In The Supreme Court of Bermuda

CIVIL JURISDICTION
(COMMERCIAL COURT)
2013 No. 52

IN THE MATTER OF A COMPANY

AND IN THE MATTER OF AN APPLICATION BY JOINT PROVISIONAL LIQUIDATORS TO RECOVER THEIR COSTS

EX TEMPORE RULING
(In camera[1])

Date of Hearing: July 3, 2013

Mr. Delroy Duncan and Ms. Nicole Tovey, Trott and Duncan Limited, for the former Joint Provisional Liquidators ("the JPLs")

Mr. Christian Luthi, Conyers Dill & Pearman Limited, for the Company

Introductory

1. In this matter the JPLs seek approval from the Court for their outstanding costs which amount to just over $445,000, being costs which have been incurred since March 15, 2013[2]. The Company opposes that application and contends that the total sum sought is unreasonable in all the circumstances.

[1] The present Judgment is accordingly being published in anonymised form.

[2] The JPLs were appointed by order of Hellman J on February 26, 2013. On March 22, 2013, I authorised the withdrawal of the Petition and also approved the JPLs' fees up to and including March 15, 2013. The same Order discharged the JPLs' appointment, subject to their right to (a) recover their reasonable fees for the approved period and thereafter for the period March 15, 2013 to completion, and (b) apply to the Court in relation thereto.

Applicable principles to approving the JPLs' costs

2. The Company's counsel Mr. Luthi referred the Court to some authorities which he contended should guide the Court. First of all, he referred the Court to rule 23(3) of the Companies (Winding-up) Rules 1982 which in effect provides that a liquidator is entitled to all costs that are "*reasonably incurred by him as provisional liquidator*"[3]. And I think that it is common ground that this is the general principle that applies in circumstances where the Court has actually ordered on March 22, 2013 that the JPLs should be entitled to their costs insofar as they have been reasonably incurred.

3. In addition, however, Mr. Luthi referred to two cases which have not to my knowledge been considered by this Court before. The first case is *Mirror Group Newspapers plc-v- Maxwell and others (No 2)* [1998] 1 BCLC 638; and the second case was the more recent case of *Brook-v-Read* [2012] 1 BCLC 379; [2011] EWCA Civ 331. Both of these cases support the proposition that the Court in looking at the fees of office holders should not simply look at the question of the time billed, but should have regard to the broader question of the value provided by the services in question in broad commercial terms. And it appears that after Ferris J gave his decision in *Mirror Group Newspapers–v-Maxwell*, a Practice Direction was developed in England and Wales which incorporated this principle[4].

4. The headnote in the report of the Court of Appeal judgment in *Brook-v- Read* [2012] 1 BCLC 379 may perhaps just be briefly cited. It says this:

> "*The real task for the court in any particular case was to balance the Practice Statement principles of the value of the service rendered, the proportionality of remuneration and a fair and reasonable remuneration for the work properly undertaken in their application to the facts and circumstances of the case. All the circumstances of the insolvency had to be considered, including that an office- holder's duties required more than just realisation and distribution of assets and involved the performance of certain statutory duties and the possible investigation of the existence of assets or the merits of claims. The touchstone for remuneration was the value of the office-holders services, and they ought not to be measured by a mere totting-up of hours multiplied by charge-out rates. The fiduciary status of a trustee in bankruptcy or other office-holder was also important, as his*

[3] Rule 23(3) reads as follows: "*Subject to any order of the Court, if no order for the winding-up of the company is made upon the petition, or if an order for the winding-up of the company is made upon the petition. or if an order for the winding-up of the company on the petition is rescinded, or if all proceedings on the petition are stayed, the provisional liquidator shall be entitled to be paid, out of the property of the company, all the costs, charges, and expenses properly incurred by him as provisional liquidator, including such sum as is or would be payable under the scale of fees for the time being in force where the Official Receiver is appointed provisional liquidator, and may retain out of such property the amounts of such costs, charges, and expenses."*

[4] '*Practice Statement: The Fixing and Approval of the Remuneration of Appointees*' (2004).

only right to remuneration or other benefit was that expressly permitted by law under the Insolvency rules, and he was under a duty to be frank with the court and creditors, a duty not to advance unmeritorious claims for any payment, and a duty to avoid incurring unreasonable costs."

5. That, I think it was accepted, was a fair summary of the leading judgment delivered by Justice David Richards sitting on a Court of Appeal Bench which included Arden and Black LJJ.

Application of principles to facts of the present case

Commercial background to the provisional liquidation

6. Applying these principles to the present case, it is clear that the present case was a complicated one because the JPLs were appointed on the Petition of an unpaid creditor in circumstances where, at the end of the day, it was clear that the Company was (its protestations to the contrary notwithstanding) insolvent on a balance sheet basis as well as on a cash flow basis.

7. The Company's commercial centre of gravity was in Ruritania and the Company's principal asset was a bank. Concerns arose at an early stage of the provisional liquidation as to the impact on the value of the Company's principal asset if news of the provisional liquidation were to become public. As a result of this, the Court made an atypical confidentiality Order.

8. In addition to the concerns about the rapid dissipation in value of the Company's principal asset if there were to be a full liquidation, and the Transaction which the JPLs were appointed to review were not approved, there was in my judgment legitimate anxiety for the JPLs about operating in a commercial environment which was somewhat volatile and unpredictable because of the emerging character of the jurisdiction where the Company's centre of commercial activities was located.

9. Accordingly, this was not a standard corporate rescue assignment where the JPLs and their advisers could simply tick the usual boxes. And so, to that extent I accept that the assignment was not quite as straightforward as the Company's counsel has sought to construe it. Mr. Duncan took the Court through the provisional liquidation process after 15 March (up to which point the Court has already proved the fees) and explained the various levels of complexity; most which culminated in one main question. And that question was should the JPLs approve the Transaction as being in the best interests of creditors in circumstances where it was unclear whether a winding-up order might potentially be made on the petition of another creditor?

10. This was a possibility because shortly before the hearing on 22 March of the Petition, the JPLs learned, seemingly for the first time, that the petitioning creditor had

compromised its claim with the Company and was going to withdraw its Petition. There was still the possibility, particularly in light of the fact that a strategic decision was taken not to publicise these winding-up proceedings, that some other creditors might later learn of the dismissal of these proceedings and decide that they wanted to invoke the winding-up jurisdiction of this Court.

Assessment of reasonableness of costs

11. Mr. Luthi nevertheless complained that some of the costs which had been charged were, to use his words, "stunning". He took the Court through a careful analysis of the breakdown of the fee charges for different periods. Between 16 March and 20 March, 294.35 hours were billed for all timekeepers at a charge of $239,774. Between 21 March and 22 March, which admittedly was the day immediately prior to and the day of the Court hearing, 87.4 hours at a total cost of $71,560 was charged. Some $92,177 was charged from 25 March to 3 April; and from 4 April to 1 May, some $42,548 was charged.

12. The complaints which counsel made were many. But there were some highlights. Firstly he points out that after 22 March when the Petition was withdrawn with liberty to the JPLs to apply with respect to their costs, much of the time was spent on the issue of their costs. Another point that he made was that looking at the time spent by members of the JPLs London team and their London lawyers on one Sunday, several days' work was carried out.

13. These criticisms have some resonance but have to be looked at in a realistic context. This was a company which formed part of a $5billion group, even accepting that much of that group had already been transferred to other ownership. The sums involved were, still, significant. One can illustrate that by referring to the Report which makes reference to the Transaction which was under consideration and refers to the fact that some $20 million was paid as part of a debt forgiveness agreement. So this was not a minor case.

14. On the other hand Mr. Luthi points out, and it is easy to see why his client could feel aggrieved, that when the JPLs took over the Company had roughly $900,000 in the Bank. And the total bill rendered by the JPLs is in excess of $1million and so the net result of the provisional liquidation is that all the cash that the Company had has been exhausted by provisional liquidation costs.

15. What value has been rendered by the provisional liquidation? That question is hard to answer in precise mathematical terms. But the Court cannot ignore the fact that the Company made a business decision to restructure itself out of insolvency without seeking the protection of the Court and appointing its own liquidators to manage the process. And so the Company itself did assume the risk that a third party creditor would become disgruntled with the Company's own plans and would file a petition

and appoint the creditors' own liquidators. And simply because the Company was able to dispose of the Petition does not mean that when liquidators are appointed by this Court that they are absolved from the fiduciary duties which flow from their original appointment. Having been appointed, it was for them to discharge their duties in a professional manner and the fact that the Company had resolved the Petition could not justify the liquidators taking significant shortcuts with a view to bringing the matter to an end.

16. Taking all those matters into account, I still am bound to accept that the global amount charged is on the high side and that it does appear that this was a matter where there was, on the margins, excessive billing. One simple illustration, which might be dismissed as a mere clerical error, came in the bill of the JPLs' London solicitors where a £2562.50 conference charge (which was clearly unrelated to this matter) was mistakenly included.

17. This is the first time to my recollection that this Court has had to resolve in such a hearing contested liquidation fees. The Court typically finds, when it comes to liquidation fees, that local liquidators have been able to reach agreements with stakeholders in the liquidation so that such disputes do not arise. In this case, one difficulty, perhaps, in arriving at an intuitive sense of what the market will bear, may be the fact that that the JPLs' work was mainly done in London because none of the leading local firms with large insolvency teams was able to take on this assignment[5]. Be that as it may, I find that I am minded to accept Mr. Luthi's submission that the Court should make a discount. However, Mr. Duncan rightly pointed out that the Court's discount[6] should not take into account the global figure because the Court has already approved the fees up to 15 March, but should only look at the amount which is now claimed of just over $445,000 for the period after 15 March.

18. It was submitted by Mr. Luthi that the appropriate discount should be a 50% discount of the total amount claimed for the post 15 March period. That would be a savage cut to any office-holder's bill and would in my judgment potentially cause serious damage to the ability of this Court to obtain the best possible liquidators to act in difficult and complex liquidations. And, accepting that the assessment of any discount is at the end of the day is a rough and ready exercise and taking into account the item that was accidentally and wrongly billed, I would impose a discount of 15% of the total sum claimed for the post-15 March period. And I do that taking into account the fact that a significant amount of that costs figure does involve haggling over costs.

[5] The local liquidator has been appointed in several local and international liquidations and his joint liquidators are attached to a respected international accounting firm. The office-holders and their advisers continue to enjoy the full confidence of the Court.

[6] For the avoidance of doubt, he vigorously opposed any deduction.

19. It does seem to me that when liquidators are unable to satisfy stakeholders of the reasonableness of their fees, they should not expect to be compensated in full for failing to do so.

Conclusion

20. I will hear counsel as to the costs of the present application, on a date to be fixed by the Registrar, if necessary, should the costs not be agreed.

Dated this 3rd day of July, 2013, _____

IAN R.C. KAWALEY CJ