IN THE EASTERN CARIBBEAN SUPREME COURT

TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

COMMERCIAL DIVISION

CLAIM NO: BVIHC (COM) 120 of 2017

IN THE MATTER OF THE INSOLVENCY ACT 2003

AND IN THE MATTER OF UNICORN WORLDWIDE HOLDINGS LIMITED IN LIQUIDATION

AND IN THE MATTER OF BALLAUGH HOLDINGS LIMITED (IN LIQUIDATION)

AND IN THE MATTER OF GLEN MOAR PROPERTIES LIMITED (IN LIQUIDATION)

AND IN THE MATTER OF SULBY INVESTMENT HOLDINGS LIMITED (IN LIQUIDATION)

Appearances:

Mr Martin Pascoe QC, South Square Chambers and with him Mrs Blair Leahy 20 of Essex Street and Andrew Willins of Appleby for the Joint Liquidators

Mr Shane Donovan and Ms Akesha Adonis of Mourant Ozannes for the Enforcement Receivers

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2018: May 14 – 17

July 5

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JUDGMENT

Principles of fixing liquidators' remuneration-Court should adopt a principled approach not a nit-picking line by line analysis -The principles to apply are contained in section 432 of the Insolvency Act; the overarching principle is whether the costs are fair and reasonable - fees should also be proportionate which is relevant to whether they are reasonable –The Judge has a statutory duty to take into account the matters set out in section 432(5)(a) (i) – (vii) and a discretion to take into account the matters set out in section 432(5)(b) – the Judge must decide whether in incurring fees and expenses the liquidator acted within the ambit of the principles; and to the extent the liquidator failed to do so the remuneration and expenses should not be allowed - Re Victory revisited and not followed in relation to treatment of expenses; since remuneration includes expenses by definition Court has statutory duty to fix expenses as well - The value criterion for fixing remuneration as applied in England does not apply in the BVI; it is unnecessary in light of the clear provisions of 432, Re Victory followed. In deciding whether to fix a Berkeley Applegate Allowance the Judge should review the streams of work done to determine whether in fact they benefited the trust assets so as to qualify for the allowance out of trust assets. On application of the principles to the facts of this case, approximately 11% of the liquidator's fees and about 3% of disbursements were disallowed, and the fixing of the Berkeley Applegate Allowance was adjourned to a date to be fixed or the next Approval Hearing.

[1] Adderley, J: This is the first Approval Hearing in a creditor's voluntary winding up. On 18 June I distributed a draft confidential copy of this judgment in advance to counsel for correction of slips and to confirm by 25 June their agreement or otherwise with the accuracy of the mathematical calculations. The Court found their input of great assistance, especially in relation to corrections to the mathematical calculations made by the JLs which the court accepted as accurate and incorporated into the judgment.

[2] The application by notice dated 31 January 2018 is for the fixing of the liquidators' interim remuneration under section 433(3) of the British Virgin Islands ("BVI") Insolvency Act 2003 ("the Act"). That section provides as follows:

> "…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.

[3] The joint liquidators ("JLs") seek approval of their fees in the sum of £5,247,432.22 and disbursements in the sum of £5,119,303.55 of which £3,710,412.49 are legal fees for the period 5 March 2015 to 30 November 2017. The total amount claimed is £10,366,735.77 or approximately US$14,513,430.08. It appears to be the largest single costs application so far in the British Virgin Islands.

[4] The court is also being asked to fix the Berkley Applegate allowance pursuant to paragraph 9 of a Berkley Applegate Order which I granted on 16 October 2017[1] for the period from 1 January 2017 to 30 November 2017 ("Second Approval Period**"**) and to postpone fixing the allowance for the period from the commencement of the liquidation in March 2015 to 31 December 2016 ("First Approval Period") to a date to be fixed.

[5] According to the JLs the liquidations of the insolvent companies have been rendered hugely complex by reason of historic frauds, the conduct of the former management of the insolvent companies (including their misappropriation of the assets of the insolvent companies and their failure to keep meaningful books and records), the nature of the assets required to be got in and realized, and the numerous and competing proprietary claims to the assets of the insolvent companies and their shares. These factors, they state, have also generated multi-jurisdictional legal proceedings, which proceedings have stretched both the human and financial resources of the insolvent estates.

[6] The burden of proof is on the JLs to prove entitlement to their remuneration and where there is doubt the benefit should be resolved against the JLs.

[7] Evidence in support of the application was by way of the First Affidavit of Carl Stuart Jackson Sworn 9 February 2018 ("Jackson One"), the First Affidavit of Simon James Bonney sworn 25 July 2017("Bonney One"), the Second Affidavit of Simon James Bonney sworn 5 October 2017 ("Bonney Two"), the Witness statement of David John Standish sworn 13 April 2018 ("Standish One"), the Second Affidavit of Carl Stuart Jackson filed 8

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May 2018("Jackson Two") and the First Witness Statement of Charlotte Caulfield filed 4 May 2018 (Caulfield One").

[8] Unicorn Worldwide Holdings Limited ("Unicorn"), Ballaugh Holdings Limited ("Ballaugh"), Glen Moar Properties Limited ("Glen Moar"), and Sulby Investments Holdings Limited ("Sulby") ("the insolvent companies") have been in creditor's voluntary liquidation in the British Virgin Islands (BVI) since March 2015. They are the holding companies of the "Arena Group" which comprises more than 60 subsidiaries. Bridge Properties (Arena Central) Limited ("BPAC") a BVI company is a subsidiary of Ballaugh. Unicorn is the main treasury vehicle for the Arena Group. Some of the subsidiaries are also under a formal insolvency process.

[9] The Arena Group comprises the group of companies which until 2014 was held by Orb a.r.l., a Jersey company. The Group was transferred to Andrew Ruhan and companies associated or controlled by him pursuant to the Arena Settlement in 2004. Prior to that the purported ultimate beneficial owner was a Dr Gail Cochrane. SMA Investment Holdings Limited ("SMA") is now the ultimate owner of the Arena Group after the Isle of Man Settlement in 2014. It is a Marshall Islands Company owned by Dr Gail Cochrane although the shares were purportedly transferred to Litigation Capital Limited in May 2016. She is an interested party in what is defined below as the Popplewell Proceedings.

[10] It might be helpful to recognize certain persons and entities that are referred to in this judgment later and so they are briefly set out below.

[11] Dr Cochrane and her company Orb a.r.l have been declared *en désastre* in Jersey and their assets currently vest in the Viscount of the Royal Court of Jersey. Pro Vinci Ltd. up until April 2016 when it went into administration provided the "family office" service to Gail Cochrane. Since then Dawna Stickler has been providing the same services through a different company, Andiamo Office Services Ltd. Her and the Administrators of Pro Vinci, now liquidators, Mr David Clements and Mr Paul Boyle are interested parties in the Popplewell Proceedings. Nicholas Thomas claims 18.75% beneficial ownership in the

shares and the assets of each of the Arena companies by virtue of a trust agreement with Gail Cochrane dated 13 December 2013.

[12] Enforcement Receivers have been appointed on the application of the Serious Fraud Office ("SFO") of England pursuant to a receivership order dated 7 April 2008 to enforce a confiscation order in the sum of £40,956,911 against Dr Gerald Smith, a twice convicted fraudster, and the former husband of Dr Cochrane. They claim a proprietary interest in all of the assets of the insolvent companies and their subsidiaries ("the Arena Assets"). The SFO likewise asserts a proprietary claim to all of the Arena Assets. The current enforcement receivers are John Milsom and David Standish of KPMG LLP (ERs) and are interested parties in the Popplewell Proceedings.

[13] There are other terms referred to in this judgment. 'The OMH Companies' refer to Orb Estates Plc (in administration), Mitre Property Management Limited (in administration) and Hotel Portfolio II UK Limited (in liquidation). 'Stewarts Law' refers to Stewarts Law LLP the ex-solicitors to Dr Cochrane and an interested party in the Popplewell Proceedings for unpaid fees. 'Phoenix/Minardi' refers to Phoenix Group Foundation and Minardi Investments Ltd interested parties in the Popplewell Proceedings. The 'Hayes Settlement' refers to the settlement agreement between Glen Moar, Unicorn, Optimum Technical Construction Ltd., SMA and GAC Holdings Limited dated 12 August 2016. Franek Sodzawiczny holds a freezing order in Jersey against £7 million of Dr Cochrane's estate in Jersey in pursuit of a proof of debt arising from a consultancy agreement for £9 million. Ulrich Pelz is also an interested party in the Popplewell Proceedings.

[14] According to the organizational chart the ultimate company in the Arena Group is SMA Investment Holdings Ltd (a Marshal Island domiciled company). According to Bonney One the ownership of the Arena Group was the subject matter of a considerable amount of litigation which commenced in the English Commercial Court in October 2012 ("the Orb litigation") and was heard by Cooke J and later Popplewell J who currently has carriage of satellite litigation arising out of the case ("the Popplewell Proceedings"). The Orb Litigation was settled on 29 April 2016 whereby a consent order was approved by

Popplewell J and sealed on 6 May 2016. The Orb litigation spawned other litigation based on the breach of the settlement terms and the alleged fraud on the companies by several persons.

[15] There are competing claims to the ownership of the shares in the insolvent companies which are the focus of the Popplewell Proceedings with a trial date set for January 2020., but in relation to the assets the JLs have the usual mandate under the Act to collect, get in, and preserve the Arena Assets held by the insolvent companies which also include all rights claims and choses in action (but not including assets of subsidiaries). Because of the many proprietary claims against the assets there is a possibility that at the end of the day the assets collected may turn out not to be Arena Assets at all but trust assets. To protect themselves against that possibility was the primary reason that the JLs obtained Berkeley Applegate relief in this court in October 2017.

[16] The assets are diverse and geographically spread out over the world consisting of apartments in New York, a game park in South Africa, a large property development in Birmingham (UK), an interest in an AIM listed company and properties elsewhere. In many cases the ownership structure is said to be complex. The JLs give as an example Unicorn's interest in the South African game park which was held through a Cypriot company which in turn held its interest through various South African incorporated companies.

[17] Ordinarily the Creditor's Committee or the creditors themselves would approve remuneration. However, there was only a Creditors' Committee in the Unicorn estate and the JL's stopped reporting to the Creditors' Committee in or around December 2016 because of conflict, as it became evident that the majority of the individual and corporate members were controlled by Dr Cochrane. She is currently along with others being sued in the BVI for fraud in connection with dissipating the Arena Assets. It was clearly impossible to obtain the unanimous consent of the creditors to the liquidators' remuneration. In the absence of such agreement it was necessary for the application to be made to the court.

[18] All of the insolvent companies are incorporated in the BVI. Carl Stuart Jackson together with Simon Bonney of the firm of Quantuma LLP, and Charlotte Caulfield of KRyS & Associates (BVI) Ltd trading as KRyS Global were appointed joint liquidators of Unicorn on 5 March 2015.

[19] Mr Jackson, Mr Bonney, Andrew Hosking (also of Quantuma) and Mrs Caulfield were appointed joint liquidators of Glen Moar, Ballaugh and Sulby on 13 March 2015. All of the liquidators are referred to as the JLs. Mr Jackson, Mr Bonney and Mr Hasking are variously also appointed over five connected Manx companies which have seen less activity. Holman Fenwick and Willan ("HFW") are the JLs primary legal counsel.

[20] In the case of Unicorn the method of remuneration, is on a time cost basis with respect to Mrs Caulfield and KRyS Global; and on the basis of a combination of time costs and success fee in relation to Mr Jackson, Mr Bonney, Mr Hosking and Quantuma.

[21] Section 433(3) of the Act allows liquidators to make an application for interim remuneration. Section 432 sets out the general principles to be applied by the court in fixing their remuneration.

[22] Under section 432(3) remuneration is fixed by time properly given by the liquidator and his staff in carrying out his duties in the insolvency proceedings in which he was appointed. In so fixing the remuneration the Court has several mandates set out in section 432(5)(a). By section 432(5)(a)(i) the court must take into account the need for the remuneration to be fair and reasonable.

[23] Section 432(5)(a)(ii) mandates the court to take into account the time properly spent by the liquidator and his staff in carrying out the work. In addition to Section 432(5)(a)(i) (fair and reasonable) and 432(5)(a)(ii) (time properly spent) the Court.

> "shall also take into account" the following matters set out in sections 432(5)(a)(iii) to 432(5)(a)(vii).

5(a)(iii) the complexity of the insolvency proceedings and whether the insolvency practitioner has been required to take any responsibility of an exceptional kind or degree.

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

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

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

5(a) (vii) whether any expenses which he incurred were properly incurred

[24] The Judge has a discretion under s 432(5)(b). Under s 432(b) the court "may take into account". (emphasis added)

(i) The commercial and personal risks accepted by the insolvency practitioner;

(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.

[25] By section 2(1) of the Act remuneration is defined to include "properly incurred expenses and disbursements". Under s. 432(5)(a)(vii) the Court must take into consideration whether expenses were properly incurred.

[26] The general principle that costs of Liquidators should be fair reasonable and proportionate are not unique to liquidations pursuant to the Act; they are the same overriding principles that govern the award of costs generally between litigating parties

under the ECSC Rules 2000. See, for example, Alhamrani et al v Alhamrani [2] where in the Eastern Caribbean Court of Appeal Webster, JA reviews the general principles relating to costs in this jurisdiction.

[27] Without independent expert cost analysis it is very difficult for the court to assess the liquidator's line by line schedule of accounts and specific figures. The Court's function must therefore be to approach the liquidator's bill of costs on a principled basis, to determine whether the charges overall satisfy the requirements of the Act.

[28] Where liquidators are being compensated on a time basis the Court must seek to ascertain whether the time was properly spent. By necessary implication this must include ascertaining that two different persons are not being remunerated for performing essentially the same task, that the proper level of staff was deployed for a particular task, that there was no apparent wastage or duplication, that the work carried out by the liquidator and his staff related to the assets in the liquidation in which he was appointed and that costs were not incurred due to his own want of care as a fiduciary.

[29] In this regard narrative commentary of the tasks performed so that discrete times can be identified for discrete tasks is important in order to assist the court. Without that assistance the court may not be able to make a decision within the principles and may have to seek assistance from an expert or appraiser or disallow the remuneration all together as having not been proved by the liquidators.

[30] Furthermore the quantum of the expenditure claimed is a relevant consideration when applying the principle of whether the expense is "fair and reasonable for time properly given". In fixing the remuneration, therefore, the court is mandated under s 432(5)(a)(vii) to take into account whether an agent's charges to the liquidator satisfy that principle within the bounds of reasonable disagreement. In fixing remuneration the Judge is exercising a discretion and he needs evidence on which to do so. Otherwise he cannot take into account the matters mandated in s 432(5)(a)(vii).

[2] [BVIHCMAP 2016/0030]

[31] It is not a matter of questioning the honesty of the liquidator; that is assumed[3]; it is rather a question of exercising sufficiently informed judicial oversight by the court. While statements by the liquidator that fees charged by counsel have been properly incurred and are reasonable and proportionate should be taken as honest, it seems to me that it is ultimately a question for the judge to decide. The simplest and most objective form of evidence would be sufficiently detailed and accurate supporting narratives for each of the charges, to enable the court to form its own view, from the court's general experience and an objective view of all the evidence, whether the requirements stipulated in .s 432(5)(a)(vii) are satisfied. In preparing his presentation the Practice Direction-Insolvency Proceedings under the English Civil Procedure Rules entitled "PART SIX: Applications Relating to the Remuneration of Office-Holders" should prove a helpful guide because of the clear similarity in the two statutory regimes. The judge may also avail himself of the assistance of objectors, if any, to all or parts of the application. This it could more effectively do with critical scrutiny of parties opposing the remuneration.

[32] A different approach was taken by Bannister J in Rich Victory Investment Ltd v Sino Union (Caribbean) Holding et al ("Rich Victory")[4]. On Bannister J's construction the only ground on which the Court can review expenses is in the case where the bill is wholly out of proportion.

[33] He said this at [33] of Rich Victory:

> "Subsection 432(5)(a)(vii) deals with insolvency practitioners' expenses (including legal expenses). As set out above, that subsection requires the court to take into account "whether any expenses which (the insolvency practitioners) incurred were properly incurred.' It does not seem to me that the language requires the court to do any more than satisfy itself that the

[3] In Re Titan Group Investment Ltd BVIHCM2012/0056 at [17] Bannister J

[4] BVIHCV2008/0053

> *instruction* by the insolvency practitioners in question of a firm of solicitors or advocates was proper. It is to the *incurring* of the expense that the Act directs the attention of the court, not to the size of the lawyers' bill. That, it seems to me, the Act leaves to be dealt with as between the insolvency practitioner and the professionals whom they engage. The Court's need is to be satisfied that it was proper to engage them. There may, of course, come a point where the Court can see that the size of a bill rendered to the insolvency practitioner is wholly out of proportion to the value of the services rendered. If that point is reached, the question may well arise whether the expenses were properly incurred"

[34] I respectfully share a different view.

[35] Under section 2 of the Act "remuneration" includes "properly incurred expenses and disbursements". So fixing liquidator's remuneration includes fixing properly incurred expenses and disbursements as well. Accordingly, the court does not have just a limited role of ensuring only that a professional service provider such as a law firm has been properly engaged by the liquidators. In my judgment, it follows, contrary to Rich Victory, that the liquidator's expenses including legal fees are open to full scrutiny by the court when fixing liquidators remuneration notwithstanding that the lawyers were properly engaged. Parliament could not have intended liquidators to be indemnified for any expenses even if not properly incurred simply because the lawyer was initially properly engaged.

[36] This differentiates the relationship from that, for example, between the Court and a trustee. A trustee's fees are not subject to a statutory regime equivalent to that of the Act. Accordingly with trustees' fees as seen from English authorities the Court understandably

adopts a more 'hands-off' approach.[5] In those cases the Court has no statutory mandates equivalent to those imposed by section 432 of the Act.

Legal fees

[37] Whether liquidators have properly engaged a professional service provider is, therefore, in my view, only the starting point in the assessment. If the firm of lawyers or other service provider engaged were suitable for the case then the expense will have been properly incurred whatever the lawyers' hourly rates are. If, for example, the firm's hourly rates are unreasonably high for the level of complexity of the liquidation, and it is clear that the liquidator ought not to have engaged them at the hourly rates because there were comparable firms available which could provide the same services but at lower hourly rates, the Court can discount the amount of fees for which it would allow the liquidator to be indemnified.

[38] Next the Court can consider whether the time spent by the lawyers has been properly spent. It will not have been properly spent if the fees were 'manifestly excessive' because of its quantum compared to the work that has been done, as stated in Rich Victory. In addition to that the Court can disallow the lawyer's fees if he has charged for a work stream upon which he was not engaged to act, or performed work for which fees are not recoverable as disbursements under BVI law, or for example was unnecessarily engaged due to the fault of the liquidator. Otherwise the liquidator is entitled to an indemnity. The burden is on the Liquidator throughout to satisfy the Court that he should be indemnified.

[39] Bannister J's interpretation in [33] of Rich Victory does not appear to be fully consistent in every respect with the function that the Act mandates the Court to undertake, otherwise I entirely agree with him.

[5] See Engel v Peri [2002] EWCH 799 where the Court indicated its limited role when a bankrupt challenged trustees' fees: See esp. paras. 34 & 35 per Ferris J

[40] The liquidator needs to guard against any liability to himself by carrying out a proper scrutiny of the lawyer's bills, and other bills, and must bear the loss if disallowed by the Court, for failing to do so, and cannot rely on simply having properly engaged the lawyer or other third party.

IS *VALUE GIVEN* A VALID CRITERIA WHICH THE COURT MAY CONSIDER?

[41] In this case the objectors argue that the value criterion as employed in England should be applied to fixing the liquidators' remuneration here in the BVI and so I must discuss it.

[42] The principles governing the fixing of Liquidator's remuneration are set out in section 432 but the issue has been raised to what extent , if any, do they parallel the value principle in England and accordingly to what extent should English authority guide the BVI Court in that regard. The test of value set out by Ferris J and later approved by the English Court of Appeal in Mirror Group Newspapers and Maxwell and others (No 2) 198 BCC 324 was stated as follows:

> "The test 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. It is not sufficient for the office holders to say what they have done is within the scope of the duties or powers conferred upon them. They are expected to deploy commercial judgment, not to act regardless of expense."…
>
> "In my judgment, it is vital to recognize three things in this field. First, time spent represents a measure not of value of the service rendered but of the cost of rendering it. Remuneration should be fixed so as to reward value, not so as to identify against costs."

[43] Last year, sixteen years after Rich Victory in Re Victory Life and Pension Assurance Co. (In Liquidation) [6] ("Victory Life") (unreported) Justice Kaye QC pointed out that Maxwell was specifically referred to by Bannister J in Rich Victory. The judgment of Hariprashad-Charles J in CPD Limited v CDW International (BVI) Ltd [7] was referred to in argument where Ferris J referred to the principle that remuneration should be fixed so as to reward value, not so much as to indemnify against costs.

[44] In paragraph [14] Bannister J rejected the test proposed by Ferris, J and after discussion concluded:

> "Next, I do not consider that it is correct, certainly not in this jurisdiction, to say that the remuneration should be set so as to reward value, not so as to indemnify against cost"

[45] Justice Kaye QC opened the door to revisiting Bannister J QC's decision. He said this:

> "I do not think this is the time or place if necessary, to revisit the reasoning of Mr Justice Bannister in the Case of Shangri La International Development Holdings Limited [Rich Victory]. And I do say simply that it may have to be revisited at some stage in the future."

[46] Earlier in this judgment I have offered a different view on the treatment of expenses. With respect to the relevance of the criterion of value, Justice Bannister's analysis has also been called into question by the objectors who contend the criterion of value should be applied to this case. .

[47] Unlike in Courts of Appeal, there is nothing wrong with a first instance judge revisiting the judgment of another judge of equal jurisdiction. The doctrine of *stare decisis* does not apply at the first instance level. As a matter of judicial comity a judge of equal jurisdiction

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[6] BVIHC(COM) 2014/10

[7] BVIHCV 2003/106

will usually accept as persuasive authority the decision of another judge of equal jurisdiction but is not bound to do so. He/she will normally only depart from it if it appears that the case was wrongly decided in any material particular. This could occur because relevant authorities were not placed before or considered by the other judge, or for other reasons.

[48] Indeed despite the doctrine of *stare decisis* which applies at the higher court levels (Court of Appeal and Privy Council) even the Judicial Committee of the Privy Council from time to time constitutes a panel of seven instead of five and revisits its own decisions which may have been authority for decades.

[49] As it relates to the applicability of the value criterion Bannister J concluded in [14] that the test has no reflection in the provisions of the Act:

> "This test proposed by Ferris, J is, in my judgment inherently unworkable as well as finding no reflection in the provisions of the Act (the Insolvency Act 2003).'

[50] The statement is logically incongruous with the Act itself. Section 432(5)(b)(iii) allows a court to take into account " the standards and practice used for assessing remuneration in jurisdictions other than the Virgin Islands". Some of those jurisdictions, notably England, employ the test of value.

[51] Furthermore the Act and the English Act basically follow the same scheme. In Re Independent Insurance No1 as can be seen from Ferris, J's statement at [4] the English Act has similar provisions to those contained in section 432 of the Act where he stated:

> **"[4]**The remuneration of provisional liquidators is provided for by r 4.30 of the Insolvency Rules 1986,SI 1986/1925 which, so far as material, reads:
>
> '(1) The remuneration of the provisional liquidator (other than the official receiver) shall be fixed by the court from time to time on his application.

(2) In fixing his remuneration, the court shall take into account (emphasis added)—

(a) the time properly given by him (as provisional liquidator) and his staff in attending to the company's affairs;

(b) the complexity (or otherwise) of the case;

(c) any respects in which, in connection with the company's affairs, there falls on the provisional liquidator any responsibility of an exceptional kind or degree;

(d) the effectiveness, with which the provisional liquidator appears to be carrying out, or to have carried out, his duties; and

(e) the value and nature of the property with which he has to deal.'"

[52] Nothing turns on the fact that this was stated in relation to provisional liquidators. In light of the fact that the English Act existed since 1986 and having regard to the history of adopting English legislation in the BVI the striking similarity of wording in the Act to that of the English Act is clearly deliberate.

[53] At the close of the hearing, I asked counsel to consider the use of the value criteria as reflected in the cases from the common law jurisdictions cited in Brook v Reed, namely In re Clynton Court Pty Ltd [2005] FCA 543 (Australia) and Flynn v McCallum; Re Roslea Path Ltd [2009] NZHC 2318 (New Zealand).

[54] In counsels' submissions it was pointed out that there was no statutory list of factors which the courts in those jurisdictions are mandated and/or have a discretion to take into account. In the Australian case there was no discussion of the value principle although it endorsed the English 2004 Practice Statement regarding the material that should be placed before the courts on such applications. Counsel concluded that "fair and reasonable" was the touchstone in fixing remuneration. The ERs expressed the additional view that proportionality is a factor in considering the question of

reasonableness. This requires that the work done must be proportionate to the difficulty and importance in the context in which it needs to be performed, and that is what is encompassed in the assessment of the value of services rendered.

[55] Assessment of value to the estate does not require a cost/ benefit analysis *per se.* After taking into account the matters mandated in sub sections 432(5)(a)(i) to (vii), and if it considers it appropriate, the matters in s.432(5)(b), the court will then take an objective view having regard to all the circumstances, including whether good commercial judgment was used, whether costs are fair and reasonable, and proportionate, as required by section s.432(5)(b)(i). Whether value to the estate was given for services rendered may be seen as another way of asking whether the time was properly spent or given, but this could only be with a view to determining the overarching requirement that costs are fair and reasonable and proportional as required by the Act.

[56] And so, I agree with Bannister J, and disagree with the objectors. The value criterion employed in England as a basis for fixing liquidator's remuneration does not apply in the BVI; it is an unnecessary gloss on the clear requirements of section 432 of the Act.

[57] This does not mean that the Ferris' test in relation to commercial prudence has no reflection in the Act. It is plainly relevant in assisting the court to determine whether in certain situations the liquidator has acted properly as a fiduciary, and whether the costs incurred as a consequence of his actions are fair and reasonable within the requirement of s 432(5)(a)(i).

[58] To summarize, it is clear that Bannister J recognized that, absent sufficient evidence, the Court labours under a difficulty in gauging whether liquidators' fees and expenses for which they seek approval for indemnification are fair and reasonable. He sought to resolve this by giving liquidators the benefit of the doubt, once liquidators show that the work in general has been properly done or properly delegated to a professional service provider. Such an approach is not objectionable and must be right, but there are, logically, limits to such latitude. Bannister J's approach should not be taken as saying

that the Court should not trouble itself with the statutory criteria. Indeed his judgments say otherwise.

[59] In cases where an application for sanction of liquidators' costs is unopposed, or where a creditors' committee has approved such costs and there is no clear basis for questioning it, the Court will have little or no reason to query whether the criteria are satisfied.

[60] Nevertheless, the Court finds itself in a position which does not reflect its usual role as the arbiter of law and fact in adversarial proceedings. As between the Court and a liquidator there is a different relationship grounded on accountability of the liquidator to stakeholders and ultimately the Court. This differentiates the relationship from that, for example, between the Court and a trustee. A trustee's fees are not subject to a statutory regime equivalent to that of the Insolvency Act. Accordingly with trustees' fees, the court understandably adopts a somewhat 'hands-off' approach. But when it comes to liquidators' fees it is different; the Court can and must do the best it can to assess all of the mandatory statutory criteria in s.432(5)(a), and consider whether it can and should apply any or all of the discretionary criteria in 432(5)(b) whether or not there are objectors.

[61] I next consider the facts of this Application.

ANALYSIS OF THE LIQU**IDATORS' REMUNERATIO**N

[62] At the first meeting of creditors of Unicorn, creditors resolved to form a Creditors Committee. At a meeting held on 9 April 2015 the committee members unanimously approved the following resolutions:

(1) that Quantuma JLs remuneration be "calculated on a combination of both [discounted] time costs and success fee. That because of the success fee the Quantuma JLs hourly rates should be discounted by 25%.

(2) The success fee should be calculated as follows:

First £10,000,000	5%

Next £15,000,000	10%
Over £25,000,000	15%

(3) That the KRyS JLs be paid a fixed fee of $7,500 plus disbursements of $500 for work undertaken up to March 2015 and all work undertaken thereafter to be remunerated by way of time costs.

(4) The pre-appointment time incurred by the Quantuma JLs in the sum of £18,087.50 representing 48.4 hours of work at the rate of £373.71 be paid as an expense of the liquidation.

[63] The JLs remuneration was to be drawn on account from realisations "as and when funds allow" and the JLs were authorized to recharge disbursements.

[64] It was lawful for the Creditors' Committee to approve a part success fee for Unicorn. Section 432(4) provides that if the liquidator requests it, or the Creditor's Committee or the Court considers that the circumstances justify it, his remuneration or any part of it may be fixed as a percentage of the value of the assets realized and the value of the assets distributed or either.

[65] From December 2016 the JLs ceased to deal with the Creditors Committee because of the internal conflicts of interest. They then established a Stakeholder Committee comprised of the English Serious Fraud Office ("SFO"), Harbour, the Viscount Nicholas Thomas, the OMH Companies, Stewarts law, Phoenix/Minardi, Franek Sodzawiczny and Ulrich Pelz. They are subject to a confidentiality agreement and their terms of reference include among other things an agreement to meet bi-monthly, which they have been doing so far. The time cost of forming and consulting with that committee has caused the JLs at an average hourly rate of £274.98 per hour the sum of £44,382.19.

[66] This application comprised 20 informational bundles, one of which was a 450 plus page exhibit with over 6000 line items of time analysis with narratives by the JLs. About 1500 of the JLs narratives were commented upon as being insufficient by the ERs. These comments were answered with further narratives by the JLs. Each of the invoices of the

engaged lawyers spanning 6 bundles was made available to the objectors in redacted form, and in unredacted form for the Judge's eyes only.

[67] The JLs presented the application for their fees by work streams for the First Period and the Second Period under the four main headings, Administration and Planning, Investigations, Realisation of Assets, and Creditor claims.

[68] It was a daunting task for a Judge to review. The Court could have appointed an assessor. Under ECSC CPR 32.17(1):

> "The court may appoint an assessor to-
> '"(b) assist the court in understanding technical evidence
> (c) provide a written Report"

[69] The Court opted not to do so because it had material assistance in identifying the issues by the input on behalf of the ERs indicating on the time sheets where in its opinion the narratives were inadequate, and Mr Donovan on their behalf also provided skeleton arguments in accordance with the Court's direction and appearing at the hearing to assist the Court by oral argument. Also, although it did not make an appearance at the hearing Harbour Fund II LP("Harbour") which is advised by Byrne and Partners LLP offered comprehensive skeleton arguments opposing various aspects of the application. They both relied on the evidence of Mr David John Standish of KPMG, England, in Standish One, given on behalf of the ERs. For their input the Court is grateful.

[70] Mr Pascoe QC on several occasions reminded the Court that in performing its function to fix the remuneration of liquidators, the judge is not involved in a taxation of litigation costs. I asked Mr Pascoe, QC what, in his view, would be the options of the judge should he/she conclude that a particular narrative did not meet the necessary requirement even after it had been queried by KPMG and answered by the JLs. He was of the opinion that the Judge could either give the JLs another opportunity to clarify the transaction, or disallow the amount. Mr Donovan expressed the view that in such case the judge should disallow the amount because the JLs should not have a second bite at the cherry, so to speak.

Similarly, the judge on his own may conclude that an item or number of items whether or not the item had been queried by the ERs or Harbour should be disallowed.

[71] The sheer volume of entries may, as in this case, make it impossible for the judge to review and evaluate every single line item and the judge is not and cannot act as a costs expert. The Judge's role must be limited to determining whether costs meet the overarching principles in section 432 of the Act of being fair and reasonable, as time properly given or time properly spent. This is no different from the duty in ordinary civil actions under the Eastern Caribbean Supreme Court Rules 2000 as amended where costs must be fair and reasonable, and proportionate. The difference here is that the JLs are fiduciaries and have an added responsibility that accompanies that role, and the statute has mandated matters the Judge has to take into account under section 432(5)(a).

THE OBJECTIONS

[72] The objections, all of which came from the ERs and Harbour relied on evidence that was set out in Standish One. They were addressed seriatim by the JLs in their skeleton arguments. In summary the ERs' objections were stated as follows:

(a) The JLs seek remuneration in respect of work which has only become necessary because of their own want of care, such that the remuneration for that work should not be allowed generally;

(b) The overall level of remuneration claimed in respect of all work streams is neither fair nor reasonable for the following reasons:

(i) The hourly rates charged by Quantuma partners and Senior managers are higher than those charged by firms of similar standing in Southampton, in undertaking similar work. This combined with the fact that the time spent by Quantuma partners and Senior Managers in carrying the work is disproportionately high, has resulted in overall costs being higher than would otherwise be expected;

(ii) The supporting evidence fails adequately to explain how much of the time of the JLs and their staff has been spent. It nevertheless appears that there has been substantial duplication and waste.

(iii) The time charged for travelling and associated disbursements is excessive;

(iv) The JLs have not provided sufficient detail in relation to various expenses to enable any proper assessment of the reasonableness or otherwise of the amount of those expenses, and the circumstances in which they were incurred; and

(v) Although the JLs seek approval of a substantial sum on account of legal fees, they failed to disclose narratives to their lawyers' invoices in their evidence in support of the application. They gave those invoices on 26 April 2018 from which it was apparent that a great volume of the work was carried out by English lawyers."

(c) The allocation of costs across the different funds, and the "pooling" of assets and work streams is not an appropriate way to deal with such liquidations, particularly where dealing with assets which may be subject to valid proprietary claims.

[73] Harbour opposed the application for what they called three broad reasons:

(a) The Berkeley Applegate relief is deficient. The JLs have failed to justify the remuneration sought according to established Berkley Applegate principles and are seeking remuneration for costs which may not properly be charged to trust assets.

(b) The quantum of remuneration sought is manifestly excessive. Any statutory remuneration or Berkeley Applegate relief by the Court ought to be reduced significantly on the basis that the JLs have failed to provide value commensurate with the fees sought.

(c) The JLs seem to suggest that they were unaware of the fact that third parties had proprietary claims to the assets until January 2017, and that it was at that point that they had sufficient knowledge of these interests to cease

incurring costs which may not be chargeable to trust assets (para 176 of the Jackson One). It is their position that the JLs had sufficient knowledge of proprietary claims being made to the assets from the outset of their appointment and the JLs ought to have approached the costs they were incurring cautiously given their knowledge of the proprietary claims being made.

[74] Although Berkeley Applegate relief has been approved in principle for the Second Approval Period it remains to be determined what quantum of the allowance will be fixed, now that the scale of remuneration being claimed is known. We also now know that the answer to the ownership of the proprietary interests in SMA will not be determined until the hearing and determination of the trial in the Popplewell Proceedings which has been fixed for January 2020. The issue of the ownership of the Arena Assets has been postponed until after the determination of the ownership of AMA.

[75] Harbour also argues that as a matter of law any costs which were incurred for work which was for the benefit of creditors or adverse to the beneficiary's interests are not chargeable to trust assets. Some examples in written submissions which it claims are not chargeable to trust assets are the following;

(a) Engaging with creditors
(b) Claims against Gail Cochrane: Until the beneficiary of the assets is determined it will be unclear whether this work was necessary or of benefit to the trust assets and beneficiary
(c) Hayes Settlement: If any of the assets are held to belong beneficially to Harbour, it would be inappropriate for those assets to bear the costs of negotiating and executing the Hayes Settlement or the costs of attempting to enforce that agreement in the Popplewell Proceedings. Harbour claims that on the evidence it is the beneficial owner of Sulby, Ballaugh, and Glen Moar, not Unicorn and so the costs of any work done by the JLs negotiating the Hayes Settlement or pursuing the JLs' claim should not in principle be funded by Harbour directly adverse to its own interest.

(d) Meetings with Pro Vinci/Andiamo: Engaging with Dawna Stickler who was found to have misled the English Commercial Court was not necessary or of benefit.

(e) Assets written off: Harbour says that it is unclear how writing off assets was for the benefit of the beneficiaries of other assets.

[76] It maintained that litigation costs are not payable under the Berkeley Applegate order.

[77] In the Orb litigation, Orb v Ruhan[8] both Popplewell J on 15 April 2016 and Cooke J a year earlier on 20 March 2015 made adverse comments about Dr Cochrane and Ms Stickler. They found that Ms Stickler was unreliable having misled the Court and breached undertakings to the court, and that payments that should have been made to the Arena Settlement Account were made to Dr Cochrane's personal account, who also took out a loan of £15 million from the Arena trust assets.

[78] The objectors also argue that in fixing the remuneration the 'English Standards of Insolvency Practice' should be taken into account and considerations should be subject to the Practice Direction under the English 1986 Insolvency Act so as to "reward value, not so as to indemnify against costs". These include the principle that the remuneration of the liquidator should reflect the value of services rendered by the liquidators and not simply reimburse them in respect of time expended and costs incurred.

[79] Earlier I discussed the concept of the value criterion and rejected it concluding instead that in the BVI the overarching principle is contained in section 432 that costs must be fair and reasonable as set out in Rich Victory, and as relied on by the JLs.

[80] However, the JLs say that even if the value principle did apply the evidence shows that significant value has been created and continues to be created by the JLs. They gave a detailed accounting of the realisations to date and a detailed summary of expected future recoveries. The realisations in the Unicorn estate to date are £9,520,007. The time costs to achieve these realisations, save those in relation to individual debtors (some of

[8] 2016 EWCH 850 Comm

whose loans are still outstanding) was £518,512.50 and for individual debtors was £149,022.50

[81] The JLs state that they continue to make assessments and have made a projection of potential future recoveries for each of the insolvent companies.

[82] The ERs raised a number of issues concerning the realisations. Firstly, they observed that the JLs spent a comparatively small amount of time in order to generate significant fees: £667,535 of time costs for Quantuma for £9,520,007 of realisations, while the remainder of the £4,373,076 costs was spent on other work streams. The expectation of success fees led the JLs to credit Unicorn with realisations which should have been credited to one or other of the insolvent companies. For example, in treatment of a loan made from escrow funds owned by BPAC and Ballaugh, the JLs have chosen to apply the repayment to Unicorn which would attract a success fee, argued the ERs. No success fee is payable for realisations on behalf of Ballaugh and the other insolvent companies. The JLs demonstrated that this was not correct.

[83] Secondly, of the £667,535 of time casts referred to above, the Quantuma Liquidators have incurred time costs of £293,363 to realise assets of £9,470,007 but in addition are entitled to a success fee of £373,500. This was, of course, part of their initial arrangement.

[84] They also referred to a net recovery of £2,122,974 made in relation to Steephill Aviation Ltd. This was a company to which Unicorn loaned money under the security of a debenture. The money was used to buy a new aeroplane to replace a defunct one. The JLs appointed Andrew Watling and Simon Campbell of Quantuma, as receivers over the aeroplane. The aeroplane was the only asset which the company had. It was sold in December 2016 and after paying disbursements the loan was repaid to Unicorn.

[85] The receivers were appointed in June 2016, but since then until the aeroplane was sold and into January 2017 the JLs have repeated time charges with the narrative “Steephill debt-discussion/email exchanges re taking control of and selling airplane”. For example,

such an entry is made on 5 January 2017 after the plane was reportedly sold. An accounting of the sale shows that £366,809.09 was used to pay costs (including VAT) of the aviation agent, £11,767.44 to pay legal fees (including disbursements and VAT) and the receivers' were paid fees paid £42,264.60 including VAT. The JLs submitted time costs of £36,020.00 charged out at partner or equivalent levels.

[86] In as much as disposal of the aeroplane was the function of the receivers, the aeroplane appears to have been sold in December, and all other aspects of the realisation appear to have been handled by others who were paid to perform their function, there appears to be a duplication of costs in disposing of the aeroplane. This appears to militate against time properly spent under section 432(3) and 5(a)(ii), and also unnecessarily deploying persons at the partner level attracting higher rates. This is discussed next under the heading 'Unreasonable use of partners/directors'. At least £20,000 if not more of the £36,020.00 time charge to partners/directors should be disallowed. To avoid double counting this will be reflected in the deduction under the next heading.

UNREASONABLE USE OF PARTNERS/DIRECTORS: SECTION 432(5)(a)

[87] Another of the objections taken by the ERs was that almost 50% (49.32% unchallenged) of the total hours charged in relation to the Unicorn matter have been incurred by partners or directors, and only 23.62% incurred by administrative staff. According to Mr Standish's evidence, in a complex liquidation one would only expect between 10% to 15% to be so incurred. Ms Caulfield in her evidence stated that she had never come across that figure in her long practice as an insolvency practitioner. She stated that from calculation in the Fairfield Sentry Limited liquidation which in her view was arguably the largest and most complex liquidation in the BVI the figure was 31%.

[88] The Court will take judicial notice of its own recent experience. In Titan Group Investment Limited (In Liquidation)[9] in which I sanctioned the final distribution last month in May the percentage was lower. That case had its own level of complexities where the two main shareholders and other stakeholders were locked in battle. The companies were held through a structure of (mainly) Hong Kong companies with its immediate subsidiary incorporated in Bermuda. It was the largest petrol facility in the People's Republic of China. The initial projection at the commencement of the liquidation in 2012 was that creditors would receive nil to at best 13 cents on the dollar. However, the liquidators succeeded in achieving a 100% return to creditors. The total fees fixed were in excess of $6,000,000. The director/ partner ratio (excluding the Liquidators themselves) in that case was 12.1%. Including the remuneration of the liquidators the percentage was around 41.5%. That was calculated over the period of a year from 16 July 2012 to 31 July 2013.

[89] HFW itself, the JLs' principle lawyers, used only 25% partners on their team; as stated at paragraph 143 of Jackson One, between April 2015 and September 2017 HFW operated a small core team consisting of one partner, one senior associate, one associate and one trainee. With this they provided the JLs with almost daily advice, as well as attending meetings and the like.

[90] Each case has its own degree and areas of complexity and no evidence was tendered in relation to a standard percentage in the industry. Nevertheless, I do not take lightly Mr Standish's evidence on which he relies on his experience as an Insolvency Practioner that in complex cases the ratio is usually between 10% to 15% and I accept this evidence. I also accept Ms Caulfield's evidence that the ratio was 30.1% in Fairfield Sentry an acknowledged very complex liquidation. These are both experts in their field. I did not consider it necessary for Mr Standish to produce tables setting out the specific cases upon which he relied to make the statement about his experience, nor did I consider it necessary for Ms Caulfield to produce the figures to support her assertion in relation to Fairfield Sentry.

[9] BVIHC (COM) 2012 No 56

[91] The objectors' views also appear to be supported on the papers. According to the JLs their primary lawyers, HFW, almost daily provided them with advice, attendance at meetings, and the like. This is corroborated by the substantial, and no doubt properly earned, monthly bills from HFW. Yet on its face the JLs appear to have used an excess of partners and directors on the same matters.

[92] By way of example are entries in the Quantuma Detailed Time Analysis which relates to work billed out to partners/directors at £475 per hour the same day: These were for the same date 1 July 2016.

Person	Time (hr)	Charge£	Category	
Andrew Hosking	1	£475	Claims against Gail Cochrane	Reviewing e-mails re progress of application
Simon Bonney	2.20	£1045	Claims against Gail Cochrane	Reviewing e-mails re progress on application and supporting documents
Carl Jackson	1.00	£475	Claims against Gail Cochrane	Reviewing ongoing e-mails/advice re proposed application

[93] In addition to those three partners/directors, there were associated costs from HFW which were billed to the estate on the same matter.

[94] There are similar narratives throughout the reports which are consistent with the use of partner/directors Simon Bonney, Carl Jackson and Jim Haddow on "Emails with solicitors re various matters", "ongoing discussions/reviewing e-mails/advice from HFW". In reviewing the narratives between March 2015 and July 2017 Jim Haddow, a partner/director, billed for a total of 147 hours for noting e-mails.

[95] In a liquidation where there is considerable litigation, as in this case, one would expect there to be a relatively high quantum of charges by the JLs' lawyers and counsel. In this case for various issues HFW engaged Stephen Davies QC, Stephen Altherton QC, Andrew Casey QC and Mark Rainsford QC including current counsel Mr Pascoe QC. The JLs later engaged Boyes Turner to pursue a different discrete claim in the liquidations which has not yet commenced.

[96] Then there is the preparatory work of conducting searches to determine the make-up of companies and entities, the ownership of properties, and gathering the facts needed for use by the lawyers. Although they were free to choose to do such tasks it was not necessary that those and similar functions be carried out by a partners/director himself. Much could be done by their staff and companies specializing in these matters. The evidence is that they used such companies as well.

[97] Furthermore the need for the JLs to spend time considering proof of debts was considerably reduced because there was a limited amount that they should do in this area until the outcome of the proprietary claims to the Arena Assets are known. Indeed they discontinued adjudicating proofs of debt since January 2017.

[98] What emerges is the utilization of director/partners where one would not expect the function to have been performed by a manager or some lower level of staff because there was adequate advice being given by counsel The court has to take that into account under section 432(5)(a).

[99] In my judgment in the circumstance the allocation of almost 50% of partners/directors which has not been challenged, "exceeds the generous ambit within which reasonable disagreement is possible" to draw an analogy from the test on appeals as referred to by Webster JA in Alhamrani et al v Alhamrani (supra).

[100] On the evidence, having regard to all the circumstances, I accept the submission of the objectors and find that the JLs have used an unreasonably large percentage of

partners/directors time in carrying out their functions with the consequence that it has contributed to the costs not being fair and reasonable, or proportionate.

[101] Utilizing the detailed summary from page 262 of Exhibit CSJ2, one can reduce the ratio of partners/directors' total hours charged to fifteen per cent as suggested by Standish and apply the partners/directors average hourly rate to that reduced number, while correspondingly increasing manager's hours and applying the average manager's hourly rate to that increased, number will reduce the overall recorded time costs of £4,373,075.90 by £521,715.75. However, based on Mrs Caulfield's evidence I am prepared to accept that a partners/directors ratio of around 30% is reasonable to deploy in a complex liquidation.

[102] In light of the evidence before me, in my judgment, it is fair and possibly overly generous to the JLS, to reduce the partners/directors ratio of almost 50% by at least 15%. I will apply that to the costs claim by reducing the partners/directors ratio by 15% and increasing the managers' ratio by the same amount. This works on the assumption that to that extent tasks performed by partner/directors could have been performed by managers. Assuming this simple method of adjustment is valid, the overall recorded time costs of £4,373,075.90 must be reduced by £228,032. On the assumption that only 75% of the overall time costs for Unicorn was actually charged to the estate in accordance with their remuneration arrangement, only 75% of the £228,032 should be disallowed. This yields £171,024.24.

[103] That figure only takes into account the reduction in the ratio for Unicorn because there was no similar imbalance in the use of partners/directors for the other insolvent companies. I will therefore disallow £171,024.24.as being incurred in using an unreasonably high level (partner/director) of staff than was necessary in the circumstances. The increased costs contributed to the overall costs not being fair and reasonable to the estate, or proportionate.

[104] These examples are along the same lines as principled objections taken by the ERs that the JLs on at least two occasions deployed a case accountant to deliver packages to

London from Southampton. It turned out to be approximately the same cost as a courier when at £95/hour she charged for 6 hours. The issue was not, however, that it cost almost the same as a commercial courier; it was the usage of a higher level of staff than was necessary for that function. Although *de minimis* in quantum it may be symptomatic of the approach taken to the deployment of staff.

[105] The ERs also sought to show that despite the 25% discount on the time charges the level of the success is not of net benefit to the estate. The realisations of over £9 million have virtually been exhausted by the costs of over £10 million. In my judgment in the absence of any application to challenge its appointment the court ought not to interfere with the fee schedule fixed by the Creditors' Committee, although it is clear why the JLs abandoned them since December 2016.

The Escrow Funds: **Dr Cochrane's fraud** - the effect

[106] The ERs say that sums of £4,045,697 and £2,630,000 were fraudulently taken by Dr Cochrane from BPAC a subsidiary of Ballaugh and apparently through the JLs' want of care. On the evidence the sum of £4,045,697 was paid over to SMA. Dr Cochrane controlled SMA and she misappropriated the sum. Proceedings to recover that sum among others have been commenced in the BVI and the ERs contend that Quantuma's costs of £578,177.50, and Appleby's costs of $77,767.70 and $44,789.73 in relation to the BVI proceedings should not be allowed in full.

[107] They also question whether the entirety of HFW's costs for securing the proprietary and freezing injunctions in connection with the fraud should be borne by the insolvent estates or the proprietary owners

[108] In a letter to the SFO dated 4 August 2017 from HFW the JLs explained that they authorized the payment to SMA but only to be held in trust for BPAC who at the time did not have banking facilities, nor did they authorize a loan from BPAC to SMA as they did not then control the board. They said further that in light of a freezing order that was in

place (granted on the application of Mr Andrew Ruhan) which prohibited the dissipation of funds from the Arena Group they did not imagine that Dr Cochrane would seek to transfer the monies away from the Arena Group via SMA. They took further comfort from the involvement of Stewarts Law LLP with whom the funds were escrowed; whom the JLs reasonably assumed would not allow themselves to be involved in misappropriation.

[109] The misappropriation occurred in April 2015.

[110] In Cooke J's judgment dated 20 March 2015 in the Orb Litigation, he made findings of fact that the Orb parties (which include Dr Cochrane) had breached undertakings to the Court to ring fence the Arena Assets and that a considerable volume of Arena Assets had been moved and expended as part of Dr Cochrane's "personal expenditure"(para 2). In the same judgment, Cooke J found, among other things, that payments that should have been made to Arena settlement accounts were paid to Dr Cochranes' personal account and that she had taken a loan of £15.46 m from the Arena Trust assets (para 120).

[111] The JLs knew or ought to have known about Cooke J's judgment in relation to Dr Cochrane because they claimed to be following the Orb litigation and the judgment was in the public domain. It is well known that assets can be dissipated despite an injunction in place if the parties are not inclined to follow the court's order. The sanction then would be contempt of court. A judge had already found that Dr Cochrane was prone to disobey court orders.

[112] Since on their evidence the JLs gave consideration to the matter at the time, it was a omission for them as fiduciaries not to take into account Cooke J's finding less than a month earlier. Their wittingly or unwittingly placing the funds under the control of Dr Cochrane did not, in my judgment, pass the commercial prudence test as quoted earlier.

[113] Although denying culpability the JLs admit "In light of the information that has come to light since, the Joint Liquidators now deeply regret this decision" [placing the funds under the possible control of Dr Cochrane].

[114] This led to a constant stream of time entries under the category "claims against Gail Cochrane" from at least as far back as 20 May 2016 to the attendance at mediation meetings in Court on the 5th and 6th September 2017. HFW has also incurred significant costs in respect of the BVI proceedings including an application for a proprietary and freezing injunction in England in support of the BVI proceedings. It was pointed out by the ERs, without objection, that there are counsels' fees for June and July of 2016 totalling £213,587 despite no charges in the surrounding months, and total counsel invoices in the First Period of £315,521. A rough estimate shows that time spent on "General" matters by HFW referred to as being Gail Cochrane related including BVI proceedings and/or freezing injunctions was almost 400 hours. Appleby's costs in respect of the BVI proceedings appear to be $77,764.70 and $44,789.73. The JLs state that it was also necessary to engage specialist counsel Stephen Davies QC and Niall McCulloch, Stephen Atherton QC and Blair Leahy and Oliver Caplin in connection with the freezing order and the BVI proceedings.

[115] The JLs also considered it necessary to engage Aiden Casey QC and Mark Rainsford QC in connect with the allegations of breach of the restraint order and contempt of court allegation because of his knowledge of the English Criminal Justice Act 1988. This was followed by Mr Pascoe QC and Ms Leahy and Mr Hamilton.

[116] The narratives which include descriptions such as "investigation into dissipation of assets", "review position papers", "review on going correspondence" were not detailed enough to discern which entries related to the £4,045,697 and £2,630,000 placed at the disposal of Dr Cochrane by the JLs. Therefore, since the Cochrane claims amount to approximately £73,070,815.06 and the estimated time charge of HFW and counsel is about £529,108, I will make a rough estimate by allocating one tenth of the costs to this particular claim. Accordingly, I treat £7.3 million as being the sum referrable to this particular claim, and I therefore disallow the recoverability of £52,910.80 of HFW costs and $7,776.47 and $4,478.93 of Appleby' costs concerning the BVI proceedings. As this this was the area in which some of the unnecessary use of partners/directors and duplication with work of HFW took place, to avoid double counting, I allow these

deductions totalling £7,312,256 to be deemed to be reflected in the sum of £285,785.50 which was disallowed under the heading 'Unreasonable use of Partners/Directors: Section 432(5)(a) above'.

[117] A number of other objections were made in relation to whether a loan to Rurelec a subsidiary of Sterling Trust was proper, and dealings with the Unicorn's Creditors' Committee, but in the circumstances in which the loan was granted to fortify Sterling Trust (Unicorn's largest asset), and the appointment of the Creditors' Committee not having been challenged the immediate relevance to fixing the remuneration was not apparent.

Adjudication on creditor claims

[118] It has come out in evidence that the identification of the Arena Assets subject to proprietary claims would not be known until the hearing and determination in the Popplewell Proceedings in England which is scheduled for January 2020. Therefore both the ERs and Harbour contend that the JLs should cease work on adjudication of creditors' claims for the time being.

[119] As I understand it the JLs acknowledge that if they carry out such work it will have to be at their own risk because the Berkeley Applegate relief does not include recovery of costs for such work. They did, however, carry on such work until January 2017 when they ceased to do so.

Fairness and reasonableness of costs

[120] Both objectors have expressed the view that the costs claimed by the JLs are not fair and reasonable (or proportionate) bearing in mind that the JLs estimate is that excluding the claims made against Dr Cochrane the recoveries from the insolvent companies will in fact be between £23 million and £47 million and that level is not guaranteed. They also noted that KRyS Global's fees of $737,022.00 were written down by £40,170.909, a reduction of 5%. The JLs stated that they too wrote down their fees as they proceeded in order to get rid of duplications and allocation of time to the wrong level of employee, but they do not

keep a record of such write downs. The Court accepts the explanation of the JLs on this point.

Hourly rates

[121] In Re Titan Group Investment Limited (In Liquidation)[10] Bannister J stated obiter that s. 432(5)(a)(vi) which mandates the Court to take into account "*the hourly rates charged by other insolvency practitioners both within and outside the Virgin Islands, in undertaking such work*" is to be read as referring to rates charged by firms of similar standing for carrying out similar work in the jurisdictions within which the foreign resident liquidators operate, as well as the rates current in the BVI in respect of the remuneration of the BVI resident liquidators.

[122] The Objectors did not take issue with KRyS' rates because they found them to be in line with firms in the BVI. However, they took objection to the Quantuma fees on the ground they are higher than those used in Southampton by firms doing similar liquidation business.

[123] Although the Creditor's Committee approved an hourly rate back in 2015, the JLS have since then in all respects abandoned the Committee. In light of the objection by the ERs and Harbour the Court had available before it independent evidence of hourly rates, and saw it necessary within its statutory mandate to consider whether there was any substance to the objection that Quantuma's hourly rates were higher than equivalent firms doing the same work. Section 432 mandates that it must be take into account.

[124] Quantuma is an English firm of insolvency practitioners headquartered in Southampton England. Undoubtedly the English hourly rates should apply especially when well over 93% of the work has been and by all indications will continue to be done in England primarily from Southampton.

[10] Supra

[125] The ERs produced a table to show that the hourly rates charged by Quantuma are higher than those charged by firms of a similar standing in Southampton. The firms included Beacon LLP, BRI (UK) Ltd, and Begbies Traynor. (See Southampton rates in [44] of ERs submissions). The JLs say that CVR (Southampton Office), FRP Advisory (Essex office), Leonard Curtis (Bristol office-Standard) and Leonard Curtis (Bristol office-Complex) are more comparable based on size measured by the number of staff in each category, and by the complexity of the liquidation in which they engage.

[126] The JLs, however, agree that Begbies Traynor is bigger than Quantuma and is a suitable comparable.

[127] However, the JLs stated that the quotes of Begbies Traynor are rates in respect of "standard" insolvency matters, not matters involving a high degree of complexity. There was no objective evidence to support this. Although the JLs produced a table showing rates for standard liquidations and rates for complex liquidations for Leonard Curtis, they did not produce one for Begbies Traynor, so that a comparison would have been possible between Quantuma rates and Begbies Traynor rates for complex liquidations.

[128] After the hearings and circulation of the draft judgment, the JLs sought to bring to the attention of the Court certain evidence not adduced at the costs hearing. However that did not come within the ambit of corrections allowed to the draft judgment. Furthermore, the evidence is not admissible along lines of the principle in Ladd and Marshall [11]. So I have not taken it into account. However, I did make allowance for the possibility that the rates quoted by Begbies did not contemplate a complex liquidation and reduced the amount I would have disallowed by 20%.

[129] The ERs entered the rates in evidence as rates of Quantuma applicable to this type of case. They were as follows:

Grade	Quantuma Hourly rate	Begbies Traynor	Quantuma %

[11] [1954] 1 WLR 1469

	Charged		Difference (+ higher,-lower)
Partners level 1 &2	£475 and £400 (lowest avg hourly rate £460.06)	£395	+16.5%
Senior Manager and Managers	£350 and £275 (lowest avg hourly rate £331.61)	£310	+7.0%
Senior Administrator and Administrator	£200 and £175	£135	+30%
Cost Accountant	£125	N/A	N/A
Assistant	£95	£110	-16%

Using the lowest average rates in the relevant category, Quantuma hourly rates (set out in [25] of Jackson Two) appear to be about 16.5% higher in the partner grade, 7% higher in the Senior manager grade and 4% higher in the manager grade than Begbies Traynor and about 30% higher in the administrators grade. The rates are about 16% lower in the support staff grade. In the absence of evidence to the contrary, this supports the assertion at paragraph 44 of Standish One that the hourly rates charged by Quantuma are higher than those charged by firms of a similar standing in Southampton for this same type of work, particularly for more senior staff, and I so find.

[130] Using Exhibit CSJ2 at p 262-265 to adjust total costs for each grade for each of the insolvent companies by the lower hourly rates as reflected in the above table, yields a reduction of £373,590.93 for Unicorn[12], £51,174.66 for Glen Moar, £55,833.30 for Ballaugh, and £5,774.33 for Sulby. This was done by reducing the average hourly rate stated in the table by the percentage in the table shown above in each of the staff grades. The reduced hourly rate thereby obtained was applied to the total hours in each staff

[12] £498,121.24 discounted by 25% for Unicorn time charges only

category. In the case of Unicorn only 75% of the time charges is being deducted because of the 25% discount given by Unicorn on time charges. This did not apply to the other insolvent companies. From this the total time costs at the adjusted rates was obtained. This was subtracted from the total time costs shown in the t analysis of time costs table. In the absence of any evidence that the rates of Begbies exclude "complex" litigation, the court finds that the rates of Quantuma are higher than those of Begbies Traynor for performing the same work.

[131] To adjust the costs downwards to take account of this in accordance with my mandate under section 5(a)(vi) the total disallowed should be £500,331.56 Based on the representation of the JLs, I will make allowance for the possibility that the rates quoted by Begbies did not contemplate the full complexity of this liquidation and reduce that figure by 20%.

[132] Accordingly, I will reduce the costs under this head by £400.265.25

Travel time and costs and Quantuma Partners and Directors face to face meetings

[133] Some of the issues raised on travel were addressed by the JLs and write downs made under the requirement to adjust time charges for "down-time" during travel as set out by the Eastern Caribbean Court of Appeal in Alhamrani v Alhamrani [13] (supra).

[134] The ERs also questioned the need for physical meetings in the BVI for consultations between the JLs incurring £12,000 in airfares alone when video link or telephone would have been adequate.

[135] One would have expected that with today's technology the necessity for face to face meetings would be at a minimum. In the event, there were only three such meetings, ~~one~~ two in London, and one in St Lucia in the BVI.

[13] BVIHCMA2016/0030 24 November 2017.

[136] Nevertheless it is not such an unreasonable exercise of the JLs discretion that the Court will disallow it.

Division of work between Quantuma and KRyS GIobal

[137] The JLs claim in relation to this objection that there was an unfair division of work, that if KRyS Global had done the majority of the work, because their fee structure is higher the costs would have been higher. This does not follow because it is possible that the work could have been done more efficiently by KRyS Global with concomitant costs savings. However, the reasons given in Jackson Two at paragraph 36 are that i) most of the directors and (alleged) shareholders were based in the UK, Isle of Man or Jersey;(ii) most (if not all) of the companies' records were held in those jurisdictions; (iii) most of the assets which the companies and their subsidiaries own (or have claims to) are located In the UK, Jersey, or Europe; (iv) most of the alleged creditors are also based in those jurisdictions (and also various parties whose proprietary claims to assets held by the companies or their subsidiaries); and (v) the Orb Litigation was taking place in London. I accept that explanation.

Kenneth KRyS

[138] An issue was raised of $103,360.50 charged by the executive Chairman of KRyS Global who is not appointed and is based in the Cayman Islands. Mrs Caulfield stated that he filled in for her while she was on maternity leave, and she communicated with him frequently giving directions and did not charge for her time. At the time he accompanied her at a meeting in London she had recently returned from leave and circumstances did not permit time to brief her and so it was thought prudent to take him to the meeting. The Court will not gainsay her explanation in these circumstances.

Legal Costs

[139] The JLs seek approval of total fees of £3,710,412.49 incurred by HFW and the lawyers engaged by them, £37,690.01 for Appleby Isle of Man and $364,285.14 for Appleby BVI. According to Jackson One HFW provided the JLs almost daily with advice, attendance at meetings, preparing agreements associated with asset realisations, preparing application papers and evidence, instructing counsel and attending at court. Appleby has also worked with their legal teams in the BVI, Jersey, the Isle of Man and, as appropriate, elsewhere. The evidence is that bills were entered monthly, and the JLs state that they scrutinized those bills to satisfy themselves that they were not excessive.

[140] HFW's First Period bills of £1,698,587.37 have been paid and £984,848.15 of the Second Period's bill of £2,077,809.62, has been paid. The JLs provided a summary breakdown of the bills in the Exhibits to Jackson One: (at H for HFW, J for Appleby, and K for the others).

[141] The JLs had taken the position, following, Rich Victory that they did not have to provide the bills. For reasons given earlier the Court revisited Rich Victory on this point.

[142] However, without any input from the Court the JLs had a change of heart and released redacted copies to the Objectors and unredacted copies for the Judge shortly before the hearing. The court agrees with the stance that the ER's had taken in [67] of Standish One that until such time as there has been an opportunity to see and consider the narratives it is not possible to conduct a proper assessment of the reasonableness or otherwise of the fees for which approval is sought.

[143] The objection which the ERs have with the legal bills of HFW is that:

(1) a considerable amount of time allocated to 'general' has been spent dealing with the Montague Square Property, the BVI proceedings, and claims against Dr Cochrane which are issues understood to be related specifically or predominantly to Ballaugh.

(2) The concerns that part of the costs were incurred because of the JLs own negligence

(3) HFW in some instances was practising BVI law and in such cases the fees would not be recoverable by virtue of the Eastern Caribbean Court of Appeal's ruling in Shrimpton v Scriven[14], that in "any action, suit or matter" attorneys' fees are not recoverable as between party and party if the lawyer's name is not on the BVI Roll of attorneys. Even if this does not apply in this case, they argue, should the JLs prevail in their case against Dr Cochrane they will not be able to recover the legal costs of HFW for the benefit of the estate.

(4) With respect to Boyes Turner the costs of £250,000 ($340,000) incurred even before the potential claims concerning Glen Moar have been finalized or proceedings issued are manifestly excessive.

[144] The JLs' answer is that once it was proper for them to engage HFW the Court is precluded from inquiring into their performance unless HFW's fees are excessive. I stated earlier in this judgment that I have revisited the decision of Rich Victory and as I am satisfied that it was wrongly decided on this issue I will respectfully not follow it. It follows that the Court can look at the bills.

[145] Mr Pascoe QC argued that section 2 of the BVI's Legal Profession Act is inoperative and therefore section 18(3) does not apply in this case. In addition he contended that Shrimpton v Scriven applies to party and party costs in court proceedings and these do not fit into that category. He argued that the decision in Shrimpton was partly based on section 2(2) of the Legal Profession Act 2015 which was never brought into effect and was repealed with effect from 29 January 2016.

[14] (BVIHCMAP2016/0031, 3 February 2017

[146] I cannot accept Mr Pascoe's submission on this issue. In Shrimpton the Eastern Caribbean Court of Appeal in deciding that Garkusha[15] was correctly decided and not decided *per incuriam*, held that the prohibition in s18(3) which led to the decision that the fees of foreign lawyers whose names are not on the Roll can no longer be recovered as a disbursement of a local lawyer was independent of section 2. To trigger the statutory prohibition all that was required was that the act in question was done by a person whose name is not registered on the Roll. Furthermore section 18(3) attaches to a person who "acts, in any respect as a legal practitioner in any action or matter or in any court".

[147] Therefore, in my judgment the charges of lawyers who did work which was practising BVI law without their names on the BVI Roll must be disallowed. In perusing HFW invoices between April and July there appeared to be 5.9 hours by Annabel Strutt which included such things as considering e-mails for directions hearings, drafting amendments to claim, reviewing documents for Brian Leahy, and other work which appeared to be acts of practicing BVI law. At £285/hr the total fees would be about £1,681.50.

[148] Boyes Turner, engaged by the JLs, submitted invoices totalling £106,443.48 for the First Period. For the Second Period they submitted invoices totalling approximately £250,000.00. their penultimate invoice was for a total of £50,720.40 but the JLs stated that they have yet to review it and so are only seeking on this application £199,735.41 for the Second Period. The objectors were of the view that these costs should not be allowed because they were not reasonable for an action not yet begun. The narratives supporting these bills seem unclear as it was not entirely possible to discern how some of them were incurred over such an extended period where no action has yet begun. There are numerous entries relating to reviewing e-mails, preparing for meetings, travel to meetings, attending to meetings, post meetings, reviewing statements and reviewing particulars of claim as far back as 2016 up to 2018 and no action has yet been commenced. One not uncommon example of the fees surrounding meetings goes like this all on the same day:

07/11/17 Chris Bronson £540 prep for Meeting HFW

[15] BVIHCMAP 2015/0010

07/11/17	Chris Bronson	£1080	Travel plus further prep
07/11/17	Chris Bronson	£612	meeting HFW
07/11/17	Chris Bronson	£432	Meeting post HFW meeting w,x,y,z
07/11/17	Chris Bronson	£360	e-mails re SFO

07/11/17 Oliver Fitzpatrick £1798 Meeting with HFW (time incl travel to/from meeting, attending meeting and debrief meeting with A

07/11/17 Oliver Fitzpatrick..£232 prep for meeting with HFW collating pleadings and reviewing latest correspondence

On the same date this was followed by 6 similar by trainees.

[149] It was not possible for the Court to independently determine, having regard to the time spent and the nature of the work as described in the narratives, if the costs were fair and reasonable. Rather than disallowing the whole amount the court will only disallow about 20%. This is relying on the statement by the JLs that the expenses were fair and reasonable, and that it is unlikely that in exercising its independent oversight the Court would discount them by more than 20%. This disallowance will result in a reduction of £21,288.70 for the First Period and £39.947.08 for the Second Period

SUMMARY

[150] It seems to me that the judge must take a principled approach, not a nit-picking line by line examination of the Liquidator's bill except where a few line items are being used to discern a particular pattern of behaviour. He must apply his mind to the matters which he *must* take into account under section 432(5)(a) and consider whether the circumstances of the case make it appropriate for him to take into account matters which he *may* take into account under section 432(5)(b). Following Re Independent Insurance No 1[16] under the English Act where the assessing Judge had appointed an assessor to assist him, the assessor reported on the approach which he took:

> "The emphasis of my work has been to address four key elements in respect of each activity set out in support of the three applications:
>
> What benefit is being derived from the particular task being undertaken?

[16] Re Independent Insurance No. 1 [2003] EWHC 51 (Ch)

Is the task being undertaken by a person of the appropriate grade?

Is the length of time taken to complete the task reasonable?

Is the task one which is within the powers of the Provisional Liquidators and necessary to fulfil the purpose for which they were appointed?"

[151] The judge accepted his report and went on to use it to assist him in fixing the liquidators remuneration.

[152] In what is said to be the leading appellate authority in Australia, Conlan v Adams[17] it is suggested that categories of conduct that would not represent time reasonably expended at the reasonable rate could include (a) work that is beyond the power of the liquidator (b) conduct that is negligent (c) unnecessary work (d) work undertaken by persons of inappropriate seniority and work undertaken at inappropriate hourly rates.

[153] These are the kind of matters among others which the objectors raised, and to which the Court was alive.

CONCLUSION

[154] Common features of most large liquidations as usually expressed by the liquidators are that the liquidation is complex exposing them to a high level of risk, the claims against the estate are numerous, diverse and complex, cross-border transaction create complex legal and logistical issues, and that their fees reflect the "market' rate. Most of these features applied to this case as well.

[155] In each case in fixing liquidators' remuneration the court must do so within the principals set out in section 432 of the Act, and is mandated to take into account the matters set out in section 432(5)(a).

[17] Conlan v Adams [2008] WASCA 61

[156] Furthermore, in this case since well over 90% of the work has been and will continue to be done in England, by liquidators primarily based in Southampton, it would be exercising bad judicial judgment not to exercise its discretion to take into account the matters set out in section 432(5)(b)(iii) namely the standards and practice used for assessing remuneration in jurisdictions other than the Virgin Islands, in this case England. I reminded myself in each case that "taking into account" does not necessarily mean applying it, but it may lead to the application of one or more of such standards. After taking it into account the Court did not adopt the value criterion, considering it unnecessary in light of the clear provisions of section 432 of the Act, however the Court embraced other aspects of the English standards and practice.

[157] While the honesty of the liquidators is presumed, the court ought not to shirk its statutory duty by rubber stamping costs submissions made by them. I approve Kaye J's cautionary statement in Victory Life [18]that we should be careful not allow section 432 of the Act to become a licence to print money. If the liquidator is the watchman, who is to watch the watchman?

[158] The table below summarizes the quantum of the Enforcement Receivers' challenges and the JLs' conceded write downs:

	Queried by Enforcement Receivers	Amounts written down by JLS
Unicorn	£903,959	£30,356 $2,993
Glen Moar	£42,957	£0 $364
Ballaugh	£128,175	£390 $113
Sulby	£2,245	£0

[18] supra

		$551
Total	£1,077,336	£30,746 (Jackson Two) $4,021(Caulfield)

[159] Having applied the principles of the Act to the evidence, below is a summary of the write downs by the court:

JLs Claim	Amount Disallowed	Amount fixed by the Court
£5,247,432.11	£400,265.25 (reduction in rates)	
	£171,024.24. (disproportionate use of partners/directors) s.432(5)(a)(IV)	£4,120,644.271

[160] Other items not allowed include £1681.50 irrecoverable legal fees incurred by foreign lawyers practicing BVI law without being enrolled on the BVI Roll, and Boyes Turner £21,288.70 for the First Period and £39.947.08 for the Second Period. £52,910.80 of HFW costs and $7,776.47 and $4,478.93 of Appleby' costs concerning the BVI proceedings

[161] The total amount disallowed (£571,289.49) is almost 11% of liquidators' fees and about 3% of disbursements referred to in [3]. Assuming that the JLs have included all their conceded deductions in the figures set out in the draft order I have deducted the amount disallowed by the Court from those figures. The £571,289.49 has been prorated as to two thirds for the First Period and one third for the Second Period for the 33 months period over which the costs span. The disallowed disbursements of £1681.50 irrecoverable legal fees, and Boyes Turner £21,288.70 for the First Period and £39.947.08 for the

Second Period, and $12,254.00 for Appleby costs.. The result is that the Court fixes the remuneration for the First Period at £3,657,472.06 and $381,307.50, and for the Second Period at £1,034,461.70 and $351,694.00 as detailed in paragraphs 2 and 3 of the Order. The disbursements for the First Period are fixed at £2,383,602.66 and $202,547.89, and for the Second Period are fixed at £2,398,367.64 and $165,739.74 as detailed in paragraphs 5 and 6. Payment is to be made as provided in the Order.

Berkeley Applegate Allowance

[162] Before fixing the Berkley Applegate allowance the court reminds itself that the ratio of Nugee, J in Re Berkeley Applegate[19] itself is that the quasi trustees (the JLs) are doing investigative and other work which benefits trust assets for the proprietary claimants who otherwise would have had to individually or collectively employ some other professional at greater expense to perform those tasks. Harbour submits that the court should therefore direct its mind to whether the JLs work conferred that benefit on the proprietary claimants for which they are bound in equity to compensate the JLs. The trust asset that received the benefit should pay the allowance but, as stated in Re Berkeley Applegate itself, this may have to be determined nearer the end of the liquidation. Clearly, as pointed out by Harbour, at the very least work done against the interest of those holding proprietary interests but for the benefit of creditors should not be paid for by an allowance out of the trust assets.

[163] Harbour has questioned whether certain work streams benefited any of the trust assets or, indeed, may have been done against their interest. On principle the fees and disbursement incurred in pursuing such streams, they argue, would not qualify for an allowance. Some examples referred to earlier were “Engaging with creditors”, “Claims against Gail Cochrane”, “the Hayes Settlement”, “Meetings with Pro Vinci/Andiamo”, and “Assets Written Off”.

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[19] Re Berkeley Applegate (Investment Consultants) Ltd, Harris v Convey and et al [1988] 3ALL ER 71

[164] This issue was not addressed at all at the hearing. The JLs already have the right in principle to obtain Berkeley Applegate relief and that remains. However, which work streams already performed should qualify for the allowance out of trust assets may need review and discussion. Out of an abundance of caution, I therefore adjourn the fixing of the Berkley Applegate Allowance to the next Approval Hearing.

[165] The JLs are entitled to draw a payment on account of 80% of their discounted time costs in relation to Unicorn and 75% of their time costs in relation to the other insolvent companies (paragraph 5(2) of the Berkeley Applegate order) from 1 January 2017 to the final determination of this application. By this application they seek permission to draw 80% of their fees and all disbursements in full between the determination of this application and their next application for approval of fees. I approve that they can draw down 80% of their fees and disbursements.

[166] Still to be decided, in addition to the amount of allowance to be fixed, are whether Berkeley Applegate relief should apply to the First Period at all, the assessment of costs for these hearings, and whether the Finality Issue should apply. The latter issue refers to whether after the Berkeley Applegate allowance has been fixed by the Court the JLs will not be liable to disgorge any part of that payment irrespective of the outcome of the hearings determining proprietary interests. That issue is under appeal before the Court of Appeal. These matters are adjourned to a date to be fixed or the next Approval Hearing.

COSTS

[167] The JLs proposed that the fixing of their own time costs and disbursements in relation to the preparation of this application be heard at a later hearing. I therefore order that the costs shall be costs in the liquidation.

Hon K. Neville Adderley
Commercial Court Judge

By the Court

Registrar