IN THE EASTERN CARIBBEAN SUPREME COURT

TERRITORY OF THE VIRGIN ISLANDS

COMMERCIAL DIVISION

IN THE HIGH COURT OF JUSTICE

CLAIM NOS BVIHC (COM) 74, 136 AND 139 OF 2009

KENNETH M. KRYS AND CHARLOTTE WARD-CAULFIELD

(As Liquidators of Fairfield Sentry Limited, Fairfield Sigma Limited and Fairfield Lambda Limited)

Applicants

Appearances:

Mr Alistair Abbott, Ms Sinead Harris, of Messrs Forbes Hare for the Applicant

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2016: November 22; December 14

JUDGMENT

[1] **Wallbank J [Ag]**: This ruling addresses the following questions: Does the Court have power to permit liquidators appointed by the court pursuant to the Insolvency Act 2003 (the "Act") to draw monies from a liquidation estate by way of interim payment on account of fees and disbursements yet to be incurred? If so, how should the Court's discretion be exercised? I will only address these issues as they pertain to liquidators appointed pursuant to the Act.

[2] In a small number of cases such payments have recently been permitted by the Court. Such permission has been construed by commentators as an innovation with perhaps wider application than is in fact the case. Suggestions have been made that this approach has brought the TVI in line with other off-shore jurisdictions where express provisions permit liquidators to draw down significant percentages of anticipated costs and expenses. Also, the Court is increasingly seeing draft orders being submitted upon the appointment of a liquidator seeking such drawing rights. I hope by this ruling to end the speculation flowing from those other cases, which were resolved orally and thus unreported. The Court has had the benefit of the helpful legal submissions, both oral and subsequently written, of Learned Counsel for the applicant Court appointed liquidators. Without in any way detracting from these, I should note that the Court did not have the benefit of opposing counsel.

Statutory provisions relating to approval of liquidators' remuneration

[3] A liquidator appointed under the Act acts as an officer of the Court[1] and as an agent of the company in liquidation[2].

[4] The remuneration of liquidators appointed under the Act 2003 is addressed in sections 430 to 433 of the Act. Remuneration is defined by section 2(1):

> *"remuneration" includes properly incurred expenses and disbursements.*

[5] This is inclusive, as opposed to exclusive language. "Incurred" is put in the perfect tense, which suggests that for expenses and disbursements to be included in any remuneration which the Court may allow they should already have been incurred. That must be right as far as remuneration to be fixed at the conclusion of the liquidation is concerned. However, this definition is descriptive, not prescriptive. Other sections of the Act contain prescriptive provisions, including in relation to interim payment of remuneration.

[6] Sections 430 to 433 of the Act deal with remuneration. The principles relating to the general application of these sections are well settled and I need not rehearse them here.

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1 Section 184(1) of the Act.

2 Section 184(2) of the Act

[7] Before any final distribution can be made to creditors (or members, if there is any surplus left after payment of creditors), there must be certainty as to the costs and expenses of the liquidation, including the remuneration of the liquidator.

[8] The remuneration of the liquidator can be fixed either by a creditors' committee (if any) or by the Court, by virtue of section 430 of the Act. This provides materially:

> *430. (1) The remuneration of an administrator, liquidator or bankruptcy trustee is fixed*
>
> *(a) by the creditors' committee, if any; or*
>
> *(b) by the Court on an application made under subsection (2).*
>
> *(2) An administrator, liquidator or bankruptcy trustee may apply to the Court to fix his remuneration, or to fix an interim payment under section 433, if*
>
> *(a) no creditors' committee is appointed;*
>
> *(b) the creditors' committee fails, for whatever reason, to fix his remuneration, or an interim payment; or*
>
> *(c) he considers that the remuneration, or an interim payment, fixed by the creditors' committee*
>
> *(i) is insufficient,*
>
> *(ii) is not in an appropriate currency, or*
>
> *(iii) is on unacceptable terms.*
>
> *…*
>
> *(5) On the hearing of an application under subsection (2), the Court shall fix the remuneration of the administrator, liquidator or bankruptcy trustee at such amount as it considers appropriate.*
>
> *(6) In this section, "liquidator" does not include a provisional liquidator.*

[9] It is often the case in TVI liquidations that there is no creditors' committee. The liquidator must apply to the Court for his remuneration to be fixed.

[10] Section 433 of the Act provides:

> *(a) The remuneration of an office holder shall be fixed by the creditors' committee or the Court after the conclusion of the insolvency proceeding.*
>
> *(b) In fixing the remuneration of an office holder, the creditors' committee or the Court shall take account of any interim payment made under subsection (3).*
>
> *(c) Notwithstanding subsection (1), a creditors' committee or the Court may at any time set an interim payment to be made to the insolvency practitioner on account of his remuneration.*
>
> *(d) An interim payment may be made under subsection (2) subject to such conditions as the creditors' committee or the Court considers appropriate.*

[11] The reference to subsection (2) in section 433(4) appears to be a typographical error. It is subsection (3) which confers the power to make interim on account payments.

[12] Thus, although the remuneration of a liquidator is "fixed" at the end of the liquidation, the creditors' committee or the Court may "set" an "interim payment" to be made to the liquidator "on account" of his remuneration.

[13] "Interim" and "on account" are terms not defined in the Act.

[14] It is common practice in the TVI for liquidators to apply during the course of liquidations for interim payments on account of their remuneration. Many such liquidations are long running, cross-border, complex and high value. Once afoot, various streams of work require to be undertaken by different professional disciplines engaged by the liquidators. These can entail months and sometimes years of effort. Average monthly cost trends can often be identified, and anticipated. It is a universal reality that professionals frequently require payment up front, on account. Most applications for interim payment approvals seek approval for fees and disbursements already incurred. However, applications (including this one) have been made to the Court for approval of interim payments on account of fees and disbursements yet to be incurred.

[15] Circumstances may arise in which, for example, the liquidators anticipate that certain expenditure will be required for which payment in arrears may not be feasible or commercially sensible. There can

also be circumstances, such as in Court vacations, where a liquidator would not be able to have an application for approval heard immediately but work needs to be done, or to continue, and service providers need to be paid timeously or up front. Frequent applications for interim payments also increase the costs burden on the estate, due to the time needed to prepare and present each application. These are just examples – the eventualities are open ended.

[16] If the liquidator were to be required to fund such expenditure in advance personally, he would in effect be called upon to act as a funding creditor or banker to the liquidation. Such a requirement does not sit well at several levels. First, it ignores that a liquidator is the agent of the company in liquidation. Imposing a *de facto* funding obligation on him would extend beyond the limits of his agency. Secondly, a liquidator is an individual, not an institution or other corporate entity. There are no minimal capitalization requirements for being a liquidator. Thirdly, a liquidator owes duties to the Court and the company's creditors and members. It would be odd indeed if financially well-endowed firms of solicitors, accountants, auditors and the like that a liquidator might need to instruct can properly refuse to fund work and expenses from their own resources, whereas an individual of no sufficient personal means must bear the financial burden if the interests of the estate require prompt action. Fourthly, although a liquidator would be excused from any liability if work on an estate had to stall because the Court was not in a position to determine a fee approval application promptly, it would be unsatisfactory for the stakeholders in an estate if the very Court which is tasked with overseeing the orderly winding up of a company's affairs were to be an impediment to that process.

[17] The scheme of the Act, in permitting interim payments on account of liquidators' remuneration to be set and thus paid before the conclusion of a liquidation, already recognizes that a liquidator should not have to fund a liquidation personally.

[18] By providing for a liquidator's fees to be fixed after the close of the liquidation, the Act treats the appointment of a liquidator as analogous to a retainer contract. Such contracts are "entire" contracts, such that as a matter of law the performer of the contractual obligations is not entitled to claim his remuneration until he has performed his side of the bargain, in accordance with the rule in Cutter v Powell (1795) 6TR 319; 1010 ER 573. In other contexts, such as solicitors' retainers, statutory provisions have been enacted which entitle solicitors to render interim on account bills. The interpretation of such provisions has elaborated principles which apply in those contexts. In relation

to English solicitors, the ability of a solicitor to render an interim on account bill for fees and disbursements which have not yet been incurred is restricted, but not excluded. Such restrictions can be modified by agreement between a solicitor and a client. In that case an interim on account payment of future fees and expenses is still an interim on account payment. The term "interim on account" is wide enough to apply to costs already incurred as well as future expenses. English solicitors' interim on account bills are not amenable to assessment, nor can a solicitor sue on them. Interim on account payments merely fund the solicitor during on-going work. They are no more than a financing arrangement. The crux, however, is that "*any anomalies and inequities can be rectified in the final bill*"[3]. It is the final bill which can be reduced-upon a solicitor-client assessment, and with any overpayment to be returned.

[19] The Applicants contend that the TVI legislation pertaining to liquidators should appropriately be construed without reference to English or other overseas insolvency statutes. It is TVI legislative intent that is in question. I agree.

[20] The Act provides for express exceptions to what is here in effect the entire contract rule. It expressly allows a liquidator to be provided with remuneration on an interim on account basis. There is nothing expressed in section 433, or in any other provision that I can see, which prevents the Court from approving an interim payment on account of fees and disbursements yet to be incurred. Any such interim payment is, as the provision makes clear, on account of the liquidator's remuneration. Any such interim payment will be taken into account on the fixing of the liquidator's remuneration at the end of the liquidation, as stated in section 433(2). There is also no requirement for a liquidator to render an interim on account bill in order for an interim on account payment to be set. Had there been such a requirement, there might be case for saying (as is the default position in England for solicitors) that such a bill should include only such costs as the liquidator has already incurred. There is also nothing in the Act which prevents an order for any overpayment, as may eventually be found, to be returned following an interim payment on account.

[21] Section 432(5)(a) of the Act sets out certain factors which the Court must take into account when fixing the remuneration of the liquidator or when sanctioning an interim payment under section 433(3). Those factors are:

[3] Cook on Costs, 2010, para. 1.7

(i) the need for the remuneration to be fair and reasonable,

(ii) the time properly spent by the insolvency practitioner and his staff in carrying out his duties,

(iii) the complexity of the insolvency proceeding and whether the insolvency practitioner has been required to take any responsibility of an exceptional kind or degree,

(iv) the effectiveness with which the insolvency practitioner is carrying out, or has carried out, his duties,

(v) the value and nature of the assets with which the insolvency practitioner has had to deal,

(vi) the hourly rates charged by other insolvency practitioners, both within and outside the Virgin Islands, in undertaking similar work, and

(vii) whether any expenses which he incurred were properly incurred.

[22] Factors (ii) and (vii) contemplate fees and disbursements already incurred. However these factors do not provide that the Court may not permit interim payments on account of fees and disbursements yet to be incurred. How the liquidator's past conduct measures up against these factors, including factors (ii) and (vii), informs the Court's discretion whether and how to set any interim payment. The need to take past events and/or factors in account suggests that it would generally be inappropriate to permit a liquidator to draw down funds on account of future costs at the start of the liquidation.

[23] Section 432(5)(b) sets out additional factors which the Court may take into account when fixing remuneration or sanctioning an interim payment:

(i) the commercial and personal risks accepted by the office holder,

(ii) the time spent by the insolvency practitioner and his staff outside the Virgin Islands and the amount of travelling required,

(iii) the standards and practice used for assessing remuneration in jurisdictions other than the Virgin Islands.

[24] The Applicants submit that, properly construed, section 433(3) does enable such interim payments to be approved.

[25] The power to approve an interim payment under section 433(3) is clearly discretionary. The Applicants suggest that in exercising its discretion, the Court will inevitably wish to ensure that the estate of the company in liquidation is not prejudiced. That must be right.

[26] Any such interim payment should not adversely impact the ongoing running of the liquidation. The Court would expect to see evidence on affidavit describing anticipated steps to be taken in the liquidation and an indication of their likely foreseeable cost, in the absence of invoices, and the current level of liquid assets in the estate available to meet any necessary expenses.

[27] The Court will also wish to ensure that there are suitable safeguards to prevent loss to the estate through excessive remuneration being paid. In other jurisdictions this is done by allowing only a percentage of the anticipated future costs to be drawn down. This is a sensible precaution. It must depend upon the facts of each case how much the Court is prepared to allow.

[28] Section 433(4) provides that the Court may make the interim payment subject to such conditions as it considers appropriate. Liquidators may thus be required to undertake to repay any amount of an interim payment to the extent that it later proves to have been an overpayment, upon the fixing of the liquidator's remuneration under section 430 or earlier. Also, liquidators may usefully be required to report back to the Court at set intervals in the future so that the Court can review the arrangement with the benefit of hindsight.

[29] The Applicants contend that any interim payment need not be a single lump sum, but can include provision for multiple payments to be made. They point out that reference to setting an interim payment "at any time" envisages that multiple interim payments may be approved during the course of a liquidation. That is right, but the scheme of these sections is to confer upon the Court both an entitlement and an obligation to supervise closely the use of the liquidation estate's money by a Court appointed liquidator. Thus these sections are not to be construed, in my view, as allowing, much less encouraging, the Court to give liquidators a broad licence to spend the estate's money and account for it after the event (and I should say that these Applicants are not suggesting otherwise). There will be situations where an ongoing interim payment on account scheme, tailored to the needs of an individual liquidation, may both be sensible and sufficiently safe for the Court to order this.

[30] A liquidator is able to apply to the Court at any time for directions in relation to a particular matter arising in the liquidation, by section 186(5) of the Act. The Court has commensurately wide powers to enable a liquidation to work most effectively in the interests of all stakeholders concerned. That must include giving directions for a suitable funding arrangement.

[31] I am thus satisfied that the Court has power to approve payment to a Court appointed liquidator from a liquidation estate, interim on account of anticipated fees and expenses, in appropriate circumstances. This power is inherent in the Act. The Act is flexible and purposive for meeting real and developing commercial needs (a feature also intentionally shared with the Business Companies Act 2004 and earlier companies legislation). The usual course envisaged by the Act is for Court appointed liquidators to apply from time to time for approval of an interim payment on account of fees and expenses already incurred. Where that would place the liquidator in a position where he would be required to fund the liquidation from his own resources, or put him or the estate to some other disadvantage or difficulty, the Court is able to sanction a regime whereby its appointed liquidator can draw down funds from the liquidation estate on account of anticipated fees and disbursements. There is nothing in the Act, or any principle I am aware of, which establishes a high threshold in this regard. It should be kept in sight, however, that generally the Court's supervisory function will best be carried out when it has full information. For approving remuneration, that will generally mean having before it bills for work already done, but much will depend upon the circumstances of each liquidation.

[32] For avoidance of doubt the file in this matter remains under seal. This judgment appears in conceptual form for the purposes of publication.

[33] I thank Learned Counsel for their assistance in this matter.

Commercial Court Judge

14 December 2016