

THE HIGH COURT

CHANCERY

[2008 No. 202 COS]

IN THE MATTER OF DENIS FINN LIMITED (IN LIQUIDATION)

AND IN THE MATTER OF THE COMPANIES ACTS 1963 TO 2009

BETWEEN

DAVID HUGHES

APPLICANT

AND

THE REVENUE COMMISSIONERS

RESPONDENT

JUDGMENT of Mr. Justice David Keane delivered on the 21st December 2016

Introduction

1. David Hughes ('the applicant') was appointed as the official liquidator of Denis Finn Limited ('the company') on the 23rd June 2008. The company's principal activity was building construction. The liquidation of the company is almost complete and an application for final orders is now before the court. Among the orders sought is one determining the applicant's remuneration in the sum of €558,750.76 and permitting the applicant to retain €93,004.00 out of the assets of the company, since the sum of €465,746.76 has already been received by the applicant from those assets in the form of interim fee payments.

2. The Office of the Revenue Commissioners ('the Revenue'), as a significant creditor of the company, is the respondent to the application in the guise of *legitimus contradictor*. The Revenue opposes the making of the order concerned on two grounds: first, that the applicant has provided insufficient information to support a payment to him in the amount claimed; and second, that the level of fees sought by the applicant is too high.

Background

3. The applicant first made an interim fee application on the 14th February 2011 to cover his remuneration, costs and expenses for the period between the 30th May 2008 and the 31st October 2010, representing 1,856.38 hours of work by the applicant and his colleagues. The sum claimed was €330,181.20, comprising fees of €266,000, outlay of €2,440 and VAT at 23% on those figures of €61,741.20.

4. The applicant made a second interim fee application on the 16th December 2013 to cover the same matters for the period between the 1st November 2010 and the 30th September 2013, representing 781.50 hours of work. The sum claimed then was €135,565.56. It comprised fees of €110,000, outlay of €215.90 and VAT at 23% on those figures of €25,349.66.

5. The court granted the applicant liberty to retain each of those sums.

6. The further payment of €93,004, which the applicant now seeks, is to cover his remuneration, costs and expenses for the period between the 1st October 2013 and the conclusion of the liquidation, representing 328.80 hours of work. It comprises fees of €75,613 and VAT at 23% on that figure of €27,391, there being no outlay for that period.

7. If liberty is granted to the applicant to retain the sum now claimed, the total fees received by him in the liquidation will amount to €558,750.76, comprising €451,613 in professional fees, €2,655.90 in outlay, and €104,481.86 in VAT at 23% on those figures.

8. The applicant summarises the work that he has undertaken since the commencement of the liquidation as including:

- (i) Statutory and court requirements.
- (ii) Investigation of the company's books and records.
- (iii) Preparation and filing of taxation claims.
- (iv) Investigation and preparation of preferential claims.
- (v) Preparation of VAT returns to Revenue every two months.
- (vi) Finalising all matters relating to the implementation of a settlement agreement between the company, in liquidation, and certain other entities in respect of a claim of professional negligence ('the professional negligence claim').
- (vii) Pursuing a dispute with a client of the company concerning monies due for construction works, which included a conciliation process before a decision was made to seek the sanction of the court to abandon the claim concerned on a risk/benefit analysis in the creditors' interest ('the client dispute').
- (viii) Attendances at the Examiner's Office and the preparation of liquidator's reports.
- (ix) Preparation of receipts and payments.

Basis for the application

9. For the period between the 1st October 2013 and the conclusion of the liquidation, the applicant relies on the computation of his charges contained in an appendix ('the appendix') to his 9th and final report to the court.

10. The appendix sets out the hours of work carried out during that period by reference to the grade within the applicant's firm of each member of staff who carried out that work and the 'rate *per* hour' attributable to each such grade. The appendix contains a table in which the hours worked by each staff member are broken down across 7 different subject headings. Those headings are, in effect, the following:

- (i) Administration.
- (ii) Cash administration.
- (iii) Tax matters.
- (iv) Creditors.
- (v) The professional negligence claim.
- (vi) The client dispute.
- (vii) Court obligations.

The appendix concludes with a further table in which a brief narrative statement appears opposite each of the subject headings just described.

11. The applicant avers to his belief that all of the work involved was properly and necessarily carried out, and properly and necessarily delegated as appropriate. The applicant further avers that the remuneration sought represents true and fair value for the work done.

The Revenue's position

12. The applicant's motion papers were served on the Revenue as an attachment to an e-mail dated the 10th December 2015. On the 15th December 2015, the Revenue e-mailed requesting a breakdown of the work carried out in the liquidation by both the applicant and his legal representatives, to include 'details of task completed, caseworker, grade and rate of pay of caseworker, time to complete task *etc.*'

13. Two days later, the applicant's solicitors forwarded a breakdown in relation to their own work. It includes a single page document setting out the hours of work carried out by each lawyer involved during the final period of the liquidation, the grade within the firm of each such person, and the 'rate *per* hour' charged by each. That part of the breakdown is very similar to the equivalent document that forms part of the appendix to the liquidator's final report. But in addition, instead of the breakdown of work across seven sub-headings, each linked to a short narrative description, that the applicant provided in the appendix to his final report concerning his own work, the applicant's solicitors forwarded daily time sheets, setting out the number of hours worked and a description of the work done on the liquidation by each lawyer involved on a day by day basis.

14. In the covering e-mail to which that breakdown was attached, the applicant's solicitors communicated their instructions that, in relation to the applicant's own fees and expenses, 'such detail as [he] is prepared to provide is contained in the report exhibited to [his affidavit].' They suggested that the appendix to the report contains 'a significant amount of detail on the work carried out together with a detailed breakdown of how the time was spent according to the various work streams.'

15. On the 21st December 2015, the applicant's solicitor e-mailed again, asking what additional detail was sought from the applicant concerning his fees. The Revenue replied by return, stating in material part:

'The level of information required by Revenue is similar to the fee earner/task/time spent/rate breakdown provided by your firm. The [applicant] is fully aware of the type of breakdown that is required by Revenue and that time sheets are required. Generic paragraphs indicating that "*significant time*" has been spent, is (*sic*) simply not sufficient for a fee application of this magnitude. Revenue are not in a position to assess the value of the liquidation to the creditors in their [the Revenue's] role as *legitimus contradictor*.'

16. The Revenue points to time sheets that the applicant's firm provided to it in another matter as evidence both that the applicant is familiar with the type of information that it requires and that there is no reason to believe that the applicant cannot produce such information to it (in the form of time sheets) in this case.

17. In the exchange of affidavits on the motion, the applicant more than once expresses the view that the level of detail and amount of information in the appendix to his report is no less than would be provided in the equivalent time sheets, were he to provide the latter. The Revenue does not agree. He also points out that the Revenue did not require the production of time sheets by him in connection with either of the two interim fee payment applications that he has already made. The Revenue responds that previous interim fee applications dealt only with payments on account, which were made expressly subject to the applicant's undertaking to repay any monies due if required to do so at the final orders stage of the liquidation, from which it follows that, by raising the matter at this stage, the Revenue is not being inconsistent in its approach.

18. A peculiar exchange occurred when the averment on behalf of the Revenue that the applicant does not appear to have any difficulty with the production of time sheets, elicited the response from the applicant that he is at a loss to understand the basis for that assertion, since he does not believe it should be necessary for him to produce them and he does not propose to do so. It seems to me that the applicant wrongly construes the relevant averment as an assertion that he does not object to the production of those time sheets, whereas I understand it to convey the Revenue's understanding that there is no practical obstacle to their production, beyond the intransigence of the applicant on the point. Indeed, in a subsequent paragraph of the relevant affidavit, the Revenue deponent avers that '[i]t is significant that the [applicant] is not suggesting that he does not have these requested time sheets available or that there would be any difficulty in [providing them].' This draws from the applicant the enigmatic and unhelpful response that '[i]n my affidavits I have made no comment in relation to the availability or otherwise of the requested time sheets and I do not accept that anything of significance can be interpreted from my failure to comment on this.'

The Law

19. Taking a large step back to view the present application in its appropriate context, it is worth recalling the following statement of Sir Roy Goode QC in his leading work *Principles of Corporate Insolvency Law*, 4th ed, (London, 2011), at p. 58:

'Corporate insolvency law has three overriding objectives: to maximise the return to creditors; to establish a fair and equitable system for the ranking of claims and the distribution of assets among creditors, involving a limited redistribution of rights; and to provide a mechanism by which the causes of failure can be identified and those guilty of mismanagement brought to book, and where appropriate, deprived of the right to be involved in the management of other companies.'

20. Commenting on that analysis in *Bloomsbury Professional's Guide to the Companies Act 2014* (Courtney ed.) (Dublin, 2015), Professor Irene Lynch Fannon states (at p. 212, fn. 47):

'Achieving a fair and equitable system of distribution relies on a transparent system and, whilst this can be balanced against the need for both an effective corporate rescue mechanism and a cheap and effective distribution system where rescue is not possible, all of this requires a balance.'

21. In this case, the applicant places significant reliance on the last two sentences in the following paragraph of the judgment of Finlay Geoghegan J. in *Re Mouldpro International Ltd (In liquidation): Farrell v Plastronix Investments Ltd* [2012] IEHC 418:

'15. 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. Order 74, r. 46 of the Superior Court Rules does require an official liquidator to support a fee application with "such evidence as the Court shall require." Some official liquidators, in my experience, have provided schedules with a breakdown of time per topic. There may be time recording systems which permit this simply to be done. However, it is not the norm.'

22. However, as the applicant very properly acknowledges, the judgment of Finlay Geoghegan J. continues:

'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....'

23. In *Re Haydon Private Clients Limited t/a Haydon Investments (In liquidation)* [2012] IEHC 505 (at para. 10), Finlay Geoghegan J. noted that the liquidator's application for the measurement of his remuneration in that case was consistent with current practice in being based upon his reports and the inclusion in certain appendices to them of a breakdown of the time spent by him and those in his firm working on the liquidation with their relevant hourly charge out rates. The judgment goes on to record that the liquidator, in his grounding affidavit, had also set out in some detail the work done in the liquidation.

24. In both *Mouldpro and Haydon Investments*, the Court cited with approval certain dicta in the judgment of Ferris J. in the Chancery Division of the High Court in England in *Mirror Group Newspapers plc v Maxwell & Ors.* [1998] 1 BCLC 638. That portion of the judgment of Ferris J. that addresses the principles applicable to the remuneration of receivers includes the following passage (at 648):

'First, office-holders must expect to give full particulars in order to justify the amount of any claim for remuneration. If they seek to be remunerated upon, or partly upon, the basis of time spent in the performance of their duties they must do significantly more than list the total number of hours spent by them or other fee-earning members of their staff and multiply this total by a sum claimed to be the charging rate of the individual whose time was spent. They must explain the nature of each main task undertaken, the considerations which led them to embark upon that task and, if the task proved more difficult or expensive to perform than at first expected, to persevere in it. The time spent needs to be linked to this explanation, so that it can be seen what time was devoted to each task. The amount of detail which needs to be provided will, however, be proportionate to the case.'

25. And later (at p. 649):

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

26. I accept those principles as correct.

Discussion

27. For my part, I can well understand that it is not 'the norm' to require liquidators to provide schedules containing a breakdown of time *per topic* or, in particular, to require liquidators to provide time sheets in support of an application for fees. That may be the position for many reasons. The limited scale or prospects of certain liquidations might not warrant it. The necessary time recording systems might not be in place. In such cases, a direction to produce time sheets in support of a fee application could well be unreasonable or unwarranted.

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

29. How is that balance to be struck in the present case? On one side of the scales, there is the information or documentation required to enable the respondent and the court to form a view on the reasonableness of the fees claimed by the applicant. The applicant says that the material in the appendix to his final report, considered in conjunction with the information set out in his reports as a whole, provides evidence at least equivalent to, if not more extensive than, that contained in his firm's time sheets, were he to produce them. He may be right in that assertion or he may be wrong. The Revenue disputes it. The point is that, in the absence of disclosure of those time sheets, it is not possible for the Revenue, or any other creditor, to express a view in the matter or for the court to form a judgment. For that reason, I am satisfied that the provision of the documentation concerned is required for that purpose.

30. On the other side of the scales, is there any evidence tending to establish that the effort or expense involved on the part of the

applicant in producing the time sheets sought would entail a disproportionate - or, indeed, any further - expense in the liquidation to the detriment of the general body of creditors? On the limited evidence before me the answer is no. That evidence goes no further than the applicant's cryptic insistence that he has made 'no comment in relation to the availability or otherwise of the requested time sheets.'

31. I am buttressed in that conclusion by the acceptance of the Court in *Mouldpro* (at para. 26 of the judgment), and the acknowledgment of the applicant in this case, that it is for the applicant to satisfy the court, on the evidence put before it, that the amount he is seeking is reasonable remuneration for the work done by him in the liquidation and that there is no onus on the *legitimus contradictor* to establish that any part of the remuneration sought is unreasonable.

32. Further, in *Mouldpro*, Finlay Geoghegan J. identified the discretion of the court in respect of the remuneration of a liquidator under s. 228 of the Companies Act 1963, as a jurisdiction analogous to that under s. 29 of the Companies (Amendment) Act 1990 in respect of the remuneration of an examiner. And in *Re Marino Ltd* [2010] IEHC 394, Clarke J., following Hamilton C.J. in *Re Coombe Importers Ltd* (Unreported, Supreme Court, Hamilton C.J., 22nd June 1995), held that the court has an obligation to be vigilant in scrutinising any application for costs brought by an examiner under s. 29.

33. The requirement of vigilance in respect of costs in a liquidation arises where, as Finlay Geoghegan J. pointed out in *Mouldpro* (at para. 14), the clients on whose behalf that work is carried out are 'those persons entitled on a distribution of the assets of the company in accordance with statutory priorities'. Those persons are, most frequently and in this case, the creditors of the company.

The second issue

34. The second issue raised by the Revenue is that the level of fees sought by the applicant is too high.

35. However, the Revenue deponent avers that, in the absence of the breakdown of fees (in the form of time sheets) sought from the applicant, the Revenue cannot assess the reasonableness of the fees charged by the applicant or by the applicant's solicitors, even though the Revenue acknowledges that it has no complaint about the level of the information provided by those solicitors concerning their own fees. The position of the Revenue is that proper consideration of the level of fees charged by the applicant and his solicitors can only be undertaken once the applicant's time sheets have been reviewed. It seems to me that this is a position that receives some support from the decision of Ferris J. in *Mirror Group Newspapers plc* (at pp. 660-662 of the report).

36. Subject to that significant *caveat*, the Revenue submits that a question will, or at the very least may, in any event arise concerning whether the applicant's fees are reasonable considering:

(i) the rates set by the court in other cases; see *Missford Ltd t/a Residence Members Club* [2010] IEHC 240, *Re Marino Ltd* [2010] IEHC 394, and *ESG Reinsurance Ltd* [2010] IEHC 365, and

(ii) the value of the liquidation for the creditors; see *Re Marino Ltd* [2010] IEHC 394, *Re Sharmane Ltd* [2009] 4 I.R. 285 and *Re Redsail Frozen Foods Ltd* [2007] 2 I.R. 361.

37. As I have already determined that the Revenue is correct in its submission that the court should direct the applicant to provide the additional information sought, it would be premature and, thus, wrong to embark upon a consideration of the arguments advanced by the parties on the second issue, prior to the resolution of the first one.

Conclusion

38. I propose to make an order directing the applicant to furnish the breakdown of his fees sought by the Revenue. I will hear the parties on the appropriate directions to allow a reasonable time for that to be done and a reasonable period thereafter for the Revenue to consider the material provided, subject to which I propose to adjourn the application for final orders to an appropriate date for mention.