

Approach of the Court to approving Joint Liquidators' remuneration rates and request for increase in respect of insolvent company.

[2020]GRC034

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

**IN THE MATTER OF
COMPANY X (in liquidation)**

THE JOINT LIQUIDATORS OF COMPANY X

Applicants

Before

**HER HON HAZEL MARSHALL QC, Lt Bailiff
on papers**

Judgment handed down: 25 April 2020

JUDGMENT

Legislation referred to:

Companies (Guernsey) Law 2008, ss 418 and 426

Practice Direction No 3 of 2015

Introduction

1. This is an application by the Joint Liquidators of Company X, ("the Company"), an international company which failed at the end of 2018. The Joint Liquidators are Mr B and other partners in the global professional services firm at which he works, with a major office in London ("YZ"). The application is made under ss 418 and 426 of the Companies (Guernsey) Law and Practice Direction No 3 of 2015 for approval of the Joint Liquidators' professional fees and expenses, as to part already incurred, but also prospectively.

Background

2. The Company is the holding company of a wide range of other companies registered in Guernsey, the UK, the Isle of Man, and elsewhere. It was placed into Administration in

2018, with two of the now Joint Liquidators as Joint Administrators, upon the application of its directors. Thereafter, the Administration order was discharged on the application of the Joint Administrators, and the Company was placed in compulsory liquidation.

3. In January 2019 the Joint Liquidators made an application to this court for the approval of their fees and expenses, both those already incurred since the start of the Administration, and prospectively for the initial period of the Liquidation. On that Application I made an order approving the Joint Liquidators' fee remuneration for the period up to 2nd December 2019, and approved their proposed fee rates for continued charging for the work of themselves and members of their staff on a time cost basis from 3rd December 2018. Whilst not being prepared to authorise or approve actual figures for fee remuneration in advance of work being done, I gave the Joint Liquidators the comfort of formally recording that, on the basis of the evidence provided at that application with regard to the work envisaged to be done and the approved fee scales, the court would regard fees of the order of £4,000,000 as likely to be reasonable for the period from 3rd December 2018 to 2nd June 2019.
4. On 14th August 2019, the Joint Liquidators made a Second Fee Application, which was similar to the first, in which they sought approval of their fee remuneration claim for the work done in the period from 3rd December 2018 to 2nd June 2019, and approval for their projected likely fees for their continued work for the following six month period of 3rd June 2019 to 2nd December 2019. The actual fee claim made for the period from 3rd December 2018 to 2nd June 2019 was a little higher than the approved estimate of £4,000,000, but having examined the evidence as to why, and what had been done, I gave approval to the figure claimed. I also indicated, in a similar way to before, that on the basis of the evidence then put before the court, the court would regard fees of the order of £4,400,000 as likely to be reasonable for the work envisaged during the following 6 month period from 3rd June 2019 to 2nd December 2019.
5. In January 2020 the Joint Liquidators made a general application that further consideration of their fee claims should take place *in camera* on the grounds that the information which it was necessary or appropriate to divulge to the court in order to explain their activities and support their applications for fee approval was commercially sensitive, in that it might be adverse to the interests of the Company and the liquidation if entities or individuals against whom the Joint Liquidator might seek to pursue claims or recoveries could access such information as to the Joint Liquidators' state of knowledge or their intentions. I granted that application. I have also previously granted a specific privacy application dated 25 June 2019 in respect of the Second Fee Application. Aside from this judgment, the Court file in relation to the Joint Liquidators' Second and Third Fee Applications remains sealed, including all documents and materials referred to in this judgment.

This Application

6. The present application is the Joint Liquidators' Third Fee Application for approval of their professional fees and expenses. Like the previous applications, it is supported by an affidavit of Mr B. It exhibits the Joint Liquidators' Third Progress Report, dated 30th March 2020 and covering the work period of 3rd June 2019 - 2nd December 2019, together with an Appendix setting out the information required to comply with the relevant practice direc-

tion, (Practice Direction no 3 of 2015) with regard to actual and proposed fees and costs. The inclusion of the Liquidators' Progress Report, whilst not a strictly stated requirement of the Practice Direction 3 of 2015, is, in my judgment, not only a proper document to be put before the court, but a virtual necessity. It provides the necessary background and context which is important for the court to be able to give meaningful consideration to the information required by the Practice Direction itself as to hours and charges incurred or envisaged, so as to form a view as to their reasonableness.

7. This Third Fee Application now seeks approval of the Joint Liquidators' time charges in respect of the period from 3rd June 2019 to 2nd December 2019 in the sum of £2,796,170 and of their disbursements of £85,932, mainly relating to flight and hotel costs. It also seeks an increase in the Joint Liquidators' fee charging rates to take effect from 3rd December 2019. In consequence and in anticipation of such fee increase, it seeks indicative approval of fees for this period in the sum of £4,100,000, based on a fee estimate of £4,042,411 for work intended and expected to be carried out.

General approach

8. The Joint Liquidators are officers of the court, and the court's function on an application of this type is that of supervision and control. It is to scrutinise the work done and fees charged or claimed, or prospectively likely to be claimed, by its officers, to ensure that those fees appear reasonable for the work being done. That work is being done in the interests of the creditors of the company. It is, of course, in the interests of the creditors of an insolvent company that the affairs of the company and its winding up should be carried out efficiently and as economically as possible, with appropriate claims or other matters being pursued effectively, so as to maximise the realisations which will ultimately be available to pay the creditors' debts. Such work requires to be done by suitably qualified and experienced professionals, who must, therefore, be paid properly and reasonably for that work. Unfortunately, and especially as regards a major enterprise, such work is inevitably expensive. It involves the relevant professionals acquainting themselves with the affairs of the company, largely from scratch, as well as their then assessing those affairs and taking whatever steps are needed, whether administrative or pursuing claims, to gather in the assets of the company to best overall advantage.
9. To protect the legitimate interests of those who step in to carry out such work, their proper fees and expenses will, in the absence of any misconduct, be paid as a first priority out of the assets of the company which are realised. It follows that, where the company is insolvent, the fees and expenses of the liquidators will go to reduce the sums ultimately available to pay creditors, and in particular the unsecured creditors of the company, who are last in line. Those creditors therefore have a very real financial interest in controlling the fees charged by liquidators, and in keeping these down in so far as they reasonably can be kept down, consistently with the liquidation being conducted properly. However, and certainly initially, those creditors have no effective means of scrutinising, questioning or objecting to such fees, and their control is in the hands of the court. In 2010 the UK Office of Fair Trading carried out an enquiry and produced a paper entitled "The Market for Corporate Insolvency Practitioners – A market study", (OFT 1245, June 2010), and it found that where there was no effective oversight and control of insolvency practitioners' fees, these tended to be about 9% higher than where there were creditors, such as a secured creditor (obviously one with

the benefit of a floating charge) exercising such control. This paper led, in 2013, to the Kempson Report, considering how such a market failure could be remedied. That report in turn gave rise to amendment to the English Insolvency Rules in 2015 to require insolvency practitioners to quote their fees in advance, and to lay down that any amendment to the quotation would have to be agreed with creditors. This was all in an effort to promote more control over liquidation fees.

10. The Guernsey Practice Direction No 3 of 2015 followed the spirit of this amendment. In my judgment, therefore, upon an application such as this, which is made *ex parte* by the Joint Liquidators with no interested party scrutinising or challenging the propositions put forward in support of the relief claimed by them, it is the function of the court to consider the application critically, and with rigour, with a view to seeing that the ultimate interests of the unsecured creditors are protected as far as possible in the circumstances as they appear. Whilst, therefore, the court will give due weight to the representations made by responsible and experienced insolvency practitioners, (as I have no doubt the Joint Liquidators are), and will recognise their right to be remunerated properly for their services, the court's response to such an application is by no means just a matter of acceding to the office-holders' requests so long as these are made in proper form and with some plausible supporting material or submission. The court will not come to the application on the basis that there is any presumption in favour of granting the approval or authority requested. It is for the applicants to satisfy the court, positively, in this regard. As I have said, the court's function is to exercise a supervisory control over fees and charges in the interests of creditors, but it will, of course, do so in an appropriately proportionate way.

Request for approval of claimed fees and disbursements for the period 3rd June 2019 - 2nd December 2019

11. The Joint Liquidators' claim for fee remuneration during this period is in the sum of £2,796,170, and is made in Paragraph 1 of the Application. It compares with a previous fee estimate which persuaded the court to approve fees in the order of £4,100,000 as likely to be reasonable, according to the work predicted in July 2019.
12. The shortfall of over £1,500,000 is explained as being because certain anticipated costs did not, in the event, materialise in this period, for four reasons the details of which are not material. Mr B explains that the effect of much of this has been to move work out of the six month period above, which has passed, and into the following period of 3rd December 2019 - 2nd June 2020; it is not that this work is not required, it is simply that it is broadly being carried out later in time.
13. The actual areas where the identified reductions in fees have come about appear from two charts exhibited by Mr B, which show the variances for the period in both the hours spent by staff and the fees generated to his firm as a result, broken down by income stream category and staff grade.
14. With regard to overspends as against forecasts, these are generally minimal and within a reasonable tolerance except for one item, where "Engagement Acceptance and Control" has

come in with a 174% overspend at £233,210, as against a forecast £85,023 for the period, with an extra 330 hours of work done at (judging from the charging rates) an average staff grade level which is relatively senior.

15. The claim for Liquidators' disbursements is relatively small at a mere £85,932.

Discussion and Decision

16. The Joint Liquidators' claim for fee remuneration for this period is, overall, well within the sums previously estimated which have been charged in accordance with rates previously approved by the Court. Having looked at the items which go to make up this claim, I am prepared to approve the claim actually made in all but one respect. That is the tremendous overspend as against previous estimate on "Engagement Acceptance and Control". No explanation for this has been given. Having considered the description of this workstream, I cannot see any explanation of why (a) the expense should be so large and (b) it should, in any event, have increased so much over the previous estimate. It is not clear to me how the matters listed by Mr B as the differences in what actually happened in the material period, which accounted for significant reductions in time costs in other areas, should have increased the time costs in this area.
17. In the circumstances, I will approve the Joint Liquidators' claim to fee remuneration in respect of the period from 3rd June 2019 - 2nd December 2019, as claimed, save that I will allow only £100,000 in respect of the claim for "Engagement Acceptance and Control", thus reducing the total fee claim by £133,210 to **£2,662,960**. I will give the Joint Liquidators liberty to apply for the balance (**£133,210**), if they wish to do so, by providing further explanation to show how this sum is justified. They may do so either by restoring this application or at a convenient juncture in the future.
18. With regard to disbursements, claimed in the sum of £85,932, since airfares, personal car mileage, public transport, rail and taxi are noted individually, as are also associated hotel and meals expenses, I would like to know what the relatively significant item for "other travel expenses" comprises. When combined with "Miscellaneous" - the amount shown for which I would not query on its own - these unparticularised items account for about 20% of the disbursements claimed. In the circumstances, I will approve this claim with regard to **£71,662** and I will approve the balance subject to further satisfactory explanation as to the items comprised in the item for "other travel expenses".

(2) Request for approval of increased fee charging rates from 3rd December 2019.

19. This part of the Application, to be found in the Sections of Paragraph 2, has two distinct limbs. These rest on a proposed division of the Joint Liquidators' work from 3rd December 2019 going forward into two separate categories, one comprising "Investigations" and "Legal strategy and Litigation Preparation" and the other comprising all other workstreams as YZ choose to designate them. There is a request for approval for a general uplift of 5% upon the previously approved charging rates for the latter, but for a new set of rates completely, corresponding to 75% of YZ's "standard" rates for "complex insolvencies" for the former. I deal with each of these in turn, but I first note some general background.

20. The fee rates which have been approved for work up to now arose, as I understand it, when the directors of the Company, applied to the court for the appointment of Administrators and proposed that YZ should provide the necessary persons. These were, in the event, Messrs B and a colleague who, I also understand, had previously also been involved in giving advice with regard to a possible restructuring of the company. The application ultimately succeeded, but as mentioned above, it then became the Joint Administrators' view that the Company could not be saved and that the situation should convert to a compulsory liquidation.
21. Unsurprisingly, YZ were the natural choice to continue as liquidators because they were on the spot, had already gained knowledge of the Company's affairs, and the situation required to be taken in hand urgently. As I understand it, and it accords with my recollection, the rates of charge for various grades of staff, which were originally proposed for the Administration, were agreed and approved at the time of the conversion to liquidation. They were said to incorporate a discount from YZ's usual rates, which Mr B says in his latest affidavit, reflected a 37% discount on YZ's standard rates for restructuring advisory work in 2018. It was those rates which were continued over into the compulsory liquidation.
- (a) General uplift of 5%**
22. The first proposal, although directed only at "Non-investigations and non-litigation" workstreams, is advanced on a basis which would seem to apply in principle to all the Joint Liquidators' fee charges. It is for a general uplift in those fee rates by 5% across all seven staff grade levels,.. The increase is proposed on the grounds that
- (i) the original rates were agreed at the time of the original appointment,
 - (ii) the fee rates of many other professional advisers engaged by the Joint Liquidators have gone up since that time,
 - (iii) YZ's own fee rates in general have gone up since that time, and
 - (iv) moderate fee rises from time to time are appropriate to counter value erosion owing to inflation.
23. No actual evidence of supporting facts are relied on in support of this argument, which is presented merely as an assertion of supposedly obvious reasonableness.

Discussion

24. With regard to the first point above, the effect of seeking the uplift from 3rd December 2019 is that the currently fixed fees will have been operative for about 14 months.
25. With regard to the second and third points, I do not regard increases in other professionals' fees, whether in the same or a different discipline, as carrying any weight in themselves. I do not regard YZ's own policy with regard to seeking to increase their fee rates in general at any particular time as being of any great weight either. I have been given no examples of the levels of fee increases being referred to, whether accepted or merely proposed, by any

such other professionals. The proposition is presented merely as assertion. I am prepared to accept that during a period of 14 months it is more likely than not that some, perhaps even many, professional firms will have sought to increase their fee rates for work, no doubt in particular as regards new instructions, but it goes no further than that. The question is whether the Joint Liquidators (effectively YZ) ought to be permitted to recover, at the prospective expense of creditors of this Company, an increased rate of remuneration over and above the rates at which they originally undertook to carry out the task which they accepted to perform, (thus *prima facie* being of the view that conducting the engagement at the rates agreed provided an acceptable return for the work expected to be done) and which office has been confided to them on the basis of that agreement.

26. I do accept the fourth point, namely that it could be reasonable, over an engagement which operates for a long period, for a professional firm to ask for and expect to be granted moderate rises in fee rates in order to make some allowance for the effects of inflation. Even if this were not reserved in the original fee agreement such an increase might still be possibly reasonable. However, the proposed rate of 5% which has been proposed appears to me to bear no actual relation to this proposition and, indeed, no evidence has been advanced to support it or to ground it in reality.
27. The time lapse between the agreement itself and the time at which this increase is proposed to take effect is just over 13 months. It covers most of the calendar year 2019 and a little earlier. As a matter of general knowledge interest rates, measuring the time value of money, have been very low during that period and significantly below 5%. YZ are operating in respect of this liquidation principally out of their London office. The UK's rate of inflation during 2019, reflected in the CPI (from the Office of National Statistics) as at December 2019, was 1.3%, or 1.4% if Owner Occupied Housing Costs are included (the CPIH). Guernsey measures its inflation rate by the RPI, and for 2019 it was 2.3% (2.4% if housing mortgage costs are excluded). The States considers the equivalent in the UK to be 2.2%. Again, public information from the Office of National Statistics states that the UK's Index of Service Producer Price Inflation rose by 1.6% during 2019, and although the professional Scientific and Technical Services sector showed a higher individual increase, this was still only 2.6%. That rate is, of course an index of inflation in the cost of supply of services, rather than an index of inflation showing the reduction in real value of monies received for performing services, and it is therefore not directly comparable, but I apprehend that it could arguably have some materiality for perhaps reflecting an increase in staff costs as part of the Joint Liquidators' overheads. I make this point as a matter of reasoning rather than evidence, as none is advanced, but in any event even this figure is well below the 5% increase which the Joint Liquidators argue for.

Decision

28. My conclusion, therefore, is that I accept that demonstrable inflation affecting the value of fees received, which should, it seems to me, be viewed by reference principally to UK rates in this case, is a change of circumstance which could justify an increase in fee rates. I would also, on balance, be prepared to hold that it should do so in this case, although that might not be so in a contract simply between commercial parties. However I am certainly not satisfied that a 5% increase is justified or appropriate on this ground. I would be prepared to find that an increase of half that, ie a 2.5% increase, would be an appropriate increase to take

account of the reasonably perceived effects of inflation since the rates were agreed, and on the basis that this should take effect from 3rd December 2019. The argument from inflation is the only supporting argument which I can accept in regard to this claimed increase. I would therefore be prepared to approve a general increase in the Joint Liquidators' existing fee rates in that amount, applying to all the Joint Liquidators' fees, across the board, from 3rd December 2019.

29. I should add that the fact that I have been prepared to hold, at this time, that some increase in fee levels commensurate with what I perceive to reflect the likely real rate of inflation applicable to their value should not be taken to indicate that I consider that an annual increase in fee rates in line with inflation is automatically going to be appropriate in the future. Still less should this be taken as any indication that such an increase will automatically be acceptable in liquidation cases. The countervailing point is that where the liquidators' fee rates are agreed at the outset, the liquidators have in effect represented that they are content for such fee rates to apply to all the work to be carried out to complete the liquidation. Such a representation means that even an increase to take account of intervening inflation is not automatically justifiable, and on any basis, any uplift will require to be justified on the grounds of material changed circumstances, and not just the circumstance that professional firms habitually seek to raise their charging rates - quite often annually - in order to maintain or improve their earnings.

(b) Enhanced uplift for “investigations” and “litigation” workstreams

30. The Joint Liquidators' proposal for increased fees in this regard is framed, not as an increase in existing rates, but rather as an increase to a discounted percentage (75%) of the fee levels for six grades of staff which are the rates which YZ present as their currently “standard” rates for “complex insolvency” work. The full rates range from an eye-watering £985 per hour for Grade 1 (the highest grade) down to the lowest rate of a mere £450 per hour for Grade 6, producing a proposed range of fee charging rates, therefore, from £740 per hour (Grade 1) down to £335 per hour (Grade 6).

31. The lowest staff grade of “Analyst” is not mentioned. As the proposal is presented by Mr B as a “rate increase” for “the grades below only” this would appear to have the unlikely intention that Analysts' rates would remain at the original agreed rates as regards work on these workstreams. The alternative is that it is not intended that any Analysts will work on these workstreams, but that conclusion is inconsistent with the information contained in the Joint Liquidators' chart of anticipated work/costs for the period from 3rd December 2019 onwards. Either interpretation seems unlikely and I suspect that the omission is therefore probably just an accident. It is, however, a relatively minor point.

32. The justification for seeking this fee uplift is given by Mr B under four headings, but I treat it as fivefold:

- (i) the Joint Liquidators had little idea of the complexities facing them in the liquidation when they took it up, the information available from their previous involvement in restructuring advice, prior to the company's collapse, being only limited,

- (ii) the rates being charged have not (therefore) been reflective of the tasks being performed,
- (iii) the actual work involved has become revealed to be highly complex and it is market standard for complex rates to be charged in such cases,
- (iv) the higher “complex” rates reflect the speculative nature of the work in question; the Liquidators and their advisors are carrying large amounts of unpaid work-in-progress already, and the Liquidators are taking the risk of being ultimately unable to recover all the remuneration for their work (whether for substantive reasons or those of enforcement), and
- (v) the above risks are growing more acute, partly because of the diminishing availability of readily recoverable assets.

Discussion

33. First, some general points. I can say at the outset that I am more than willing to accept that this liquidation can fairly be described as “complex”. However, that is not decisive of the merits of this Application, and I am disturbed by it, both on a general basis and on account of some specific aspects.
34. This limb of the request for increased fees was sought on the basis of the points mentioned above as advanced by Mr B, but mitigated by dividing the Joint Liquidators’ work into the two categories noted above and claiming this enhanced uplift only for the category comprising “Investigations” and “Legal Strategy and Litigation Preparation”, as well as presenting the figures as being a significant discount - namely 25% - from the YZ’s stated current fee rates for such work, supported by the proposition that it is market standard to charge “higher” rates for such work.
35. As regards YZ’s published fee rates, I am not particularly impressed by the proposition that these are being discounted by 25%, because a firm’s fee rates are, in my experience, largely aspirational - rather like the asking price for a house. I have been given no evidence about fee rates actually negotiated and paid, and I have no doubt that stated charging rates will frequently, even routinely, be negotiated down. The stated fee rates will be expected to provide sufficient financial headroom to enable the firm to carry out work at an acceptable profit at lower rates, so as to be able to give ground in negotiations to secure the instruction, and enable the counterparty to feel good about apparently obtaining an advantageous deal. If the commission in question is a sufficiently large matter then this will enable even greater ground to be given, because the security of gaining a large workstream to occupy personnel productively for a significant period of time makes accepting lower fee rates well worthwhile for longer term overall gain. Indeed, the receipt of this instruction by YZ in the first place would seem likely to fall into just this category, as it is a major matter, received as a consequence of their previous involvement in advising the Company and becoming Administrators initially, such that they then secured the engagement as Liquidators without competition or particular sales effort. I have no doubt that this engagement will have been seen as a very valuable instruction.

36. I therefore find YZ's published fee rates for "complex" insolvency work, and the discount then claimed to be being applied to these, to lack any meaningful weight. It is really no more than assertion. I have no evidence of comparative fee levels actually being paid (nor in what circumstances), nor do I have any evidence of comparative fee scales of other similar professionals, so as to judge competitive fee rates or the reality of the claimed discount, or the existence of the claimed "market standard practice" - although bearing in mind the point that promulgated fee rates are not necessarily what is actually paid, I doubt if this last such evidence would be of much practical value in any event.
37. Of far more materiality therefore, to my mind, is the percentage increase in fees which would then be being applied to the fee rates currently being charged. This is because these were what the Joint Liquidators originally agreed as the basis on which they were willing to accept the office of Joint Liquidators. This increase is not adverted to by Mr B, although it can be derived from the figures which he gives, and I have done so. The increase is not uniform, and seems to vary considerably and with no obvious logic. I calculate the figures for the proposed increases to be as follows:

Grade 1: 23.3%

Grade 2: 24.4%

Grade 3: 36.3%

Grade 4: 22.4%

Grade 5: 39.5%

Grade 6: 13%

As mentioned above, the lowest grade of Analyst is not given.

38. It is not very helpful to give an average rate increase, because the actual effects of any differing rates of increases on actual charges will depend on the quantum of work carried out by a member of staff of the relevant grade, but it can be seen that an increase of the order of 25% looks about right in broad terms.
39. Turning to the point, that these rates will be applied only to the two workstreams of "Investigations" and "Legal strategy and Litigation Preparation", I have mentioned that this seems to me to be aimed at suggesting a mitigation of the effects of charging such very steep increases, through applying these only to two out of eleven designated workstreams into which the Joint Liquidators categorise their work. [The court here drew some conclusions about apparent balance of the overall work between the two classes of workstream] Also, and perhaps more importantly, it does not seem to me that the distinction between the internal descriptions of workstreams is a bright line, and it is also subjective. There is therefore opportunity for classifying work as falling within the two higher value workstreams rather than the others, and differential charging rates will provide an obvious incentive for that to be done. Indeed, looking at some of the information contained in the Progress Report, this seems to me to be exactly what is expected to happen.

40. As already noted, in support of the application for indicative approval for fees for the current six month period, (ie from 3rd December 2019 to 2nd June 2020) the Third Progress Report and its appendices provide a break down of the Joint Liquidators' estimated time costs for the period, but assessed in accordance with their proposed new fee structure (ie applying the uplift to 75% of published complex insolvency rates for workstreams of "Investigations" and "Legal Strategy and Litigation Preparation" and 5% for all the remainder). Up to the end of March these would be figures for actual work done, but as these are given as global figures for hours spent, without breakdown as to the grade of personnel, I have not felt able to derive anything of great help to assess the validity of my misgivings from this table. That, though, does not dispel my concerns, which go both to the quantum of increased charges applied in the Joint Liquidators' proposals, and to the undesirable complexity and uncertainty of applying different fee rates to different workstreams.
41. Turning now to the specific reasons advanced by Mr B for seeking a more remunerative fee arrangement for the Joint Liquidators than that which they originally accepted (apart from any reasonable increase for inflation), the first point made above which is said to justify such a significant increase is that the Joint Liquidators failed to appreciate the complexities which would face them in the liquidation, because of limitations on the information available to them at the outset. The implication is that, had they done so, they would (and would reasonably) have sought fees based on higher rates apparently associated with complex insolvencies from the start, and presumably that these higher rates would, or should, have been acceptable.
42. I have already said that I accept that this liquidation can reasonably be categorised as "complex". I say this because one only has to consider the Company structure report, and the Joint Liquidators' reports on the nature and size of the Company's engagements abroad, and the jurisdictions in which these were taking place, to see that liquidating such an enterprise was likely to be complex. That is even apart from the possibilities of encountering challenges, lack of co-operation, obstruction, and downright obfuscation or delay in seeking to recover Company property or debts from other parties - although I should also say that, given the above circumstances and the nature of the Company's business, the likelihood of such obstacles being encountered would, in my view, be rather obvious.
43. I am hugely sceptical, therefore, about the assertion now being made that the Joint Liquidators (certainly Mr B and his colleague) did not appreciate, let alone could not have appreciated, at the outset, that this liquidation would be what they would term a "complex" liquidation, from the knowledge which they acquired, first in advising the Company on possible restructuring, and then in taking on the office of Joint Administrators. The whole point of the latter appointment was with a view to comparison between seeking to run an administration process in comparison with the alternative of an immediate liquidation of the Company, and the information required and made available to the Joint Liquidators at that time, to enable them to make such a judgment, must have revealed, at least, the likely "complexity" of the Company's situation and affairs even if detail was not then fully transparently available.
44. The Joint Liquidators assumed office on the basis of this knowledge, and were then content to do so on the basis of the fee rates then proposed and approved, whatever their discount on their firm's internal fee scales for any work, and whether or not these were related to their

firm's internal scale of fees for "complex" insolvencies. When their engagement changed from that of Administrators to Liquidators, they did not suggest that the fee structure which had been agreed and approved, even if based only on their scale of fees for "restructuring advisory" work, was going to be inappropriate for the work which they were going to have to undertake for a liquidation. Put at its lowest, they must have then been able to see that this would be a liquidation on a large scale. If the change in the nature of the office could be expected to make any material difference to the kind of work requiring to be done, then this was a point which one would expect to have been taken into account at that time.

45. Further, and to my mind even more telling in this regard, no such change was mooted or requested at the time of the Second Fee Application, which both sought approval of the fees being charged on the agreed basis for the six months from 3rd December 2018 to 2nd June 2019, and also approval and authority for the work envisaged during the following six months to be carried out on the same fee basis. By the time of that application, the Joint Liquidators had had the benefit of the information gained over eight months' work as Joint Liquidators, in addition to the information available to them as mere Administrators, such that any initial failure to appreciate the nature of the work involved in a liquidation which could reasonably have had an effect on their fee proposals on taking it up (which they are now claiming, with the benefit of hindsight, was the case) would surely have been apparent.
46. The second and third points noted above are that the nature of the work required to be done in this liquidation, is *in itself* a justification for charging higher "complex" fee rates for such work. This is put in point (ii) on the basis that the fee rates which have been charged "have not been reflective of the actual tasks now being performed", and in point (iii) that it is market standard to charge "complex rates" (ie, higher rates) for this kind of assignment.
47. Those seem to me to be different ways of putting the same proposition, namely that "complex" work - or, more accurately, work on a "complex" overall matter - justifies charging higher fee rates *for the same work done by the same person but in a non-"complex" context*. I apply this emphasis for the following reason. Where an engagement is upon a complex matter, it will naturally require more work, and possibly - even probably, - work by more highly skilled or experienced persons, in order to carry out the tasks required to best effect. That is the consequence of "complexity". However, the former would be reflected in more hours being spent and the latter would be reflected in the work being carried out by a higher grade of personnel, or with more supervisory involvement by personnel at more senior levels. Each of these would result in an increase in remuneration earned for the firm from the engagement, but, logically, neither requires nor justifies an increase in the rate of the time charge for those who carry out the work. They earn fees according to their time spent and are spending more time. Nothing has been suggested to me as demonstrating that there are greater overheads, not recoverable as disbursements, involved in carrying out "complex" work. The only one I can even envisage for myself would perhaps be insurance, but even if that were the case, I doubt if it would be of material significance. I therefore do not regard these arguments as to the claimed nature of the work intrinsically justifying a higher rate of time charge as being made out and, once again, they are advanced simply as assertion, or as if they are self-evident.

48. In essence, this proposition seems to boil down to an assertion that the value of work done on a “complex” matter must be relatively greater than the value of similar work done on a non-complex case, thus justifying a higher charge. However, it is difficult to see how such claimed relativity could be assessed except on the crude approach that if the *subject matter* is of a higher value, then higher time charges are justified.
49. This brings me to the second argument, namely that such differential charging rates are justified because they are the “market standard”. I accept that this may well be the way in which the market does present its charges, as it is obviously in the interests of the market providers of such services to do so, but this seems to me, in reality to be driven not so much by the “complexity” of the work, which is just an excuse, but the perceived size of the realisations. The perception, not unnaturally, is that higher fees *can* be obtained in such cases, which translates into the approach that these can be demanded, which in turn gives rise to the approach that this is justifiable and therefore justified, such that it finally becomes “standard”. However, any such standard practice of expecting to impose higher charges for the same work simply done in a high value context does not seem to me to make that automatically justifiable, and to my mind that is all the less so when the context is a renegotiation of fees because such higher charges were not thought appropriate at the outset.
50. The fourth point mentioned above is that the Joint Liquidators are subject to the risk that their remuneration may never get paid if insufficient recoveries can be made (whether as a matter of substantive availability or of enforcement), that these risks are significant, and that greater risk is well understood to justify greater return (ie increased fees). It links with the fifth point, which is the specific point that these risks are now becoming more acute, because of the diminishing availability of readily realisable assets.
51. I do accept that there is something in the point that it is appropriate to charge higher fees in a situation where there is a greater risk of non-recovery, although this is a rather unattractive argument in this context. One cannot escape the immediate impression conveyed that the Joint Liquidators want to charge higher fees because they have now used up all the obvious and easily available resources, and done so to a considerable extent in paying their own fees. With regard to the merits of the argument from greater risk, the first point is that the Joint Liquidators have more protection against the possibility of insufficient recovery than anyone else, and in particular more than the creditors (to whom the Company’s assets in an insolvent liquidation now effectively belong), because the Joint Liquidators have priority to recover their remuneration before those creditors will receive anything at all. The creditors are therefore bearing an even greater risk in this regard - including the risk that higher liquidators’ fees will reduce or eliminate any recovery for them even further. The second point is that allowing higher fees to be charged than would otherwise be appropriate for the actual work being done because of the risk of their not being paid in the end means that, where there are recoveries which can go to creditors, those creditors are either subsidising other, unconnected, liquidations being carried out by their office-holders in which there are insufficient recoveries to pay them, or they are providing insurance for their office-holders against loss of earnings, depending on how one looks at it. Neither of these seems very fair, although I again recognise that the commercial realities are that this may be the price which creditors have to pay (in effect) for having anyone attempt to recover assets for them.

52. The Joint Liquidators have provided their receipts and payments account for the period to 2nd December 2019. [The court made observations about the contents of this and concluded:] This shows in broad terms that an enormous portion of the Company's assets has already been taken for Liquidators'/Administrators' fees, or Legal Fees.
53. I should here mention one other aspect of this application, and its timing, which has troubled me. On the Second Fee Application, the Joint Liquidators gave estimates for future work and costs for the period from 3rd June 2019 - 2nd December 2019 which persuaded the court to indicate that, on the basis of that proposed work at the originally agreed fees, a remuneration claim of the order of £4.4Mn for that period was likely to be reasonable. However, in the event that work has not all been carried out, and the Joint Liquidators are claiming approval only for fees to the value of £2.8Mn for that period. They had thus, originally, anticipated doing work to the further chargeable value of about £1.6Mn during this last period, at the original rates. It is not alleged that this work is not necessary, or is not going to be done, but, rather, that strategic considerations have resulted in its being deferred into the following period (3rd December 2019 to 2nd June 2020) or later. When this point is coupled with the Joint Liquidators' current application for fee increases, it is clear that work to the value of about £1.6Mn which the Joint Liquidators were previously content to carry out on the basis of their agreed fee scales would in consequence, be carried out for higher remuneration.

Decision

54. The difficult question for me is how far, in the light of all the above facts as they appear to me, I should now authorise the significant increase in the Joint Liquidators' chargeable fee rates which they request for the major part of their remaining work. I am conscious that, in making this decision, I do so as the protector of the creditors' residual interests. This does not oblige me to act like a negotiator of the Joint Liquidators' fees, as this is not a negotiation. It seems to me, rather, that I should consider the representations made by the Joint Liquidators and ask myself what, in all the circumstances, reasonable creditors would regard as fair, and reasonable professional insolvency practitioners would, or ought to, regard as acceptable and reasonable as a fee basis for their upcoming work, in all the circumstances appearing.
55. I am not prepared to grant the Joint Liquidators' application as asked, in this regard.
56. First, and in any event, I do not think it appropriate to set different fee scales for different tasks according to their allocation to workstreams of different descriptions. I consider this to be unnecessarily and undesirably complicated. It is also a matter of subjective interpretation and, as such, would tend to incentivise a self-serving approach to categorisation of work. This is just plain undesirable, not least because any oversight of the reasonableness of categorisation would, it seems to me, take supervision of the Joint Liquidators' fee claims to yet another level of detailed inquiry, which would be disproportionately costly and inappropriate. Whilst I can see that the application of different fee rates could be characterised as a discount in respect of the lower rates, rather than a premium in respect of the higher ones, the point remains that it is, in my view, undesirable to introduce any such complication. The liquidation is all one single commission and fee rates should be immediately

identifiable, without distinction, in a simple way. It follows that if I am prepared to award any further increase, it will be in relation to fee rates generally.

57. Leaving aside the general increase for inflation which I have already considered above, I start by being very reluctant to grant any further substantive increase, on principle. The most compelling factor which inclines me to this view is that, on being offered and accepting the office of Joint Liquidators, which was very plainly likely to enable them to earn a large amount of money in fees because of the obvious enormity of the undertaking, the Joint Liquidators were perfectly willing to take on that office at the fee rates which they then proposed and which were approved at the time, and as to which they could, in my judgment, have entertained no legitimate expectation of revision upwards other than for inflation. Having secured that instruction they are now, in effect, asking to renegotiate their agreed fees. I do not accept that there can have been any significant misapprehension as to the complexity or difficulty of the work likely to be involved operating on the minds of the Joint Liquidators in accepting the continuation of their fee scales as Administrators when they then continued as Liquidators, so as to justify granting relief to them on that score, ie, in effect, on the grounds of mistake. I also do not think it appropriate to encourage the belief that a fee basis which has been accepted as reasonable can easily subsequently be renegotiated upwards, virtually for the asking.
58. Having identified, on the one hand, this point which seems to me to militate strongly against allowing any further increase in fee rates, whether or not the liquidation is appropriately categorised as “complex”, I then turn to consider any countervailing points. I have rejected the argument that, just because I may well accept that this is what would be termed a “complex” liquidation, that acceptance now justifies a revision of fees to come more in line with a probable market practice of charging higher fees in such a case. I have said that I can see no respectable logic to support this as a matter of value, certainly as concerns the provider of the services, and that is especially so in the context where what is being sought is a fee revision, rather than an initial agreement. However, and with some reluctance, I have concluded that there are two considerations which it is right to put in the balance in favour of now granting some additional uplift.
59. The first is the point about the apparent risk being run by the Joint Liquidators with regard to possible non-recovery of their fees. Much as I find this unattractive, not least because it seems to me that it is somewhat unfair on the creditors that they, who are running an even greater risk, should be put at yet more risk by the Joint Liquidators effectively securing an even greater prior interest in whatever sums may be recovered for the benefit of the Company’s creditors, the commercial reality is that much expensive professional work has to be done to achieve this. The mark of professional service is that the professional will put his client’s interests ahead of his own, but this inevitably means that the remuneration allowed to the professional has to be such that the professional will feel that he can promote his client’s interests fully with the assurance that, one way or another, his work will secure him a fair return.
60. This leads to the second point, which is again a commercial one. It is that, whilst I do not like what I have little doubt is the “market standard” approach, that a “complex” (ie high value, with more money involved) liquidation can bear higher charging rates than a smaller

or less complex matter, and that it is therefore not merely permissible but appropriate to charge in that way, I have no doubt that that is what happens in practice.

61. It seems to me, therefore, that I have to balance my view that on the one hand, there is really no unforeseeable change of circumstance (ie apart from the effects of inflation) which can fairly be prayed in aid to justify a substantive departure from the fee scales previously agreed, against, on the other hand, the kind of comparison with market realities which the present fee rates may cause to be made, and which might deter the Joint Liquidators from pursuing the matters in this liquidation with the vigour which they deserve. I do not suggest that this would actively be in the minds of the Joint Liquidators and their staff - it would, of course, be highly unprofessional if this were the case - but I do not ignore the point that it could happen subconsciously or indirectly. Therefore, despite the absence of any substantive evidence about actual market fee levels, and simply as a matter of pragmatism, proportionality and the avoidance of the additional costs which any more detailed consideration of this matter would generate, I feel I can and should take these factors into account to some extent, and award some uplift in the Joint Liquidators' basic fee scales.
62. For reasons which will by now be apparent, I regard it as right to consider the matter on the basis of an increase in the fee scales originally accepted by the Joint Liquidators rather than using the fee rates which they say they would now be wanting to propose as their "complex" rates, on the basis of a fresh negotiation for fees.
63. From a crude analysis of the figures presented by the Joint Liquidators, it seems to me that their proposals would have generated an overall increase in their fee levels relative to the current charging rates of around 15%, at present. I consider that this is far too great in all the circumstances. The Joint Liquidators ambitiously proposed an inflation-linked increase of about twice the rate which, it seems to me, could be objectively justified. Taking all the considerations which I have mentioned into account I am prepared to approve an increase in the Joint Liquidators' fee charging rates, as existing, of 7 1/2%, applicable to their work on this liquidation going forward from 3rd December 2019. For the avoidance of doubt, this increase is inclusive of the 2 1/2% increase which I have previously indicated I would be prepared to award to take account of the effects of inflation, ie I am awarding a further 5% increase to take account of their arguments about increased risk, and to acknowledge (without approving) the effects of market practice, whilst in the context that lower rates were previously accepted. I also make it clear that this is an across the board increase, with regard to fees for all workstreams, and I should add that, whilst I have considered whether or not my concerns with regard to the fortuitous moving of work from lower to higher fee scales by that work having been deferred to future periods should be taken into account in some way by an adjustment of my order, such as by deferring the commencement of such higher authorised fee rates, I have concluded that this would really be too complicated, and I have therefore left the position simple.
64. Lastly, I have asked myself whether, on the evidence and in all the circumstances presented to me, I consider that reasonable insolvency practitioners ought to accept the above as a fair conclusion. I am satisfied that this is the case. However, I recognise that I have dealt with this application on the papers, and without the benefit of oral argument. I would therefore propose to make the order indicated (ie that I will approve a 7 1/2% uplift in the

Joint Liquidators' remuneration rates to take effect from 3rd December 2019) but with liberty to the Joint Liquidators to apply for me to reconsider the matter in the light of any further argument they may wish to make, in the light of this judgment.

Further matters

[The Court here recited the specific orders which would be made]

65. With regard to the future of this liquidation, the following points occur to me.
66. First, to enable comparisons to be made, I would request that tables showing work done should include detail in relation to hours spent by particular grades of staff, rather than simply giving totals or averages, when these do not enable a clear picture to be obtained, (as, for example, in the section of the Estimated Joint Liquidators' Costs from 3 December 2019 to 2 June 2020 with regard to work actually done, as compared to future work estimated to be done). I would also request inclusion of the comparative figures for all previous 6 month periods to enable ready comparison of progress to be made.
67. Second, I consider that it would be extremely useful if there could be some creditor involvement in the review and approval of the Joint Liquidators' fees, rather than it being solely left to the court, which is not an expert in such matters and must therefore work very much on the basis of impression, since the introduction of evidence in the shape of expert evidence would be costly, cumbersome and in my view disproportionate. I note that the Joint Liquidators say that they have been in contact with creditors. Whilst I know no details, I would welcome such contact to extend to providing creditor input on the question of fee approval, even if only on a representative basis, since creditors are both directly affected in their interests, and likely to be more directly in tune with commercial considerations. I would therefore request the Joint Liquidators to give some consideration to how this might be achieved.
68. Third, this leads me to the final point, which is that I think it is now high time that the Joint Liquidators provided some indication of the likely value of realisations, and the consequent likely extent of dividends, even if these remain subject to uncertainties, or have to be qualified, or given as a range. If any of this material is sensitive, it can, of course, be included in documents which are confidential to the court. It would, however, be helpful to have some idea of the likely shape of this liquidation, and I think that by now it ought to be possible to provide one.

Hazel Marshall QC

Lieutenant Bailiff

25th April 2020

ADDENDUM POST JUDGMENT

Following receipt of the above judgment in draft, the Joint Liquidators elected to submit further evidence to justify the costs and fees incurred which had been disallowed, but to accept the fee increase which the court had allowed and re-submit calculations as to likely future fees based upon those revised rates.