IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 285 of 2023 (IKJ)

IN THE MATTER OF THE RECEIVERSHIP OF PORT LINK GP LTD. (IN VOLUNTARY LIQUIDATION) ITS ASSETS AND THE ASSETS OF THE PORT FUND L.P.

IN CHAMBERS

Before:	The Hon. Justice Kawaley
Appearances:	Mr Matthew Dors and Ms Annalisa Shibli of Collas Crill LLP on behalf of the Joint Receivers ("Receivers")
Heard:	8 May 2024
Date of Decision:	8 May 2024
Draft Reasons circulated:	4 June 2024
Reasons delivered:	19 June 2024

Limited partnership-receivers appointed in relation to general partner to conduct litigation-receivership being funded by adverse parties in litigation-fee approval application determined by Court without reference to funding parties-governing principles

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REASONS FOR DECISION

Background

1. This is an unusual fee application which the Court is required to adjudicate without reference to any stakeholders because they are adverse parties in the litigation to which the application relates. It is important that they understand the basis on which it was adjudicated.

2. Gordon MacRae and Elizabeth Mackay were appointed by this Court as Joint Receivers of Port Link GP Ltd (the "GP") in respect of the GP's own assets and the assets of The Port Fund L.P. (the "Fund") on 1 June 2023 by Parker J in FSD 236/ 2020 (RPJ) (the "Appointment Order"). The Appointment Order was extended by Parker J's Order dated 18 September 2023, pursuant to which the Receivership was assigned to me and the presented proceedings were opened.

3. Funding of the Receivership was provided by the Plaintiffs in FSD 236/2020 pursuant to a letter agreement dated 20 October 2023 ("Funding Agreement"). The Appointment Order had previously provided:

> "*3. The Receivers shall be indemnified out of the assets of the Company and/or the Fund (as may be appropriate) for all remuneration, costs, fees, charges, expenses, disbursements, claims, demands and liabilities which they may reasonably incur or for which they may become liable arising out of or in connection with or in relation to the proper performance of their duties pursuant to this Order.*
>
> *4. The Receivers shall be authorised to be reimbursed for their reasonably incurred expenses and to charge remuneration by reference to time spent at their ordinary hourly rates from time to time in amounts to be approved periodically by the Court.*"

4. On 5 December 2023, the Receivers filed their First Confidential Report for the period 1 June 2023 to 30 November 2023 ("Confidential Report"). By Order dated 11 December 2023 herein, I directed, *inter alia*, that:

> "*3. Where there is confidential information which the Receivers consider it appropriate to share with the Supervising Judge in a Receivers' Report, the relevant Receivers' Report shall be divided into two parts: the first part consisting of information which is not confidential and which shall be made available to the Limited Partners and creditors of the General Partner and/or the Fund; and the second part consisting of information which*

is confidential and which shall not be provided to any person other than the Supervising Judge, including but not limited to, the parties to the Related Proceedings, unless the Supervising Judge orders otherwise.

4. The Summary Narratives… shall be provided to the Limited Partners and creditors of the General Partner and/or the Fund, and the parties to the Related Proceedings, at the same time as they are provided to the Funders….

5. The Receivers shall apply to the Court at 6 monthly intervals for approval of their remuneration and expenses (Remuneration Application), with the first Remuneration Application to be issued within 6 weeks of the date of this Order.

6. Each Remuneration Application shall be issued and heard on a confidential basis and, unless the Supervising Judge shall otherwise direct, shall not be served on, or provided to, any other party, including but not limited to, the parties to the Related Proceedings."

5. At the 11 December 2023 hearing, I was first referred to the Confidential Report and the various workstreams which the Receivers were pursuing were explained. I specifically directed that the Summary Narratives should be provided not just to the Funders but all other stakeholders as well in order to maximise the level of stakeholder oversight of the Receivership as far as possible.

6. By Summons dated 19 February 2024, primarily supported by the Second Affidavit of Elizabeth Mackay ("MacKay 2"), the Receivers sought approval of their remuneration for the period 1 June 2023 to 31 December 2023. The First Affidavit of Amiel Gottlieb ("Gottlieb 1") explained how queries raised by one of the two Funders had been dealt with. On 8 May 2024 after hearing counsel for the Receivers, I granted an Order in the following terms:

"*1. The remuneration of the Receivers for the period 1 June 2023 to 31 December 2023, comprised of the Receivers' fees in the sum of US$1,122,108.75, legal expenses in the sum of US$1,540,665.39 and disbursements totalling US$33,693.07 are approved;*

2. The sum of US$124,678.75, being the difference between the fees of the Receivers as charged at the Ordinary Rates and the fees of the Receivers as charged at the Discounted Rates is approved to be paid as an expense of the General Partner and/or the Fund;

3. Pursuant to Order 63, rule 3 of the Grand Court Rules (as amended), the Second Affidavit of Elizabeth Mackay, Exhibit EM-2 thereto, the First Affidavit of Amiel Gottlieb and Exhibit AG-1 thereto be sealed and not open to inspection by any other party or person except with the prior leave of the Court; and

4.The costs of and incidental to this Summons be paid out of the assets of the Fund as an expense of General Partner and/or the Fund."

7. These are, subject to the obvious confidentiality constraints, the reasons for that decision.

Legal principles governing assessing the reasonableness of receivership fees

8. Mr Dors referred the Court to apparently the only local authority on the principles applicable to approving receivership fees, which I was invited to follow in the present case. In *Perry and Perry-v- Lopag Trust Reg. and others*, FSD 205/2017 (NSJ), Judgment dated 20 April 2020 (unreported), Justice Nicholas Segal, seemingly based on his own researches, helpfully set out the following principles which provide valuable guidance:

> "*23. Neither the JRs nor the Plaintiffs in their written submissions dealt with the approach to be adopted and principles to be applied by the Court when reviewing fee approval applications. In the absence of the citation of any authority, I do not intend to set out or analyse the case law in any detail but will briefly mention the principles that seem to me to be applicable on this application:*
>
> > *(a). the amount of remuneration and disbursements of court-appointed receivers is directly and exclusively within the court's discretion to fix and approve.*
> >
> > *(b). the Court will have regard to and generally apply the principles and approach developed in relation the [sic]review of the remuneration and disbursements of insolvency officeholders in this jurisdiction and other relevant jurisdictions (particularly England and Wales).*
> >
> > *(c). the Regulations do not apply to court appointed receivers. However, to the extent that they establish rules governing the remuneration of official liquidators the Regulations provide an important basis for the review of receivers' remuneration. The Regulations set out the permissible bases on which official liquidators may be remunerated (including being remunerated upon a time spent basis, as in the present case) and establish (in Part A of the schedule) maximum hourly rates for different grades of staff involved in the liquidation. It appears that these requirements have been complied with in the present case. However, the Regulations do not provide any guidance as to the principles to be applied by the Court when reviewing whether the work done, for which remuneration is claimed, was justified and whether the amount of time spent was appropriate.*
> >
> > *(d). in In the Matters of Liberty Capital Limited, Integrity Limited Holdings Limited and Waterford Insurance Limited [2002 CILR 606], this Court referred with approval to the following statement of principle in the Ontario Court of Appeal decision in Belyea v. Federal Business Dev. Bank (44 N.B.R (2d) 248 at 250 per Stratton J. A.):*
> >
> > *'The governing principle appears to be that compensation allowed a receiver should be measured by the fair and reasonable value of his services and while sufficient fees should be paid to induce competent persons to serve as receivers, receiverships should be administered as economically as reasonably possible.*

Thus, allowances for services performed must be just, but nevertheless moderate rather than generous.'

(e). the decision in Liberty Capital dealt, of course, with the Court's jurisdiction to determine and approve the fees of official liquidators under the old from [sic] of the Companies Winding Up Rules, which were based on and referred to the English rules (and was ultimately upheld by the Privy Council). Nonetheless the Court approved and applied the approach of the Ontario court to the review of receivers' fees.

(f). in Saad the Chief Justice, when approving the joint official liquidators' revised remuneration agreement noted that:

'I consider that the quantum of remuneration for which approval is sought is reasonable and the work done is value for money. I also consider that the spread of ....work between the levels of staff appears reasonable. As a result, I am content to approve the quantum of the JOLs' remuneration.'

(g). the UK's Practice Direction: Insolvency Proceedings (the UKPD), issued in July 2018 (see [2018] BCC 421), while not being directly applicable, sets out a helpful statement of the objective which the Court should seek to achieve in any remuneration application:

'21.1 The objective in any remuneration application is to ensure that the amount and/or basis of any remuneration fixed by the Court is fair, reasonable and commensurate with the nature and extent of the work properly undertaken or to be undertaken by the office-holder in any given case and is fixed and approved by a process which is consistent and predictable.'

(h). Paragraph 21.2.3 of the UKPD set out a number of guiding principles by reference to which remuneration applications should be considered by the court. These include: (1) 'Justification' (namely that it is for the appointee to justify his claim and be prepared to provide full particulars of it); (2) 'The benefit of the doubt' (namely that the corollary of (1) was that if the court is left in any doubt as to the appropriateness, fairness or reasonableness of the remuneration, it should be resolved against the appointee); and (3) 'Proportionality of remuneration' (namely that the amount of remuneration should be proportionate to the nature complexity and extent of the work done by the appointee, and to the value and nature of the assets and liabilities).

(i). the (extensive) English case law (starting with Maxwell No 1 [1998] BCLC 638) includes decisions dealing with the proper approach to the treatment of ancillary services such as secretarial time. In Re Independent Insurance Co Ltd (In Provisional Liquidation) (No.l) [2002] EWHC 1577 [2002] 2 B.C.L.C. 709 (Independent Insurance) the court drew a distinction between time spent in relation to the provision of specialised ancillary services, such as a treasury service, in a case which required specialist support case compared with the provision of ordinary support services commonly provided within and by the accounting firm of which the officeholders were partners. In this case the practice adopted by the court in dealing with the fixing of solicitors remuneration was followed. Such a cost is

> *considered an overhead and consequently irrecoverable on an assessment. Secretarial services were normally considered part of a firm's overheads and were subsumed in the claim for remuneration. Any separate claim for such services had to be justified by reference to the performance of exceptional duties attributable to the requirements of a particular assignment.*"

9. I found this to be a helpful articulation of principles suitably supported by sources to which one can conveniently turn if a particular issue requires further analysis. I did not find any further analysis was required in all the circumstances of the present case. I would, however, attempt to reduce that sumptuous entrée-sized serving of principles to a more abstemious, appetiser-sized offering, and find that:

(a) the rules and practice relating to approving liquidators' remuneration should generally be followed in relation to receivers as they will generally serve as a useful guide;

(b) the approach to what is fair and reasonable should balance the need to attract competent persons to professional receivership work with the need to ensure efficiency and economy in receiverships;

(c) what is fair and reasonable remuneration will be informed by, *inter alia*, the level of complexity of the work performed, the appropriate assignment of tasks to staff of different seniority levels and the proportionality of the fees relative to the value of the assets under management; and

(d) it is for the appointee to demonstrate an entitlement to the remuneration in relation to which approval is sought.

Merits of application

Modified liquidator remuneration application approach

10. It occasionally happens in liquidations where the relevant rules ordinarily require seeking the prior approval of a liquidation committee for remuneration applications before seeking Court approval, that such stakeholder consultation cannot take place: see e.g. *Re Herald Fund SPC*, FSD 227/2013 (IKJ), Judgment dated 4 June 2024 (unreported). In the present case, in the absence of binding

rules, it was straightforward to justify departing from the consultative process which would generally be required.

11. As regards remuneration rates, the Receivers' Ordinary Rates are within the Insolvency Practitioners' Regulations range, with the Funders agreeing to pay 90% of the total fees, with the 10% discount being recoverable out of the assets of the GP if any recoveries are made.

12. The Receivers provided Summary Narratives to the Funders, Limited Partners and creditors of the GP and/or the Fund of the work which they had done in relation to each invoice they rendered.

13. The Court was provided with the fulsome Confidential Report which was consistent with the sort of report that would normally be provided to stakeholders and the Court in an official liquidation. The Court was also provided with the Summary Narratives which stakeholders received with each invoice. They generally did not exceed 10 pages, but included:

    (a) a summary table showing fees, direct expenses, E—Discovery costs, local legal fees and counsel's fees;

    (b) a few pages setting out the key work done by work-stream; and

    (c) a table of the Receivers' own fees and expenses showing various categories of "*work function*" and how many hours were billed by what level of staff member in relation to each work function was often (if not invariably) provided.

14. In my judgment the Summary Narratives provided a meaningful high-level insight into the work that the Receivers had done and the basis for their charges. By the date of the hearing there were no outstanding queries or objections from any Funder or stakeholder. An appropriately modified liquidator remuneration application had been made by the Receivers with informed stakeholders being afforded with a reasonable opportunity to identify eyebrow-raising billing trends, albeit without subjecting the billing process to detailed scrutiny.

Fair and reasonable

15. The Receivers have been appointed to defend to the extent appropriate proceedings brought by, principally, two Gulf public institutions (Kuwait Ports Authority and The Public Institution for Social Security) seeking to recover losses said to exceed US$100 million. Misappropriations overall sought from the GP and other Defendants are said to exceed US$150 million. Public interest

as well as purely private commercial interests are ultimately engaged. The relevant proceedings in addition to the most active FSD 236/2020 case include:

(a) FSD 235/2019 and FSD 13/2020;

(b) FSD 118/2021;

(c) FSD 41/2022, which overlaps with FSD 236/2020;

(d) Proceedings being monitored in Dubai, Kuwait and the United Sates.

16. As already noted, their rates of charge are within the IPR range discounted by 10% in terms of guaranteed payment. From the outset, an intense period of high level legal analysis and factual investigation into the strategy to be adopted in respect of complex litigation was reasonably required. As regards what was done, it was understandable that the information supplied to stakeholders showed, for example, that:

(a) in June, 50% of time was attributable to investigations and legal work which was primarily carried out by the highest fee earners; and

(b) in subsequent months, e.g. November, that work function and the involvement of the highest level fee earners had substantially dropped.

17. The Receivers themselves, as official liquidators would do, satisfied themselves of the reasonableness of their lawyers' bills. Although they provided copies of the relevant detailed bills to the Court (but not to the stakeholders), I did not consider it necessary to scrutinise them in detail like a taxing master.

18. The Funders who are Plaintiffs in the litigation the relevant legal work relates to were well placed, based on the Summary Narratives, to identify any proportionality concerns. Each Narrative provided monthly legal expense totals, while the summary work descriptions identified (admittedly with deliberate generality) the sorts of legal matters being addressed.

19. The Confidential Report (the body of which ran to less than 60 pages) set out a more detailed but very easily digestible account of the Receivers' work and basis on which their fees and expenses had been incurred. The material provided demonstrated that the fees and expenses incurred were fair and reasonable and proportionate viewed in light of the complexity and monetary scale of the Receivership overall.

Paragraph 2 of the Order: the discounted amount

20. The Receivers in addition to seeking approval for their remuneration also soughta declaration that they were entitled to recover the amount that they had agreed to discount in relation to their fees based on their Ordinary Rates. Mr Dors acknowledged that the wording of the Funding Agreement in relation to the discount issue was unhappily worded, but argued that its general intent was clear. The Funders would only be liable to pay the Receivers' remuneration discounted by 10%. The Receivers would be entitled to recover from the assets of the GP, if it recovered any, the discounted element of its remuneration.

21. I accepted this submission and accordingly found it appropriate to grant the relief set out in paragraph 2 of the Order.

Summary

22. By the end of the hearing, the Receivers had satisfied me that they were entitled to the approval of their remuneration and the Order that they sought. I indicated that having explained so fully the way in which their billing process worked in an in-person hearing, future applications could (in the absence of any objections) be presented in a more streamlined way without an oral hearing in order to save costs.

Conclusion

23. For the above reasons on 8 May 2024, I granted the Receivers' application for approval of their remuneration for the period 1 June 2023 to 31 December 2023 and confirmed the Receivers' entitlement to recover the discounted element of their fees from the assets of the GP.

THE HONOURABLE JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT