THE HIGH COURT

Record no. 2011 COS 135

IN THE MATTER OF SWIFT STRUCTURES LIMITED (IN LIQUIDATION)

AND IN THE MATTER OF THE COMPANIES ACTS, 1963-2009

Record no. 2011 COS 136

IN THE MATTER OF EURO-PLANT HIRE (IRELAND) LIMITED (IN LIQUIDATION)

AND IN THE MATTER OF THE COMPANIES ACTS, 1963-2009

Judgment of Mr Justice Haughton delivered the 31 day of July, 2017

1. Introduction

1.1 In this application Mr Neal Morrison the official liquidator ("the liquidator") of the above named companies ("Swift" and "Europlant" respectively) asks the court to measure/fix his remuneration as liquidator including the legal costs of his solicitors McDowell Purcell. He was appointed liquidator of the two related companies by orders of the High Court dated 21 March, 2011, on foot of petitions presented by the Revenue Commissioners.

1.2 These liquidations are funded by the Revenue Commissioners in circumstances where it was anticipated, correctly, that there would otherwise not be sufficient realisations to fund the liquidations. The Revenue Commissioners are a notice party to and opposing the application.

2. The Notice of Motion

2.1 In the notice of motion the liquidator seeks the following reliefs: –

"Swift Structures Limited (in Liquidation)

> 1. An Order pursuant to Order 74, rule 46 of the Rules of the Superior Courts 1986 to 2014 fixing the remuneration of the Official liquidator of Swift Structures Limited (in liquidation) for the period from the commencement of this liquidation to date at €33,996.93 net of VAT as provided for in the table scheduled hereto.
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> 2. An Order measuring the legal costs of the Official Liquidator of Swift Structures Limited (in liquidation) for the same period in the sum of €26,051.09 plus VAT thereon in the amount of €5991.74 together with counsel's costs in the amount of €1,250 plus VAT thereon in the amount of 172.50, together with outlay in the sum of €797.43, coming to a total of €34,262.76 inclusive of VAT.
>
> 3. An Order measuring the payment due to the Official Liquidator in respect of his outstanding remuneration and legal costs in the amount of €43,855.69 inclusive of VAT.

Euro-Plant Hire (Ireland) Limited (in Liquidation)

> 4. An Order pursuant to Order 74, rule 46 of the Rules of the Superior Courts 1986 to 2014 fixing the remuneration of the Official Liquidator of Euro-Plant Hire (Ireland) Limited (in Liquidation) for the period from the commencement of this liquidation to date at €28,380.82 net of VAT as provided for in the table scheduled hereto.
>
> 5. An Order measuring the legal costs of the Official Liquidator of Euro-Plant Hire (Ireland) Limited (in Liquidation) for the same period in the sum of €18,283.13 plus VAT thereon in the amount of €4,205.12, together with counsel's costs in the amount of €1,250 plus VAT thereon in the amount of €172.50, together with outlay in the sum of €1,023.15, coming to a total of €24,933.90 inclusive of VAT.
>
> 6. An Order measuring the payment due to the Official Liquidator in respect of his outstanding remuneration and legal costs in the amount of €28,077.77 inclusive of VAT.
>
> 7. Such further or other direction as to this Court shall seem appropriate.
>
> 8. Such further or other order as to this Court shall seem appropriate.
>
> 9. An Order providing for the costs of this application."

2.2 The reference to the "same period" in paragraphs 2 and 5 are references to work done by the liquidator and his solicitors post March 2012. This is because in April 2012 the Revenue Commissioners discharged remuneration and legal costs up to that time in respect of both liquidations. The payments then made for combined professional fees amounted to €51,695 plus VAT and outlay, giving a total of €63,987.88.

2.3 It is common case that the liquidations were substantially completed in October 2015 when the High Court made restriction orders in respect of the companies' directors. It is apparent from the narrative in the "Billing Guide Data" from McInerney Saunders, the liquidator's firm of accountants, and "Time And Charges Ledger By Matter" prepared by his solicitors in respect of their work, which are exhibited by the liquidator, that the sums sought in the Notice of Motion include many items arising since that time, and more particularly since January 2016, referable to the present dispute in relation to the liquidator's remuneration and legal costs, and in relation to the preparation and bringing of the present application. The amounts featuring in the notice of motion include claims in respect of these items arising post October 2015 – they are rolled up in what the liquidator asserts are remuneration and legal costs properly arising in the liquidations and which the court is asked to measure. One of the Revenue Commissioners arguments is that insofar as these can be allowed at all they are items of costs related to this application, and that as the application was not necessary or appropriate they should not be allowed.

3. The legal costs accountant

3.1 While this application was pending, and with some encouragement from the court, the parties agreed to refer McDowell Purcell's legal fees for reports from Behan associates, legal costs accountants, and to share the costs of that exercise. Three reports from Mr Noel Guiden all dated 11 July, 2017, have been produced. He expresses his views "as an experienced Legal Costs Accountant of the fees that would be taxed and determined by a Taxing Master". In respect of legal fees incurred for the period 2 April, 2012, to 31 January, 2016, his view is that the solicitor's instructions fee in Swift would tax at about €13,000, and that counsel's brief fee of €750 is reasonable, and in respect of Europlant his figures are an instructions fee of €8,500 and a brief fee of €750.

3.2 In opening the application counsel for the liquidator adopted these new figures and sought to modify the sums sought to be measured in the Notice of Motion at paragraphs 2 and 5, with consequential reductions in the measurement sought in paragraphs 3 and 6 respectively. Thus in paragraph 2 instead of a total of €34,262.76 inclusive of VAT and outlay, measurement was sought at a total of €18,104 and in paragraph 5 instead of a total of €24,933.90, measurement was sought at a total of €12,832.65, in respect of the legal costs in Swift and Euro plant respectively post March 2012. Counsel for the Revenue Commissioners opposed any amendment of the Notice of Motion.

3.3 In addition to seeking payment of the sums as modified the liquidator relied on Mr Guiden's third report in which he expresses the view that the solicitors appropriate professional fee in respect of this motion for directions would be about €35,000 with an appropriate brief fee for Senior Counsel at €3000 plus an appropriate fee for Junior Counsel.

3.4 It appears that Mr Guiden's estimations are largely based on time worked – although he opines that it would not all necessarily be allowed in full – and hourly rates that he regards as reasonable. In his first report on Swift he adds that –

> "Time of course is only one of the factors to be taken into consideration and the other factors are set out in detail in Order 99 rule 37(22)(ii)".

3.5 Some of the items of legal work itemised in Mr Guiden's reports on Swift and Europlant relate to preparation and prosecution of the section 150 restriction proceedings. The Revenue Commissioners assert that this work was separately invoiced by McDowell Purcell on 30 October, 2015, in the sum of €2,583 in each liquidation, making a total of €5,166 inclusive of VAT, and that there is no entitlement to have these matters re-measured, or alternatively that allowance must be given in respect of the discharge of these invoices by the Revenue Commissioners.

4. The grounds of opposition

4.1 The Revenue Commissioners argue that the measurement sought in the notice of motion should be refused on a number of grounds.

4.2 First, it is said that the Revenue Commissioners agreement to fund the liquidations is a matter of contract and that, as there are no assets in the liquidation in respect of which the court could give any statutory direction in relation to payment, it is not appropriate for the court to measure the remuneration or legal expenses. It is suggested instead that the liquidator's remedy lies in judicial review or a claim for damages for the alleged breach of his contract with the Revenue Commissioners.

4.3 Secondly, it is said that the amounts in respect of which measurement is sought by the liquidator for both remuneration and legal costs are excessive. It is argued that this is so by reference to the terms of the agreement between the liquidator and the Revenue Commissioners, and McDowell Purcell's indications and commitments as to the legal costs. In particular it is asserted that McDowell Purcell invoiced and accepted €5,166 inclusive of VAT "to all work done and advices provided in relation to the section 150 proceedings", and that the court should not measure any further sum for legal work post March 2012.

4.4 Thirdly, it is asserted that the measurements sought are based exclusively or almost exclusively on time charges and agreed hourly rates, and fail in accordance with well established jurisprudence encapsulated in the judgment of Finlay Geoghegan J. in *Re Mouldpro International Limited* [2012] IEHC 418, to have regard to:

> "(i) the nature of the work carried out;
>
> (ii) the complexity of the work; and
>
> (iii) the importance or value of the work 'to the client'."

In particular it was argued that there was no great complexity, and that the discounted rates applied by the liquidator and McDowell Purcell did not equate with value, and that the results attained by the liquidator do not demonstrate value. In this context the Revenue Commissioners also complained that there was undue delay by the liquidator in bringing and prosecuting the restriction applications.

It was also argued that the measurement sought greatly exceeds the level of remuneration and legal costs that would reasonably be expected in liquidations of this nature, and the level of funding that the Revenue Commissioners agree in other cases where the level of work is comparable.

4.5 Fourthly, the Revenue Commissioners relied on an open offer of payment to the liquidator of a further €25,000 plus VAT to cover legal costs and liquidator's remuneration with a view to avoiding the liquidator bringing the present motion for directions. This offer was made before the present motion issued. It was claimed that this, when added to the sums already paid, exceeded what the Revenue Commissioners should be expected to pay in funding these liquidations in all the circumstances. There were subsequent further efforts to resolve the dispute without recourse to the court and these are evident from correspondence that was put before the court and will be referred to later.

4.6 Fifthly it was claimed that as this was effectively an *inter partes* motion it was inappropriate to treat the costs related to the preparation and prosecution of the motion as liquidators remuneration or legal costs that should be measured in the liquidation. Rather the award of costs should depend on the outcome. The Revenue Commissioners contended that the application was unnecessary and ought not to have been brought or pursued in the light of their open offer (and subsequent offers), and that insofar as that offer might not be bettered by any measurement by the court then costs should be awarded against the liquidator.

5. The jurisdictional issue

5.1 As these liquidations arose prior to the commencement of the Companies Act 2014, section 228 of the Companies Act 1963 applies and provides: –

> "The following provisions relating to liquidators shall have effect on the 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…"

Order 74, rule 46 of the Rules of the Superior Courts (as inserted by SI121/12) provides: –

> "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."

The effect of section 228 and the then equivalent Order 74 rule 47 was considered by the Supreme Court in *Merchant Banking Ltd (in liquidation)* [1987] ILRM 260 and that decision clearly establishes that the High Court has the power to direct what remuneration the liquidator is to receive.

While the court has the power to direct an enquiry before the Examiner or the Master, this is as to amount and not of nature or kind. As Finlay Geoghegan J. noted in re *Mouldpro*–

> "8. The jurisdiction given the court to direct an enquiry to be held by the examiner in O. 74, r. 46 is not one which has been exercised in recent times.…"

Instead the practice for many years has been for liquidators to apply to court for measurement of the remuneration and to put the creditor most likely to be affected by the determination on notice.

5.2 The Revenue Commissioners argued that the position is different where there are no assets in the liquidation. Counsel referred to section 244 of the Companies Act 1963 which provides –

> "The court may, in the event of the assets being insufficient to satisfy the liabilities, make an order as to the payment out of the assets of the costs, charges and expenses incurred in the winding up in such order of priority as the court thinks just."

It was argued that as the court's jurisdiction to make a payment out of assets cannot be exercised, and as the Revenue Commissioners had a contractual arrangement with the liquidator in relation to the funding of this liquidation, the court has no role under section 228. Instead, it was suggested, the liquidator if aggrieved could have recourse to judicial review or could sue the Revenue Commissioners for damages for breach of contract.

5.3 In my view this contention is incorrect. Section 228(d) was intended to give the court a supervisory function in relation to liquidators' salary and remuneration. In *Re Missford Ltd* [2010] 3 IR 756, albeit in the context of an examinership, Kelly J. emphasised the need for "the vigilant scrutiny of the court". Doubtless the court should take into account any indemnity or other contractual arrangement reached between the liquidator and a funder such as the Revenue Commissioners or another creditor of the company when measuring remuneration. However that and the absence of assets cannot have been intended to oust the court's jurisdiction to give a direction if required in an appropriate case. While it is true that the court cannot direct a payment out of costs, charges and expenses under section 244 because there are no assets in this liquidation, that does not prevent it measuring remuneration. The process of obtaining payment from the Revenue Commissioners or other funder after measurement by the court is another matter that may well be governed by contractual considerations.

5.4 One point however should be noted in relation to the role of the Revenue Commissioners in this motion. The Revenue Commissioners are not simply a legitimus contradictor such as would be the case where the most affected creditor is put on notice in circumstances where there are assets but the remuneration and legal costs sought are such that the distribution to such creditor will be more or less depending on the courts measurement. Here the Revenue Commissioners have agreed, on terms, to indemnify the liquidator in respect of his remuneration and costs. In this sense I consider that the present motion is in reality a dispute *inter partes*, and this is borne out by the correspondence that is disclosed.

6. Principles applicable to measuring reasonable remuneration

6.1 In *Merchant Banking Ltd (in liquidation)* [1987] ILRM 260 the Supreme Court endorsed the following statement from Keane 'Company Law in the Republic of Ireland' at paragraph 34.47 –

> "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 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…"

6.2 It seems that the court retains a wide discretion. In *Car Replacements Ltd (in liquidation)* (unreported High Court 15 December 1999) Murphy J. commented –

> "Despite this wide discretion the practice of the court has been for many years to determine the remuneration of an official liquidator on the basis of hours worked by him and his staff. No doubt this procedure has its own infirmities.…"

6.3 The practice has been to seek measurement based on charge out costs computed from hours worked and hourly rates varying dependant on the expertise/seniority of the liquidator and those working for him. In *Sharmane Ltd* [2009] 4 IR 285, a case which concerned the measurement of remuneration in an examinership pursuant to section 29 of the Companies (Amendment) Act 1990 (as amended), Finlay Geoghegan J. observed:

> "36… 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."

These principles have since been cited with approval – see for example Kelly J. in *Re Missford Ltd* [2010] 3 IR 756, in relation to an examiner, a case in which the court recalibrated the hourly rates that might be appropriate. Finlay Geoghegan J. applied the same principles to a liquidator in *Mouldpro*, stating:

> "14.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 examiner's, administrators or official liquidator's, will not determine the reasonable remuneration by reference only to the 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; and
>
> (ii) the complexity of the work; and
>
> (iii) the importance or value of the work 'to the client'."

She agreed with the statement of Ferris J. in the English High Court *in Mirror Group Newspapers plc v Maxwell* [1998] BCLC 638, at page 652 –

> "… 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 cost…"

In the context of a solicitor's general instructions fees the idea that time spent is only one element of the relevant circumstances that should be considered was recently emphasised by the Supreme Court in the judgment of Laffoy J. in *Sheehan v. Corr* (15 June 2017) where she stated the first conclusion of the court in the following terms: –

> "(1) as a general proposition, the amount of time actually spent on a case should not be elevated above the relevant criteria mandated by Order 99, rule 37(22)."

6.4 In *Mouldpro* Finlay Geoghegan J. noted that in most liquidations the 'client' are those persons entitled to distribution of the assets of the company in accordance with the statutory priorities. She added: –

> "There is, in general, the added complication in a liquidation that not all work which a liquidator is required to do may be of importance or value to those entitled on distribution of the company's assets. In making this comment, I have in mind, in particular, the obligations imposed on a liquidator pursuant to S.150 of the Companies Act 1990, and S. 56 of the Company Law Enforcement Act 2001, in relation to making reports to the Director of Corporate Enforcement and bringing applications for declarations of restriction of former directors of the company in liquidation. In the context of a winding up, it appears to me that one would have to add, as a relevant matter, compliance by the liquidator with statutory or regulatory obligations. This latter matter is not something of importance on the facts herein."

6.5 This is of particular relevance in the present case where early on in the liquidation it became apparent that there would be no realisations for the benefit of creditors and that the primary tasks would be distribution of statutory redundancy entitlements to employees and the restriction of directors. In that the Revenue Commissioners agreed to fund this work it became the 'client'. It did so for the public benefit, and ultimately it is the public purse that is funding this liquidation. In these particular circumstances the fact that the completion of liquidation is a matter of public interest and for the public benefit is a further significant factor that the court should take into account in measuring remuneration. It seems to me that this element carries with it the requirement that the public interest objectives of the liquidation be achieved at a reasonable and proportionate cost. This cost should be proportionate to the size of the company and its known indebtedness, and the sort of overall cost that the Revenue Commissioners have paid or might expect to pay to liquidators in comparable cases. This is in addition to considering the nature of the work carried out, its complexity, and the importance or value of the work 'to the client', although to an extent the concept of proportionality may be encompassed by those considerations. This is consonant with the comment of Mr Justice Clarke in *Re Marino Ltd* [2010] IEHC 394 where at paragraph 3.11 in commenting on *Sharmane* he stated –

> "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."

It is also in keeping with the court's wide discretion under section 228(d).

6.6 Moreover liquidators who agree to take on liquidations where there are unlikely to be realisable assets must reasonably anticipate that the remuneration which they can expect will be curtailed by these circumstances. In my view in such instances liquidators have a responsibility to reflect these wider considerations when seeking to agree remuneration or seeking measurement of their remuneration. It is notable that in practice when seeking final orders some liquidators in recognition of this responsibility seek modest fees and in some instances are willing to close liquidations without any additional fees.

6.7 Finally and importantly in this case it is clear that the court should consider any agreement between the liquidator and the Revenue Commissioners in relation to funding. As Finlay Geoghegan J. commented in *Re Sharmane Ltd* –

> "37… It should have regard to any agreement which has been reached between the relevant persons who are better placed to assess same. For the purposes of s.29, this would include any agreement reached by an examiner at the time of his appointment with the directors of the companies to which he is to be appointed, or the petitioner."

While consideration of hours spent and hourly charges is generally the "starting point" (per Finlay Geoghegan J. in *Mouldpro*) for a court measuring remuneration, where there are no assets and a creditor or the Revenue Commissioners or the Department of Social Protection are funding the liquidation, their agreement in relation to that funding should be the first consideration. Moreover it should be of primary importance because the essence of the relationship between the liquidator and the funder is contractual. The court in such cases has a diminished supervisory role.

7. Application of the principles

7.1 The liquidator's firm reached agreement with the Revenue Commissioners over funding following a meeting on 9 March, 2010. A follow-up email of 12 March, 2010, records: –

> "Based on our discussions we have revised downwards the rates that we would propose charging to Revenue (before deduction of the 8%) and I confirm that we would at all times seek to provide a value for money service. I also confirm that we are always mindful of our responsibility to control costs and in cases where we would be appointed at Revenue's behest, we would similarly seek to exert strict control over the legal costs."

Attached to the email was a revised schedule of rates which included the following note: –

> "LEGAL FEES – CONTROLLING COST
>
> Our firm has existing relationships with law firms that have specialist departments dealing with insolvency, including Court appointments. We exert strict control over the legal costs in any liquidation or receivership and we confirm that this will apply to any Court appointments we obtain".

It is of significance that the liquidator expressly accepted responsibility to control costs and "to exert strict control over the legal costs".

7.2 The liquidator engaged McDowell Purcell as solicitors and obtained from them a letter under section 68 of the Solicitors Act on 25 February, 2011. This set out their hourly rates, described as "a reduced rate on the basis that there is a reasonable volume of work emanating from the Revenue Commissioners." It was stated that they were intended to be "fair and reasonable, having regard to all the circumstances of the case, including…" and there followed a list of seven considerations that reflect Order 99, rule 37(22), including items such as complexity, the amount of property involved or its amount or value, "the importance of the matter to you" and time expended. The letter then stated: –

> "Fixed Rate
>
> On the basis that your appointment by the High Court as official liquidator involves the liquidation of an "empty" company (no significant assets, debtors, retention of title claims, no landlord and tenant issues etc…) and where the principal objective of the petitioning creditor is to restrict the directors, I am prepared to offer this firm's services on a fixed rate basis.
>
> Standard OL work and advices to include:
>
> - preparation of the Examiners Notice to proceed
> - attendance at examiner's office
> - review statement of affairs
> - settle s.150 proceedings, grounding affidavit exhibits, filing and service etc
> - present an uncontested s.150 High Court application
> - file annual OL accounts
> - all necessary attendances at High Court on motions for consideration
> - review second/ last OL report
> - prepare motion for final directions
> - all final/tidy up work to complete the liquidation
>
> If the official liquidation is confined to these areas I am prepared to offer a fixed rate of €10,000 plus VAT and outlay (advertising, stamping etc.)".
>
> To this was added a footnote that if the directors failed to file a statement of affairs necessitating a motion for committal and attachment the additional cost would be €1000 plus VAT.
>
> A further footnote stated that "If s.150 proceedings are contested counsel will be retained and [solicitors]'s costs are incurred on the hourly rate."

7.3 Although the directors failed to file a statement of affairs no motion was brought. While replying affidavits were filed, ultimately the section 150 application was not contested and both directors were restricted. The failure of both directors to file a statement of affairs amounted to non-cooperation with the liquidator and that should have made this outcome straightforward particularly when combined with the guilty plea to charges in respect of the non-payment of pension scheme deductions, and the outstanding indebtedness to the Revenue Commissioners at the date of the winding up order.

7.4 In the Billing Guide for Swift for the period 28 March, 2012, to 27 May, 2016, the liquidator sets out the hours worked, or parts of hours, the name of the staff member concerned and the rates charged, giving a total of €13,828 before adding VAT. The Billing Guide for Europlant over the same period yields a total of €7063.50 before VAT is added. Measurement of these figures in full appears to be claimed in the Notice of Motion, notwithstanding the liquidator's acknowledgement in his third affidavit that "the time recording is generally used as a guideline and the final figure can be increased or decreased as the case may be", and his contractual commitment to control costs.

7.6 It is notable that in both Billing Guides the description of work undertaken from March 2016 onwards concerns discussion with

solicitors and preparation related to the present application, and should therefore more properly be regarded as part of the costs of this application.

7.7 Another infirmity is that the liquidator's time recording is based on one hour, or a fraction of an hour broken into quarters. So for example a task that actually takes 20 minutes may be recorded as taking 30 minutes. Such time recording is inherently inaccurate.

7.8 During this period the liquidator prepared four reports to the High Court in each liquidation. It is apparent that there is a considerable overlap between the work required in respect of both liquidations which concern two companies engaged in the scaffolding and building material business, and having had two common directors, one of whom resigned prior to the winding up. I accept the affidavit evidence that for convenience work common to both was split equally between the two bills. However it is notable that by the time of the Second Reports dated 15 October, 2012, it was apparent to the liquidator that "there will be no prospect of a dividend being paid to any class of creditor in this liquidation". This had been anticipated by the liquidator as early as 31 May, 2001, when in a letter to the Revenue Commissioners he stated "At this juncture I do not anticipate any return to Revenue." It was equally clear that the main work "going forward" was to "finalise and issue the section 150 proceedings against the directors of the company" in both cases. This work was delayed while a prosecution was pursued against one of the directors on a charge related to failure to remit certain pension contributions.

7.9 There is remarkably little change in content in the liquidator's Third Report dated 14 October, 2013, which both note –

> "4.1 the Revenue Commissioners have agreed to fund a section 150 application against the directors of the company. My solicitors have drafted the papers and I will be issuing the papers in the High Court in the coming days."

In fact the restriction applications were not issued until December 2014 apparently because of a decision to await the outcome of the prosecution notwithstanding a guilty plea and a listing before Naas Circuit Criminal Court on 19 November, 2013.

The Fourth Reports dated 30 June, 2014, show remarkably little progress. Both state –

> "the affidavits in relation to the section 150 application were drafted and lodged during this period. Due to the lack of information available to the Official Liquidator the process of completing the affidavits was arduous."

7.10 In fact, contrary to the impression given by these reports, the motions do not appear to have been issued until some months later. In the liquidator's Fifth Reports the paragraph just quoted reappears followed by a statement that "the affidavits for restriction have now all been filed and the case is progressing" and noting that the matter has been transferred to the Chancery list to be assigned a hearing date. Replying affidavits were filed.

7.7 The liquidator has also exhibited documents setting out the work carried out in these liquidations pre-March 2012, and "Work carried out post-March 2012". It is apparent from the latter document that in the preparation of all of his reports to the court: "This required active engagement with our legal team…"

Given the liquidator's expertise, that these are the liquidator's reports to the court and not legal documents, that there is remarkably little difference between successive reports, and that they are largely replicated as between the two liquidations, it is hard to see how any engagement with his legal team was warranted apart from obtaining an update on the progress of the restriction application. If this is normal practice in a straightforward liquidation, it is not good practice.

7.11 The Restriction hearing took place on 7 October, 2015. The respondents did not appear, and Mr Justice Barry White read the papers. There followed a short uncontested hearing, and both respondents were restricted.

7.12 Having reviewed the Billing Guides, and compared them with the solicitor's "Time and Charges Ledger by Matter" in each liquidation I am struck by what I consider to be excessive to-ing and fro-ing over the drafting of section 150 papers, with numerous reviews and re-reading of drafts, email exchanges and telephone attendances. This includes for example about a dozen email reminders or telephone attendances between the liquidator and his solicitors between October 2013 and April 2014, the subject of charges of €34 on each occasion and charged out to the liquidator in *both* liquidations. The time charging for this and 'preparative work' at agreed hourly rates resulted in the accumulation of inordinately high charges both on the part of the liquidator and his solicitors. In an email of 21 September, 2015, it is recorded that McDowell Purcell's "Work In Progress" from March 2012 up to that point in the two liquidations was €16,947.50. This was excessive when the nature and complexity of the work is considered.

7.13 Apart from straightforward work related to the distribution of redundancy payments and routine compliance, the only task of significance was the application for restriction which the liquidator was statutorily obliged to bring. The investigation of the directors had been undertaken in large part prior to March 2012. I do not accept the submission that there was complexity in the preparation for or the making of the restriction application such as to justify this expenditure of time. Non-cooperation by directors is not unusual as a feature of restriction applications. The most that could be said was that the preparation for the application was rendered more awkward by difficulties in serving the respondents (substituted service was ordered) and by having to address their replying affidavits. While noting that the application came before the court on some nine occasions, these were routine mentions such as adjournments for filing affidavits, and fixing a hearing date; there was only one substantive hearing, on affidavit, that was uncontested and therefore brief. Moreover the bulk of the work on the restriction applications was legal rather than for the liquidator.

7.14 The liquidator also suggests that in achieving a "realisation" of in excess of €20,000 from the Department of Social Protection for redundancies he was adding value. However this was not a realisation in the sense of recovery of assets for the benefit of creditors; rather it was the product of routine liquidation work which a liquidator is statutorily required to undertake for the benefit of former employees of the company.

7.15 Counsel for the liquidator argued that by agreeing reduced rates, further reducing these rates for work done post-March, 2012, in addition to observing the 8% reduction required by the Revenue Commissioners, the liquidator was providing "value". Also it was argued that delaying the restriction application until after the prosecution was completed could have saved cost, if the criminal court had seen fit to impose restriction. This last point is rejected, as the court and practitioners are aware that it is not generally the practice of the criminal courts to exercise their power of restriction. As to the reduction of fees, the first reduction was part of the negotiation that led to initial agreement. The second reduction followed on the prompt payment by the Revenue Commissioners of €63,987.88 less withholding tax in respect of the main bulk of the work on the liquidations that had been undertaken by the liquidator up to that time. I have already commented on the time charging evident in the Billing Guides post-March 2012, and I do not accept that this represents "value" when it is considered how relatively little work remained, and when viewed in the context of the liquidator's contractual duty to "control costs", and the wider duty to consider all the circumstances and seek remuneration that was

proportionate to the ends to be achieved. I am also of the view that unnecessary delay by the Liquidator eroded the value of his work.

7.16 What the liquidator seeks to have measured in respect of his own remuneration for further work on the liquidations is in the order of €13,000 plus VAT, and this is excessive in all the circumstances. I am of the view that a fair and reasonable total remuneration to cover the work done by the liquidator in both liquidations post-March 2012 would be €10,000 plus VAT. This does not take account of the further payments made by the Revenue Commissioners in November 2015 which I will address in the context of legal costs.

8. Legal costs

8.1 Turning to the legal costs which the liquidator asks the court to measure, it is clear that these as billed and as posited in the Notice of Motion are based on the rates set out in the section 68 letter, and hours/personnel identified in McDowell Purcell's 'Time and Charges Ledger by Matter' in each liquidation. They were not reduced until the motion was opened by counsel, and the reduction reflects the review by the costs accountant Mr Guiden.

8.2 In the second affidavit of Susan Woods sworn on behalf of the Revenue Commissioners on 19 July, 2016, at paragraph 2(b) she states: –

> "Having been informed by the Liquidator that the only remaining matter was the restriction application, Revenue sought an estimate for the costs of the hearing. The Liquidator advised that the costs for preparing and attending the hearing for a full day would be €2500 plus VAT for his solicitors, and €1500 plus VAT for counsel. Following the application (which was not contested), a bill for €4200 plus VAT for those professional fees. That bill was paid in November 2015."

8.3 In fact McDowell Purcell presented separate invoices in relation to each company both dated 30 October, 2015, "To all work done and advices provided in relation to the section 150 proceedings" for VAT inclusive sums of €2583, giving a total of €5166 inclusive of VAT. Ms Woods in her third affidavit at paragraph 4 explains that Revenue understood from an email in September 2015 that the fee quoted there would include "preparing for" the section 150 hearing. She states –

> "Further, as the liquidator and his solicitors are aware, Revenue would never agree to a fee of €2500 plus VAT for simply attending on the day of the hearing. As set out in paragraph 6 of my affidavit, usually Revenue discharge a fee of €2000 plus VAT for all work done – including preparation and attendance at the relevant hearing, by liquidators and their legal team, in an uncontested restriction application."

8.4 Ms Woods goes on in paragraph 5 of her affidavit to rely on the wording of the invoices as including "all work done and advices". She also noted, correctly, that in seeking measurement of legal costs no deduction had been made to allow for the sums already paid by Revenue in November 2015. This was acknowledged for the first time by the liquidator (and his solicitors) in paragraph 6 of his fourth affidavit.

It is noteworthy that these invoices were presented not long after the emails in September 2015 in which, as the liquidator was aware, the Revenue Commissioners were made aware of the Work in Progress claim.

8.5 I find that the wording used in the invoices resulted from a mistake on the part of McDowell Purcell and was not intended by them to cover all preparatory work in relation to the section 150 application. The Revenue Commissioners knew or ought to have known of this because of the wide disparity between the €4200 plus VAT claimed in the invoices and the €16,947.50 Work in Progress plus hearing costs of "€2500 plus VAT for preparing and attending full-day contested hearing" and "€1500 plus VAT per day for barrister" specifically notified by the liquidator in an email of 21 September, 2015, to Ms Woods. This totalled nearly €21,000 plus VAT. It would be unjust and unreasonable for the court to measure the liquidator's legal costs at a low level on the basis of this mistake.

8.6 However the liquidator undertook to maintain "strict control over the legal costs". This should be viewed in the context of the section 68 letter and the possibility of a Fixed Rate of €10,000 plus VAT for certain specified legal work including an uncontested section 150 application. While the application was contested prior to the hearing date, the limited nature and extent of the additional legal work and the lack of complexity did not justify effective doubling of the Fixed-Rate. The court finds that at this level – some €21,000 plus VAT – the liquidator failed to take any or any adequate steps to control the legal costs which, on the time/rate charge out, were mounting beyond what was reasonable. I have also commented earlier on what the court considers to be excessive or unnecessary to-ing and fro-ing over the preparation of the section 150 application and affidavits and this applies with equal measure to the solicitor's role in these liquidations. The only reasonable element is the provision for counsel which was in fact modest and better reflects the lack of complexity in the restriction applicantions.

8.7 While I have had regard to the Legal Costs Accountants two reports of 11 July, 2017, in relation to Swift and Europlant relating to legal work carried out in the two liquidations from March 2012 until January 2016, I have two concerns that diminish their usefulness. These concerns do not reflect in any way upon the undoubted expertise and impartiality of Mr Guiden.

The first is that in setting out in bullet point form the legal work and duties carried out by the solicitors, in both reports work concerned with the more immediate preparation for the section 150 hearing, including the briefing of counsel and court attendance, is included, notwithstanding that this was billed in the invoices of 30 October 2015 and discharged by the Revenue Commissioners in November 2015. This makes it impossible to divine Mr Guiden's opinion as to the appropriate instructions fee for work not yet paid for in each liquidation. What can be said is that in relation to Swift his figure of €13,000 should be reduced by the invoiced amount of €2,100, and in Europlant the figure of €8500 should similarly be reduced by the invoiced amount of €2,100; this reduces the figures to €10,900 and €6400 respectively, or a total of €17,300 before VAT and outlays.

8.8 The second concern is that the task undertaken by Mr Guiden and the basis for his opinion are different to the task that the court undertakes in measuring the liquidator's reasonable legal costs. Mr Guiden provides an opinion on what might tax before a Taxing Master in the context of a normal party and party taxation. Unlike the court he does not take into account the relevant considerations identified in *Mouldpro* and this judgment, in particular as they apply to liquidations where there are no assets and where the liquidator's remuneration and legal costs are governed primarily by contractual considerations.

8.9 Nevertheless it is of note that Mr Guiden also recognises that time expended is only one of the factors to be taken into consideration under Order 99, rule 37(22)(ii), and his opinions result in considerable reductions from the amounts claimed by McDowell Purcell on the basis of time/rate billing.

8.10 Taking all the evidence and circumstances into account I measure the liquidator's total legal costs (excluding the costs of this motion) covering both liquidations at €15,000 plus VAT, to include counsel's fees, and to this I add outlays (€577 in Swift and €840.65

in Europlant) totalling €1417.65. From the figure of €15,000 must be deducted €4200 already paid. Accordingly I measure the liquidator's total outstanding legal costs (excluding the cost of this motion) at €11,800 plus VAT plus outlays of €1417.65.

9. Total measurement
9.1 Accordingly the court measures the liquidator's remuneration including legal fees covering the period from April 2012 up to the present time, excluding the costs of this motion, at €21,800 (€10,000 plus €11,800) plus VAT plus solicitor's outlays of €1417.65. This measurement takes into account fees paid to the liquidator's solicitor in November 2015. It is not necessary to measure remuneration paid for the period up to April 2012, accepted by the liquidator in discharge of remuneration for work done up to that time. It does not appear to be necessary for this court to divide this measurement between the two companies, but were it necessary to do so I would divide it equally between Swift and Europlant save that the outlays would be divided as to €577 Swift and €840.65 for Europlant.

10. Costs of the Motion
10.1 A liquidator can bring an application to court for measurement of remuneration at any time, but should only do so when it is reasonably justified. Typically in a substantial and long-running liquidation the liquidator will bring an application for payment on account out of company assets. Very often the application for measurement of remuneration will be delayed until the application for final orders.

10.2 Different considerations apply where there are no assets. In such circumstances it is usual for the remuneration to be agreed with the funder in advance of the application for final orders, and the court will invariably respect what has been agreed and will approve it as one of the final orders (if that is required – generally no order is requested). Where there is no agreement the application for final orders, including an order measuring the liquidator's remuneration, can still be brought. As I have indicated earlier in this judgment in such circumstances the dispute between the liquidator and the funder results in an *inter partes* hearing, and accordingly the normal rules in relation to the awarding of costs under Order 99 should apply.

10.3 Counsel for the liquidator argued that the court should take an approach similar to that taken by Finlay Geoghegan J. in *Re Sharmane*, where an examiner sought measurement of his fees under section 29 of the Companies (Amendment) Act, 1990 (as amended). Ulster Bank Ltd was a notice party who successfully opposed joint and several liability of the companies concerned in respect of the examiner's remuneration, and succeeded in some reduction of the examiners fees. Finlay Geoghegan J. refused to grant Ulster Bank Ltd any costs against the examiner, notwithstanding their success, because they were acting in their own commercial interest. She granted the examiner 60% of his professional fees plus VAT. However the circumstances of that case are fundamentally distinguishable from the present case because the company under examinership had assets and under section 29(3) as amended following sanction by the court the examiner's entitlement to payment in full enjoyed priority over "any other claim, secured or unsecured, and any compromise or scheme of arrangement or in any receivership or winding up of the company to which he has been appointed".

10.4 In the present liquidations following the making of the restriction orders there was no impediment to the liquidator seeking final orders. This should have been done in late 2015 or early 2016, and the measurement of remuneration could have been undertaken in the context of such an application.

10.5 More important is the question of whether it was reasonable to bring this motion to ask the court to measure the liquidator's remuneration and legal costs. I'm satisfied that it was not reasonable.

10.6 The affidavits disclose that offers and counteroffers were made between the parties in the lead up to the issue of the motion. The liquidator suggests that it was inappropriate of the Revenue Commissioners to 'haggle down' the remuneration sought. I disagree. Having regard to the funding agreement between the parties, and the wider considerations that the court should take into account when measuring liquidator's remuneration, it was entirely appropriate that there should be negotiation in the attempt to reach agreement. Indeed the court would be concerned if, in the context of such a dispute, no concerted and reasonable attempts were made to negotiate agreement in advance of the court application.

10.7 Before issue of the motion the Revenue Commissioners offered to agree the liquidator's remuneration and costs at an overall figure of €25,000 plus VAT. Having regard to my conclusions in this judgment the liquidator should have settled for that figure and should not have proceeded with this motion. On this ground alone I would decline to award any costs of this motion to the liquidator.

10.8 The unreasonable approach taken by the liquidator in pursuing this motion is emphasised by his rejection of further offers of compromise, and the approach taken that his costs of this motion, (which Mr Guiden now opines would tax at €35,000 plus VAT plus Senior Counsel and Junior Counsel fees) be discharged. The correspondence shows the following: –

a) In a letter of 1 June 2017 McDowell Purcell counter offered as follows: –

> "The liquidation costs for our client, our counsel and ourselves as set out in the attached schedule amount to €46,356.47 (ex VAT and outlay). We are prepared to offer a discount of 15% of these fees which discounted figure amounts to €39,403.
>
> The motion for directions costs for our client, our counsel and ourselves as set out in the attached schedule amount to €60,918.45 (ex VAT and outlay). We are prepared to offer a discount of 30% of these fees which discounted figure amounts to €42,642.91."

` b) In a letter of response dated 9 June, 2017, the Revenue Commissioners increased their offer to €30,000 plus VAT and statutory outlay, which excluded any costs related to the motion. They added: –

> "From the outset, revenue has endeavoured to adopt a cost-effective and sensible approach to this matter. The office of the Revenue Commissioners is a public body, and operates within restrictions placed on the expenditure of public monies. Revenue is subject to review by the office of the Comptroller and auditor general, to ensure that public funds are spent in an effective and proper manner. Revenue are subject to audit by the office of the Comptroller and auditor general to ensure value for money is obtained. We are quite satisfied that any review by the Comptroller law and order general of this matter would determine the discharge of "*the motion for directions costs*" as an ineffective and improper use of public funds."

c) McDowell Purcell replied on 12 June, 2017, rejecting this proposal and counter offering to accept €35,000 (plus VAT and outlay) provided Revenue also paid costs of €42 642.91.

d) This was not acceptable to the Revenue Commissioners, and in a final effort to resolve the matter they increased the offer in respect of professional remuneration and outlays to €35,000 plus VAT, on the basis that both parties pay their own costs of the motion. As the liquidator still required his costs to be paid this offer was rejected.

10.9 In my view the liquidator through his solicitors compounded the unreasonable refusal of the offer of €25,000 plus VAT in the subsequent refusal of improved offers which were increased in order to avoid the motion proceeding to hearing. This reinforces my decision not to award the liquidator any costs of the motion.

10.10 In these circumstances the Revenue Commissioners seek their costs of the motion. For two reasons I have decided to make no order in relation to their costs.

In the course of these liquidations the Revenue Commissioners on 22 May, 2012, submitted two fee notes to the liquidator, oddly enough sent to the liquidator's solicitors, in relation to their costs of presenting the two petitions. In the letters they seek €6500 as a 'Professional Fee' in each case. Quite why they did this when it should already have been apparent that there would be no assets in either of the liquidations is unclear. They state that "… The amounts claimed are in line with recent awards made in favour of the Revenue Commissioners by the Taxing Master of the High Court". Such fees seem high, at least for winding up orders that are uncontested, and it may be questioned whether such fees are reasonable in cases where there are no assets or limited assets available for distribution to creditors. Certainly the submission of these fee letters undermined the arguments raised on affidavit and the objections taken by the Revenue Commissioners in relation to the liquidator's remuneration and legal costs, and provided ammunition for the liquidator.

10.11 Secondly the Revenue Commissioners will have the benefit of this judgment which may be of assistance to them in reaching agreement over liquidator's remuneration and legal costs in other liquidations where there are no assets and they have arrangements in place to fund the liquidations. I will therefore make no order as to the Revenue Commissioners costs of this motion.

10.12 I would make one further observation. The funding arrangement in the present case is quite limited in its terms, and I have certainly come across more comprehensive agreements. In particular there may be scope for more fixed rate agreement, broken down in respect of specified work, with provision for possible or anticipated variations, and with a mechanism for hourly charging or renegotiation where the work required exceeds the parties' expectations. Further it seems to me that there should be an agreed method for resolving disputes e.g. conciliation by an agreed appropriate mediator or professional, with measurement by the court as a last resort.