SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2021] SC EDIN 64

EDI-SQ7-21

JUDGMENT OF SHERIFF WILLIAM HOLLIGAN

in the Appeal under Section 188(1)(c) of the Bankruptcy (Scotland) Act 2016 by

Samantha Warburton, Insolvency Practitioner, Carrington Dean Group Ltd, as assumed trustee conform to (i) Protected Trust Deed granted by PS ("the debtor") in favour of Fiona Rae on 28 January 2016 and registered as a Protected Trust Deed on 21 March 2016; (ii) Deed of assumption and resignation by Fiona Rae in favour of Nicola Teader dated 12 July 2018; and (iii) Deed of Assumption by Nicola Teader in favour of Samantha Warburton dated 4 June 2019

Appellant

against a direction by

The Accountant in Bankruptcy

Respondent

Act: Advocate Instructed by Creditfix Ltd
Alt: Thomson QC instructed by Harper Macleod

Edinburgh, 15 October 2021

The sheriff, having resumed consideration of the cause allows the appeal; reduces the Direction of the Accountant in Bankruptcy dated 22 January 2021; makes the following directions: (i) that the Storage charge which the Appellant charged and recorded against the Trust deed is not a Category 1 Disbursement as defined in paragraph 18 of Statement of Insolvency Practice 9 (Scotland); (ii) that the Storage Charge is not an outlay for the purposes of Regulation 23 of the Protected Trust Deeds (Scotland) Regulations 2013; (iii) that the Storage charge cannot be reimbursed to the Appellant through the payment of a cost charged against the Trust Deed; reserves all questions of expenses meantime.

NOTE

[1] This action began as an appeal in terms of the Bankruptcy (Scotland) Act 2016 ("the 2016 Act"). The appellant is the current trustee in the Protected Trust Deed ("PTD") executed on or about 28 January 2016 by PS; it became registered as a protected trust deed on 21 March 2016. The appellant became trustee following various deeds of assumption and conveyance. For the purposes of this appeal, I shall refer to the appellant as "the trustee". The respondent is the Accountant in Bankruptcy ("the AIB").

[2] The issue between the parties concerns a very small sum of money (£35). However, I am advised that this case is one of thousands in which the particular issue has arisen. The parties are anxious to have a decision on the matter. This particular PTD was chosen as a test case. Unfortunately, the procedure has taken a rather unusual course. Put very crudely, and I will expand upon this in greater detail, the question is whether the sum of £35 incurred by or on behalf of the trustee can properly be considered a charge on the estate of the debtor. In order to bring the issue before the court the AIB purported to make a direction under section 179 of the 2016 Act to the effect that the sum of £35 could not be considered an allowable charge by the trustee. He did so by issuing a letter to her dated 22 January 2021 (document 8 in the bundle lodged by the trustee). The trustee did not agree with the direction and, in terms of section 188(1)(c) of the 2016 Act, appealed to the sheriff against the direction. In the course of her preparations for this matter, Ms Roxburgh realised that the 2016 Act does not apply to this matter because the PTD predates the commencement of the 2016 Act (30 November 2016 – see section 162 of the 2016 Act and regulation 2 of the Bankruptcy (Scotland) Act 2016 (Commencement) Regulations, SSI 2016/294). I should add I am not aware that Ms Roxburgh was involved in this matter from the outset. It follows that this matter is governed by the Protected Trust Deeds (Scotland) Regulations 2013 (SSI

2013/318) ("the 2013 regulations"). For the purposes of this action the statutory provisions contained within the 2013 regulations and their equivalent in the 2016 Act are identical; had the direction been made under what is regulation 19 of the 2013 regulations it would have made no difference to the outcome of the case.

[3] Rather than lose the opportunity to have a judicial decision upon the core issue between them, parties agreed to amend the writ and seek from this court a direction under regulation 28 of the 2013 regulations. Amendment has taken place. It follows that I have before me both an appeal under the 2016 Act and a request for directions. I have to say that the procedure adopted is, to say the least, unorthodox and must lie at the very outer edges of what is permissible by way of amendment and its consequences. However, the alternative would be to dispose of the action without dealing with the issues between the parties, requiring them to start again at further expense. The substance of the argument can be accommodated within the terms of the record, as amended, albeit only just. Counsel were also agreed that, notwithstanding the terms of regulations 23(8) and 27(1)(b), it is open to me to give directions in the matter.

The factual position

[4] There is no material dispute between the parties as to the relevant facts. There is a joint minute in appropriate terms. There is also an affidavit of the trustee dated 7 September 2021, together with an appendix ("the affidavit"). The affidavit makes reference to a number of documents. The interpretation of certain of the documents is the subject of some dispute.

[5] In essence, the trustee has prepared a scheme of division relating to the trust estate. As part of that scheme of division there are several outlays which she seeks to recover, one of which amounts to £35 and appears in appendix 1 to the affidavit, described as "secure

data and call recording storage". Appendix 1 contains a number of outlays, some of which relate to the work of previous trustees. How the charge came about and exactly what it comprises are set out in the affidavit.

[6] As I understand the evidence, the catalyst for this particular outlay arose because of some uncertainty concerning the policy of the trustee's firm of deleting call recordings after three months. The basis for that practice was an understanding that statutory obligations in relation to data protection mandated such deletion. By letter dated 25 October 2019 (document number 7) the trustee's professional body, the Insolvency Practitioners Association ("the IPA"), advised the trustee that insolvency legislation took precedence over GDPR considerations and that records, including call records, should be kept for the same period as other insolvency practitioner records. As a result of this advice steps were taken to establish the appropriate system.

[7] As the affidavit discloses, the steps to address the issue led to the appointment of Vision Blue Technology Ltd ("VB"). The appointment was done by way of a contract between Creditfix Ltd and VB dated 30 December 2019 (document 4) ("the contract"). The precise relationship between the trustee, Carrington Dean Group Ltd to whom the trustee refers as her employer, and Creditfix Ltd is not entirely clear.

[8] The contract sets out the services to be provided by VB to Creditfix Ltd. Clause 1.1 contains a number of definitions:

> "Services: The storing of all of the Customer's Data and providing security to protect such Customer Data and other services which are incidental or ancillary to such services, including but not limited to consultancy services.
>
> "Customer's Data" certain data created by the customer in relation to, and ancillary to, the Debt Relief Contracts Clients enter into.

"Client": a client of the Customer that has entered into a Debt Relief Contract.

"Debt Relief Contracts" are defined as comprising:

(a) an Individual Voluntary Arrangement under part VIII of the Insolvency Act 1986;

(b) a PTD;

(c) a debt arrangement scheme under the Debt Arrangement Scheme (Scotland) Regulations 2011 or;

(d) any other form of contract which the parties agree in writing will be treated as a Debt Relief Contract for the purposes of the agreement.

Clause 7 provides as follows:

"7. Charges and payment

7.1 In consideration of the provision of Services by the Supplier, the Customer shall pay £35 per Debt Relief Contract subject to the Services, in advance and not in arrears, on the commencement date and every three year anniversary thereafter throughout the Initial Period…

7.2 On the commencement date the supplier shall invoice Creditfix for an initial fee of £2,336,740 relating to the services in relation to the first three year service period. Creditfix will pay the supplier in the following instalments:

(a) £400,000 as a deposit on the Commencement Date;
(b) £1,000,000 by 31 January 2020; and
(c) £936,740 by 29 February 2020"".

[9] The affidavit sets out more of the background to the execution of the contact.

"6.1 Following the introduction of GDPR in 2018 and a declaration by my regulator, the IPA, that they expected insolvency practitioners to record and retain all telephone calls in relation to the advice given to consumers entering into a Trust Deed (and individual voluntary arrangements), I, together with the Company and the other insolvency practitioners employed by the Company's group, reviewed the resources available to comply with both sets of regulations. [reference is made to the letter from the IPA to Creditfix Ltd dated 25 October 2019].

> 6.2 Whilst some telephone call recordings were stored by the provider of the telephone system currently used by Carrington Dean, these were only retained for a short time before being deleted. Storage itself was not considered to be secure enough to satisfy the requirements under GDPR, nor was it efficient in terms of being able to allocate recordings to specific cases and allow for efficient retrieval.
>
> 6.3 As an Insolvency Practitioner and Trustee of Protected Trust Deeds entered into by individuals, and also a registered data controller with the Information Commissioner's Office, it is essential that I protect the data that I hold on these individuals.
>
> 6.4 Accordingly, the VB Agreement was a solution that enabled me to comply with all applicable regulations and provided absolute security of data.
> …
>
> 6.6 A quote was obtained for a similar software from Aspen Solutions Ltd, which was £41 per case and for a shorter period of time, which demonstrates that the £35 outlay is fair and reasonable…
>
> 6.7 I am confident that the £35 outlay incurred for secure data and call recording storage would not have been incurred if the PTD had not been granted and it is therefore a directly relatable cost to the PTD."

[10] It is important to note that the services provided by VB to the trustee for this matter are not limited to the recording of phone calls.

The statutory and regulatory framework

[11] Counsel each produced written notes of argument. The parties are agreed that the matter is one of statutory interpretation. I shall therefore set out the relevant statutory provisions together with the relevant parts of the Statements of Insolvency Practice ("SIP") being documents produced by the IPA. (The reference to SIP9 is a reference to the SIP9 (Scotland) then in force – 2012.) As I am invited to deal with this matter on the basis of the 2013 Regulations, I shall refer to these provisions rather than the 2016 Act although, as I have said, the corresponding provisions in the 2016 Act are in virtually identical terms.

The 2013 Regulations

"2.(1) 'remuneration' means reasonable fees and outlays.
…
10. Documents to be sent to creditors

(1) Not later than seven days after registration… the trustee must send to every creditor known to the trustee…

(d)(vi) a statement as to whether the creditors are likely to be paid a dividend and the amount of the dividend that is expected to be paid;
…

(e) a statement in Part I of Form 3 and the trustee's anticipated realisations from the trust deed.

19. Directions to trustee under protected trust deed

(1) The Accountant may give directions to the trustee under a protected trust deed as to how the trust deed should conduct the administration of the trust.

21. Administration of trust under protected trust deed

(1) At intervals of not more than 12 months… and by no later than six weeks after the end of each interval, the trustee under a protected trust deed must send the trustee's accounts of the trustee's intromissions of the debtor's estate in administering the trust during the periods in question

(a) to the debtor;
(b) to each creditor and;
(c) to the Accountant…

23. Remuneration payable to trustee and protected trust deed

(1) For work done by the trustee in administering the trust, the trustee under a protected trust deed is entitled to remuneration which may consist only of:

(a) a fixed fee which must be sent out in the Form 3 ("fixed fee");
(b) an additional fee based upon a percentage of the total assets and contributions realised by the trustee which must be set out in the Form 3; and
(c) outlays incurred after the date on which the trust deed was granted.
…

(8) The Accountant may, at any time, audit the trustee's accounts and fix the outlays of the trustee in the administration of the trust.

Sheriff's direction

28. (1) Any person with an interest may at any time apply to the sheriff for a direction as regards the administration of the trust deed.

(2) A direction by virtue of paragraph (1) may include –

(a) any order the sheriff thinks fit to make in the interests of justice; or

(b) an order to cure any defect in the procedure."

SIP (9) (Scotland)

Principles

2. Payments to an office holder… should be appropriate, reasonable and commensurate reflections of the work necessarily and properly undertaken.

…

18. Costs met by and reimbursed to an office holder in connection with an insolvency appointment should be appropriate and reasonable. Such costs will fall into two categories:

(a) Category 1 disbursements: These are costs where there is specific expenditure directly referable both to the appointment in question and a payment to an independent third party. These may include for example, advertising, room hire, storage, postage, telephone charges, travel expenses, and equivalent costs reimbursed to the officeholder or his or her staff;

(b) Category 2 disbursements: These are costs that are directly referable to the appointment in question but not to a payment to an independent third party. They may include shared or allocated costs and can be allocated to the appointment on a proper and reasonable basis, for example, business mileage.

19. Category 1 disbursements can be drawn without prior approval, although an officeholder should be prepared to disclose information about them in the same way as any other expenses.

20. Category 2 disbursements may be drawn if they have been approved in the same manner as the office holder's remuneration. When seeking approval an office holder should explain, for each category of expense, the basis on which the charge is being made.

21. The following are not permissible:

(a) a charge calculated as a percentage of remuneration;

(b) an administration fee or charge additional to an office holder's remuneration;

(c) recovery of basic overhead costs such as office and equipment rental, depreciation and finance charges".

Submissions for the trustee

[12] In relation to statutory interpretation, the court requires to go through a number of stages. First, it requires to identify the interpretative criteria which are relevant in the instant case. Secondly, it must determine by reference to those criteria the specific interpretative factors which are decisive. Finally, it must weigh the factors put forward by either party with a view to determining the correct instruction (*Bennion on Statutory Interpretation,* 6th Edition at page 504). The interpretation of a statutory provision is not a process for its improvement or for removing anomalies (*Stock* v *Frank Jones (Tipton) Ltd* [1978] 1 WLR 231 at pages 234 and 238). The first and most important principle of statutory interpretation is that the correct meaning of a statutory provision is that which the legislator can be taken to have intended by using the statutory words in their context. That context includes the whole statute and the setting in which the statutory provision was enacted. The court is looking to identify the ordinary meaning of language in the general context of the statute. Other principles of interpretation may also be relevant. In many cases, the court is looking to strike a balance between considerations, which may be conflicting. (See *MacMillan* v *T Leith Development Ltd*) *(In Receivership and Liquidation)* [2017] CSIH 23 at paragraph 54; *R* v *Secretary of State for the Environment, Transport and Regions, ex parte Spath Homes Ltd* [2001] 2 AC 349). The legislative purpose of Parliament is particularly important when considering technical areas such as bankruptcy and insolvency (*Liquidators of Grampian MacLennan's Distribution Services Ltd* v *Carnbroe Estates Ltd* [2018] CSIH 7 at paragraph 35). The court may refer to other sources such as Hansard and so forth (*Pepper(Inspector of Taxes))* v *Hart* [1993] AC 593; *R (S)* v *Chief Constable of South Yorkshire Police* [2004] 1WLR 2196 at 2199.

[13] Regulation 23 of the 2013 Regulations specifically provides that a trustee is entitled to remuneration for the work done in administering the trust deed. However, it also places restrictions on the form that remuneration is to take. Remuneration is to take the form of a fixed fee, which is identified to creditors prior to the trust deed becoming protected. In addition, the trustee is entitled to charge for outlays. Other than temporal restrictions, the only restriction contained in the provision is that the outlays relate to work done by the trustee in administering the estate. That is subject to the definition of "remuneration" which is defined in the 2013 Regulations as meaning "reasonable fees and outlays". There is therefore an overriding requirement that fees be reasonable. The creditors require to be given an estimate of the trustee's proposed fees and outlays prior to determining whether the trustee should receive protected status. Thereafter, the trustee requires to report to creditors every 12 months.

[14] SIPs are issued by the regulatory body overseeing the conduct of insolvency practitioners. They are issued with the purpose of identifying the basic principles and essential procedures with which insolvency practitioners are expected to comply. On reading paragraphs 18-21 of SIP9 there are three points of importance. The first is the requirement that any disbursement made by an insolvency practitioner in respect of a particular appointment be appropriate and reasonable. Secondly, SIP9 draws a distinction between two categories of disbursement. Both category 1 expenses and category 2 expenses must be directly referable to the appointment in question. However, category 1 expenses must meet two further criteria. First, the payments must be made to independent third parties. Secondly, they must relate to specific expenditure relative to the case. The distinction is important because, in terms of paragraph 19 dealing with category 1 disbursements, these can be paid without first having to be approved. The fact that they are

paid to an independent third party suggests that the charge will represent market value. Accordingly, those costs should be paid from the estate unless it is shown that they are unreasonable or inappropriate. By contrast, category 2 disbursements represent payments which are made to a connected party or which involve the insolvency practitioner apportioning shared costs amongst different insolvency cases. Paragraphs 20 and 21 deal with those costs. Where there is a payment to a connected party there is the potential that the payment may be disguised remuneration. Similarly, where there is an allocation of costs between cases there are two obvious risks. The first is that the allocation may be wrong and the second is that the costs, if payable across all cases, may represent basic overheads which ought to be covered by the insolvency practitioner's fee. It is for that reason that these disbursements cannot be recovered from the estate unless and until they are approved. Paragraph 21 gives specific examples of types of category 2 disbursements that will not be permissible.

[15] The disbursement in this case is a fee of £35 payable to an independent third party in respect of the provision of secured data and call recording storage. The payment relates to storage costs for the trust deed alone. The disbursement is therefore a category 1 disbursement. The trustee was and is obliged to comply with the advisory notice of 25 October 2019 that call recordings must be retained. The services in question were obtained in order to enable the trustee to comply with that obligation. The fee charged is £35 per debt relief contract. The trustee does not own and operate a system of her own for storing secure data and call recordings. To do so would be time consuming and expensive. Instead an independent third party provides these services at a price reflecting the market rate for such services. The independent third party makes a separate charge for each insolvency case. Accordingly, the cost is both appropriate and reasonable and satisfies the

requirements for a category 1 disbursement. That is sufficient to entitle the trustee to recover the disbursement under regulation 23. The AIB rejected the disbursement in question on the grounds that it is a basic overhead. It is not. The ordinary meaning of the word "overhead" in accounting terms is an expense which is incurred to support the business while not being directly related to a specific product or service. In the insolvency context this would mean costs that are not directly attributable to a specific insolvency but which are incurred in support of insolvency appointments generally or are costs associated with other services that the insolvency practitioner provides as part of his business. That is consistent with the approach taken by ICAS. The ordinary meaning of the word "basic" in this context is something essential or at the lowest acceptable level. The disbursement which the appellant seeks to recover relates to the trust deed only. It is not a cost which the trustee incurred to support insolvency appointments in general. It was only incurred because of the existence of the trust deed. It would not have been incurred had the trust deed not been entered into. As such, it is not an "overhead" at all, let alone a basic overhead.

[16] Accordingly, the disbursement should be properly characterised as a category 1 disbursement. That is consistent with the terms of paragraph 18 which specifically provides that storage costs may come within that category. The AIB would only be entitled to reject it as a permissible outlay if it were not appropriate and reasonable. The AIB denies the fee is reasonable. The AIB seems to be suggesting that those insolvency practitioners who take on work as trustees in Scotland should have their own system storing recordings of telephone calls. There is nothing in the legislation or in SIP9 which requires the insolvency practitioner to take that approach. Indeed, SIP9 specifically provides the cost of storage may be a category 1 disbursement. Such an approach might well increase the cost of administering

cases. It would place more firms of insolvency practitioners who might have only a small number of appointments at any one time at a disadvantage to larger firms.

[17] In her oral submission, Ms Roxburgh accepted that the words "outlay" and "disbursement" are interchangeable. So far as the interaction between the statutory provisions and SIP9 are concerned, the practitioner is bound by both, the first in terms of a specific legal obligation, and the second in terms of professional obligation. There is no inconsistency between the statute and SIP9. Furthermore, in the letter of 22 January 2021, which contained the direction from the AIB specifically refers to SIP9. Form 3, sent to creditors, specifically allows for costs to be charged by third parties.

Submissions for the AIB

[18] In short, the AIB's position is that the outlay of £35 is not a category 1 disbursement as defined in paragraph 18 of SIP9. It is not directly referable to the PTD and therefore cannot be recoverable from the PTD. Although SIP9 is not a statutory measure it sets out the professional obligations of insolvency practitioners. It is therefore both logical and reasonable that the AIB, in his approach *inter alia* to the auditing of trustees' accounts, proceeds on the basis of an expectation that trustees will comply with the contents of the applicable SIPs. It is also reasonable and proper for the AIB to construe regulation 23(1)(c) (now section 183(1)(c) of the 2016 Act) (both refer to outlays) with reference to the contents of SIP9.

[19] Mr Thomson agreed with Ms Roxburgh's submissions in relation to the relevant authorities on statutory interpretation. He emphasised the importance of context (see in particular the speech of Lord Nicolls in *R* v *Environment Secretary* at page 397 A-D). It follows that the recovery of disbursements must be seen in the context of a statutory scheme

which entitles the trustee to recover *inter alia* "a fixed fee which must be set out in a form prescribed for the purposes of this paragraph". The statutory scheme (reinforced by the professional requirements imposed on trustees) contemplates that a trustee is to recover the costs of carrying on business – that is, the general overheads of their business – from the fees charged and not by way of outlays. Three points emerged from the terms of SIP9: (i) costs to be reimbursed must be "appropriate and reasonable"; (ii) both category 1 and category 2 disbursements must be expenditure which is "directly referable to the appointment in question" and; (iii) it is not permissible to recover as a disbursement "basic overhead costs such as office and equipment rental, depreciation and finance charges"

[20] The first question is whether the outlay is truly a cost/outlay which has been incurred by the trustee qua trustee under the PTD in question. The second question is whether the outlay is "appropriate and reasonable". It is not at all obvious from the information supplied by the trustee that the outlay meets either or both of the criteria. In the AIB's opinion, the appropriate mechanism by which the outlay might properly be capable of being recovered (being essentially an overhead) is via the fixed fee to which the trustee is entitled in terms of regulation 23 and not by way of an outlay. The cost of carrying on business as a trustee is to be recovered by way of a fixed fee which a trustee is entitled to charge and not by seeking to make such costs outlays which can then be recovered in full by way of application to individual trust deeds.

[21] The outlay is not directly referable to the appointment in question. It constitutes consideration for performance of a service to the trustee which is required for services which the trustee requires in order to operate her business. It follows that the outlay is in fact an overhead which is not properly recoverable from the PTD. It is therefore not permissible for the trustee to seek to recover by way of a disbursement the basic overheads of the trustee.

[22] In his oral submissions, Mr Thomson drew attention to paragraph 7 of the joint minute which is carefully drawn. It is agreed that the disbursement of £35 has been paid to a third party. The AIB does not agree that one is dealing with an independent third party. The factual basis for the payment is still not entirely clear. Mr Thomson then went through various provisions of the contract, and in particular clause 7. The interrelationship between clause 7.1 and 7.2 is not clear. It looks as if the payment of £35 in clause 7.1 is an apportionment of the sums in clause 7.2. Secondly, the contract is between Creditfix Ltd and VB. Creditfix Ltd is not the trustee. The trustee designs herself as part of the Carrington Group. It is not clear how she becomes liable for payment of the £35. Analysis of the contract does not support the proposition the outlay was in referable to the PTD. The affidavit does not explain how the trustee has herself incurred the outlay. The letter from the IPA, dated 25 October 2019, related to call recording but the contract goes beyond that. It also represents what the trustee should have been doing in any event. The reference to Aspen Solutions in the affidavit at paragraph 6.6 does not assist as the services described therein are vague and the quotation comes some nine months after the contract was entered into. In short, the contract is with someone else (Creditfix) which has an obligation to pay some £2.3m. It is not an outlay referable to the PTD. It is not clear whether the trustee has paid Creditfix £35 and nothing is said about Carrington Dean.

[23] As to the issue as to the difference between an overhead and an outlay, there is no clear line. In the present case the trustee states that she is obliged to have a call storage facility. The AIB agrees but says this is an overhead not an outlay. In relation to the trustee's argument as to the meaning of overhead, in the present case the payment of £35 is necessary in every case and therefore amounts to a cost of operating the business.

Reply by trustee

[24] In relation to clause 7 of the contract, the charge is £35 per debt relief contract. In relation to the internal structure of the trustee's business, there is a holding company of which Carrington Dean and Creditfix Ltd are subsidiaries. The VB contract is a UK wide agreement covering all debt schemes. There are approximately 92,000 arrangements in England alone. The trustee's evidence in this matter was not challenged. That the trustee is not a party to the agreement is a purely technical point. There is no reason why her employer cannot enter into the agreement. The insolvency practitioner gets the benefit of it. Other outlays are paid by the company employing the trustee.

[25] In relation to the meaning of overhead, this should be given its ordinary meaning as it is applied in a field of accountancy. This is a cost incurred specifically for each case. It is irrelevant that it needs to be paid in each case. The same might be said in relation to payments made to the Keeper of the Register of Inhibitions. That is paid in each case but it is also accepted as an outlay.

Decision

[26] The issue in this case comes down to an analysis and interpretation of the 2013 Regulations and SIP9. I am not sure that the various authorities as to statutory interpretation add much to the overall process. In my opinion, it is important to consider the overall context in which the issue arises.

[27] The 2013 Regulations place emphasis on disclosure. At the outset of the PTD procedure the trustee must complete Form 3, setting out anticipated recoveries and giving both to creditors and the debtor information as to the fees the trustee proposes to charge and

the expected outlays (regulation 10). The obligation to report in detail as to the trustee's intromissions continues throughout the administration of the trust deed (regulation 21).

[28] The trustee has a right to remuneration (regulation 23). It is important to note that regulation 23 was amended by the insertion of the word "only" so that it reads "… The trustee under a protected trust deed is entitled to remuneration which may consist only of…" (inserted by the Common Financial Tool Etc (Scotland) Regulations 2014/290; section 183(1) of the 2016 Act is in similar terms). The regulation goes on to refer to a fixed fee and outlays incurred after the trust deed has been granted. Regulation 23 accordingly prescribes set parameters within which a trustee may seek payment for her services and they are tightly drawn. "Remuneration" is a portmanteau word comprising both fees and outlays (regulation 2(1)). It is important to note that regulation 2(1) goes on to define remuneration as "reasonable fees and outlays". It is, correctly, accepted by both parties that "reasonable" in the definition qualifies both fees and outlays. I was advised that the fixing of the fee is left to the individual trustee in the sense that there is no scale charge fixed by the AIB or the IPA. It is a figure for which the trustee proposes to carry out the work. Regulation 2(2)-(4) sets out strict criteria which must be satisfied before a fixed fee may be increased.

[29] A further safeguard is to be found in regulation 23(8) which entrusts to the AIB the right to audit the trustee's accounts and "fix the outlays of the trustee in the administration of the trust". A similar statutory provision has been in place since the Bankruptcy (Scotland) Act 1913 (section 185). It appears never to have given rise to any reported litigation. Of the words "audit" and "fix" the latter appears to me to be more peremptory than the former. The only specific statutory guidance is that the fees and outlays be reasonable. Against the decision of the AIB lies a right of appeal (regulation 27(1)(b)). I make the general

observation that, given his overall responsibilities, regulation 23(8) is a powerful tool available to the AIB to ensure that fees and outlays are kept within appropriate bounds. It does not require that there be an application made to the AIB by an interested party; the AIB may exercise the power if he considers it appropriate to do so as part of his general function of superintendence.

[30] Both parties relied upon the terms of SIP9. SIPs are produced by the professional body associated with insolvency practitioners. As the details as to the role and powers of the IPA were not explored I shall limit my comments. For the purposes of the present case, in the event of an inconsistency between the regulations and SIP9, the regulations, being statutory, must prevail. No inconsistency was suggested and none is apparent to me. Rather, it seems to me that SIP9 gives more detailed guidance to trustees as to the subject of outlays than the rather sparse framework contained within the 2013 regulations. Further, and in any event, I note that by clause 9 of the trust deed it is expressly provided that the trustee shall comply with both regulation 23 and SIP9. Having said that SIP9 cannot enlarge the scope of what constitutes a "reasonable outlay" within the meaning of regulation 2(1). I do make one small observation. The language of the regulation is "outlay"; in SIP9, it is "disbursement". Although parties accepted that, for present purposes, the words can be used interchangeably, it seems to me that if there are to be SIPs for Scotland it would be better for reasons of consistency that SIPs follow Scottish statutory terminology. It is my understanding that disbursement is the language of English law and procedure; the appropriate term in Scottish procedure is outlay.

[31] From a factual point of view, as the definition of "Customer Services" in the contract shows, the service which the £35 funds is more than just the storage of phone calls, albeit the storage of phone calls appears to have been the catalyst for the contract. I accept that the

trustee requires to have this facility in order to comply with the requirements of her professional body. The administrative mechanism by which the £35 comes to be paid is opaque but I am satisfied that, by one route or another, it is the trustee of this PTD who causes to have paid the sum of £35. It appears to me that the arrangement with VB is akin to a drawdown process: the facility is organised by reference to each individual PTD. On what I would regard as a basic analysis the cost is directly referable to the appointment in question. It was incurred for the purpose of the PTD. In the context of this case, I do not regard that as being a particularly high bar to cross nor is it the end of the matter. I accept that payment of £35 is payment of an outlay. To my mind, using the analogy of a solicitor's judicial account in a litigation, an outlay is something paid by the professional in furtherance of the client's affairs; it appears in an account as monies expended by the solicitor on behalf of the client. An example might be fees paid to the court service to raise an action; the cost of instruction of an expert witness; or the instruction of counsel. On that basis the payment of the £35 is an outlay; it is paid by the trustee to a third party, namely VB.

[32] The issue becomes whether it is appropriate and reasonable? Put another way, is it an overhead cost? If it is the latter, it is not the former. As a matter of interpretation, the draftsman seems to have had in mind a distinction between "appropriate" and "reasonable": in this context, as I read it, "appropriate" refers to whether a charge is recoverable; "reasonable" refers to the amount. I confess determining whether the charge is appropriate is not easy to resolve. There is a dividing line between an outlay and an overhead but where the line rests is less clear. The accounting definition does not advance matters greatly. Easy examples abound. The cost of the trustee's premises at which she conducts her business would be an overhead: travel expenses for a specific case would be a cost. The examples of what constitutes allowable category one disbursements seem to me to

be a little old fashioned, even for 2012 (e.g. postage and telephone charges). Things have moved on. These days data protection, whether of phone calls or other materials, is an increasing part, not just of commercial, but of daily life. Securing its protection, as well as its storage, is increasingly a fundamental part of good business and professional practice; it is not a matter of choice. I would regard it as an essential part of the business of an insolvency practitioner and should be treated as a cost of the business and not as an outlay. My conclusion is that the charge of £35 is not a recoverable disbursement/outlay.

[33] In relation to the disposal of the action, I require to allow the appeal in relation to the direction given by the AIB as it was issued pursuant to the wrong statutory provision. However, and also as requested by both parties, in terms of regulation 28 I shall give the relevant directions as to the payment of the storage cost. I should add that there was mention in the debate about an entry relating to a storage charge of £480. The matter was not greatly pressed on behalf of the AIB. As a matter of fact there is an explanation set out at paragraph 3.13 of the affidavit. I accept the explanation. There is no requirement for any direction thereanent.

[34] Both parties were agreed that the cause is suitable for the instruction of senior counsel. Although counsel were agreed expenses should follow success, there is the complication of apparent divided success. I say apparent because the issue of the appeal did not feature greatly. I have reserved expenses. If agreement is reached on expenses the court can be notified and an appropriate interlocutor issued.