



**DM Property Holdings (Guernsey) Limited**  
Royal Court  
10<sup>th</sup> January 2017

**JUDGMENT**  
**1/2017**

Cost caps

**IN THE ROYAL COURT OF GUERNSEY  
(ORDINARY DIVISION)**

**IN THE MATTER OF  
DM PROPERTY HOLDINGS (GUERNSEY) LIMITED  
(IN LIQUIDATION)**

**Decision on papers in respect of costs cap**

**Judgment handed down: 10<sup>th</sup> January 2017**

**Before: Richard James McMahon, Esq., Deputy Bailiff**  
**Jurats: J Ferguson, D P L Hodgetts LVO and N D McCathie**

**Timothy Le Cornu of KRyS Global (Guernsey) Limited, as the liquidator, made submissions in writing**

**Legislation referred to:**

Practice Direction No. 3 of 2015  
The Companies (Guernsey) Law, 2008

**Introduction**

1. The background to the present application from the Liquidator of DM Property Holdings (Guernsey) Limited, Timothy Le Cornu of KRyS Global (Guernsey) Limited, has been described in previous decisions and will not be repeated, save to the extent now necessary. The most recent development was the provision to Mr Le Cornu on 29 September 2016 of a draft judgment by which the Court approved in part the revised estimate of the costs of the liquidation. Guidance was also given to Mr Le Cornu as to how he could request the Court to re-consider the matter before its decision was to be finalised and the Act of Court issued.
2. Mr Le Cornu as Liquidator has availed himself of the opportunity to supply more material for consideration by the Court. In doing so, under cover of his letter dated 18 November 2016, he seeks leave to rely on an Affidavit sworn by him on 18 November 2015. He requested that a decision on that application be reached on the papers.
3. The Deputy Bailiff carefully reviewed the content of Mr Le Cornu's Affidavit. Although he could not spot any information in it that could not have been produced by Mr Le Cornu

previously, he decided that he would nevertheless exercise the Court's discretion in favour of admitting this evidence at this late stage. He reached this decision as much as anything because Mr Le Cornu finds himself in new territory because of the new practices introduced by Practice Direction No. 3 of 2015. In future, procedural matters such as these will be expected to be followed without needing to rely on the indulgence of the Court.

4. As a result of that decision, Mr Le Cornu's Affidavit was placed before the Jurats and they were invited to consider how, if at all, the information contained in it affected their decision as set out in the draft judgment of 29 September 2016.
5. The Jurats have noted Mr Le Cornu's explanations about the approach that he has taken to this liquidation. However, nothing that he has set out in his Affidavit changes the conclusion reached by the Court that his application to increase the cap on the fees that had been imposed and then increased should only be allowed to the extent that the cap will be further increased to £45,000. In particular, the Court points out that there is a difference in approach between a case in which there is something explicit upon the face of the Act of Court relating to the fees of a liquidator, as in the present case, and a case where compliance with the estimate requirements of the Practice Direction do not translate into something explicit. In the former, the liquidator cannot charge fees, or seek to recover such fees from the liquidation estate, above the amount specified. Accordingly, a liquidator potentially has a choice as to whether to work within the fee cap imposed or make application to vary the cap, or even have it removed. In the present case, work has been done in respect of which fees are sought to be recovered above the amount previously fixed on two occasions. It is the significant level of additional fees for work that apparently was not envisaged at the time of the previous application to modify the cap with which the Court has struggled and nothing in Mr Le Cornu's recent Affidavit adequately addresses that point.
6. The background is as follows. On 23 March 2015, DM Property Holdings (Guernsey) Limited ("the Company") was ordered by the Court to be compulsorily wound up and the liquidator appointed. The Company had had to be restored to the Register of Companies before its winding up could be ordered. The Applicant was one of the Company's creditors, Guernsey Home Loans Limited.
7. The Court agreed that the Liquidator could charge on a time costs basis. However, the Court also made the amount of fees to which the Liquidator would be entitled subject to a cap of £15,000. It did so because the liquidation appeared to be a straightforward exercise, involving the realisation of the Company's principal asset, which was the residence of the owners and directors of the Company. The Court also provided that, if needed, the Liquidator had liberty to apply to increase the cap.
8. The Liquidator availed himself of that liberty in September 2015. On 28 September 2015, the Court made an order increasing the cap, as requested, to £36,851.50. By that time, the Practice Direction had been issued. Consistent with the approach set out therein, Mr Le Cornu's application was considered on the papers. The Court was satisfied that the explanation offered by the Liquidator about the additional steps that he had been required to take, including having to commence proceedings to evict the occupiers of the residential property, which had not been foreseen at the time the original cap was imposed, justified the increase of the cap sought. The Court further noted that the application for an increase in the fee cap took into account the Liquidator's estimate of the costs likely to be incurred to bring the liquidation to a conclusion. What was sought, and approved, as a fee cap increase was a very precise amount.
9. The Liquidator prepared his final report dated 30 June 2016 in readiness for having his accounts examined by a Commissioner of the Court. He explained that the professional fees incurred during the course of the liquidation had exceeded the revised cap imposed by the Court by £18,341.50. He mentioned that he had chosen not to defer seeking a further revision of the fee cap so as to save costs, rather than do so when the fee cap had been exceeded. He further

indicated that the estimate of fees to complete the liquidation is £1,480. In doing so, he failed to appreciate that the function of a Commissioner under section 417 of the Companies (Guernsey) Law, 2008 does not extend to re-visiting any fee cap that the Court has imposed, which ties the Commissioner's hands as much as it ties the Liquidator's, and that this is an issue that must be returned to the Court for further consideration.

10. The Liquidator then applied by way of a letter dated 2 September 2016 in accordance with the Practice Direction seeking a second revision of the fee cap that has been imposed in such a way that the entirety of the fees, ie, the costs, charges and expenses, including the remuneration of the liquidator, as set out in section 418 of the 2008 Law, are capable of being paid out of the Company's assets in priority to all other claims. His letter enclosed a copy of his final report, in which key activity summaries describe the nature of the tasks undertaken. The Liquidator further explains that he has written off various charges that might otherwise have been included. He also enclosed e-mail correspondence provided on behalf of the Company's two secured creditors, both of which have not had their debts settled in full and so would be the only beneficiaries if the Liquidator cannot be paid everything he now seeks. Both of the secured creditors have indicated their agreement with the level of fees being sought by the Liquidator. Consistent with the Practice Direction, the Liquidator invited the Court to determine the application in respect of the fee cap on the papers.
11. The Court also received a letter dated 7 September 2016 written by one of the owners and directors of the Company, which was forwarded under cover of a letter from his Advocate. That letter expressed concern at the level of fees being sought by the Liquidator. The letter did not raise any issues that the Court would not of its own motion have considered anyway.
12. As already set out, the Court provided its reasoning in draft to Mr Le Cornu and then received the Liquidator's application for admission of his Affidavit prior to re-considering its conclusions. Mr Le Cornu states that the suggested imposition of a fee cap at the outset took him by surprise. It may have done, but the Court has already taken into account the difficulties a potential liquidator has in estimating the likely costs associated with a liquidation by agreeing to increase the cap in exactly the way the Liquidator proposed in 2015. The Court considers it is entitled to regard that modification to the fee cap as having been proposed by the Liquidator with the benefit of the detailed knowledge he had by then acquired about what was involved with this liquidation.
13. The Court has fully considered the more detailed explanation that Mr Cornu has now provided in his Affidavit. In the same manner as the way it approached the application for a modification to the fee cap when it was first made in September 2016, it has attempted to identify what, if anything, has happened since the increase in the fee cap in 2015 that was not expected, or could not have been expected. The restraint order made by this Court in 2014 obviously pre-dates the order to wind up the Company and so the steps required to vary that order must have been in the contemplation of the Liquidator. The eviction of the occupants of the residence had been accomplished at or around the time of the previous fee cap increase in 2015 and so had already been taken into account. Although the Liquidator had not gained entry to the property until after the occupants had vacated and so had to take various steps to arrange for the property to be fit to market, those were the very steps that must always have been contemplated as needing to be taken in order to realise the Company's primary asset. There is a reference to the identification of a potential issue relating to the electric supply cable that needed to be resolved before conditions of sale could be signed, but it transpired subsequently that this issue had been raised incorrectly on behalf of the purchaser. Much of the other activity described appears to the Court to be no more than could have been expected in order to sell a residential property and liaise with those concerned, including in respect of distributing the proceeds of sale. Accordingly, although the Court recognises that there were a few aspects of the liquidation that had not been foreseen in the way it subsequently turned out, there is really very little that was not known, or capable of being considered, at the time of the 2015 increase of the fee cap.

14. In summary, therefore, the Court has struggled to identify what has actually happened that falls outside of what Mr Le Cornu expected to happen and what should have been covered by the estimate of fees to be incurred with which the Court dealt in September 2015. A fee cap was placed on this liquidation at the outset because it was recognised that what was involved was broadly equivalent to the saisie of a residential property where the incidental costs should not be exorbitant. Events have been slightly overtaken by the introduction of the Practice Direction, the scheme of which is designed to enable the Court to be provided with as accurate an estimate of the fees likely to be incurred by liquidators (and others) so that it helps the Court to identify whether to exercise the Court's discretion to make the order sought. Moreover, the Court does not lightly impose a fee cap on a liquidator and does so to encourage realism and pragmatism in how to fulfil the duties imposed on the liquidator by the 2008 Law. In particular, any fee cap is intended to introduce into the liquidation a level of financial discipline that would not necessarily exist if no cap has been imposed.
15. As previously stated, the Court does understand that the task of Mr Le Cornu as Liquidator has been more complex than initially envisaged. For that reason, the Court has concentrated on what steps in the liquidation appear to have arisen out of the ordinary course of the liquidation, because it is that type of step that potentially warrants consideration of a modified fee cap. Unlike the position in 2015, where the revised estimate of the overall cost of the liquidation had increased significantly for reasons that were readily understandable, the further steps taken in the liquidation do not appear to the Court to have taken the Liquidator wholly by surprise.
16. In those circumstances, even with the benefit of the greater detail contained in Mr Le Cornu's Affidavit, the Court cannot accede to the Liquidator's application to revise the fee cap to a level that would make provision for all that he now claims as having been properly incurred in the liquidation. To do so would involve disregarding the imposition of the fee cap in the first instance. The aspect of the Court's order imposing a fee cap must, in its view, have been acknowledged by the Liquidator as serving some purpose. It should operate in the same way as any other order of the Court and be complied with. Although not a perfect analogy, when the Court requires something to be done and it is not done, the person failing to comply and seeking longer in which to do the act ordered seeks the Court's indulgence. The Liquidator has already sought such an indulgence at a time when some of the fees he wished to recover had already been incurred. Although he approached the Greffe in April 2016 about when to seek a further modification to the fee cap, as he now does, it is also apparent that he had by then exceeded the 2015 modification of the fee cap anyway. Those to whom the Practice Direction applies should realise that the best practice will be to revert to the Court for directions pursuant to section 426 of the 2008 Law, in respect of which the Practice Direction similarly applies, as early as possible when it becomes apparent that a previous estimate is no longer accurate. Failing to do so and only raising the matter after the event is not a bar to obtaining the relief sought but a late application, and in particular when it is a second application of that type, raises the question as to why it has been left until then to draw the matter to the Court's attention. As the Liquidator realises, imposing a fee cap is an unusual step for the Court to take anyway. Once imposed, it involves the liquidator considering most carefully whether what is being done or the way it is being done is the most appropriate way forward.
17. In seeking to identify a just outcome, the Court has taken into account the fact that the two secured creditors raise no opposition to the Liquidator's application. However, the Court does not regard the absence of opposition as determinative of this application. The fee cap was imposed at the instigation of the Court and it appears to the Court that it has not particularly exercised the Liquidator's mind when it should have.
18. The Court is not, on this application, considering whether the costs of the liquidation, including the liquidator's remuneration, have been properly incurred. Instead, the Court has considered whether it is prepared, in its discretion, to increase the cap on the Liquidator's fees that it has imposed and already increased once. In the same way that the initial cap was imposed as a round sum, in the light of all the information now provided to it, the Court is prepared to

recognise that there were a handful of tasks that have turned out to be more complicated than when the revised fee cap was imposed on the Liquidator's application in 2015 and to increase the fee cap imposed yet further. The new fee cap imposed will be £45,000. This sum represents a threefold increase of the original cap and the Court regards this as a generous amount to reflect the additional, unforeseen steps that have had to be taken over and above what was inevitable in a straightforward liquidation of this type. What this means is that the Commissioner's examination of Mr Le Cornu's accounts is constrained by this fee cap but, however unlikely that eventuality is, that it is still open to the Commissioner to conclude that the expenses properly incurred are lower than the amount of the cap.

19. For the reasons given the Liquidator's application is partially successful, in that the fee cap set out in para. 2(5) of the Court's order, as subsequently modified, will be further increased to £45,000 (and not to £56,745, as the application sought). This outcome was again provided in draft to the Liquidator accompanied by an invitation, if he so wished, to elect to have his application addressed at an oral hearing. The Liquidator has now informed the Greffe that he does not seek an oral hearing, so the final decision on his application has been reached on consideration of the papers only and is as set out in this judgment.