

MERCHANT BANKING

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THE HIGH COURT

1982 No. 5555P

IN THE MATTER OF MERCHANT BANKING LIMITED
(IN LIQUIDATION)

AND IN THE MATTER OF THE COMPANIES ACTS 1963 TO 1983

JUDGMENT of Mr. Justice Costello delivered the 29th day of April, 1985.

The winding-up order in this matter was made on the 24th May 1982 (nearly three years ago) and an Official Liquidator was appointed. He has applied on five separate occasions for payment on account of his remuneration, and an application has now been made to determine finally, the remuneration properly payable from the date of his appointment to the 12th October, 1984, under section 238 of the 1963 Act and O.74 r.47 of the Rules. On the 3rd December 1984 I made an order under r.47 that the Examiner inquire into the claim and report to the Court. The Inquiry was held by the Assistant Examiner and his helpful report (clarified by a later amendment) is dated 20th February, 1985. The Revenue are the principal preferential creditors and they were asked by the Court to attend at the Inquiry and they did so.

The total amount allowed on account by the Court to date in respect of remuneration was £266,782.84p which together with £6,297.58p expenses and £58,281.83p for Value-Added Tax makes a total allowance to date of

£331,362.25p. The basis of the claim for remuneration and its composition was the subject of the Inquiry, and the results obtained have helped me in the exercise of my duties under the section.

In directing the appropriate amount for remuneration the first matter which calls for comment is that the Inquiry has disclosed that included in the claims made by the Official Liquidator is a sum of £46,460 (plus V.A.T.) which is said he should be paid for preparing what is termed a "Report" for the Court. The Official Liquidator has called this a "Report submitted to the Court under Section 299(1) of the Companies Act, 1963". It related to a possible reference by the Court to the Director of Public Prosecutions of allegations of criminal wrongdoing by directors and officials. It is said that this "Report" was commenced in October 1982 and was completed in late March, 1984, and that the general responsibility for its compilation was given to a Mr. Sheil. The Report (which I have read) deals with a number of formal breaches of the Companies Act which were found to have occurred, but in the main relates to the behaviour of directors and officials in the conduct of the company's business. A liquidator is entitled to remuneration for work done from which facts suggesting delinquency are ascertained but I note that in addition to the claim for £46,460 there is a further claim for £53,035.50p for what is termed "miscellaneous work" which the liquidator and his staff carried out. The Inquiry has established that this work involved considering

transactions between the company and other companies in the Gallagher group, consideration of what are said to be fictitious deposits and the examination of possible claims against the company's auditors. The Examiner's Report states that 40% of this item of fees is attributable to charges in respect of Mr. Sheil's work and that he had responsibility for the management of the liquidation on a day-to-day basis.

It may well be that the claim for £46,460 for preparing this "Report" may have been based on a misunderstanding of s.299 of the Act. The section does not call upon the liquidator to prepare a "report" for the Court. Subsection (2) requires a liquidator in a voluntary liquidation to "report the matter" to the Director of Public Prosecutions when it appears that a director or officer may have been guilty of a criminal offence. But subsection (1) requires the Court in a compulsory liquidation in circumstances which it outlines to direct that the matter of a possible breach of the criminal law be referred to the Director. The Official Liquidator has of course a duty to draw the attention of the Court to any matters which may come to his attention relevant to the exercise by the Court of its section 299 powers.

The liquidator should be remunerated for all the work he was called on to perform to unravel the inter-company transactions which occurred in this case, and the other matters referred to in the "miscellaneous work" section of his claim, and I am prepared to allow him a sum of £53,035.50p as claimed for this work. But I do not think

that he is entitled in addition to a further sum of £46,460 for the preparation of a "Report" whose preparation is said to have spread over a period of seventeen months. It seems to me that the facts which are contained in the "Report" must have been largely if not wholly obtained during the currency of the "miscellaneous work". Furthermore, if the facts disclosed the possibility of breaches of the criminal law the duty to the Court to which I have referred did not require the extraordinary elaborate document which was produced in this case; a simple statement of the facts (with copies of supporting documents, if necessary) would have sufficed, any work over and above this being supererogatory. Bearing in mind the overall figure which I propose to allow I consider then that the liquidator would be reasonably remunerated for the fulfilment of his duty to the Court by the sum for "miscellaneous work" I have mentioned, plus £500 for the preparation of a statement of facts plus V.A.T. I will allow this sum in lieu of the claim for £46,460 (plus V.A.T.). There should therefore be deducted from the figure of payments approved to date (£331,362.25p) the sum of £46,460 plus the appropriate V.A.T. and there should be added to the balance thus arrived at the sum of £500 plus appropriate V.A.T. The resulting balance I will call the "revised balance".

In England liquidators fees have been fixed by reference to a percentage of the value of assets recovered and realised. By using this method as a counter-check other aspects of the present claim would appear at first sight to be excessive.

The Report of the Assistant Examiner has drawn attention to the fact that 36.3% of the total claim for fees related

(a) to work in the collection of rents which produced £104,035 and

(b) work relating to the sale of freehold which produced £102,851.

But for reasons given by the Examiner I propose to allow this part of the claim. I note also that remuneration amounting to £41,255 was claimed in respect of the collection of amounts due for "loans" by the company which only produced £41,169 for the liquidation. But again for reasons suggested by the Assistant Examiner I think the fees charged should be allowed. The figure for the "revised balance" to which I have just referred is based on payments of fees provisionally approved by the Court in the five interim applications, and not on the basis of the claims made by the liquidator on those applications. A claim for fees charged at a rate higher than ordinary rates has been previously disallowed and it has not been shown on this present application that such disallowance was improper.

In view of the attitude adopted by the Revenue at the Inquiry and taking into account what has been ascertained during the Inquiry I will allow as remuneration to the liquidator from the 24th May 1982 to 12th October 1984 the "revised balance". This should be certified by the Examiner. He should further certify that the liquidator has refunded the appropriate balance of fees paid on

account, and when this certificate is given the liquidator will be discharged from the undertakings given by him on the interim applications.

The Revenue was represented at the Inquiry at the direction of the Court and their costs and expenses of doing so should be allowed out of the assets as well as the costs on this Motion. But I do not think it would be reasonable to allow out of the assets legal charges incurred by the liquidator in relation to the Inquiry as these were incurred in his own interests and not those of the liquidation. For similar reasons I do not think that he is entitled to remuneration for attending on his claim for remuneration. In the ordinary way he is entitled to the costs of the Motion I am considering.

I am not aware whether the liquidator's statement as required by s.306 and Rule 131 (required where a liquidation has not concluded within two years) has been filed. I will direct that a statement be filed every six months and that a copy of it should accompany any future application for interim payments.

This case illustrates the need to establish more satisfactory ways of fixing the remuneration of official liquidators. As there are special circumstances in this case it is not to be taken as a precedent either for the level of rates to be charged or for the means of ascertaining the appropriate amount of remuneration payable.

Appraisal
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JR