would sit very uneasily with the settled law that the onus is on the liquidator to justify his claim.

62. In this case, however, I am invited by the Revenue to measure the value of the work and expenses associated with the liquidation at the sum of €36,000 which was offered long ago as the most which could have been justified.

63. Of the sum of €10,080.83 for "*legal and professional fees*", I find that the liquidator has not justified (or even offered any explanation for) the sum €5,535.00 for "*a professional fee paid to Fiducial Accounting, the company's former accountants, who provided accounting assistance in this liquidation*". The sum of €1,845.00 for "*legal fee amount paid in error*" had nothing to do with this liquidation. The payment of €2,700.33 for "*legal fee*" represents the fees, inclusive of VAT, of the solicitors and counsel instructed to deal with the s. 150 application. This last element was properly incurred, is reasonable, and has been vouched.

64. As to the €9,790.80 for "*payments to consultants*" which was paid to Mr. Gloster, this was for most or all of the work Mr. Gloster did, the vast majority of which was said to have been done on the s. 56 report. Without sight of Mr. Gloster's report it is difficult to put a value on it but on the evidence I am quite satisfied that there was no conceivable justification for 68 hours. Doing the best I can, half that would have been more than enough.

65. The liquidator, I think, is entitled, in principle, to subcontract work which he or his staff may be unable to do, provided that this is not done at the expense of the creditors. Conversely, the liquidator is not entitled to subcontract work at a profit. In my judgment it is wrong in principle that the liquidator's account should show a charge for this work of €17,564.40 (inclusive of VAT) with a credit for the €9,790.80 which he paid for it. The correct adjustment is to eliminate the charge entirely and substitute an allowance for the reasonable cost of the work necessarily and properly and efficiently done.

66. There is considerable overlap between the hours charged for the liquidator's own work and Mr. Gloster's work on the s. 56 report which goes beyond what might reasonably have been necessary for proper oversight. I find that there is no justification for the number of hours said to have been spent by either the liquidator or by Mr. Gloster, never mind by both, on the s.150 application. It seems to me that the work established to have been done could and should have been done in half the time.

67. As to the time claimed to have been spent by the liquidator's staff on the important but nevertheless routine work of processing employees' claims and filing notices and returns, it seems to me that the number of hours have not been justified. Again, it seems to me that the work established to have been done could and should have been done in half the time.

68. The total amount claimed on the analysis of hours is €59,632.50, exclusive of VAT. If I deduct the sum of €14,280 attributed to Mr. Gloster's work, the total reduces to €45,352.50. Half of that is €22,676.25. There was no dispute in relation to the sum of €350.00 for sundry outlays or €940.39 claimed for travel expenses. If I add those items, the total is €23,966.64 before VAT, or €29,478.96 inclusive of VAT. I add to that figure €4,895.40 (inclusive of VAT) for the half of the money paid to Mr. Gloster which I have found to be justified, and the entire sum of €2,700.33 (inclusive of VAT) which I have found to be justified. The end result is €37,074.69.

69. The liquidator attached to his final report an appendix showing receipts and payments. The sum received in respect of employee claims was matched by the disbursement of those monies. Besides the liquidator's claims for remuneration, consultancy and legal and professional fees, there was sundry expenditure for advertising and the like amounting in total to €809.00, which was uncontested. I need to add this figure of €809.00 to the €37,074.69 to arrive at the final figure which the liquidator is entitled to retain, which is €37,883.69.

70. I observed at the outset that there was one issue of law on which the parties were not agreed. That is whether, on an application under s. 280 of the Companies Act, 1963 the court had power to, or, perhaps, if it had, if ought to, make an order for payment by the liquidator of a dividend to the creditors.

71. Section 280 of the Companies Act, 1963 provides, insofar as is relevant:

> *"280. -(1) The liquidator or any contributory or creditor may apply to the court to determine any question arising in the winding up of a company, or to exercise in relation to the enforcing of calls or any other matter, all or any of the powers which the court might exercise if the company were being wound up by the court.*
>
> *(2) The court, if satisfied that the determination of the question or the required exercise of power will be just and beneficial, may accede wholly or partially to the application on such terms and conditions as it thinks fit or may make such other order on the application as it thinks just."*

72. I was referred in argument to a case of *Re: Cherryfox Limited* [2018] IEHC 260 which, for a time, had travelled with this case. *Cherryfox*, like this case, involved a dispute between the applicant and the Revenue Commissioners as to the remuneration claimed by the applicant for acting as a liquidator. In that case the applicant was an official liquidator but the parties are agreed that the applicable principles are the same. In a decision given on 9th May, 2018 Gilligan J. measured the applicant's remuneration and went on to make an order for payment by the applicant to the respondents of the difference between the money collected by the applicant and the amount allowed in respect of his remuneration. I was informed that the applicant had appealed against so much of the order of Gilligan J. as had directed payment of the balance to the respondents.

73. It was argued on behalf of the liquidator that it was not appropriate to make such an order on the basis, as I understand the argument, that the law requires that the liquidator's remuneration must take priority over any dividend. The court, it is said, has no power to direct payment of a dividend. Rather, it is argued, it is a matter for the liquidator to determine the amount of any dividend, for which purpose he will have to prepare a final account.

74. In my firm view this argument is misconceived. Under s. 280 of the Companies Act, 1963 the court had, and under s. 631 of the Companies Act, 2014, the court has, power to determine any question arising in the winding up of a company and , having done so, to make such other order on the application as it thinks just. In *Cherryfox*, as in this case, the winding up had been completed and the costs and expenses, bar the liquidator's remuneration, ascertained and paid. The only outstanding issue in that case, as in this, was the amount of the liquidator's remuneration. Once that was measured by the court, the calculation of the amount of the dividend was a matter of simple arithmetic. The liquidator was entitled to retain what he was entitled to retain and was obliged to account to the creditors for the balance. Since the preferential liabilities greatly exceeded the money available, the Revenue were entitled to it. In my view it would not only achieve nothing for the liquidator (whether at his own, or a *fortiori* at the creditors' expense) to have to draw up a formal final account showing the two figures and the figure for the balance, but would postpone the creditor's entitlement to be paid.

75. In this case I am asked by the parties to adjudicate on the outstanding issues of the amount of the liquidator's remuneration and his entitlement to retain sums equivalent to the payments he has made, and I have done so. I am asked by the Revenue Commissioners to deduct from the €80,000 proceeds of realisation of the company's assets the amounts which the liquidator is entitled to retain and to make an order for payment by him of the balance and I have not the slightest hesitation in doing so.

76. All of the issues in the liquidation have been determined. The liquidator has received sums amounting in total to €99,565.65. He has properly paid out €19,565.65 to the employees. He claimed to be entitled to retain the entire balance of €80,000 and has been found to be entitled to retain €37,883.69. The difference between what the liquidator should have in hand and the amount which he is entitled to retain is €42,116.31. There is nothing further to be done in the liquidation and no other conceivable claimant to the €42,116.31 other than the Revenue Commissioners.

77. I mention for the sake of completeness that along the way the Revenue Commissioners called upon the liquidator for a full copy of the liquidation bank account. The liquidator did not produce a copy of the account but he did, eventually, in an affidavit sworn on 24th October, 2016, exhibit a copy of page 54 of the bank statement dated 28th September, 2016 which showed a balance of €54,272.45. The liquidator then deposed that the balance in the bank account as of 24th November, 2014 had been €60,097.50 (sufficient to meet his claim) but that since then "*certain additional, unanticipated extra costs and expenses [had] arisen which necessitated payment*." Those payments were said to have been €443.80 in respect of "*additional consultancy fees*" and €5,381.25 in respect of "*additional legal fees*" and were said to have been paid out on unspecified dates between 24th November, 2015 and 28th September, 2016. I find this to be quite unsatisfactory. I can think of no good reason why the liquidation account should have been so depleted and the liquidator has offered none. However, I do not propose to dwell on this. In fact the money available in the liquidation bank account is sufficient to meet the liquidator's liability to the Revenue. If it was not, it would make no difference. The liquidator is bound to account to the creditors and is bound to keep the proceeds of the liquidation in a separate account: but any irregularity in the manner in which the liquidator has dealt with the proceeds of realisation does not affect his liability to account to the creditors for what he should have available in the liquidation account.

78. There will be an order;

1. Fixing the liquidator's remuneration and expenses, inclusive of VAT, at €37,883.69;

2. Determining that of the sum €10,080.83 claimed for "legal and professional fees", the liquidator has justified the sum of

€2,700.33 for "legal fee" (which is included in the €37,883.69);

3. Determining that of the €9,790.80 claimed for "payments to consultants" the liquidator has justified the sum of €4,495.40 (which is included in the €37,883.69);

4. Directing the payment by the liquidator to the Revenue Commissioners, forthwith, of the sum of €42,116.31.

79. The Revenue's open offer of €36,000.00 plus VAT would have come to €44,280.00. The liquidator is short of that and must pay the costs of the proceedings.

80. I will hear counsel as to whether I should make an order for Courts Act interest, and if so from what date.