THE COURT OF APPEAL

Ryan P.
Hogan J.
Whelan J.

[2018] IECA 88

[Appeal Number 2014/658]

[Article 64 transfer]

IN THE MATTER OF MOULDPRO INTERNATIONAL LIMITED (IN LIQUIDATION)

AND

IN THE MATTER OF THE COMPANIES ACTS 1963 – 2005

Between

Pierce Farrell (Official Liquidator)

Applicant/

Respondent

And

Plastronix Investments Limited

Notice Party/

JUDGMENT of Ms Justice Máire Whelan delivered on the 16th day of March 2018

1. This appeal is brought by Plastronix Investments Limited ("Plastronix"), a notice party, from the judgment of Finlay Geoghegan J. made in the High Court on 9th October, 2012 fixing to the remuneration sought by Pierce Farrell, Official Liquidator, ("the liquidator") in relation to the performance by the liquidator of his duties: see *Re Mouldpro International Ltd.* [2012] IEHC 418. The order of the High Court was made on 25th October 2012 and was perfected on 15th November, 2012. It provided that pursuant to s. 228 of the Companies Acts 1963 – 2012 and O. 74, r. 46 of the Rules of the Superior Courts, 1986 that the remuneration of the liquidator as provisional and official liquidator for four separate periods of the liquidation of a company Mouldpro International Limited (in liquidation) ("Mouldpro") should be the amounts set forth in the said order totalling €1,298,350.51 plus VAT. Costs of the application were awarded to the liquidator and the notice party. Plastronix sought a reduction in the amounts of remuneration claimed to the liquidator in respect of each discrete period.

The background
2. The company was incorporated and commenced trading in April 1987. It was established originally as a subsidiary of Toyota Ireland Limited pursuant to a technical collaboration agreement with Munekata Company Limited of Osaka in Japan ("Munekata"). The company specialised in the manufacture of advanced technology plastic injection mouldings primarily for the consumer electronic and automotive industries. In time the company diversified into the production of advanced technology plastic injection mouldings for the construction industry. In 1989 the company was acquired by Munekata Group from Toyota Ireland Limited. In 1992 it was integrated into the business of Munekata Group under the name Munekata (Ireland) Limited. In 2002 the directors for the time being of the company acquired it through a management buy-out from Munekata. It was at that stage that the company changed its name to Mouldpro International Limited. In 2003 it established a branch of its operations at a facility approximately 60 miles outside Prague at Korozluky, Most, in the Czech Republic. The company operated factories in Dublin and in Most.

3. Arising from its historic relationship with Munekata the company's key clients included Sony, Orion and Toshiba. The subsequent dramatic reversal of fortunes for the company is a reminder that we live in a small open economy characterised by financial globalisation where decisions made in distant boardrooms in Osaka or Beijing can dramatically and irrevocably adversely impact on the business and affairs of even the most well and efficiently-run companies.

4. By the end of October, 2004, Sony and Toshiba had announced the cessation of their UK production operations. As a supplier of mouldings to both companies, UK operations represented the primary activity of the company. This turn of events had an immediate and devastating impact upon Mouldpro which then ceased to be viable. The liquidator was appointed as a provisional liquidator on 22nd July 2005 on foot of a petition brought by a related company, the notice party, Plastronix, in its capacity as a creditor of the company. Subsequently, on 14th August, 2005, an order was made in the High Court providing for the winding up of the company and the appointment of Mr Farrell as official liquidator.

Fees claimed
5. The liquidator claimed the following fees:

(i) Period 1: 22nd July, 2005 – 28th February, 2006

Net sum claimed: €738,449.31

VAT thereon: €155,074.36

Total claimed: €893,523.67

(ii) Period 2: 1st March, 2006 – 30th September, 2007

Net sum claimed: €348,379.17

VAT thereon: €73,159.63

Total claimed: €421,538.80

(iii) Period 3: 1st October, 2007 – 31st March, 2009

Net sum claimed: €211.522.03

VAT thereon: €45,477.24

Total claimed: €256,999.27

(iv) Period 4: 1st April, 2009 – 30th September, 2011

Net sum claimed: €196,081.00

VAT thereon: €41,177.00

Total claimed: €237,258.00

(v) Post-costs: €8,264.00

VAT: €1,736.00

Total: €10,000.00

The aggregate sum being claimed in the High Court was:

Net amount: €1,502,695.41

VAT thereon: €316,624.24

Total: €1,819,319.74

6. The trial judge did not interfere with the sums claimed save in respect of the fourth period, from 1st April, 2009 to 30th September, 2011, when the sum claimed was abated to €139,518.00 together with VAT. Further, an issue arose in the course of the hearing pertaining to the hourly rates being charged by two individual members of the liquidator's firm's staff, Mr Taite and Mr Carr in the fourth period. The trial judge found that the increased hourly charge out rates sought on behalf of these individuals was not reasonable. It was found that their promotion should be reflected in some increase in charge out rates but not in respect of the sums claimed. The judge found that it may be efficient in the management of a liquidation to retain a member of staff already working in the liquidation who has been promoted within the liquidator's firm but that such a decision does not automatically justify remuneration for the liquidator based on the full increased charge out rate which the firm attributes to such a person by reason of their promotion. The Court accordingly made an order determining that the remuneration of the liquidator, both as provisional liquidator and official liquidator, be approved with reductions in respect of the fourth period as aforesaid. I propose to consider presently the details of the judgment of Finlay Geoghegan J..

The judgment

7. The trial judge, having set out the statutory provisions at s. 228 of the Companies Act 1963 and the provisions of O. 74, r. 46, noted the jurisprudence with regard to the discretion vested in the Court as adumbrated by Murphy J. in *Car Replacements Limited* (15 December 1999, unreported). The Court noted that it is the practice to put a creditor likely to be affected by the determination of the liquidator's remuneration on notice and to direct that person to act as a *legitimus contradictor*. (para. 9)

8. The learned trial judge noted at para. 10 that the established practice is that an official liquidator may apply from time to time throughout the liquidation seeking either

(a) a determination of his remuneration for a specified period, or

(b) a payment on account of the amount of the remuneration which he is seeking in respect of that period:

> "In recent years, it has been the prevalent practice only to make orders for payments on account and to leave the final determination of the remuneration to the end of the liquidation. The orders for payments on account are made upon an undertaking from the official liquidator to refund the liquidation in the event that the amount determined is less than the payment on account."

9. The Court further noted at para. 10:

> "Where objections are made to the amount of the remuneration on an application for a payment on account, the Court will sometimes make orders for payments on account of less than the total amount sought. However, even where an order is made for the payment on account of the full remuneration sought, it is not indicative that the Court will fix the

remuneration in the amount sought. This is accepted on behalf of the Liquidator herein."

The trial judge continued:

> "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'."

The trial judge noted that in a liquidation the client is not the company. The trial judge determined that the "client" in the context of a liquidation "are those persons entitled on a distribution of the assets of the company in accordance with statutory priorities.

10. The trial judge further stated:

> "Current practice does not expressly require an official liquidator to break down in any precise way the time spent on different elements of the work conducted by him and his staff in the course of the winding up."

The court noted at para. 15 that O. 74, r. 46 requires an official liquidator to support a fee application with "such evidence as the Court shall require".

11. The trial judge noted at para. 16:

> "It is important to try and keep an appropriate balance between requiring a liquidator to put sufficient information before the Court that it (and any creditor acting as *legitimus contradictor*) can form a view on what is reasonable remuneration, having regard to the above elements, and not imposing such detailed requirements as will involve extra work and expense to the liquidation."

12. The trial judge noted the task of the Court being to fix remuneration which is reasonable as between the official liquidator and "reasonable for the creditors of the company. She also cited with approval the decision in *Red Sail Frozen Foods and Mirror Group Newspapers v. Maxwell* stating,

> "I would agree with the distinction made between the value of work done and the cost of rendering it. Persons who have worked as professionals are aware of the truism that there is not a direct correlation between the value to a client of work done and the time spent by the professional person in producing the work."

She continued:

> "In determining an official liquidator's remuneration, it is appropriate to have regard to the value of the work and also, separately, to the cost of rendering it."

13. The trial judge noted that Plastronix was not the *legitimus contradictor* in any of the prior applications to the High Court. The Revenue Commissioners were on notice of the first application, G.E. Commercial Finance, as "the largest unconnected unsecured creditor" of the second and third applications;

> "Whilst criticism has been made of this choice, it does not appear to me justified. The only orders made on the first three applications were orders for payment on account and counsel for the Liquidator properly did not seek to rely upon the amounts paid as a determination previously made by the Court of the remuneration for the first three periods."

14. The Court noted the position of Mr Nangle who has been particularly diligent in pursuing the issue of accountability in regard to the fees claimed by the liquidator in the instant case. The Court noted as follows:

> "Mr. Nangle is a person who has a particularly detailed knowledge of the winding up of the Company and is in a position to be of assistance to the Court in the objective determination of the reasonable remuneration of the Liquidator. However, inevitably, he is also a person who has a particular point of view on certain issues by reason of his closeness to the affairs of the Company."

15. The trial judge finds that there were a number of complex issues arising within the liquidation which required significant work by the liquidator and his staff. "Nevertheless, objectively, the level of remuneration sought is high and the time taken to complete the liquidation significant." (para. 24) The trial judge noted that the unsecured creditors in this liquidation have been adjudicated at €3,272,163 which gives an estimated dividend of 6.52 per cent. "The estimated dividend is based upon an allowance of the full fees claimed by the Liquidator. Any reduction in fees increases the amount available for the unsecured creditors."

16. At para. 25 of the judgment the trial judge notes that the total fees sought are in the order of €1.5 million. The trial judge noted that receipts in the liquidator's summary as at 30th September, 2011 being the end of the fourth period of the liquidation amounted to €8,345,503. Certain of those receipts are not realisations which required much work in the liquidation in the sense of being deposit interest, VAT refunds (on fees paid during the liquidation), bank balances in existence at the commencement of the liquidation and employee entitlements received from the relevant departments. These items aggregate approximately €2.8 million.

17. With regard to the burden of proof, the trial judge noted at para. 26 the contention of Plastronix that it is a matter for the liquidator to satisfy the Court on the evidence put before it that the amount of the remuneration he is seeking is reasonable for the work done by him in the liquidation. The trial judge accepted that submission, noting that the liquidator had put before the Court four separate reports justifying the fees sought in respect of the four separate periods and had given additional information in response to the affidavits filed by Mr Nangle. "It is, therefore, appropriate for the Court to consider the reasonableness of the remuneration claimed in the context of the objections raised by Mr. Nangle, having regard, in particular, to Mr. Nangle's detailed knowledge of what took place in this liquidation and in relation to the affairs of the Company."

Period 1
18. The trial judge in her judgment considers the objections raised by the notice party regarding the aggregate fees claimed for the first period, being from 22nd July, 2005 to 28th February, 2006, a period of seven months. During that time the liquidator acted as provisional liquidator between 15th July 2005 and 15th August 2005 and subsequently as the official liquidator. Finlay Geoghegan J. stated:

> "It is noteworthy that the projected profit and loss account furnished by the liquidator included an estimated fee for the liquidator's remuneration of €140,000."

The judgment continued:

> "I do not accept the submission that as a matter of probability, if the fees incurred by the Liquidator and his staff were lower, there would have been a benefit to the liquidation. I am satisfied that this was a period of intense work in the liquidation with positive benefits for the creditors."

19. In concluding, accordingly, the trial judge finds with regard to the first period:

> "My assessment is that the remuneration claimed by the Liquidator for the period up to and including 28th February, 2006, the primary part of which covered the trading and significant realisations of debtors (€2.3 million) is reasonable."

Jim Dully
20. A payment disbursed by the liquidator in the first period involved Mr Dully, a consultant retained by the liquidator who was previously employed as a consultant by the company prior to its winding up. The Court found in accordance with the evidence that "the fees paid to him were paid by cheques drawn on the liquidation account, all of which were countersigned by the Examiner in accordance with the Rules of Court. The amounts paid were included in the Liquidator's accounts, all of which have been passed by the Examiner." The trial judge had regard to O. 74, r. 128(2), noting that the Examiner allowed the payment of the consultancy fees to Mr. Dully by countersigning the cheques in question and "it is not a matter for the Court on this application to review those payments."

Period 2
21. The second period of this liquidation ran from 1st March, 2006 to 30th September, 2007. It will be recalled that the total fees claimed amount to €348,379.17 together with VAT of €73,159.63, aggregating at €421,538.80. The trial judge noted that there was force in the submission of Plastronix that in this liquidation it would appear that the greater part of the realisation of the assets was completed as of 28th February, 2006, i.e. at the conclusion of the first period of this liquidation:

> "The estimated outcome as at 28th February, 2006, included a projected dividend to preferential creditors of 89.36 and, implicitly, no dividend for unsecured creditors. The future anticipated payments included €1.04m for liquidator's costs, fees and expenses. This must be considered against the determination sought at the time for payment of €733,449.31 in respect of fees and outlay which had not been paid. The Liquidator, at the time, must therefore have anticipated only incurring an additional €300,000 in fees and outlay to the completion of the liquidation."

22. The liquidator, as the Court notes, made his second application for approval of €348,379 in respect of fees and outlay for the second period and the application was moved in the High Court in December, 2007. The liquidator's report upon which the December, 2007 application was based discloses that "the only additional expected receipt was deposit income of approximately €140,000. The trial judge notes at para. 32 of the judgment that the cash on hand at that time was €4,132,266. "Hence, it appears that the Liquidator may have anticipated completing the liquidation within approximately one year."

23. In fact the process extended out for a further four years, the fourth and final period concluding on 30th September, 2011. The trial judge notes at para. 34:

> "It is undisputed that all realisations were complete by 30th September, 2007."

The trial judge noted:

> "The 30th September, 2007 estimated outcome, however, also includes, amongst future anticipated payments, Liquidator's costs fees and expenses of €725,000. There does not appear to be any explanation in the report of the increase from the estimate in February 2006. The relevant comparison is the additional €300,000 already explained. Having regard to the amount claimed for the period ending 30th September, 2007, it appears that the Liquidator was estimating a further €375,000 approximately in fees and expenses after September 2007."

24. With regard to the sums claimed in respect of the second period the trial judge states as follows:

> "In respect of this period, subject to one matter relating to the rates applied to individuals who had been promoted within FGS, I propose allowing the fees claimed in respect of the period up until 30th September, 2007. From a consideration of the Liquidator's report at the time, it appears to me that the time taken for the additional work done and the work done is such that the fees claimed are, in general, reasonable. As with the earlier period, certain of the rates claimed are higher than would currently be considered reasonable, but are in line with those being allowed at the time." (para. 36)

Period 3
25. The third interim application for fees in this liquidation was made in May, 2009 in respect of the 18 month period from 1st October, 2007 to 31st March, 2009. The fees and expenses claimed were €211,522, together with VAT thereon the total sum being €256,999.27. By then the liquidator had been in receipt of €1,086,828 on account of the total remuneration claim.

26. The trial judge noted at para. 37 of the judgment:

> "When the amount to be paid pursuant to the claim (€211,522) is deducted, this leaves a balance of approximately €110,000 for future payments. This was the estimate made in March 2009."

27. Paragraph 39 of the judgment analyses the report of the liquidator regarding the third period. This report is dated April, 2009 and

refers to some work in relation to the integrated pollution prevention and control licence from the EPA with some reference to work in relation to the adjudication of preferential creditors which appears to have substantially concluded in 2007 and the final report of the Director of Corporate Enforcement. The trial judge formed the view that the main work done by the liquidator in the third period related to a potential claim against the Sony Group. The trial judge stated:

> "I accept that this was both a complex claim and significant in amount such that if it were to succeed, it would have been of considerable benefit to the unsecured creditors. It required collation of facts in this jurisdiction and also, on counsel's advice, the obtaining of both expert evidence and legal advice from Japan. On the facts before me, the time spent up until the end of March 2009 appears to be reasonable."

Fourth period -Delays

28. The total remuneration and expenses claimed was €196,081, together with post-costs of €8,264. The trial judge compared this with the liquidator's estimate in April, 2009 in regard to additional costs as being approximately €110,000 to complete this liquidation:

> "The fees charged in this period were the subject of query on behalf of Plastronix, and in my judgment, the fees claimed exceed what is reasonable, having regard to the following matters;" (para. 41)

The trial judge notes that there were three outstanding issues as of April, 2009:

> (i) A final decision in relation to the Sony claim;
>
> (ii) The Willis preferential claim;
>
> (iii) The adjudication of unsecured creditors;

29. As regards the Sony claim, as the trial judge correctly found, a decision had previously been made by the liquidator prior to the end of March, 2009, that unless Mr Nangle personally funded the Sony claim no proceedings would be instituted. The trial judge correctly concludes after considering the evidence:

> "I cannot accept as reasonable that any significant work had to continue in relation to the claim until June 2010, which was in excess of a year after the Liquidator had stated in his April 2009 report that he had formed the view based on Senior Counsel's advice that he would not apply to the Court for leave to commence proceedings unless the matter was funded by Mr. Nangle."

30. It is noteworthy that the trial judge observes at para. 45:

> "It is axiomatic that delay in finalising a winding up leads to increased costs, particularly where the remuneration is sought by reference to time spent. Routine matters in the liquidation continue to require to be done and the lapse of time since commencement probably makes finalisation more time consuming."

31. A complicating element advanced by the liquidator in regard to the fourth and final period of the liquidation pertained to the Willis preferential claims, where Willis (formerly Coyle Hamilton Limited) being the scheme administrator of two pension schemes in regard to the company, being the Management Scheme and the Staff Scheme, had claims against the company for unpaid amounts at the date of commencement of the winding up in respect of underfunding, risk costs paid by the fund and expenses outstanding and undischarged.

32. The trial judge noted at para. 46:

> "It is now accepted that the Liquidator's office received claims under these headings in relation to each of the schemes between 2005 and 2007. The Liquidator states that Willis never made clear that the total claims were being made as preferential claims. There also appears to have been some confusion between the amounts claimed in respect of each of the schemes."

33. It would appear that errors were made on the part of the liquidator and his firm in relation to this aspect. Certain contributions which ought to have been attributed to the Staff Scheme were erroneously attributed to the Management Scheme. There was an exchange of communication between Willis and the liquidator's firm extending over a period of five years. Ultimately the liquidator had to obtain the advice of a firm of solicitors to ascertain that the claims were in fact preferential claims. As the trial judge correctly pointed out:

> "Whilst I accept that the failure of Willis to identify at the outset that the respective claims were in full preferential claims may have led to some confusion in the Liquidator's office, nevertheless, it appears to me that the Liquidator must accept some responsibility for the level of confusion which appears to have arisen, and what appears to me, upon a reading of the exchange of correspondence, and having regard to the affidavits of debt and averments of the Liquidator, to have been an unnecessary extra amount of work. The Liquidator is an experienced insolvency practitioner and it must be expected that he would have amongst his staff persons who would identify potential issues arising in respect of claims by pension funds against a company in liquidation and the need, if necessary, to obtain legal advice in a timely manner." (para. 48)

The trial judge concluded that as a matter of probability there was unnecessary additional work of a protracted nature during approximately one year following August, 2010 for which the liquidator must accept partial responsibility and in respect of which there should be some deduction for the fees claimed on a time spent basis and the trial judge required a deduction of 20 per cent overall in respect of the claim.

Mr Taite and Mr Carr

34. A final element in the judgment concerns the hourly rate charged for persons in the liquidator's firm who came to be promoted during the very protracted period of this liquidation. The issue concerns in particular two persons who worked on this liquidation and in respect of whom particularly subsequent to their respective promotions claims are being pursued in respect of significant hours. In the case of Mr Declan Taite, at the commencement of the liquidation he was listed as a director between 22nd July, 2005 and 31st December 2005 his fees came in at an hourly rate of €275. On 1st January, 2006 he was listed as a partner. His hourly rate claimed increased to €350. From 1st January, 2006, There is a claim in respect of Mr Taite for a total of 424 hours on this liquidation. The

hourly rates were increased to €375 in 2007 and in 2009 to €405 however they were reduced from 1st April 2009 to €365 per hour which was the maximum rate allowed for a partner by Kelly J. in *Re ESG*. With regard to the second member of the liquidator's own firm in respect of whom fees were charged, Mr Carr, as with Mr Taite, the Court noted that it should make some reduction in respect of the fees:

> "The very significant jumps in charge-out rates do not appear objectively reasonable in determining the total remuneration of the liquidator, and accordingly, I should make some reduction in respect of same. This must, of necessity, be done in a reasonable but simple way."

Notice of appeal

35. By notice of appeal dated 15th November, 2012, Plastronix originally appealed to the Supreme Court for an order reducing the amount of remuneration of the liquidator relying on 17 separate grounds including, inter alia;

> (i) The assessment of the liquidator's remuneration was unfair, unwarranted, excessively high and disproportionate to the nature and extent of the work involved.
>
> (ii) The trial judge did not have sufficient regard to the principle that the burden of proof rests on the liquidator to demonstrate that the costs claimed are reasonable.
>
> (iii) The trial judge failed to properly assess the nature of the work carried out, its complexity and the importance or value of the work to the creditors.
>
> (iv) The trial judge erred in the assessment of the evidence including time records submitted by the liquidator in support of his claim.
>
> (v) The trial judge erred in failing to require the liquidator to facilitate the ability of Plastronix in its role as legitimus contradictor to effectively challenge the remuneration awarded to the liquidator.
>
> (vi) The trial judge erred in failing to apply sufficient scrutiny to the question of the volume of work being charged for and the rights of the unsecured creditors when determining the appropriate remuneration of the liquidator.
>
> (vii) The Court placed excessive weight on the perceived complexity of the liquidation.
>
> (viii) The trial judge erred in finding that the fees of Mr Dully. The trial judge erred in failing to apply a greater reduction to the level of remuneration awarded for the fourth period.
>
> (ix) The trial judge erred in law in the interpretation and/or application of the provisions of s. 228 of the Companies Act 1963 – 2009 and the provisions of O. 74, r. 46 of the Rules of the Superior Courts.

Following the establishment of this Court in October 2014, this appeal was transferred to this Court pursuant to Article 64 of the Constitution.

Arguments advanced on behalf of the appellant

36. The appellant contends that the remuneration of over €1.45 million ultimately allowed by the High Court to the liquidator is unfair, unwarranted and wholly excessive in the circumstances. Plastronix separately dispute the fees of €100,000 plus VAT paid to Mr Dully in the course of the liquidation. It is contended that the trial judge ought to have required the liquidator to furnish full and detailed particulars of the work carried out by him, the time expended in carrying out the said work and the costs incurred as a result. A notice party advances the following contentions:

> (a) That this was not a complex liquidation. Any issue arising which was considered "complex" by the liquidator was assigned to a third party expert.
>
> (b) The liquidation took over six years to complete which was excessive.
>
> (c) The sum of €1.45 million in respect of fees represents a very large amount.
>
> (d) Notwithstanding that the notice party did not pursue a request at the trial in the High Court for the appointment of a forensic accountant, it seeks to revive that request.
>
> (e) It contends that the reduction in fees made by the High Court is inadequate.
>
> (f) The particulars provided were inadequate to justify the level of remuneration ; and
>
> (g) The trial judge failed to apply the relevant principles to the facts.

37. The appellant and respondent rely on broadly similar authorities, including Keane *"Company Law in the Republic of Ireland"* which sets out the test of fairness, together with the decisions of Finlay Geoghegan J in *Sharmane Limited* [2009] 4 IR 285 (hereinafter "Sharmane"), Kelly J.(as he then was) in *Re Missford Limited t/a Residents' Members Club* [2010] IEHC 240, [2010] 3 IR 756 (hereinafter "Missford") and Clarke J.(as he then was) in *Re Marino Limited* [2010] IEHC 394 hereinafter ("Marino"), which stressed the obligation to be "vigilant in scrutinising" an application for sanction of payment. The relevant statutory and regulatory provisions were relied on including s. 228(d) of the Companies Act 1963 and the former O. 74, r. 46 of the Rules of the Superior Courts, as amended.

38. The appellant contends that the High Court could not effectively exercise its discretion at the interim applications without sufficient evidence being procured either by requiring a liquidator to support his application for remuneration with such evidence as the Court required or in the alternative directing the Examiner to enquire into and to furnish a report pursuant to O.74r.46 on the liquidator's fees.

39. The appellant emphasises that the relevant jurisprudence makes it clear that in determining the remuneration of an officeholder including a liquidator the Court will not be confined to an assessment by reference only to the total charge out costs computed from

the hours spent at relevant hourly rates but will also have regard to;

(a) the nature of the work carried out;

(b) the complexity of the work;

(c) the importance or value of the work to the client.

In the case of a liquidation the client is characterised as being "those persons entitled on a distribution of the assets of the company".

40. The appellant attached weight to the decision in *Re Haydon Private Clients Limited* [2012] IEHC 505, a decision of Finlay Geoghegan J. which concerned the regard to be had to estimates of fees and how a court might prudently approach claims by a liquidator in respect of further unenvisaged additional work.

41. The appellant takes issue with the trial judge's statement that current practice does not expressly require an official liquidator to break down in any precise way the time spent on different elements of the work and in particular contends that this contrasts with the decision of the English High Court of Ferris J. in *Mirror Group Newspapers plc.v Maxwell* [1998] BCLC 638 (hereinafter "Mirror Group"). The appellant contends that the obligation of the liquidator extended to:

"(i) explaining the nature of each main task undertaken;

(ii) explaining the considerations which led him to embark upon that task; and

(iii) to show what time was devoted to each task.

The appellant argues that the summaries provided in respect of the claims of the liquidator are generic and non-specific and contends that the "prudent man test" adumbrated by Ferris J. in the *Mirror Group* referenced above ought to have been applied by the trial judge to the facts of the instant case. The appellant contends that the trial judge did not adequately consider to the "value" of the liquidator's work to the creditors.

Appellant's contentions regarding Period 1
42. With regard to period 1 of this liquidation which ran from 22nd July, 2005 to 28th February, 2006 the total net figure being claimed in respect of liquidator's fees was €738,449.31. It is accepted that the liquidator was required to continue to trade and operate the business of the company for a period of approximately 15 weeks. The appellant contends that the trial judge failed to consider the fact that this trading was supported by a fully cooperative workforce within the company. Whilst the trial judge determined that this was a period of intense work in the liquidation with positive benefits for the creditors, it is alleged that the trial judge failed to identify those "benefits".

43. It is contended that the liquidator failed to provide adequate particulars of contemporaneous records for this period of the liquidation. In particular, it is asserted that at Appendix X of the liquidator's report for the first period he merely gives a list of the names of his staff and the number of hours each person contributed to the liquidation, omitting to disclose which task each person worked on or the time devoted by each person to such task or tasks. "The Court did not place itself in a position to determine whether the length of time taken to complete the task was reasonable."

44. The appellant contends that the High Court placed excessive weight on the time records adduced by the liquidator.

45. With regard to the estimates methodology of the liquidator in relation to fees for this period, the appellant notes that the actual amount ultimately sought was more than double the estimate and contends that the trial judge failed to embark on the same exercise she undertook in the later case in *Re Hayden* in respect of estimates but simply accepted that the work required by the liquidator in respect of the first trading period was "much greater than anticipated". It is also raised that the liquidator failed to provide a separate record with regard to works done during the period of the provisional liquidatorship from 22nd July, 2005 to 17th August, 2005.

Appellant's contentions regarding Period 2
46. With regard to period 2 which ran from 1st March, 2006 to 30th September, 2007 a total net figure of €348,379.17 is claimed by way of remuneration by the liquidator, the appellant accepts that the trial judge's determination that certain tasks including finalisation of trading accounts in the Czech Republic, the investigation of a pre-liquidation disposition of Mouldpro's Finglas premises and issues around the Sony claim were completed by the end of this second period. However it is contended that a number of tasks identified by the liquidator were in truth carried out by others including by employees of the company Mouldpro themselves in the case of the dismantlement of plant and equipment and by solicitors and counsel retained on behalf of the liquidator in regard to an assessment as to whether a fraudulent preference had occurred within the meaning of s. 286 of the Companies Act 1963 in regard to a real property disposition that pre-dated the appointment of the liquidator.

47. The appellant asserts that the trial judge having accepted that there was "force" in the appellant's submission that the greater part of realisation of assets had been completed by the liquidator prior to the commencement of the second period on 28th February, 2006 and that " . . . the report makes clear that the sale of plant and machinery was already well progressed and anticipated to be completed by June, 2006" and hence that the orders made by the court should have reflected that. Accordingly, it was contended that there was nothing in the nature of the work which could justify the level of fees sought for the second period and that the work during that period was not complex.

48. Additionally, the appellant contends that the trial judge failed to determine the value to the creditors derived from the work during the second period and failed to seek further particulars from the liquidator requiring a breakdown by him of the time expended on each task in respect of which a claim for remuneration was made.

49. Further, it is contended that a reduction in the remuneration ought to have been made in light of the fact that the fees claimed for period 2 exceeded very significantly the estimates provided at the relevant interim application to the court by the liquidator.

Appellant's contentions regarding Period 3 – 1st October, 2007 to 31st March, 2009
50. The work claimed for by the liquidator in the third period totalled 1,079.50 hours and encompassed four separate issues namely:

(i) dealing with the Sony claim;

(ii) liaising with the Environmental Protection Agency regarding an IPC licence;

(iii) an application to the High Court to approve settlement of a claim; and

(iv) the disallowing of one outstanding preferential claim and the payment out of a 50% dividend to all preferential creditors on 17th December, 2008.

The appellant contends that in substance the work in relation to the Sony aspect had concluded in the second period and that a vigilant scrutiny would have shown that the sums claimed were not reasonable in the circumstances, records provided did not appear to be contemporaneous and that the "prudent man" test was not employed in respect of the liquidator's actions.

Chartered Accountants of Ireland file review
51. Further, the appellant contends that three senior members of staff , including the liquidator, charged time to the creditors of the company for preparing the file for an Institute of Chartered Accountants of Ireland file review and inspection in respect of "compliance review". In regard to this aspect of the claim the appellant asserts:

> "This was in respect of a regulatory review by the Institute of Chartered Accountants of Ireland and it is submitted that the cost of complying with regulatory reviews is a routine cost of business or 'overhead' for any insolvency firm and that it is inappropriate to charge creditors for same. It is respectfully submitted that had the learned High Court judge been 'vigilant in scrutinising' the liquidator's application that she would have discovered these improper charges and disallowed same."

52. The sum claimed was of €1,537.50. At the hearing of the appeal the liquidator indicated that this sum was not being pursued now and hence this issue does not required determination in this appeal.

Appellant's contentions regarding Period 4
53. The fourth and final period of this liquidation ran from 1st April, 2009 to 30th September, 2011 and the total net sum claimed by way of remuneration for the liquidator is €196,081. As is clear from the judgment, the trial judge found that the fees claimed exceeded what was reasonable in regard to this period. The liquidator did not appeal that determination. The appellant seeks further reductions and contends that a relatively small amount of work was left to be completed which did not warrant the retention of 26 members of staff of the liquidator's own firm to be engaged in regard to same.

54. The appellant further contends that the delays were excessive in the fourth period and it should not have taken the liquidator two and a half years to complete the tasks in question. Since the High Court had found that the liquidator delayed the conclusion of the liquidation in the fourth period, thereby increasing the costs of same it is argued that there is no objective justification for visiting these additional costs on the creditors.

55. Whilst the trial judge reduced the fees by 20 per cent for this period based on the submissions of the appellant, the appellant contends that the reduction made was not adequate in the circumstances and asserts that "the work carried out conferred no benefit on the creditors whatsoever". The appellants seek a greater reduction to the liquidator's fees in light of the findings of the trial judge herself.

56. The appellant contends that the Sony claim was not particularly complex and that the liquidator had formed an early opinion not to proceed with the claim. With regard to the Willis preferential claim which pertained to defined benefit pension trusts it is asserted that the liquidator had failed to address the Willis claim to be a preferential creditor in a comprehensively informed manner at an appropriate earlier time in the liquidation and in particular in the period 2005 to 2007. In particular, the appellant relies on para. 48 of the trial judge's judgment where she concludes that the Willis claim generated ". . . an unnecessary extra amount of work".

Mr Dully
57. A significant issue in this appeal centres on the discharge by the liquidator of a number of invoices in respect of Mr Dully totalling €100,000 together with VAT. Mr Jim Dully had been retained as a consultant by the liquidator in the course of the liquidation and provided advice to him in relation to the recommencement of trading in both the Dublin and Czech Republic operations of the company and provided other assistance in relation to the realisation of assets for a time during the liquidation.

58. The trial judge refused to interfere with these payments in circumstances where Mr Dully had been paid by cheques drawn on the liquidation account, all of which had been counter-signed by the Examiner of the High Court. The appellant objects that the sums in the invoices exhibited provided no details whatsoever in relation to the actual services carried out by Mr Dully. "Apart from the bald assertion by the liquidator, there is little information available on the benefit derived from Mr Dully's services or the necessity for them." The appellant contends that the trial judge erred in finding that the fees of Mr Dully were not subject to review by the High Court in this application. The appellant, in the alternative, contends that the High Court judge erred in determining that the Examiner had "fixed" and "allowed" the payments by the liquidator of fees to Mr Dully in accordance with the Rules of the Superior Courts, in particular O. 74, r.128 (2)(a), as amended.

59. The appellant sought to present comparators derived from a document compiled by the Revenue Commissioners entitled "Court Liquidations, Creditor Voluntary Liquidations and Receivers by Equitable Execution". This is a document which came into existence subsequent to the hearing of this action in the High Court. I propose to disregard same for the reasons set out below.

Other issues
60. Finally, the appellant advances for the Court's consideration a series of matters which are characterised as "anomalies" which require to be considered or resolved. The respondent objects that many of these issues were not raised in the High Court or not pursued at the hearing.

61. Other issues include that the liquidator sought outside legal advice in relation to 33 retention of title claims, a matter which the appellant contends should have been capable of being addressed in-house given the level of experience of the liquidator.

62. It is contended that the liquidator breached the High Court order of his own appointment dated 17th August, 2005 which directed that monies received by the official liquidator be paid by him into Bank of Ireland at its branch at 2 College Green whereas the liquidator availed of a bank account with Ulster Bank.

63. It is claimed that the notice party to the liquidator's third interim fee application to the High Court on 25th May, 2009 was not in fact constituted a creditor of the company at the time and accordingly was not a valid or correct *legitimus contradictor*. The

appellant takes issue with para. 19 of the judgment which states that GE Commercial Finance was the largest unconnected unsecured creditor. The appellant objects and states that it was in fact the fifth largest unsecured creditor. The largest unsecured creditor at all material times was Plastronix Investments Limited, the appellant herein. The appellant emphasises that GE Commercial Finance was not in fact the notice party to the third application but rather GE Capital Solutions Limited, a company based in London. Furthermore, the corporate entity which consented to the third interim fee application in writing and was named in the court order was another further different corporate entity, GE Money. Neither GE Capital Solutions Limited nor GE Money were creditors of the company.

64. The appellant seeks to reagitate the point abandoned by it in the High Court, seeking the appointment of a forensic accountant to consider the liquidator's fees and costs or in the alternative that this Court on appeal would effect a reduction of the amount of remuneration awarded to the liquidator based on the information before the Court or in the alternative a remittal of the matter to the High Court for reconsideration based on the principles being relied upon and argued before this Court on appeal.

The position of the liquidator

65. It was contended on behalf of the liquidator that since this appeal arises in the context of the official liquidator's application to the High Court for final orders in the liquidation and the judgment of the High Court pertained to one issue arising in the final orders application, namely the amount of the official liquidator's remuneration, this appeal should likewise be confined to the said issue. The liquidator does not take issue with the two reductions made by the High Court in the exercise of its discretion. The liquidator objects that the appellant seeks to raise a significant number of arguments which were not opened before the High Court and were not subject to consideration by the trial judge.

66. With regard to the level of detail which is required to be given by the official liquidator in an application such as this, it was contended that the level of detail furnished in this case was consistent with existing practice and was appropriate. Further, it was contended that if this Court was to conclude otherwise and take the view that the existing practice is not sufficient it would not be appropriate to retrospectively apply any new practice concerning the level of information to be provided in the case of a liquidation such as this which dates back to 2005, nor would it be appropriate to reduce the level of the official liquidator's remuneration by reference to any perceived flaw in the "old practice".

67. Insofar as the appellant sought to make new arguments in the course of this appeal or to revive an argument abandoned before the High Court it is argued on behalf of the liquidator that such an approach is impermissible in light of the jurisprudence including *Movie News v. Galway County Council* (unreported, Supreme Court, 25 July 1977) and *Lough Swilly Co-operative v. Bradley* [2013] 1 IR 227.

68. Fifteen separate issues are identified by the liquidator as constituting "new arguments" which, it is contended, ought not to be entertained in this appeal.

69. The correct approach to these issues particularly in the context of the Supreme Court decision in *Lough Swilly* will be considered further hereafter.

70. The liquidator contends that this Court should not interfere with the orders made in the High Court unless it is clear that the discretion has not been exercised within the parameters of what might be described as a reasonable exercise of that discretion.

71. It is asserted on behalf of the Liquidator that the level of information provided when seeking remuneration, both at the final orders application and in the earlier interim applications was not deficient in light of the existing practice of the High Court and that the appellant's claim failed to have regard to that fact. It was asserted that whilst this Court is free to depart from its previous practice, any such departure ought to be on a carefully considered basis so as not to cause injustice to parties who had relied upon the court's previous practice.

72. It was contended that since the decision in *Re Sharmane Ltd*. was given on 30th July 2009, by which date the bulk of the work in this liquidation had been carried out, the principles set out in that judgment should only be applicable prospectively, particularly with the obligation to furnish additional material to verify the nature of the work carried out; its complexity and the importance or value of that work to the client. It was contended that the court should have regard to the fact that *Sharmane* concerned an examinership rather than a liquidation and that that latter judgment did not set out amended principles concerning the provision of information by an insolvency professional.

73. The respondent contends that there were a number of complex issues in the liquidation which required significant work by the Official Liquidator and his staff. This included the necessity of the company to trade for a period of 15 weeks in 2005. It was also contended that a further complicating factor developed by virtue of the desire of Mr. Nangle, a director of the company and also a director of the notice party, Plastronix, that the Official Liquidator would pursue a claim against the Sony Group in respect of costs incurred and losses suffered as a result of Mouldpro relying upon Sony's production plans for the year 2005/2006.

74. It was accepted on behalf of the Liquidator that the judgment of Finlay Geoghegan J. in *Haydon Private Clients Ltd*. [2012] IEHC 505, reiterated the position that it is appropriate to have regard to the value of work done by a liquidator and also the costs incurred in rendering it. However, it was contended that the decision in *Haydon* is distinguishable on its facts.

75. It was accepted on behalf of the Liquidator as uncontroversial that a court should be vigilant in scrutinising an application for sanction of payment by an insolvency practitioner.

76. It was acknowledged on behalf of the Liquidator that in certain respects a liquidator is a trustee for the general body of creditors of the company. However, to an extent it was sought to distinguish the decision of Finlay Geoghegan J. in *DR Developments* [2012] 1 ILRM 374.

77. In the course of submissions in this Court on behalf of the Liquidator, it was denied that the Liquidator's duty to account to creditors in relation to how he exercises his powers and in relation to the property with which he deals extends to a duty to justify any remuneration sought as is contended for by the appellant. In particular, it was asserted that the jurisprudence, including the judgment of Ferris J. in *Mirror Group Newspapers*, does not impose any such duty to account "to justify any remuneration sought".

78. The liquidator acknowledges that it clear from the judgment of the trial judge that she approved the statement of Ferris J. in the English High Court in *Mirror Group Newspapers plc. v. Maxwell (No. 2)* [1998] 1 BCLC 638, where he said:

> ". . . time spent represents a measure not of the value of the service rendered, but of the costs of rendering it. Remuneration should be fixed so as to reward value, not so as to indemnify against costs."

79. It was contended that it is clear, particularly from para. 17 of the High Court judgment, that the judge referred to the current Irish system "in a context where the starting point is a computation of the remuneration based upon time spent and the relevant charge out rate".

80. Insofar as the appellant has contended that the High Court failed to apply the "prudent man test" in this case, the Liquidator asserts that such a test does not form part of Irish law and is, further, not entirely appropriate in the context of a liquidation. It is contended that such a test is inadequate by reason that, in a liquidation, not all work performed or required to be done may be of importance or value to those entitled on a distribution of the company's assets.

81. With regard to the remuneration claimed in respect of period one, it was asserted that the Official Liquidator's position is that extensive work was carried out in order to ensure that the trade could recommence in a way which was going to enhance the value of the assets to be realised in the liquidation and that post-liquidation trading ensured realisation of larger debtor balances.

82. Regarding period two, from 1st March 2006 to 30th September 2007, it was argued on behalf of the Liquidator that work was done. As regards the initial estimate anticipating that an additional €300,000 in fees and outlay would be required, that that picture had changed significantly by December 2007, a fact which the judge of the High Court had acknowledged.

83. With regard to period three from 1st October 2007 to 31st March 2009, it was contended that the proposed claim as against the Sony Group, which was being advocated by Mr. Nangle, added to the fees incurred and that significant work was in fact done in seeking to pursue the proposed Sony claim.

84. Concerning period four, it was emphasised on behalf of the Liquidator that although 26 staff were retained at this latter stage, they were junior staff involved in minor administrative tasks and that a relatively small amount of work was being done in that final period by the senior staff members including the Official Liquidator himself. It is denied that there was any undue delay.

85. With regard to the claim for a review of payment made to Mr. Jim Dully, the Official Liquidator objects that these fees are not properly part of this appeal and that it is neither necessary nor appropriate to examine the issue. It is contended that the determination of the trial judge that the fees of Mr. Dully are not subject to any review by the High Court should not be interfered with, or in the alternative, that since the Examiner allowed the payment of the fees to Mr. Dully in accordance with the Superior Courts Rules by countersigning the relevant cheques, it is not open to this Court to interfere with same.

86. With regard to the decision of the Official Liquidator to exclude Plastronix as a *legitimus contradictor*, the Official Liquidator emphasises, in particular, his second affidavit sworn on 27th January 2012, where it is suggested that since Mr. Nangle, the principal of Plastronix was retained by the Official Liquidator in respect of advices in relation to the Sony claim, it was not thought appropriate to make Plastronix a notice party.

The Function of this Court

i. Discretion

87. While, as this Court has frequently stated, the appellate jurisdiction of this Court as conferred by Article 34.4.4 of the Constitution cannot be artificially cut down by rules of practice or judicial statements, the Court will nonetheless afford considerable weight to the exercise of a discretionary jurisdiction by the High Court. This point was acknowledged by Irvine J. in Emo *Oil Ltd. v. Willowrock Ltd.* [2016] IECA 200, delivering the judgment of this court:

> "While an appellate court clearly enjoys the jurisdiction to overturn an order made by a High Court judge in the exercise of his/her discretion, it should nonetheless attach significant weight to the conclusions reached by the judge at first instance
>
> . . .It would be an incorrect approach for this Court to engage in a full reconsideration of the matters heard in the Court below and then substitute its own views for those of the High Court judge."

In *Desmond v. MGN Ltd*. [2009] IESC 56, Geoghegan J. for the Supreme Court majority stated:

> "Traditionally the common law view was that a discretionary order should not be interfered with by an appellate court unless the judge at first instance made an error of law in the exercise of the discretion. In a landmark case… In *bonis Morelli; Vella v. Morelli* [1968] I.R. 11, it was pointed out by this court that an appeal lay from every decision of the High Court to the Supreme Court, unless otherwise provided for by law. Any rule by which the court was inhibited from interfering with a discretionary order was not therefore compatible with the Constitution. However, in *In bonis Morelli; Vella v. Morelli* … Budd J. indicated that the court would have to give, "great weight to the views of the trial judge". I think that that is the true legal principle in the light of the Constitution now. But there is an added factor in my opinion. The expression 'discretionary order' can cover a huge variety of orders, some of them involving substantive rights and others being merely procedural in nature including mundane day to day procedural orders, such as orders for adjournments *etc*. I think that in reality over the years since *In bonis Morelli; Vella v. Morelli* this court has exercised common sense in relation to that issue. The court would be very slow indeed to interfere with the High Court Judge's management of his or her list, but in a case such as this particular case where much more substantial issues are at stake the court, while having respect for the view of the High Court Judge, must seriously consider whether in all the circumstances and in the interests of justice it should re-exercise the discretion in a different direction."

88. In *Godsil v Ireland* [2015] IESC 103 McKechnie J delivering the judgement of the court at para. 65 in connection with the exercise of a discretionary power by the High Court noted:

> "such discretion is not one at large but must be exercised judicially and in accordance with well recognised principles.… it was established in *In the Goods of Morelli deceased* [1968] IR 11, and it has never been doubted since, that the Supreme Court has full appellate jurisdiction in respect of such orders. This jurisdiction is not dependent on having to establish an error of law or otherwise on proving that in the exercise of such discretion the trial judge acted erroneously. No such precondition or requirement exists: the jurisdiction is rooted in the express provisions of the Constitution itself (Art. 34.4.3). Therefore, subject only to its terms, any rule of law which inhibits this Court from interfering with a discretionary order of the High Court, is incompatible with the Constitution. I cannot therefore accept any type of prescriptive approach which would tend to trammel or circumscribed the exercise of such jurisdiction."

MacKechnie J. continued at para. 66:

> "It has of course always been the case, that the appellate Court will attach considerable weight to the views of the trial judge: this, which I readily accept, results largely from the constitutional structure of the judiciary. Despite the various ways in which this approach has been expressed over the years, all tend to have the same meaning."

In my view, the nuanced view of Geoghegan J. in *Desmond*, as further articulated by MacKechnie J. in *Godsil*, represents a correct statement of the law in this regard.

89. The real task for this Court is to balance the guiding principles as adumbrated by the trial judge in her judgment in their application to the facts and circumstances as made out by the parties. In the instant case, as the matter proceeded by way of affidavit, this Court is in as good a position as the High Court to carry out that balancing exercise. Since in the instant case the questions of fact determined by the court of trial did not depend on a choice of alternatives arising out of divergent oral testimony but amounted instead to a conclusion in the nature of an evaluation of affidavit evidence, the Court of Appeal is itself free to rely on its judgment as to whether the evaluation made by the Court was correct or not on the grounds that its competence to evaluate the facts in question is no less than that of the original tribunal of fact. I am fortified in my view in that regard by the judgment of Henchy J. in *Northern Bank Finance Corporation Limited v. Charlton* [1979] IR 149 at p. 192.

90. I am satisfied on a review of the jurisprudence that the discretion of the Court in respect of the remuneration of a liquidator pursuant to s. 228 of the Companies Act 1963 constitutes a jurisdiction analogous to that which exists pursuant to s. 29 of the Companies (Amendment) Act 1990 in respect of the remuneration of an examiner. It is noteworthy that in *Re Marino Limited* [2010] IEHC 394, Clarke J., following Hamilton C.J. in *Re Combe Importers Limited* (unreported, Supreme Court, Hamilton C.J., 22 June 1995) determined that the court has an obligation to be vigilant in scrutinising any application for costs brought by an examiner pursuant to s. 29. I am satisfied that the exercise of discretion is likewise informed by the obligation for vigilant scrutiny when an application for costs falls to be considered pursuant to s. 228.

Basis of assessment of liquidator's remuneration
91. Statutory guidance for the relevant period under consideration in this liquidation was to be found in s. 228 of the Companies Act 1963 ("the 1963 Act"). The relevant provision stated as follows:

> "The following provisions relating to liquidators shall have effect on a winding-up order being made—
>
> . . .
>
> (d) a person appointed liquidator shall receive such salary or remuneration by way of percentage or otherwise as the court may direct, . . ."

A liquidator is an agent of the company and he owes fiduciary duties to it in addition to his statutory obligations. The Companies Act 2014 has brought about significant changes to the process whereby the liquidator's remuneration is fixed, particularly in Part XI, Chapter 8, of that Act. However, that statute was inapplicable with regard to any part of the periods in question in the instant case.

92. Order 74 of the Rules of the Superior Courts governs the winding up of companies. The applicable operative rule at the time of the events the subject matter of this remuneration claim was O. 74, r. 46 which provided:

> "An Official Liquidator shall be allowed in his accounts or otherwise paid, such salary or remuneration as the Court may from time to time direct and in fixing such salary or remuneration the Court shall have regard to any necessary employment of accountants, assistants or clerks by him. Such salary or remuneration may be fixed either at the time of his appointment or at any time thereafter. Every allowance of such salary or remuneration, unless made at the time of his appointment or upon passing an account, may be made upon application for that purpose by the Official Liquidator on notice to such persons (if any) and shall be supported by such evidence as the Court shall require. The Court may from time to time allow such sum (if any) as the Court shall think fit to the Official Liquidator on account of the salary or remuneration to be thereafter allowed. The Court may direct that an inquiry be held by the Examiner or the Master as to the salary or remuneration of the Official Liquidator and that the Examiner or the Master (as the case may be) do report thereon to the Court. The Master shall have the same powers as the Examiner in conducting any such enquiry."

Fair remuneration and the practice of the courts
93. Considering the effect of the statute and Rules, McCarthy J. in *Merchant Banking Limited (in liquidation) in the matter of the Companies Acts 1963 – 1983*, [1987] ILRM 260, 261 stated:

> "The effect of the statute and rules are, subject to one qualification, correctly reflected in Keane *"Company Law in the Republic of Ireland"* (Butterworths, 1985) at para. 34.47 in these terms:-
>
> > 'The Court directs what remuneration the Liquidator is to receive. There is no scale of fees fixed for remuneration: the Court considers the circumstances of the particular case and determines what is fair. The Court is in no sense bound by the scales of fees fixed for accountancy work by professional institutions, although it may take such scales into account in determining what is fair remuneration if it thinks proper. In practice, the Court will naturally seek to ensure that there is reasonable uniformity in the fixing of remuneration for accountancy work of similar types. In order to achieve this result, a practice has developed in recent times of appointing a creditor - usually the Revenue - to represent the general body of creditors in an inquiry into the Liquidator's charges before the Examiner. The procedure is not dissimilar to the taxation before a Taxing Master of a successful litigant's costs. The Examiner then submits a report on the inquiry to the Judge.'

McCarthy J. continues:

> "I respectfully adopt this summary with the qualification or addition that the inquiry into the Liquidator's charges before the Examiner is one of amount and not of nature or kind, a qualification highlighted in the instant appeal. I would endorse the practice of appointing a creditor to monitor the inquiry into the Liquidator's charges."

94. The Supreme Court noted that the trial judge had invoked the powers now to be found in O. 74, r. 46 to have an enquiry held by the Examiner as to the remuneration claimed by the official liquidator. In that case the trial judge in the High Court had ordered an enquiry by the examiner in December, 1984 and the report was furnished to the High Court in February, 1985.

95. The High Court does not appear to have made directions for an O.74 enquiry to be held by the examiner as to remuneration claimed by an official liquidator frequently in the years post 1987.

96. In *Re Car Replacements Limited* (unreported, High Court 15 December 1999) Murphy J., in considering s. 228, stated:

> "Despite this wide discretion, the practice of the courts has been for many years to determine the remuneration of an official liquidator on the basis of the hours worked by him and his staff. No doubt, this procedure has its own infirmities. There was no scale of the appropriate rate of the remuneration and it is frequently argued that such a system does nothing to encourage expedition in the completion of the winding up of the affairs of a company. In the present case, the official liquidator has throughout presented his claim for remuneration on the basis of the hours worked, and it is agreed by Primor and the other notice parties who appeared on the application that the rates claimed by the official liquidator were appropriate and that no dispute arose as to the hours worked by him and his staff on the winding up of the companies viewed as a whole."

97. By contrast with the facts *in Car Replacements Limited*, Plastronix, although the largest unsecured creditor, the notice party in the instant case, was not a notice party appointed to represent the general body of unsecured creditors in the first three applications for interim payments brought by the liquidator. Plastronix has now raised concerns regarding the entire period of the liquidation around the lack of expedition and significant delays in the winding up of the affairs of the company together with concerns regarding the level of remuneration sought and the very significant number of hours claimed to have been worked.

98. Given the important function that a *legitimus contradictor* discharges, as found by the trial judge at para. 9 of the judgment: "It has also been the practice to put a creditor likely to be affected by the determination of the remuneration on notice and to request that person to act as a *legitimus contradictor*.", in holding the liquidator as a fiduciary to account , a position not disputed by the liquidator, it is important that those concerns are carefully evaluated.

99. In his judgment in *Re Car Replacements* in 1999 Murphy J. was very much alive to the inherent risks in the approach of the courts at that time which was noted to be still largely based on time spent and charge-out rates.

100. The dead hand of self regulation does not oust the courts' function in ensuring insofar as reasonably practicable that in the discharge of its statutory functions pursuant to s. 228 (d) this function is performed in a manner consonant with the duties and obligations of the liquidator as a fiduciary and an officer of the court and having due regard to the obligation to balance the respective rights of all interested parties including creditors.

Principles applicable in the exercise of discretion pursuant to s. 228(d)

a. fairness
101. It is clear from the *dictum* of McCarthy J. in *Merchant Banking Limited* that an important consideration on the part of the Court is fairness. Accordingly, the Court is not bound by the existence of scales of fees, though it is entitled to take such scales into account if it thinks it proper to do so in the exercise of arriving at what constitutes a fair remuneration in all the circumstances of the case.

b. elements as would be taken into account by professionals
102. It was noted by Finlay Geoghegan J. in the significant decision *Sharmane Limited* [2009] 4 IR 285 that a practice existed to seek measurement of costs based on charge out costs computed from hours worked and hourly rates varying depending on the expertise and level of seniority of the liquidator and those engaged along with him. In that case the issue concerned the remuneration payable in an examinership pursuant to s. 29 of the Companies (Amendment) Act 1990 (as amended). The examiner had been appointed in late 2008. With regard to that practice the learned judge stated:

> "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." (para. 36 of judgment).

c. reasonable
103. The principles set forth in *Sharmane* were subsequently cited with approval in a number of significant decisions regarding remuneration, in particular Kelly J. in *Re Missford* which pertained to an examiner. The ambit of that function was helpfully articulated by Finlay Geoghegan J. in *Sharmane* in the context of an examiner, however I am satisfied that the principles are equally applicable to a liquidator in the context of the court discharging its statutory functions under s. 228 of the 1963 Act. It is clear from the jurisprudence that s. 228(d) confers on the court a supervisory function in regard to liquidators' remuneration and fees.

d. precluded from simply approving an hourly charge out rate
104. In *Missford Limited*, Kelly J., in the context of an examinership stated:

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

He expressly agreed with the view of Finlay Geoghegan J. in *Re Sharmane Limited* [2009] IEHC 377.

105. Clarke J. in *Re Marino Limited* 29th July, 2010 cited the dictum of Kelly J. in *Missford* with approval. The significance of *Missford* is that at issue in that case, as in this appeal, was not alone the rate of remuneration, but also the amount of work to which the rate should be applied.

e. vigilant scrutiny
106. In the course of his judgment in *Re Marino Limited*, Clarke J. identified the inherent dangers and risks in an hourly rate of payment approach where he stated:

> "Sometimes the payment of an hourly rate is presented as the most transparent way of determining an appropriate level of remuneration for professionals. While such a method of charging has its merits, it is, in my view, possible to exaggerate

the extent to which it may provide an entirely transparent way of charging."

In *Marino*, Clarke J. expressed the following view:

> ". . . there are some similarities between party and party costs of litigation and the costs of examiners in the case of a failed examinership. Like all analogies it should not be pushed too far. However, the reason for exercising scrutiny is broadly the same. In litigation the successful party is entitled to have its costs paid on a party and party basis by the loser. It follows that the amounts which it may be reasonable to impose on that losing party need to be scrutinised. On the one hand parties should be entitled to incur reasonable expense in bringing successful cases to court and should not be unduly penalised by not allowing proper recovery of those costs in the event that they should succeed and have costs awarded to them. On the other hand, there must always be significant scrutiny in cases where one person is being expected to pay sums incurred by someone else."

f. that the hours were actually worked and were necessary
107. The overall approach of Clarke J. in *Re Marino Limited* was to strike a balance involving the legitimate interests of creditors who effectively must foot the insolvency practitioner's bill. He continued:

> "As pointed out by Finlay Geoghegan J. in *Sharmane*, the exercise of scrutinising the fees of an Examiner is not confined to identifying that the hours charged for were actually worked and were necessary, and that the rates per hour are as per the relevant professionals' normal charge out rates. Rather the court is required to take an overall view as to whether the costs being imposed on the creditors are, in all the circumstances of the case, reasonable. While the normal rates charged in the marketplace and the normal rates charged by the individual practitioner are significant factors, those rates are not the only matters to be taken into account. I am not, therefore, satisfied that there is any proper basis for departing from the views of Kelly J. as expressed in *Missford*." (para. 3.10).

g. regard for those who ultimately pay the costs
108. He went on to state that the Court was under a duty to carefully scrutinise the costs of the examiner because those costs are ultimately going to be paid by someone other than those who are directly or indirectly involved in the appointment of the examiner in the first place and that for that reason it was not appropriate for a court to countenance a very wide disparity in the rates of remuneration that should be paid to examiners. The learned judge concluded in light of *Missford* that he could not accept a rate of remuneration in excess of €375 per hour for an individual at partnership level.

Attempts to Raise New Issues on Appeal
109. This action was heard on affidavit in the High Court. Certain issues referenced in the affidavits sworn on behalf of the appellant in the proceedings were not argued in the High Court. Separately, it is noteworthy that whilst it was proposed that a forensic accountant be appointed by the High Court to carry out an exercise with regard to the claims of the Official Liquidator in regard to remuneration, in substance, that claim was abandoned in the course of the hearing which is expressly referenced by the trial judge. Clearly, it is not now open to the appellant in this appeal to revive such an abandoned proposition. Accordingly, I am satisfied that the contention advanced on behalf of the appellant in this appeal that the court should appoint a forensic accountant to consider the Official Liquidator's fees and costs, this ought not be acceded to.

110. With regard to the other issues raised by the appellant and characterised by the respondent in the course of this appeal as constituting new arguments, I am satisfied that while some undoubtedly constitute new arguments which ought not be entertained in light of the dictum of O'Donnell J. in the Supreme Court in *Lough Swilly Cooperative v. Bradley* [2013] 1 IR 227, where he stated:

> "At one extreme lie cases such as those where argument of the point would necessarily involve new evidence, and with a consequent effect on the evidence already given. . .
>
> or where a party seeks to make an argument which was actually abandoned in the High Court . . .
>
> In such cases leave would not be granted to argue a new point of appeal."

Clearly, any issue being raised by the appellant which falls at this end of the spectrum will to be disregarded in the context of this appeal.

111. However, the approach of O'Donnell J. in the *Lough Swilly Cooperative* decision involved evaluating the varying situations that can emerge across the entire spectrum of scenarios and a very small number issues raised fall at the more benign end of the spectrum of case described by O'Donnell J. of which he states:

> "At the other end of the *continuum* lie cases where a new formulation of argument was made in relation to a point advanced in the High Court, or where new materials were submitted, or perhaps where a new legal argument was sought to be advanced which was closely related to arguments already made in the High Court, or a refinement of them, and which was not in any way dependent upon the evidence adduced. In such cases, while a court might impose terms as to costs, the court nevertheless retains the power in appropriate cases to permit the argument to be made."

112. A number of arguments advanced in this appeal are reformulations or refinements of the arguments made in the High Court or are closely related to arguments already advanced in the High Court. To the extent that it is appropriate to do so it is proposed to consider such argument to the limited extent that is appropriate only where they constitute a refinement of or are closely related to arguments already made before the High Court.

The Principles Governing Approval by the Court of a Liquidator's Remuneration
113. The liquidator is a preferred creditor in regard to his own remuneration.

The decision in *Red Sail Frozen Foods*
114. The judgment of the High Court in the matter of *Red Sail Frozen Foods Ltd.* was delivered by Laffoy J. on 20th October 2006 during the course of the first half of the second period of this liquidation and five years prior to its completion. It is noteworthy that the receiver whose fees were being considered had been appointed in 2002. It represents one of the first occasions when the High Court considered the decision of Ferris J in the English High Court in *Mirror Group Newspapers plc. v. Maxwell* [1998] BCLC 638. It is noteworthy that in the course of her judgment, Laffoy J. cited with approval the statement of principle in the judgment of Ferris J. in

relation to the remuneration of office holders such as administrators, liquidators, receivers, trustees in bankruptcy *etc.* The judge stated:

> "Having stated the essential point, that office holders are fiduciaries whose fundamental obligation is a duty to account, both for the way in which they exercise their powers and for the property with which they deal, Ferris J. stated (at p. 648):
>
> > '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 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'."

115. Laffoy J. also cited with approval the *dictum* of Ferris J. at p. 652 of his judgment :

> "In my judgment it is vital to recognise three things in this field. First, time spent represents a measure not of the value of the service rendered but of the cost of rendering it. Remuneration should be fixed, so as to reward value, not so as to indemnify against cost. Second, time spent is only one of a number of relevant factors, the others being, as I have said, those which find expression in r. 2.47 and similar rules. The giving of proper weight to these factors is an essential part of the process of assessing the value, as distinct from the cost, of what has been done. Third, it follows from the first two points that, as the task is to assess value rather than cost, the tribunal which fixes remuneration needs to be supplied with full information on all the factors which I have mentioned."

116. Of particular note is para. 35 of her judgment where Laffoy J. states:

> "The argument advanced by counsel for the Companies in relation to the quantification of the Receiver's remuneration is premised on the entitlement of the owners of the assets out of which the assets are to be paid to know by what criteria the amount of the remuneration claimed is calculated. That proposition is correct, although, in an insolvency context, the owners of the assets will be the creditors whose debts require to be met. Essentially the argument advanced on behalf of the Companies was that the information provided by the Receiver falls short of enabling any real analysis of either the remuneration claimed or the legal costs in respect of which he seeks reimbursement."

117. In the course of the judgment in considering the quantum of remuneration, costs and expenses claimed by the Examiner, the Court noted at para. 33 of the judgment:

> "It is not in dispute that the Court must determine reasonable remuneration and legal expenses. Counsel for the banks submit that the starting point for the court's consideration of what constitutes reasonable remuneration and the measurement of the Examiner's reasonable legal expenses should be the amount which the Examiner agreed to accept with the directors and the investor in February 2009, at the time of the formulation of the proposed schemes of arrangement. They submit that, insofar as the Examiner claims that there was subsequently significant extra work then not envisaged, that the Examiner should not be entitled to recover same as in part, at least, it was caused by a lack of clarity on certain aspects of the proposed schemes of arrangement."

118. Laffoy J. unequivocally accepts the aforesaid proposition as a correct statement of the law. In the instant case, it being an insolvency, the owners of the assets are, in truth, the creditors. Leaving to one side the preferred creditors, in respect of whom there has at all material times been confirmation that their debts will be satisfied in full, the unsecured creditors whose debts required to be met included, in order of quantum, the appellant itself, Plastronix. Brian Nangle, Pat Coyne and Munekata Company Ltd. amongst others.

119. I am satisfied that the principles set forth in *Red Sail Frozen Foods Ltd*. represent the law both as regards the significance of value in the process of calculation of remuneration and also in regard to the obligation to ensure full information is made available, and finally, in regard to the obligation of the Liquidator to ensure that in any application to the court, a proper, *legitimus contradictor* or amicus curiae is nominated who will be in a position to effectively perform the obligation of ensuring that the measurement of remuneration is the subject of a meaningful and transparent consideration by the court at each interim application.

The decision in *Re Sharmane*

120. Apart from the principles set out in *Red Sail* by Laffoy J. in her judgment delivered in October 2007, a key decision is *Re Sharmane Ltd*. [2009] 4 IR 285, delivered by Finlay Geoghegan J. on 30th July 2009 in the fourth period of this liquidation. Sharmane reflects a clear reiteration and elaboration of the statements of principles referred to in the English High Court decision in *Mirror Group Newspapers v. Maxwell* [1998] as cited with approval by Laffoy J. in *Red Sail Frozen Foods Ltd. (In Receivership)* [2000] delivered in October 2006. Whilst the case of *Sharmane* concerned an examinership rather than a liquidation, it has at all times been acknowledged that the principles set out in that judgment are applicable across the board to all insolvency practitioners. There cannot have been any doubt since the delivery of that judgment that in the determination of the remuneration of an office holder, including an official liquidator, the court will not reach its decision by reference to total charge out costs alone, the hours expended and relevant hourly rates, but will have regard, in particular, to the importance and the value of the work to the client, the complexity of the work undertaken and the nature of the work actually carried out by the liquidator.

Court's approach

121. The appropriate approach of the court to a claim for remuneration has been reiterated on a number of occasions including by Kelly J. in *Re Missford Ltd*. [2010] 3 IR 7.The Court in that case noted the wide variety in the hourly rates chargeable by examiners. In that regard, Clarke J. in *Marino* was of the view that a uniform rate was not to be imposed:

> *"In that context I am not dealing with questions as to whether the hours claimed were actually worked, for as I have pointed out, there is no question in this case but that the relevant hours were actually worked. However, persons of different experience and expertise may well be able to do the same work in very different periods of time. Doubtless the differential rates charged by different personnel within the same firm, at least in part, reflects that fact. There can be little doubt but that large firms, which may have a significant level of expertise in different areas available within the*

> *same firm, may be able to bring efficiencies to bear on the conduct of work which would not be available to a smaller firm. On the other hand, large firms typically have higher overall overheads not otherwise recovered from clients. It does need to be recalled that a charge out rate by a professional in a firm is not the same as that person's pay. Those overheads of the firm which are not directly charged to clients need to be met out of the fees charged. It is possible that a large firm may not cost more at the end of the day if higher hourly rates might be offset by lower number of hours. However, even that factor is itself variable for not all work is of a type which can be shortened by expertise or experience."*

The Court went on to conclude:

> "Having regard to the variety of factors that could legitimately be taken into account, it does not seem to me that it would be appropriate to impose a single fixed hourly rate, nor to insist that the hourly rate method is the only means by which the level of remuneration of examiners should be calculated."

Multi-faceted approach

122. In *Re Carton Limited* [1923] All E.R. 622 at p. 627 P.O. Lawrence J. had this to say in regard to a claim for remuneration on a time basis:

> "The Court as a general rule only fixes remuneration on a time basis if there is not method which would operate to give the liquidator fair remuneration. Experience has shown that the time occupied by a liquidator and his clerks affords a most unreliable test by which to measure the remuneration. Even the best accountant may spend hours over unproductive work, let alone his more or less efficient staff of clerks. . . The Court has long since come to the conclusion that the proper method to adopt whenever it is practicable is to assess the remuneration according to the results attained. . ."

123. Over the ensuing decades it became readily apparent, particularly in a rising property market, that if remuneration were to be benched as a percentage of realisations and distributions then readily realisable assets of high value could lead to disproportionately higher remuneration with little or no effort on the part of the officeholder and by contrast in a complex case to poor recompense if the value of the assets were low in relation to the amount of work undertaken.

124. Hence the attraction of the multi-faceted approach outlined by Finlay Geoghegan J. in Sharmane which represents good law in this state.

Legitimus contradictor

125. "A *legitimus contradictor* is a person who puts an opposing point of view before the court" Murdoch's *Dictionary of Irish Law* (4th ed Butterworths 2014) In the instant case the liquidator applied to the court on four separate occasions. On the first occasion the notice party was the Revenue Commissioners. In the course of her judgment the trial judge stated at para. 9 of the judgment;

> "It has been the practice to put a creditor likely to be affected by the determination of the remuneration on notice and to request that person to act as a *legitimus contradictor*. In many cases, this is the Revenue Commissioners as a preferential creditor. In instances where the preferential creditors may be paid in full, normally the largest unsecured creditor will be put on notice. There may be particular reasons in some instances why a different creditor may be chosen."

126. In the first application the Revenue Commissioners were put on notice as they were a preferential creditor. The Revenue Commissioners and the liquidator would have been aware that there was no risk but that the Revenue Commissioners' entitlements would be disbursed in full. Given that it was the first application to the court I find on balance that it was an adequate discharge of the liquidator's statutory fiduciary obligation.

127. The likelihood that any objections at all could be made is dependent on the *legitimus contradictor* who is on notice and appearing at the Court application being a creditor who stands in a position likely to be directly affected by the determination with regard to remuneration. This reinforces all the more the desirability in the public interest of ensuring that the *legitimus contradictor* is, in general, the largest or a significant unsecured creditor.

128. However, the measures taken by the liquidator in the second, third and fourth applications were in all the circumstances sub optimal – specifically in the third interim application -when no meaningful *legitimus contradictor* was before the court. A dominant purpose of an interim application must be recalled. It is to seek interim approval for the liquidator's remuneration. The practice is that the liquidator then secures an order for payment out of fees on account. Thus it confers a significant pecuniary benefit on the liquidator – albeit subject to variation at the end of the process.

129. In any case where a liquidator comes to court seeking a payment out on account, it is of critical importance that such a payment out is predicated on a proper evaluation of the fiduciary obligations of the claimant in the first place.

130. Interim payments out are harbingers of expectation. The requirement of vigilant scrutiny predicates that there is a holding to account at all steps of the process and same can only be achieved where there is meaningful engagement by a *legitimus contradictor* who is likely, on the facts obtaining, to be impacted by the rewards of remuneration.

131. The trial judge noted at para. 20 of the judgment that in the context of the present application when an issue was raised regarding excessive legal costs of the liquidator, "…agreement was reached on those by a reduction of 10% of the legal costs in respect of the final period." This ably illustrates the importance of a fiduciary being held to account and the innate risks in self-regulation.

132. As stated above in the Liquidator's first interim fee application, the notice party was the Revenue Commissioners. In the second interim fee application, the notice party was GE Commercial Finance. However, the notice party to the Liquidator's third interim fee application which was brought before the High Court on 25th May 2009 was GE Capital Solutions Ltd. (London) which does not appear to have been constituted a creditor. Further, the documentation appended to the Liquidator's second affidavit, Exhibit 2PS8, indicate that it was an entity "GE Money" who consented to the interim application. This represents an unsatisfactory state of affairs, because in truth in contrast to a significant unsecured creditor such as Plastronix, this particular notice party did not really have a sufficient stake in the outcome of the liquidation.

133. In is important to have regard to the purpose of a *legitimus contradictor* in such an interim application. As is clear from the judgment of Laffoy J. in Red Sail delivered in October 2007 and referenced above, the High Court does not have available to it the option of having the costs or fees sought to be approved and invariably drawn down on an interim basis, independently evaluated.

134. The court must fall back upon its own resources in carrying out the exercise of evaluating the documentation and material presented to it in assessing the value of the work. The court is charged with the obligation of being vigilant in scrutinising the application. The *legitimus contradictor* performs an important function in assisting the court in ensuring that a liquidator is held to account in regard to remuneration. Therefore, it is incumbent on the liquidator to ensure, in the interests of transparency, that the limited resilience which is afforded to the process and to assist the court in having a proper *legitimus contradictor* is not unduly diminished and that significant creditors are not excluded from being appointed as *legitimus contradictor* for reasons predominantly dictated by the official liquidator's personal convenience. In the instant case, from and including the first interim fee application onward, it would have been preferable to have a significant unsecured creditor constituted *legitimus contradictor* in the applications brought by the Liquidator to approve the interim fee application.

135. In an affidavit sworn on 27th January 2012, the Official Liquidator had this to say regarding his choice of *legitimus contradictor*:

> "52. Mr. Nangle suggests that Plastronix would have been an appropriate party to act as *legitimus contradictor* in respect of my fees applications in this matter. I say and believe that at the relevant times, Mr. Nangle, the principal of Plastronix, was retained by me in respect of advices in relation to the Sony claim. Accordingly, while Plastronix was and remains the largest unsecured creditor, it is not thought appropriate to seek its views in relation to the discharge of my fees, costs and expenses."

It does appear that Mr. Nangle was retained at a remuneration of €1,500 per month for a time by the Liquidator, as stated above. However, I am satisfied that that fact , in and of itself, did not disqualify Plastronix from being the appropriate *legitimus contradictor*.

136. Further, I am satisfied that, in the circumstances, the nomination of GE Capital Solutions Ltd. and/or GE Money as a notice party in respect of the third interim fee application resulted in no effective inputs being provided by way of assistance to the court from any independent notice party in respect of the remunerations claimed in the application heard on 25th May 2009. Thus, the important test established by Finlay Geoghegan J. in the jurisprudence outlined above and in her judgment in the High Court was not satisfied. Whilst it cannot be said that that was the intention on the part of the Liquidator, it resulted in a significant lack of resilience in the process at that time.

137. The test set by the trial judge herself, namely "put a creditor likely to be affected by the determination of the remuneration on notice" does not appear to have been met on the third application.

138. I am not satisfied that there is sufficient evidence available in the affidavits sworn in these proceedings and the exhibits to support the contentions on behalf of the liquidator that they were in effect constrained or entitled to pass over the four largest unsecured creditors from consideration as notice parties. Such a course of action must lead the Court to scrutinise the claims and drafts submitted with the greatest particularity especially in circumstances where it would appear that on none of the first three occasions when the matter came before the High Court did the notice party selected by the liquidator actually appear.

139. In the instant case, at some of the interim stages when the matter appeared before the court the views of the unsecured creditors were not heard, so that there was no real or effective *legitimus contradictor* from that perspective present before the court.

Priority of liquidators fees
140. The liquidator enjoys a special status whose costs are preferential and rank in priority to all others, a factor which has potential implications from a fiduciary perspective.

The liquidator as trustee
141. It was acknowledged on behalf of the Liquidator, that he is, in certain respects, a trustee for the general body of creditors of the company.

142. That a Liquidator is, in certain circumstances, constituted a trustee is well established. In *"Loose & Griffiths on Liquidators"* 8th Ed. 1.5:

> "A liquidator is often described as a trustee and he has duties to the creditors and the contributories to administer the funds of the company, which are said to be impressed with the trust for these parties."

143. The decision of *Oriental Inland Steam Co*. (1874) 9 Ch. App. 557 is cited in support of that proposition. In that regard, as *"Loose & Griffiths on Liquidators"* states, the liquidator is obliged to carry out his duties with proper independence and integrity.

144. However, it is important to draw a distinction between the strict concept of a trust as understood in equity and the statutory trust which the liquidator's position to encompass.

145. In McPherson's, *"Law of Company Liquidation"* 3rd Ed. Sweet & Maxwell 2013, it is stated at p. 443 that ". . . in a number of respects, a liquidator is not a trustee". That is clearly so insofar as, *inter alia*, company property does not actually vest in the liquidator, the legal estate remains outstanding in the company. The same text provides at p. 444 that the liquidator is a ". . . hybrid composite with elements of fiduciary duty, agent and . . . officer of the court."

146. As stated by Mellish L.J. in *Oriental Inland Steam Co*. (1874) 9 Ch. App. 557 "..in a winding up the legal estate still remains in the company. But, in my opinion, the beneficial interest is clearly taken out of the company. What the statute says …is that from the time of the winding up order all the powers of the directors of the company…shall be wholly determined and nobody shall have any power to deal with them except the official liquidator, and he is to deal with them for the purpose of collecting the assets and dividing them amongst the creditors. It appears to me that that does in strictness, constitute a trust for the benefit of all the creditors."

147. There are material distinctions, however, between the statutory trusts governing the liquidator's dealings with the assets of a company in a winding up and the rules of equity which govern a trust of assets established voluntarily by deed or will.

148. A liquidator does not owe to the members of the company or individual creditors all the obligations that a trustee in equity owes to a cestui que trust.

149. The statutory trust arising in a liquidation is a legal construct which confers no beneficial interest on the creditors.

150. The trust arising requires the liquidator to exercise relevant statutory powers for the benefit only of parties entitled to share in the realisation of the assets pursuant to the statutory scheme.

151. As Lord Diplock stated in *Ayerst v C&K (Construction) Ltd* [1976] AC 167 180/181"…the effect of the statute was to give to the property of a company in liquidation that essential characteristic which distinguishes trust property from other property, viz, that it could not be used or disposed of by the legal owner for his own benefit, but must be used or disposed of for the benefit of other persons"

The liquidator as fiduciary
152. Official liquidators are officers of the Court. Accordingly, it is argued by the appellant that equitable principles can be availed of as a baseline for the interpretation and construction of the nature and extent of the duties of the liquidator insofar as statutory or regulatory provisions are incomplete or inexact.

153. In the matter of *DR Developments (Youghal) Ltd. (In Liquidation)* [2011] IEHC 307, which was delivered on 25th July 2011, the trial judge, Finlay Geoghegan J., stated:

> "11. The Official Liquidator is an agent of the company with fiduciary obligations arising from his office and with statutory obligations imposed on him by the Companies Acts 1963 to 2009 (see, inter alia , Keane 'Company Law' 4th Ed. par. 36.107 and Re Belfast Empire Theatre of Varieties [1963] I.R. 41 and 49).
>
> 12. The primary duty of a liquidator is to take possession of the company's assets and protect them; realise those assets and apply those proceeds in distribution to those entitled in accordance with the statutory schemes. He also has additional duties imposed on him by statute, including regulatory obligations of reporting to the Director of Corporate Enforcement and the Registrar of Companies, and unless relieved, bringing applications pursuant to s. 150 of the Act of 1990."

Whilst the key consideration in that case centred on the circumstances when the court might sanction arrangements whereby an official liquidator may be remunerated by a petitioning creditor, Finlay Geoghegan J. emphasised:

> "The fiduciary obligations of the liquidator and the general rules applicable to his remuneration must be borne in mind in making any such arrangements."

That judgment makes clear that where there is an obvious potential conflict of interest for the official liquidator, it is incumbent upon him to make a disclosure to the court so that any potential conflict of interest can be identified and managed.

154. The extent to which, if at all, the law imposes an obligation on an official liquidator to justify any amount or remuneration sought is a matter of sharp contest between the parties.

155. In the instant case, the process of the liquidation extended over a very significant period of in excess of six years, it is important to have regard to the jurisprudence as it evolved over that significant period of time. During the operative period of this liquidation, on a number of occasions, clear statements were made in the High Court as referenced above in the context of insolvency practitioners and that their remuneration and the overall ambit and extent of their professional obligations which are relevant to the extent that they touch and concern the issues under consideration in this appeal.

Estimates
156. In circumstances where the final fees claimed in any period deviates significantly from the estimate submitted for approval to the court circumspection is warranted particularly in regard to the over run. It cannot have been the intention of the framers of the rules that the submission of an estimate of fees to the Court for approval would be a mere gesture drained of all consequence or implication. The practice of the High Court in approving interim payments out to an insolvency practitioner necessitates having as notice party a *legitimus contradictor* who is a significant creditor likely to be affected by the determination of the remuneration otherwise the process presents risks to unsecured creditors

157. The underestimating of future anticipated fees on each occasion calls for careful evaluation and an explanation. Otherwise the process of assessing future anticipated payments risks becoming a sterile exercise, potentially undermining of the Court in the discharge of its supervisory functions. Such a risk can only be effectively guarded against be the presence of a *legitimus contradictor* before the court.

Mr. Dully's fees – The Role of the Examiner
158. An issue which consumed a significant amount of time pertained to the decision of the Liquidator to discharge a fee of €100,000 to Mr. Jim Dully in respect of "invaluable" advices and assistance rendered to the Official Liquidator in the course of the winding of the company. The appellant strenuously contests the value to the creditors of the work done by Mr. Dully, arguing that there was little information available on the benefit derived from his services to the Official Liquidator or the necessity for them, and in particular, it was asserted that, in the case of some of the invoices provided by the Official Liquidator, they provided little or no detail in relation to the services actually carried out by Mr. Dully.

159. It will be recalled that the operative language of O. 74, r.128(2) provided as follows:

> "No payments in respect of bills of costs, charges or expenses of solicitors, accountants, auctioneers, brokers, or other persons, other than payments for costs, charges or expenses fixed or allowed by the court shall be allowed out of the assets of the company unless they have been duly fixed and allowed by the Examiner or the Taxing Master as the case may be."

In the present case Finlay Geoghegan J. noted (at para. 29 of her judgment) that the amounts paid to Mr. Dully were included in the Liquidator's accounts, all of which had been passed by the Examiner:

> "I am satisfied on the facts of this liquidation that the Examiner allowed the payment of the consultancy fees to Mr. Dully by countersigning the cheques in question and it is not a matter for the court in this application to review those payments. There is no requirement that the sanction of the court be obtained for such fees where they form part of the costs of realisation."

160. Under the scheme that obtained during the course of this liquidation, the Examiner did not engage in a process of scrutinising consultancy fees incurred on the part of a liquidator. It would appear that the process was far more cursory than that, and in particular, the primary consideration for the Examiner and the Examiner's Office staff was to ensure that the claim advanced by the Liquidator corresponded to the terms of an extant court order.

161. There is clear authority to confirm that officers of the court, including the Examiner, are amenable to the court, as held, for instance, in *Re Castle Brand Ltd*. [1990] IR 301, where the liquidator of a company applied to the High Court for liberty to pay the costs of a legal costs accountant employed by a firm of solicitors retained by him in connection with the taxation of his solicitor's costs. Carroll J, having considered s. 282 of the Companies Act 1963 and O. 74, r. 128(2), considered the claims of the official liquidator that the costs in question were costs and charges properly incurred by him and had to be allowed by the Taxing Master, reviewed the determination of the Taxing Master previously made pursuant to O. 74, r. 128(2) of the RSC. I am satisfied in light of that authority and having due regard to the inherent jurisdiction of the court to review the acts or omissions of its own officers, that it was open to the trial judge to review the payment out of the disputed monies pursuant to O. 74, r. 121 and/or O. 74, r. 128(2) of the Superior Courts Rules and exercise in supervision by the court of its own officer.

162. Carroll J., in the course of her judgment in *Castle Brand* stated:

> "The liquidator cannot claim to have the same rights as an ordinary client with payout of its own pocket and who can decide whether to compromise or not. The official liquidator is not in the same position. He pays out of funds belonging to the creditors or contributories and the requirement to go to taxation in every case is for their protection to ensure that costs have been reasonably and properly incurred."

That assessment in my view is consistent with the liquidator's statutorily based fiduciary duty.

163. It being established that the court could have directed such a review, the question arises: ought it to have done so in all the circumstances that obtained, including the substantial effluxion of time that had occurred since the payments out to Mr. Dully were made and the generally less prescriptive approach to the discharge of functions by a liquidator that obtained in the initial period of this liquidation? In my view, on balance, taking an overview of the sums involved; the depositions of the liquidator regarding the benefit of the services rendered and the inevitable additional costs to the client that a review process or a rehearing in the High Court would now incur, it would not be proportionate in the circumstances to direct such a course of action. Accordingly, I am satisfied, on balance that the correct exercise of discretion by this Court is not to accede to the application on the part of the appellant to review the payments disbursed by way of consultancy fees to Mr. Dully on foot of cheques countersigned by the Examiner of the High Court in accordance with O. 74, r. 128(2).

Jurisprudence

164. The decision in *Sharmane* represents a clear articulation of the approach previously approved by Laffoy J. two years before and clearly aligns the approach in this jurisdiction to the evaluation of what constitutes reasonable remuneration in respect of a liquidator with the approach in the neighbouring jurisdiction.

165. In my view the principles set forth by Kelly J. in *Missford Limited* in relation to the remuneration of an examiner are important and apply equally in the case of a liquidator. In particular, he stressed that the Court should only make such orders as it thinks proper for payment of remuneration, costs and expenses of an examiner.

> "The court is not a cipher to rubber stamp claims made by an examiner. That is clear from the observations of Hamilton C.J. in *Re Coombe Importers Ltd*. (Unreported, High Court, Hamilton C.J., 22nd June 1995) where he said at p. 6:-
>
> > 'There is no doubt that the court has jurisdiction to review and disallow the remuneration, costs and expenses of the examiner and in view of the priority given to such remuneration, costs and expenses there is an obligation on the court to be vigilant in scrutinising an examiner's application for sanction of payment.'"

166. Kelly J. continued:

> "That vigilant scrutiny can only be carried out effectively if all the necessary information is placed before the court"
>
> "That the vigilant scrutiny of the court was not confined to a consideration of whether the work done by an examiner fell strictly within his powers, but also extended to a consideration of the actual remuneration which was sought to be recovered."

The necessary inference from this statement is that the Courts have regard to value in the overall evaluation of remuneration. It is worthwhile noting that in the Missford case no parties sought to oppose the claim made in respect of remuneration or legal costs. The vigilant scrutiny adopted by the Court of its own initiative extended to considering the results and outcomes achieved. It is noteworthy also that in regard to the legal costs claimed the learned judge referred them to the Taxing Master.

167. Kelly J. further agreed with the views expressed by Finlay Geoghegan J. in *Re Sharmane* delivered the previous year which held that the fees could not be determined by reference only to the total charge-out costs computed from the hours spent based on the relevant hourly rates, though same may comprise one element or factor in determining what reasonable remuneration is. The Court's review extends to an evaluation of the nature of the work carried out, its complexity and the importance or value of that work to the relevant client.

168. The issue was revisited again by Kelly J. in the High Court in November 2010 in *Re ESG Reinsurance Ireland Limited* [2010] IEHC 365. Whilst the issue under consideration was the fixing of remuneration in regard to an administrator, the judgment strongly suggests that similar principles apply across the boards in regard to the fixing of remuneration by the Court for insolvency practitioners and experts:

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

169. The learned judge noted that the legislature has charged the Court with the obligation of fixing the costs, expenses and remuneration:

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

170. He noted that the approach adopted by them in respect of the remuneration of the interim examiner in *Re Missford Limited* had subsequently been approved by Clarke J. on 29th July 2010 in *Re Marino Limited* and the Companies Acts. In the case of Marino, the examiner was appointed on 18th September 2009. The evidence before the Court was that the rate of his remuneration was €560 per hour (the normal rate). At the conclusion of the hearing Clarke J. allowed €375 per hour for those at partner level in the case. The Court noted that even before the reductions imposed by Kelly J. in *Missford* the relevant charge-out rate for partner level personnel in that case had been €425 and that an action be a engineering, the partner level rate sought and obtained in the High Court in 2010 was €300 per hour.

The jurisprudence and estimates

171. An issue raised in this case is the weight and regard which the Court in adjudicating a claim for liquidator's remuneration ought to have regard to the extent to which the claim in any relevant period deviates from estimates submitted to the Court from time to time in the context of interim fee applications. It is asserted that particularly in light of the principle adumbrated by Kelly J. in *Missford* that the Court is not to be treated as a cipher in rubber stamping remuneration claims that a significant and vigilant scrutiny is warranted where, as here, on each separate occasion a significant and materially greater sum is ultimately charged in respect of the relevant period.

172. In my view there is merit in the appellant's contention in this regard. It cannot have been the intention of the legislature that in a process of such significance as a mandatory interim application to the Court in regard to fees that the estimates submitted is not to be the subject of consideration later in circumstances where, as here, the additional liabilities in regard to remuneration adversely directly impact on the creditors' interests.

173. The significance of the practice of the court that such an estimate be provided requires consideration. It cannot have been the intention that such a step would be drained of all consequences and on balance it appears to me that the intention must have been that insofar as practicable an obligation is imposed on the liquidator in his fiduciary capacity to furnish as best he can in all the circumstances a genuine pre-estimation of the costs and fees likely to be incurred for the relevant period under consideration and to ensure the presence of a *legitimus contradictor* before the court. It is noteworthy that in *Re Haydon Private Clients Limited* [2012] IEHC 505 Finlay Geoghegan J. considered an objection to remuneration in circumstances where the estimates furnished at the interim phase had been substantially lower.

174. In that case a relevant fact was that the liquidator, as he acknowledged, had inadvertently failed to include certain fees incurred in the early part of the liquidation in the estimates provided to the Court at an interim application in June 2011.

175. The Court noted that the liquidator sought to explain the difference by identifying additional work which had not been envisaged at the time of the estimate provided to the Court. The estimate was provided to the Court. In that case the trial judge stated:

> "There is an added special consideration on the facts herein. The Court should have regard to the estimate given by the Official Liquidator… This was an estimate given in the course of the liquidation upon which the Steering Committee was entitled to rely. For the reasons already stated, I accept that there was, through error, an underestimate in respect of the unpaid element of the Liquidator's remuneration and legal costs up to 12th November, 2010. I propose taking that error into account in any comparison between the estimate given and fees which the Court is asked to measure. However, insofar as the Liquidator gave, lastly, in June 2011, an estimate intended to cover monies which would have to be paid out in respect of work done since November 2010, to the completion of the liquidation, the Court should have regard to same. I am not satisfied on the affidavits that there is evidence of any significant work which was required to be done between November 2010 and November 2011 which was not predictable by the Liquidator in June 2011."

176. It is clear from that decision that the preparation of estimates is an important aspect of the liquidator's functions and that potential consequences flow where the subsequent increase in remuneration sought beyond the estimate emanates from a reason other that *bona fide* error on the part of the liquidator or significant additional work which was not reasonably predictable by the liquidator at the time that the estimate was submitted to the Court for interim approval in the first place.

177. In the instant case it is noteworthy that in her judgment Finlay Geoghegan J. effected reductions in respect of claims for the final period in 2010, a year during which, as she noted, remuneration claimed in a number of decisions in the High Court in respect of insolvency practitioners was reduced by differing percentages. The Court also had regard to the fact that the subsequent sum sought by way of remuneration exceeded the estimate by a relatively significant additional sum which has had as its immediate consequence a reduction in the funds available for distribution to unsecured creditors:

> "It appears that I should have some regard to this albeit on the basis that it was a genuine error."

178. In my view the decision in *Haydon* is authority for the proposition that if the evidence before the Court on affidavit signifies that there was not significant work actually carried out in the intervening period from the point when the estimate was submitted for approval and approved by the Court, the Court should have regard to the nature and extent of the increase being sought over and above the estimate to evaluate its reasonableness and the Court should consider whether the nature and extent of any unenvisaged additional work that was necessitated but is claimed to have been unforeseeable at the time of the Court application. In every case the work should be demonstrated to have been necessary, and the hours worked. In the instant case, of concern is the fact that on each interim application the estimate bore little or no relationship to the ultimate claim for total remuneration sought in respect of that period.

Public Interest

179. Mr Justice Lightman in his oft quoted 1995 address to the Insolvency Lawyers' Association referred to the visceral disquiet at the level of fees exigible by insolvency practitioners. He considered the attitude to fees and expenditure perceived to be adopted by office holders which he articulated to be explicable only on the basis that the pocket from hence fees were paid was deep, unguarded and belonged to somebody else.

180. Unless, accordingly, the High Court and the Examiner maintains vigilant scrutiny in respect of all aspects of the fees claimed and incurred the expeditious conclusion of an insolvency process is unlikely to be the preferred outcome.

Complexity

181. Whilst there was a sharp divide between the parties with regard to the complexity or otherwise of this liquidation it appears to

me that the key more intricate and complex aspects fell to be dealt with early on in the process.

The prudent man test
182. The duty imposed as a matter of law on an insolvency practitioner has been characterised in other jurisdictions as the "prudent man test". The prudent man test is pre-eminently a concept from trust law. In dealing with the assets and affairs of a trust, a trustee is obliged to act as a prudent man of business would, not on his own behalf but on behalf of persons for whom he is morally obliged to provide, should anything untoward happen. The paramount consideration must be the safety of the trust funds and the avoidance of risk so far as possible. The concept has evolved over time particularly in the area of occupational pensions, imposing on pension trustees even a personal liability in certain instances for investment returns. I am not entirely satisfied that the "prudent man test" in its narrow construction represented the applicable law throughout the tenure by the official liquidator of his office in this liquidation .

183. The language of Ferris J. in *Mirror v. Maxwell* envisaged the "reasonably prudent man" a somewhat different concept in equity. His dictum with regard to the reasonably prudent man is as follows:

> "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 upon them. They are expected to deploy commercial judgment, not to act regardless of expense."

That statement of principle does not appear to me to deviate in any material respect from the principles which have been adumbrated by the High Court by Kelly J. in *ESG Reinsurance Limited* and *Missford Limited* where he repeatedly set out the obligation of the Court to be vigilant in scrutinising an application for sanction of payment together with the decision of Clarke J. in *Marino* referred to above which sets out the necessity for significant scrutiny in cases where one party is being expected to discharge sums incurred by another and indeed in *Sharmane Limited* where Finlay Geoghegan J. stated in regard to consideration of a claim for remuneration that the approach of the Court was in the context of it amounting to "a potentially significant interference with the property rights of secured creditors" and as such "it requires the Court to give a strict interpretation to the provisions". Whilst the language in this jurisdiction is focused on the integrity of the scrutiny process and the importance of reiterating that the Court is not a rubberstamping process, it appears to me that as of now there is a significant alignment between the jurisprudence in both England and Wales and this jurisdiction.

184. The appellant contends that the burden of proof rests with the liquidator in regard to justifying the remuneration claimed. I am satisfied that that is a correct statement and it is for the official liquidator who seeks to be remunerated in the manner which he does and in particular in a manner and to an extent which exceeds substantially the estimates originally submitted and approved by the Court to justify his claim. It appears to me based upon the prevailing standards of the time that a greater visibility and particulars of the actual basis for and the precise nature of his claim for remuneration especially in the second, third and fourth periods ought to have been provided. This is so to a lesser extent with regard to the second period. The appellant contends, correctly, that all relevant information was pre-eminently within the dominion and control of the liquidator. That is of course so. However the preponderance of the fees sought pertain to the first period in the liquidation. This was a time when a less thorough and conscientious approach obtained with regard to the standard of transparency and accountability to which an insolvency practitioner was being held by the Court. These are overall factors which have to be taken into account.

Conclusions
185. In light of those factors and having due regard to the jurisprudence I would approach the determination of the liquidator's remuneration on the following basis;

The first period
186. I am satisfied that the vast bulk of the work was carried out by the liquidator and his firm in this period. Positive benefits enured to the creditors including the unsecured creditors and the value of the realisations was increased.

187. To the extent that new grounds of appeal are being advanced on issues which were not agitated at the trial in regard to the first period and including the contention that a top heavy management team in that period contributed to high fees being charged, since this was not properly ventilated and considered in the High Court by the trial judge I do not believe that this contention should be entertained in this appeal in the circumstances.

188. It does appear to be the case that whilst a fee estimate for the trading period of €140,000 was put forward by the official liquidator, in fairness as Mr O'Ferrall contends at para. 9 of his third affidavit "the fact that this work was done and the consequent increase in costs was acknowledged by the main customers, Sony and Toshiba." Their discharge, in full, of the increased costs meant that no loss was suffered by the company (in liquidation) or by its creditors.

189. It is clear in the first phase that a significant amount of activity involved the operations and plant which was operating in the Czech Republic as well as in Finglas in Dublin. I am satisfied on the basis of all the available information that it represents the most intense period in the liquidation. The fees were very high and the hours claimed for exceptionally long. The state of the law was somewhat less clear with regard to the precise extent of the fiduciary obligations of liquidator in that time. Accordingly, on balance, I am satisfied that the remuneration claimed by the liquidator in respect of the first period should not be interfere with.

190. The records provided in the instant case by the liquidator in his court report for his interim fee applications would not be considered adequate today or indeed be considered as complying with the requirements on a liquidator as is clear from the jurisprudence developed since the decision of Laffoy J. in *Red Sail* and thereafter. It is my understanding that the liquidator acknowledges that fact but asserts that the law should not be applied retrospectively to his performance in regard to this liquidation. As to whether it can be reasonably said that they constitute "proper records" it is my view that up to the point where the law was unequivocally adumbrated the liquidator ought to be given the benefit of the doubt that the minimalist approach adopted in the first period was probably sufficient bearing in mind the prevailing standards of the time in this regard.

191. As with any case involving a professional officeholder who is in addition for the purposes of this application an officer of the court, the Court should afford weight to the fact that he is a member of a regulated profession subject to its rules and principles with regard to professional conduct.

Period 2 (1st March 2006 to 30th September 2007)
192. I am satisfied that from late 2006 and following the judgment of the High Court in *Red Sail Frozen Food Limited*, it ought to have been apparent that the obligations on insolvency practitioners with regard to detailed record keeping were quite significant.

193. Further weight must be attached to the fact as it is acknowledged by the trial judge in her judgment that the estimated

outcome prepared by the liquidator at the time represented to the Court that an additional sum of €300,000 in fees and outlay would be required to complete this liquidation.

194. I am in agreement with the trial judge that there is force in this submission on the part of the appellant that the greater part of the realisation of assets was completed as of 28th February 2006. I am unable to find any reasonable basis amongst the papers furnished by the liquidator for the very significant deviation that subsequently took place from his estimate which was expressly represented to the Court on 28th February 2006 that an additional €300,000 in fees and outlay would suffice to complete this liquidation.

195. Having carefully considered case law concerning the amounts of remuneration chargeable at around this period I would not interfere with the rates of remuneration as approved by the Court, I have, however, very significant reservations and concerns regarding the amount of time in respect of which payment is sought in the context of value for money and the overall value and benefit to the creditors of the work recorded as having been done. I am not satisfied that the number of hours claimed for were either reasonable or necessary. As regards the complexity and the nature of the work, the vast bulk of same had been completed by this stage.

196. The period of time claimed for is very substantial relative to the work done and its relative importance and necessity and the limited value it conferred on the clients. In all the circumstances the amount by which the fees for this period ought to be reduced is 25%. Accordingly, I would reduce same by 25%.

Third period
197. With regard to the third period it is significant that a firm of solicitors and counsel were retained in this jurisdiction in regard to the possible Sony claim and legal advice was obtained from Japan. No proceedings were instituted whatsoever and the involvement of the liquidator and his firm in relation to the matter was relatively minor. In the estimated outcome as of 31st March, 2009, being the end of the third period of the liquidation, preferential creditors were anticipated to be paid in full and included was an application to pay the balance of the 50 per cent dividend. The funds estimated to be available for unsecured creditors at that stage was €459,034. For the reasons hereinafter set forth I am satisfied that the input of the liquidator in this regard and in particular in regard to the Sony claim was of modest value, the value being provided principally by other parties and entities whose fees have been separately discharged.

198. Having reviewed all of the affidavit evidence together with the exhibits that were before the High Court I am satisfied that the hours claimed and approved in respect of time in regard to this period of the liquidation are on balance quite excessive and not reasonable a vigilant and thorough scrutiny suggests that the work identified could have been carried out more efficiently in a substantially shorter period of time. The engagement of the liquidator in regard to the Sony claim does not warrant the significant volume of time attributed to it. No litigation was ever instituted. Mr Nangle had wished that such a course of action be taken and the liquidator wisely sought the advices of solicitors, junior and senior counsel. Further, he acted upon their advices. In other words he refrained from instituting proceedings. It would appear that a routine enough application to the High Court was made for the purpose of approving a settlement of a suit involving the company. A firm of solicitors and counsel acted. There was some liaising with the Environmental Protection Agency however it cannot have been more than relatively nominal in circumstances where the licence was due to expire by effluxion of time in the month of September 2008.

199. The value of the work done to the creditors is nominal in all the circumstances. The lack of an adequate explanation for the significant increases, coupled with the absence of transparency lead me to conclude that in all the circumstances that the time claimed for is excessive having due regard to the nature of the work specified to have been carried out and considering the fairly routine and non complex nature of that work and the limited extent to which it provided value "to the client". Accordingly, in my view the length of time ascribed to the work in question is excessive in respect of Period 3 by the extent of 25% in each period and the sums claimed should be abated accordingly.

Fourth period
200. With regard to the fourth period, the conclusions of the trial judge were that the fees claimed exceeded what is reasonable having regard to the matters identified by the trial judge in her judgment. The hours claimed for were neither reasonable nor necessary. In all the circumstances however I would vary with her decision and find that the reasonable remuneration in respect of the fourth period warrants a reduction of 25% of the amount claimed rather then 20%.

Conclusions
201. There will be an order determining the remuneration of the liquidator, as provisional and official liquidator firstly, to remain unchanged in Period 1, and to be reduced by 25% in Periods 2 and 3 . In respect of period 4 the reduction in fees and remuneration made in the High Court is varied from 20% to 25%.

202. Orders will be made in the amount as follows:

(i) With regard to the period 22nd July 2005 to 28th February 2006, €738,449.311 together with VAT of €155,074.36, Total €893,523.67.

(ii) With regard to the period 1st March 2006 to 30th September 2007, €261,284.38 together with VAT thereon.

(iii) With regard to the period 1st October 2007 to 31st March 2009, €157,488.39 together with VAT thereon.

(iv) With regard to the fourth period, €130,798.12 plus VAT thereon.

203. With regard to the third period an issue arose in this appeal regarding the liquidator charging in respect of a regulatory review by the Institute of Chartered Accountants of Ireland in respect of which the appellant contends it was inappropriate to charge creditors for same. The official liquidator fairly concedes that in order to minimise the issues in dispute he is determined not to pursue this aspect and consents to a further reduction in respect of the third period of €1,537.50. That sum is deducted off the top accordingly. The sum of 25% is deducted from the balance claimed for the third period.