THE COURT OF APPEAL

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Noonan J.
Haughton J.
Ní Raifeartaigh J.

IN THE MATTER OF THE COMPANIES ACTS 1963 – 2013
AND IN THE MATTER OF LUCCA FOOD TRADING COMPANY LIMITED
(IN VOLUNTARY LIQUIDATION)
AND IN THE MATTER OF SECTION 280 OF THE COMPANIES ACT, 1963
ON THE APPLICATION OF:

ANTHONY J. FITZPATRICK IN HIS CAPACITY
AS LIQUIDATOR OF LUCCA FOOD TRADING COMPANY LIMITED
(IN VOLUNTARY LIQUIDATION)

APPLICANT/APPELLANT

- AND -

THE REVENUE COMMISSIONERS

RESPONDENT

JUDGMENT of Mr. Justice Robert Haughton delivered on the 21st day of May 2021

Introduction

1. This is an appeal from the judgment of Allen J. delivered on 18 January 2019 in respect of the application of the appellant ("Mr. Fitzpatrick") to the High Court pursuant to section 280 of the Companies Act, 1963 to fix his remuneration as liquidator of Lucca Food Trading Company Limited (in Voluntary Liquidation) ("the Company") in the sum of €59,324.64 (including VAT and outlays) and ancillary directions/reliefs.

2. The respondent ("Revenue") was on notice of the application as preferential creditor, and, as such, the only creditor entitled in the circumstances to receive a dividend from the liquidation.

3. Revenue actively opposed the level of remuneration and expenses sought by Mr. Fitzpatrick at the creditor's meeting called on 26 August 2014 to approve the said sum of €59,324.64,

and in addition €10,080.83 in "legal and professional fees", and €9,790.80 in "consultancy" fees, giving a total of €79,196.27. Revenue was the only creditor present, so the meeting was not quorate, and Mr. Fitzpatrick therefore had to apply to court pursuant to s.280. Revenue opposed Mr. Fitzpatrick's application in the High Court, and again before this court. Although the motion did not seek approval of the additional sums, these were brought to the court's attention by Revenue and it is not disputed that they fell to be considered by the court.

4. The trial judge delivered a written judgment at the end of which he decided as follows:-

> "78. There will be an order;
>
> 1. Fixing the liquidator's remuneration and expenses, inclusive of VAT, at €37,883.69;
> 2. Determining that of the sum €10,080.83 claimed for '*legal and professional fees*', the liquidator has justified the sum of €2,700.33 for '*legal fee*' (which is included in the €37,883.69);
> 3. Determining that of the €9,790.80 claimed for '*payments to consultants*' the liquidator has justified the sum of €4,495.40 (which is included in the €37,883.69);
> 4. Directing the payment by the liquidator to the Revenue Commissioners, forthwith, of the sum of €42,116.31.
>
> 79. The Revenue's open offer of €36,000.00 plus VAT would have come to €44,280.00. The liquidator is short of that and must pay the costs of the proceedings.
>
> 80. I will hear counsel as to whether I should make an order for Courts Act interest, and if so from what date."

5. Having heard counsel further the trial judge ordered that Mr. Fitzpatrick pay Revenue the costs of the proceedings and Courts Act interest on the amount of the award of €42,116.31 from the 16th day of October 2016. He refused an application for a stay on the payment of €42,116.31, which he directed be made within 7 days, but he did order a stay on the costs order in the event of an appeal to the first directions list in the Court of Appeal, "and any further stay application to be made to the Court of Appeal". The order was perfected on 6 February 2019.

6. Notice of Appeal was filed on Friday 8 February 2019, and on that day Mr. Fitzpatrick made an application *ex parte* to this court for a stay on those parts of the order of the High Court that required him to pay to Revenue the sum of €42,116.31 and costs, pending determination of the appeal. Irvine J. granted an interim stay. The matter was again before her on 22 March 2019 when Irvine J. made an order on consent granting a stay only on the order for costs made in the High Court, pending the determination of this appeal, and ordered that Mr. Fitzpatrick pay Revenue the costs of the motion to be taxed in default of agreement, with a stay on that costs order pending the determination of the appeal. Irvine J. declined to renew the stay on payment of €42,116.31.

7. Subsequent to the order of Irvine J. on 22 March 2019 the sum of €42,116.31 was duly paid by Mr. Fitzpatrick to Revenue.

8. Before addressing the background to this appeal it is worth noting that at the outset counsel for Mr. Fitzpatrick accepted that the trial judge accurately set out the law relating to measurement by the court of liquidator remuneration and expenses. Counsel further stated that the appeal would be confined to arguing that the trial judge erred in his application of the law in reducing the amount claimed by some 50%, and in particular by discounting the number of hours claimed to have been worked on the liquidation by Mr. Fitzpatrick and his staff. This judgment therefore focuses on addressing that broad ground rather than dealing with each individual ground of appeal. I have nevertheless considered all of the parties' written submissions as well as their more focussed oral submissions.

Background

9. The background to the application is uncontroversially set out in paragraphs 1 – 12 of the judgment in the High Court. In summary the company was incorporated on 24 June 2010 and traded for 14 months to 1 March 2012, carrying on a pizza and pasta restaurant business from two locations in Salthill County Galway, which business was purchased by the company from the promoters, both Italian nationals, who became the directors of the company.

10. On 15 March 2012 it was resolved by the directors that the company could no longer continue trading by reason of its liabilities, and Mr. Fitzpatrick was appointed liquidator. Shortly before occurred that the Company agreed to sell its assets and undertaking for €100,000, payable by instalments. The deposit of €25,000 was paid to the Company and duly passed on to Mr. Fitzpatrick, and he also received some monthly payments so that by 12 October 2012 Mr. Fitzpatrick confirmed to Revenue that he had collected a total of €50,000, but he only received one more monthly payment. Ultimately Mr. Fitzpatrick settled for a further €25,000, giving a total realisation of €80,000. Apart from employee redundancy payments, there were no other receipts.

11. Mr. Fitzpatrick convened the final meeting of the company for 26 August 2014, when he presented his final report.

12. This Report at Chapter 5 summarises the work undertaken by Mr. Fitzpatrick. It states that he carried out appropriate searches and filled in appropriate forms on his appointment as liquidator, and in relation to CRO filings reported he had "now recently prepared for submission the required interim annual and bi-annual returns to the Companies Registration Office". He gave notice of his appointment to the directors, auditors, Revenue, a leasing company, the bank and rates office in Galway City Council. He reported that the company had total tax liabilities of €197,950. He liaised with the creditors in relation to the validity of their claims (but did not give figures for other creditors). He did not register for VAT in liquidation. He reported taking control of the company's books and records which appeared to have been "reasonably well written up to the date of the liquidation". He reported his receipt of €80,000 on the sale of the business, representing a write off of €20,000. He reported that he had submitted a s. 56 Report to the Office of the Director of Corporate

Enforcement (ODCE) in respect of the two directors, both of whom were subsequently restricted by order of the High Court (Finlay Geoghegan J.) made on 2 December 2013. This order was made on consent, and included an order that the directors jointly and severally contribute €2,000 plus VAT towards the costs of the application, but no monies were recovered from the directors.

13. As to his own fees, Mr. Fitzpatrick reported in Chapter 7 that –

> "As is normal in insolvency assignments, our fee will be calculated on a time/charge-out rate basis. Charge-out rates are determined by the seniority of staff involved, their level of responsibility and experience."

He then set out the charge-out rates, starting with his own charge-out rate of €290 per hour. He then reports –

> "The value of Work completed during the course of this liquidation came to €64,847.57 inclusive of VAT.
>
> The fee limited to funds available is €59,324.64".

14. In Appendix 2 of the Report Mr. Fitzpatrick sets out a "Final Receipt & Payments Account" showing that he collected €80,000 from debtors and €19,565.65 in respect of employee claims, which latter sum he duly paid out to employees. Besides some small payments for advertising and the like the final account showed payments of €9,790.80 for "Consultancy", €10,080.83 for "legal and professional fees" and "€59,324.64 for liquidator fee".

15. In Appendix 3 headed "Breakdown of Work in Progress (WIP)" Mr. Fitzpatrick sets out in a spreadsheet on a single page "Analysis of Hours by Individual & Charge Out Rate", reporting that he and his staff had worked for a total of 312.25 hours resulting in a claim for €59,632.50 exclusive of VAT. Added to this are sundry outlays, and the total work in progress is given at €74,638.37 inclusive of VAT, from which was deducted a figure of €9,790.80 for "payments to consultants", to reach a "Chargeable Fee" of €64,847.57. This figure was then cut back to "Actual Fee Charged (inclusive of VAT) €59,324.64", which is what the Report in Chapter 7 describes as "The fee limited to funds available…".

16. Revenue's representative Noreen Considine attended the creditor's meeting on 26 August 2014 and protested that the claim for remuneration was "far in excess of the normal level of remuneration in a liquidation of this size and complexity", and Revenue's position was confirmed in correspondence the following day. By letter dated 16 October 2014 Revenue wrote suggesting that the appropriate remuneration, based on the information provided to the creditors meeting, was €36,000, and inviting Mr. Fitzpatrick to apply to the High Court to fix his remuneration at an appropriate level and to include in his application a direction in relation to the legal and consultancy fees claimed.

17. Notwithstanding the clear dispute as to the level of appropriate fees, Mr. Fitzpatrick's proposed Final Account was filed in the CRO on 26 November 2014, resulting in dissolution of the Company. That necessitated an application to the High Court which came before me

on 8 February 2016. I declared the dissolution void and made an order restoring the Company to the register. I declined to order that Mr. Fitzpatrick's costs be costs in the liquidation, and declined to award Revenue its costs against Mr. Fitzpatrick.

18. The reasons for opposing the level of remuneration sought are broadly but succinctly set out in a replying affidavit sworn by Elizabeth Griffin, Revenue office, on 21 October 2015 where she states:-

> "5. …The company traded fast food restaurants from two leased premises in Salthill and had only traded, according to the liquidator, for a brief period of 14 months before it entered liquidation.
>
> 6. This was a 'pre-pack liquidation'; prior to entering liquidation the business of the Company had been sold. The sale occurred on the 5th day of March 2012.
>
> 7. I say that the liquidation involved realising one debt, bringing section 150 restriction proceedings against two directors, making statutory payments to 22 employees, but involved the realisation of no stock, no fixtures or fittings, no freehold property, and no leasehold property.
>
> 8. I say that it was a relatively small liquidation of a Company whose business had already been sold, with no complication arising during the winding up of the Company's affairs that was sufficiently serious to merit a consultation with the creditors.
>
> 9. I say that when the liquidator called the final creditors meeting the liquidation of the Company was inexplicably already of a longer duration than the existence of the Company."

The legal principles

19. I will refer further to the affidavit evidence when considering the trial judge's expressed reasons for reducing the remuneration and expenses sought. At this point it is appropriate to refer to the applicable legal principles which, as I have stated, were not disputed on this appeal.

20. Section 280 of the Companies Act, 1963 so far as relevant states: -

> "280.(1) The liquidator or any contributory or creditor may apply to the court to determine any question arising in the winding up of a company, or to exercise in relation to the enforcing of calls or any other matter, all or any of the powers which the court might exercise if the company were being wound up by the court.
>
> (2) The court, if satisfied that the determination of the question or the required exercise of power will be just and beneficial, may accede wholly or partially to the application on such terms and conditions as it thinks fit or may make such other order on the application as it thinks just."

Also relevant is s. 281, which applies to costs of a voluntary winding up: -

"281. All costs, charges and expenses properly incurred in the winding up, including the remuneration of the liquidator, shall be payable out of the assets of the company in priority to all other claims."

These provisions had been replaced by the Companies Act, 2014 by the time this application was made, but as this liquidation preceded the coming into operation of that Act it was not in dispute that these provisions applied.

21. At issue therefore is whether the costs, charges and expenses claimed have been "properly incurred". From para. 50 on in his judgment the trial judge sets out the relevant case law in relation to the fixing of a liquidator's remuneration, and the importance to that of the fiduciary capacity of a liquidator. The trial judge quotes extensively from the decision of the High Court of England in *Mirror Group Newspapers plc v. Maxwell and Others* [1998] 1 BCLC 638 at p. 648-649 (Ferris J.), a decision approved by this court in *Re. Mouldpro International Limited* [2018] IECA 88 (Whelan J.). He refers also to the key decision of Finlay Geoghegan J. in *Re. Sharmane Limited* [2009] 4 IR 285, at 297 (which related to an examinership), and the same judge's decision in *Re. Mouldpro International Limited* [2012] IEHC 418 at para.14, applying the same principles to an official liquidator. He also refers to *Re. Missford Limited* [2010] 3 IR 756 (Kelly J. establishing maximum charge-out rates for examiners) and *Re. Marino Limited* [2010] IEHC 394, both of which followed the principles established in *Re Sharmane* in fixing the remuneration of an Examiner, and in *ESG Reinsurance Ireland Limited* [2010] IEHC 365 concerning the remuneration of an Administrator. It was not disputed in the instant case that there was no difference in principle between the approach to remuneration of an official liquidator and a voluntary liquidator.

22. For present purposes the principles established by this case law may be summarised as follows:-

(1) The court's function is supervisory and its task is to fix remuneration that is reasonable for both the liquidator and the creditor(s). The court is not bound by scales. (*Re Mouldpro*, *per* Whelan J.).

(2) The liquidator as a fiduciary must justify the claim (*Mirror Group Newspapers*). Thus the onus lies on the liquidator to establish the reasonableness of the fees in respect of which remuneration is sought, and the liquidator also bears the onus of establishing the necessity and value of the work carried out.

(3) The "client" is not the company – it is the creditor or creditors with a financial interest in the outcome (and in the instant appeal it is the Revenue alone).

(4) The court should bring to bear a vigilant scrutiny to the exercise of fixing fees and needs to be satisfied that the hours were actually worked, and that the work and time were necessary and reasonable, having regard to the creditor(s) whose funds are paying the liquidator's remuneration and costs.

(5) The court's role is not to simply approve an hourly charge-out rate. The court is to have regard not only to the hours spent and relevant hourly rate, but also "(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'." (*per* Finlay Geoghegan J. in *Re Mouldpro*).

(6) Liquidators should expect to give full particulars and do more than merely list the total number of hours spent by them or their staff. They must explain the nature of each main task undertaken, the considerations which lead them to embark upon that task, and if the task proved more difficult or expensive to perform than at first expected, to persevere with it.

(7) A transaction carried out by a liquidator at a high cost in relation to the benefit received, or even an expensive failure, will not automatically result in the disallowance of expenses or remuneration, but it must be expected that transactions having those characteristics will be subject to close scrutiny (*Mirror Group Newspapers*).

(8) Liquidators must keep contemporaneous records of what they have done and why they have done it, and in the absence of such records any doubts in relation to that work and those fees may be resolved against the liquidator (*Mirror Group Newspapers*).

(9) The court will apply a 'prudent person test' to a liquidator's dealings with the assets and affairs of the company – the liquidator is expected to deploy commercial judgment (*Mirror Group Newspapers* and *per* Whelan J. in *Re Mouldpro*).

Mr. Fitzpatrick's submissions

23. In his oral submissions counsel for Mr. Fitzpatrick emphasised a number of points: -

(1) In *Missford* Kelly J. fixed on a maximum partner charge-out rate of €741 per hour. Counsel noted that this was exceeded by the liquidator in *Re. Haydon Private Clients Limited* [2012] IEHC 505, which led Finlay Geoghegan J. to reduce the net remuneration sought. In the instant appeal Mr. Fitzpatrick's charge-out rate was €290 per hour, well below the *Missford* rate.

(2) Counsel criticised the reliance by Revenue on its own tender system for liquidation, and in particular the Invitation to Tender, which was exhibited by Ms. Griffin in her first affidavit sworn on 21 October 2015. In that affidavit Ms. Griffin avers that the maximum figure that a liquidator would charge "for a liquidation of this size and complexity is €36,000" based on figures which she then sets out - €18,000 basic fee, €16,000 for "collections" and an additional fee of €2,000 to include legal costs including those related to a restriction application. She states at para. 44 that these rates "are not determinative of the value of work done in every liquidation, but they are a very useful guide for the Revenue Commissioner and for the Court in evaluating the appropriateness of remuneration being sought", and she avers to the large

number of liquidations which "are being carried out at these rates". Counsel argued that this document did not set out the "right metric" and that it bore no reality for instance to the charge-out rates permitted by *Missford*. Counsel argued that there was no jurisdiction to apply these lower rates simply because they appeared in the Invitation to Tender, and that they were not realistic or fair to Mr. Fitzpatrick.

(3) Counsel criticised the trial judge for taking issue in his judgment with what he perceived to be a lack of detail to support the application for remuneration, and in particular to support the number of hours worked. Counsel pointed to the Final Report, and a spreadsheet headed "Analysis of Work Completed" exhibited by Mr. Fitzpatrick along with the Final Report, and to a Review carried out on the request of Mr. Fitzpatrick by Mr. John McCann of MCM and Co., Chartered Accountants and Registered Auditors dated 7 January 2015 ("the McCann Report"), which was also exhibited. The McCann Report runs to five pages and refers to work done and the charge-out rates, and expresses the opinion that –

> "In my opinion, my assessment of the extent of the work carried out on this Liquidation by the Liquidator, Mr. Fitzpatrick, in the 29 months since his appointment has been extensive, substantial, efficient, professional and statutorily compliant, and the Liquidator, in this case, has followed the guidelines contained in the Statements of Insolvency Practice (SIPs) adopted by the Institute of Chartered Accountants – of which Mr. Fitzpatrick is a member – which set out the 'modus operandi' in relation to dealing with corporate insolvency cases."

Counsel argued that the trial judge acted arbitrarily in discounting the hours charged by Mr. Fitzpatrick/his staff relative to the work done. He argued that although the Company had a short life, it was a lengthy liquidation, and Mr. Fitzpatrick was required to prepare a section 56 Report and then to pursue restriction applications in relation to both directors. Counsel argued that, by reference to the criteria approved by Whelan J. in Re. Mouldpro International Limited sufficient particulars had been given, and that the reduction in hours by the trial judge was an "overcorrection". Noting that the tasks actually undertaken by Mr. Fitzpatrick were not criticised by the trial judge, counsel observed that Mr. Fitzpatrick had to pursue the restriction applications, and had to engage with the directors and their conduct – there was no suggestion that he did not actually spend the time which he said he spent on this task.

Decision and reasons

24. I am not persuaded by these arguments. In my view the trial judge delivered a comprehensive judgment on this application for remuneration. It is evident that he considered all of the affidavits and exhibits, and in particular had regard to Mr. Fitzpatrick's Final Report, the McCann Report and the *Analysis of Work Completed*. I am also satisfied that he applied the correct legal principles, summarised earlier in this judgment, in reaching his conclusions.

25. The trial judge resolved in favour of Revenue the fundamental question of whether this was a routine straightforward liquidation, or one that involved complexity. He states –

> "58. The Liquidator's claims, in the narrative on his affidavits, of novelty, difficulty and complexity are not borne out by the '*analysis of work completed*'. The Liquidator in his affidavits, and counsel on his behalf in argument, took exception to the characterisation by the Revenue of this liquidation as a '*pre-pack*' liquidation. In my view it was just that, and the Liquidator took it on and concluded it on that basis."

This was a finding of fact by the trial judge which he was entitled to make, and was justified by the summary of work undertaken that appears from the Final Report, and it follows from the reasons given by Ms. Griffin at paras. 5 – 9 in her affidavit, quoted earlier in this judgment. This explains why Mr. Fitzpatrick's charge-out rate was €290, and well below the *Missford* rates which were established by Kelly J. as a maximum appropriate to charge-outs in examinerships which by their very nature are complex and time pressured. The maximum rates could be charged by a liquidator, but they would only be appropriate to liquidations that entail significant complexity.

In particular the Company's assets and undertaking had already been sold off prior to Mr. Fitzpatrick's appointment, and the sale of the undertaking was adopted by the liquidator. The task of establishing that Revenue, as preferential creditor, was in effect the only creditor who could be entitled to any dividend, was not, in light of the assets that could be collected, a significant one. Apart from this there was a routine management of redundancy payments, and the preparation of the s. 56 Report and ensuing restriction applications, which were unopposed.

26. The McCann Report opinion suggests that the work undertaken was "extensive" and "substantial", but the trial judge was entitled to differ, and to prefer the Revenue view. One difficulty with the McCann Report is that it seems the author had regard to more material than was put before the High Court. For example, it refers to Mr. Fitzpatrick being "forced to take legal advice and threaten proceedings to recover the balance, finally accepting a further €25,000 in full and final settlement of this debt", and asserts that "The 'write-off' of €20,000 was prompted by legal advice…" – yet no evidence of this is given by Mr. Fitzpatrick and no legal advice is detailed or exhibited. The trial judge considered the McCann report, and he comments that –

> "41. Mr. McCann expressed the view that the recorded time was both justified and necessary. If Mr. McCann was shown time records, the Revenue and the court were not. Mr. McCann looks at the average per month over the period of the liquidation. I am quite satisfied that this is no measure of the value or necessity of the work or even of the reasonableness of the time allegedly spent."

Perhaps more fundamentally it was the High Court that was tasked with fixing the remuneration and expenses, so the weight (if any) to be attached to the report of an accountant engaged by Mr. Fitzpatrick to bolster his claim was entirely a matter for the trial judge. He clearly considered it and did not find it helpful.

27. The criticism of the trial judge for having regard to Revenue's Invitation to Tender and Revenue rates is also unjustified. He deals with this at paragraphs 45 – 48 of the judgment, noting that "Revenue propose that the liquidation might retain a total sum of €36,000 plus VAT", which was a figure taken from Revenue scales when engaging liquidators dependent on the number of employees, payment for asset realisations, contested/and contested s. 150 applications and legal fees. The trial judge states–

> "47. Incidentally, I do not believe that the Liquidator's criticism of the remuneration structure is entirely justified. More fundamentally it seems to me that the Liquidator missed the point of the open offer of settlement of his claim for remuneration. It was never suggested that the Revenue scale was to be the basis by reference to which the value of the Liquidator's work was to be measured. Rather what was said was that the claim was unjustified and unjustifiable; that in the opinion of the Revenue the maximum that might be justified was €36,000; that the Revenue was prepared to allow the Liquidator to deduct that amount; and that if he persisted in the claim which he had made and fell short of that amount, the Revenue would urge the court to fix him with the costs."

In my view this conclusion is correct and follows from a reading of paragraphs 39 – 48 of Ms. Griffin's affidavit of 21 October 2015 where she refers to the Revenue tender system and sets out the rates to which I have referred earlier. At para. 43 she says –

> "I say and believe that the market rate for a liquidation of this size and complexity is €36,000 and that that is reasonable remuneration to an experienced insolvency practitioner".

It is not proposed that these rates were in fact agreed between Revenue and Mr. Fitzpatrick, or that the court must follow these rates, which Ms. Griffin acknowledges "are not determinative of the value of the work done in every liquidation, but they are a very useful guide for the Revenue Commissioners and for the Court in evaluating the appropriateness of remuneration being sought." Ms. Griffin is careful to put the rates in context, and she provides the Revenue's tender document "as an aid to the Court", and no more than that. It is quite clear from a full reading of her affidavit that the trial judge correctly viewed the offer of €36,000 as having been made on the basis that it represented Revenue's view of "reasonable remuneration", and that it was made with a view to resolving the matter and avoiding costs.

28. As to the hours worked, the starting point is that Mr. Fitzpatrick did not produce contemporaneous time records to corroborate the time worked. As the trial judge states–

> "56. In this case, despite Revenue's protests from the outset, the Liquidator has not produced any contemporaneous time records or any work product beyond a few forms which were filed. Not even the s. 56 Report has been produced so as to allow any assessment to be made as to whether it is worth what is claimed for it.

57. In my judgment the Liquidator has not established that the time said to have been spent working in this liquidation was properly spent. By reference as to the list of hours and the '*analysis of work completed*' it seems to me that far too long was spent on routine tasks. If those doing the work spent as long doing it as they said to have spent, they are not sufficiently skilled and efficient to justify the rates per hour claimed."

29. This follows from the *dicta* in *Mirror Newspapers plc* quoted by the trial judge which establish that liquidators "must expect to give full particulars" and "must keep proper records of what they have done and why they have done it. Without contemporaneous records of this kind they will be in difficulty in discharging their duty to account."

In that case Ferris J. cautioned (at p. 649) –

> "Office-holders whose records are inadequate are liable to find that doubts are resolved against them because they are unable to fulfil their duty to account for what they have received and to justify their claim to retain part of it for themselves by way of remuneration."

In the present case the trial judge was, in the absence of adequate particulars and in particular contemporaneous recording of hours worked, entitled to doubt that the hours claimed could in fact have been worked or were justified by the work done, or the value of that work to Revenue.

30. As the trial judge correctly pointed out the "Analysis of Hours by Individual & Charge Out Rate" at Appendix 3 in the Final Report gives no more than an indication of the total number of hours worked, together with the charge-out rates – it gives "no indication of what work was done, or when or by whom" (para.14). The "*Analysis of Work Completed*" spreadsheet goes further in allocating particular hours spent by Mr. Fitzpatrick or other members of staff on particular tasks described in the left hand column, but is not a contemporaneous document. Having reviewed this, and Mr. Fitzpatrick's evidence on affidavit, the trial judge was entitled to comment: -

> "61. The paucity of the evidence as to what work was done, the disproportion between the tasks said to have been done and the hours said to have been spent doing them, the inconsistencies between the narrative account of the work allegedly done and the particulars (in the '*Analysis of Work Completed*') of the work said to have been done makes it very difficult to assess the fair value of the work properly done. On one view, at least, any attempt by the Court to go behind a claim which was not established would sit very uneasily with the settled law that the onus is on the Liquidator to justify his claim."

31. At paras 16 and 17 the trial judge addresses the fact that the Company had 23 employees, and Mr. Fitzpatrick dealt with their statutory entitlements. His analysis finds that 81 hours were spent on this, i.e., 3.5 hours per staff member, mostly billed at €160 per hour plus VAT, and he concludes: -

"67. As to the time claimed to have been spent by the Liquidator's staff on the important but nevertheless routine work of processing employees claims and filing notices and returns, it seems to me that the number of hours have not been justified. Again, it seems to me that the work established to have been done could and should have been done in half the time."

In my view this was a finding that was open to the trial judge for the reasons he gives, and because of the paucity of evidence provided by the Liquidator.

32. At paragraph 18 the trial judge addresses other routine work undertaken by Mr. Fitzpatrick, in the following terms: -

"18. Some of the items of work on the '*Analysis of Work Completed*' appear to have taken a surprisingly long time. For example, the work of taking control of company assets, keys, books and records is said to have taken 4 hours and the filing of the notice of the Liquidator's appointment is said to have taken 4.5 hours. The later 'update and completion of CRO Forms' (possibly including the Form erroneously filed) took 5.5 hours; followed by 3.5 hours said to have been spent on '*review of CRO Forms, attendance at Commissioner for Oaths and same executed and subsequent filing of same*'. There appears to me to have been double counting of this work with the work of '*processing various CRO returns as required from time to time*' which is said to have taken 15.25 hours and '*update and completion of report for final creditors and members' meeting*', which is said to have taken 21.5 hours. My tot is 50.25 hours."

This was a legitimate exercise in judicial scrutiny. The trial judge was entitled to bring to bear his common sense and experience, as well as his legal experience, in reviewing these hourly claims in the context of the nature and value of work undertaken, and the lack of complexity - particularly where, as here, he has identified "double counting".

33. It is fair to say that the trial judge was very sceptical about the hours claimed in relation to the preparation of the s.56 report and the High Court application to have the directors restricted. He states–

"20. On my tot (ignoring any issue of double counting) the Liquidator claims to have spent on the s.56 Report and the restriction application, 40 hours of his own time at €290 plus VAT per hour and 64.5 hours of the time of a Liquidation senior, charged out at €210 and €160 per hour plus VAT. In money, this comes to a claim for €11,600 plus VAT for the Liquidator's own time and €13,545 plus VAT for the Liquidation seniors.

21. This was a company which traded for about 14 months. The books and records were reasonably well written up. The company made one VAT return for January/February 2011 and PAYE/PRSI returns for January and February 2011 and, thereafter, made payments against some of the Revenue's assessment.

22. The substantial cause of the insolvency was the fact that the company paid the promotors for the business rather than its creditors and the Revenue. This much must have been obvious from the reasonably well written up books and records.

23. I can see no conceivable justification for the hours said to have been lavished on the s.56 Report; for poring over the plain and simple facts; and least of all ten entirely idle and useless hours said to have been spent attending Court on an uncontested s.150 Application which, in the event, was a consent application."

34. I cannot see how the trial judge erred in principle, or in his application of principle to the facts, in coming to these conclusions. The s.56 Report was not even exhibited. The court application was on consent, and this can hardly have come as a surprise given that the two directors do not appear to have filed replying affidavits, and had returned to Italy. As the judge who presided over s.150 applications in the High Court over a number of years, I am familiar with the straightforward manner in which uncontested applications are dealt with. Usually the trial judge has read the affidavits in advance and will have formed a provisional view as to whether the directors should be restricted, and this means that in uncontested cases the hearing in court can be very brief indeed – particularly where an actual consent is forthcoming. In such cases it is not necessary, or warranted, for the Liquidator to actually attend court – all appropriate instructions can be given in advance, and the matter is in any case heard on affidavit.

35. The next matter addressed by the trial judge was time spent by Mr. Fitzpatrick and his staff on the preparation of draft accounts to reflect the true VAT liability. He states –

"27. It was said that the company had failed to make VAT returns and that the estimates raised by the Revenue for VAT were not reflective of the correct VAT liability. The Liquidator said that he and his staff had to '*substantially examine and review the company's records and history in order to draft accounts to reflect the true VAT liability*'. It makes perfect sense to me that the Liquidator and his staff needed to examine the books and records and establish the correct VAT liability but I do not understand why accounts might have had to be drafted to do this. It is not said that the returns were ever made showing the correct liability. Rather, all that is shown for this work is an increase in the total figure for Revenue liabilities from €71,710 in the estimated statement of affairs to €197,950 in the draft final account."

Later in his judgment the trial judge returns to this subject –

"60. … What was, perhaps, out of the ordinary was that the Revenue liabilities were greater than shown on the statement of affairs but if (as they were said to be) the books and records were reasonably well written up, it cannot have taken a great deal of work to establish the true extent of the liabilities. In any event the suggestion that a good deal of work was done on that is unsupported by the evidence and inconsistent with the '*analysis of work completed*'. Even if it had been established that such work had been done, it seems to me that the Liquidator would have had enormous difficulty in meeting the requirement of showing that a reasonably prudent

man would have laid out his own money to carefully calculate the amount by which the Revenue liabilities exceeded 130% of the maximum amount that could be collected."

In my view this is an acceptable rationale for reducing the hours claimed in respect of this work, and it accords with the third test enunciated by Ferris J. in *Mirror Group Newspapers Plc* where he states–

> "Thirdly, the test of whether office-holders have acted properly in undertaking particular tasks at a particular cost in expenses or time spent must be whether a reasonably prudent man, faced with the same circumstances in relation to his own affairs, would lay out or hazard his own money in doing what the office-holders have done." (p. 649)

36. The trial judge is, correctly in my view, highly critical of the manner in which Mr. Fitzpatrick asserts that he incurred significant consultancy costs, and includes charges in respect of Mr. Robert Gloster, Chartered Accountant, in relation to the preparation of the s.56 Report. Some 68 "staff hours" are claimed for Mr. Gloster on the "*Analysis of Work Completed*", charged out at €210 per hour, 36.5 hours of which is recorded as referable to the investigation work carried out to underpin the s.56 Report and opinion. As the trial judge notes, at para. 11 of his first affidavit Mr. Fitzpatrick states that –

> "Payments to the liquidation consultant in this case were duly subtracted from the total value of work in progress which can be seen in Appendix 3 of the Final Report … ."

The trial judge's findings and conclusions on this are as follows: -

"36. I do not believe that Appendix 3 shows what the Liquidator says it shows. The analysis of hours identifies Mr. Gloster as a member of the Liquidator's staff who is said to have spent a total of 68 hours on the liquidation at €210 plus VAT per hour. It does not give any indication of what work it is alleged that Mr. Gloster was doing. Appendix 3 does show a credit of €9,790.80 for '*payments to consultants*' but there is nothing to link this deduction from Mr. Gloster's time.

37. Throughout this application the Liquidator uses a mix of VAT inclusive and VAT exclusive figures. The analysis of hours shows Mr. Gloster's time charged at €210 per hour, exclusive of VAT, a total of €14,280.00, exclusive of VAT. The credit for '*payments to consultants*' (which was rather belatedly explained to be a payment to Mr. Gloster as a consultant) is €9,790.80 inclusive of VAT, which is €7,960 exclusive of VAT. I find it very peculiar to see Mr. Gloster charged out as an employee but paid as a consultant. Perhaps more to the point, it is clear that the Liquidator is seeking to recover in respect of Mr. Gloster's work, nearly twice what he paid for it."

37. It is hardly surprising, in light of this discrepancy - where the consultancy deduction on Appendix 3 was far less than the amount charged for Mr. Gloster as a member of staff -

that the trial judge did not consider that Mr. Fitzpatrick had discharged the onus of proof in relation to the hours charged in respect of Mr. Gloster, or the work which it was asserted he carried out, and did not accept the legitimacy of his inclusion as a member of Mr. Fitzpatrick's "staff".

38. The trial judge was therefore entitled to deduct the sum of €14,280 attributed to Mr. Gloster's work as a member of staff, from the total hourly charge claim of €59,632.50, reducing it to €45,352.50 – as he does in para. 68 of the judgment. In other words, he correctly excludes any hourly charges attributed to Mr. Gloster as a member of staff, and he later adds back the figure that he considers was appropriately paid to Mr. Gloster *as a consultant*. This is a figure of €4,895.40, inclusive of VAT, being 50% of the figure of €9,790.80.

39. I would add that I find it surprising that an experienced liquidator, with at least one "Liquidation Senior" (Mr. J. Kirby) in his office, would find it necessary to engage a consultant such as Mr. Gloster to undertake work on a s.56 Report, including ten hours spent on preparing parts of a draft grounding affidavit and proofreading the final affidavit received from solicitors, and "arranging to have same sworn by Mr. Fitzpatrick and filed".

40. One further aspect of the deductions made by the trial judge warrants comment. It will be recalled that the Final Receipt & Payments Account in Appendix 2 refers to "Legal & Professional Fees €10,080.83". In his affidavit sworn on 30 October 2018 Mr. Fitzpatrick belatedly clarified the breakdown of this as follows: -

"Professional Fee:	€5,535.00 (note one)
Legal Fee:	€2,700.33 (note two)
Legal fee amount paid in error:	€1,845.00 (note three)
Total:	€10,083.33

Note 1.

The amount of €5,535.00 relates to a professional fee paid to Fiducial Accounting, the company's former accountants, who provided accounting assistance in this liquidation.

Note 2.

The amount of €2,700.33 relates to payment to our Solicitor, Stiofan Fitzpatrick and Counsel in respect of a section 150 application to the Court.

Note 3.

The amount of €1,845.00 relates to a legal fee paid to Counsel out of this liquidation in error."

41. The trial judge addresses these figures in para. 44, stating –

> "44. … It appears from the Liquidator's final report that Fiducial were the company's auditors. There is not the merest scintilla of evidence as to what work they allegedly did for the purposes of the liquidation or when. At the end of the hearing of this application the Revenue admitted (it having not been proved by the Liquidator) that this sum of €5,535.00 had been paid but that was as far as the concession went. The €2,700.33 had been more or less accidentally vouched by the fact that the Liquidator had exhibited the solicitor's and counsel's fee notes with his grounding affidavit. The liquidator in this application persisted in standing over a figure of €10,080.33 for legal and professional fees which included a payment of €1,845.00 which had nothing whatsoever to do with this liquidation and which was plainly paid out of the liquidation account in error."

Not surprisingly the trial judge allowed only the figure of €2,700.33 (inclusive of VAT) which he found "to be justified" (para. 68) for legal fees. He clearly was not satisfied that Mr. Fitzpatrick had discharged the onus of proof as far as the monies paid to Fiducial were concerned. It is also clear that the amount of €1,845.00 paid in error out of the liquidation funds as a legal fee for Counsel could not be allowed.

Conclusion

42. It follows from the foregoing that Mr. Fitzpatrick has failed to demonstrate to this court that the trial judge made any error in his application of the applicable legal principles to fixing the remuneration and expense in this case. It is true that the trial judge made a very significant reduction in the number of hours worked by Mr. Fitzpatrick and his staff which he considered to be necessary for accomplishing the work that was done. However in relation to all the deductions the trial judge sets out his reasoning, whether it is general in nature and therefore applicable to all the hours claimed, or particular to certain aspects of the work done. Further, in my view when the supervisory jurisdiction of the High Court is invoked, and it is asked to fix liquidator's remuneration, that court should be afforded a margin of appreciation, because it is of the nature of the task that the court brings to bear its judgment of what work was necessary and how long it might reasonably take, and whether a "reasonably prudent man… would lay out or hazard his own money in doing what the office-holders have done" (*per* Ferris J.). It is not therefore sufficient for counsel for Mr. Fitzpatrick to urge on this court that the trial judge "over corrected" without identifying in what manner the trial judge's reasoning was flawed, or principle was misapplied.

43. Other grounds of appeal have not been pursued. One of those (ground six) related to the order for payment out of €42,116.31 by way of dividend to the Revenue. In making that order the trial judge followed the precedent established by Gilligan J. in *Re. Cherryfox Limited* [2018] IEHC 260. The trial judge rejected the argument that the court had no power to direct a dividend, and he regarded as misconceived the suggestion that it was a matter for the liquidator to determine the amount of any dividend, for which purpose he would have to prepare a final account. The trial judge further commented –

"74. … Once [the Liquidator's remuneration] was measured by the court, the calculation of the amount of the dividend was a matter of simple arithmetic. The Liquidator was entitled to retain what he was entitled to retain and was obliged to account to the creditors for the balance. Since the preferential liabilities greatly exceeded the money available, the Revenue were entitled to it. In my view it would not only achieve nothing for the Liquidator (whether at his own, or *a fortiori* at the creditors' expense) to have to draw up a formal final account showing the two figures and the figure for the balance, but would postpone the creditor's entitlement to be paid."

The decision of Gilligan J. in *Re. Cherryfox Limited* was appealed to this court, and in an *ex tempore* decision of the court delivered by me on 11 March, 2020 (which is unreported) I held that under s.280 of the Companies Act 1963 the court did have the power to make an order for payment of a dividend to creditors after fixing the remuneration and expenses of the Liquidator. In this respect I wish to record that I agree with the remarks of the trial judge in the instant appeal as to the power of the High Court, having fixed the remuneration and expenses of the liquidator at the point in time where a Final Report is to hand, to direct the payment of a dividend where that can readily be calculated.

44. I would therefore dismiss this appeal.

Costs of appeal

45. As is usual in appeals heard remotely I will indicate my proposal in relation to costs of the appeal. As Revenue were entirely successful, they should be entitled to their costs. As this was not an application or appeal brought by the Company, but rather was one brought by Mr. Fitzpatrick entirely in his self-interest, under the principles enunciated by McKechnie J. in *Re Ballyrider: Fitzpatrick v. The Revenue Commissioners* (Supreme Court, Record no. S:AP:IE:000082) – see particularly para.88 - these should be ordered to be paid by Mr. Fitzpatrick personally, such costs to be adjudicated by a legal costs adjudicator in default of agreement. Should Mr. Fitzpatrick wish to dispute the proposed order the Court of Appeal Office should be notified in writing within 14 days of the electronic delivery of this judgment and a costs hearing will be arranged.

In circumstances where this judgment is being delivered electronically, Noonan and Ní Raifeartaigh JJ having read the judgment have authorised me to record their agreement with it.