

1 IN THE **GRAND COURT** OF THE CAYMAN ISLANDS

2
3 CAUSE NO. 436 OF 1991

4 CAUSE NO. 399 OF 1992

5 CAUSE NO. 40 OF 1994

6 CAUSE NO. 41 OF 1995

7 CAUSE NO. 167 OF 1992

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11 IN THE MATTER OF **CONSOLIDATED**
12 **APPLICATIONS FOR THE GRANT OF INCREASES**
13 **IN THE LIQUIDATORS FEES.**
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24 **APPEARANCES:**

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26 Mr. Guy Locke of W.S. Walker & Co. for the Liquidators.

27 Ms. Lisa Agard, Crown Counsel, as amicus curiae.
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30 **RULING**
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34 These applications first came on for hearing ex parte, on 15th August 1996,
35 when they were adjourned out at the instance of the Court for lack of
36 supporting material on which to ground them.
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38 In four of the matters the supporting material took the form only of the
39 respective affidavits of Mr. Johnson, the senior partner in Coopers and
40 Lybrand and a liquidator in each matter, citing the increased costs of doing
41 business in the Cayman Islands since the respective dates of the
42 commencement of the liquidations.

1 In his affidavit in one matter - Cause 40 of 1994 - Mr. Johnson also cited the
2 results of what he described as an “informal survey” of “the charge out rates
3 of the four main firms in this jurisdiction”. This he offered as a benchmark
4 against which to set the increases which are sought in that matter. The
5 affidavit also cross-referred to that “survey” for reliance in the context of
6 the other applications as well.

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8 In the same affidavit Mr. Johnson also cited a recent order In the matter of
9 Argentina Income & Growth Fund Limited Cause number 301 of 1996 as
10 precedent for the order sought in the present matters.

11
12 On the resumed hearing before me, Mr. Locke for the liquidators and Ms.
13 Agard (invited by the Court having regard to the Governor’s role as
14 petitioner in the compulsory liquidation in Cause 40 of 1995) reported the
15 results of further enquiries made of firms within the jurisdiction as to their
16 charge out rates.

17
18 I was also referred to the Consumer Price Indices for 1985 to 1995 as
19 published in the Government Handbook Annual Report for 1995.

20
21 Thus, these consolidated applications proceeded on the basis that the Court
22 has an unfettered power to increase the liquidators’ fees, from time to time,
23 by way of ex parte applications brought on their behalf.

24
25 Mr. Locke also explained to me that part of the rationale behind the
26 applications was to allow the liquidators a uniform charge out rate in respect
27 of all the liquidations. To that end what is sought is a scale of fees setting
28 bands for each category of professional personnel from senior managers
29 down to junior accountants within which the liquidators would be given a
30 discretion to charge, depending on the complexity of the work to be done.
31 That appears to have been the practice, sometimes sanctioned by this court
32 which has been adopted by the profession in this jurisdiction.

33
34 In the course of the submissions I was not referred to the relevant
35 Insolvency Rules, but I have since consulted them. Having done so, I am
36 firmly of the view for the reasons which follow that I might not accede to
37 the applications as they presently stand.
38

1 Three of the matters are voluntary liquidations proceeding under the
2 supervision of the Court. The other two are by virtue of orders for
3 compulsory windings-up.

4
5 I accept that there is jurisdiction to adjust the rate of remuneration of the
6 liquidators whatever the mode of winding-up. In a winding-up subject to
7 the supervision of the court under Section 153 of the Companies Law, the
8 Court exercises all powers which it might have exercised if an order had
9 been made for winding-up the company altogether by the Court. And
10 specifically on the question of jurisdiction to set and vary the liquidators'
11 fees, that point is dealt with In re Mortimers (London) Limited [1937] 1 Ch.
12 289.

13
14 I should also state that no question arises here as to the bona fides of the
15 liquidators or as to the accuracy of their evidence in bringing the
16 application. That however, can be no final arbiter of the appropriate
17 quantum of fees.

18
19 The fundamental objection I see arises from the ex-parte manner of the
20 application; it does not recognise the right or interest of the creditors or
21 contributories to be heard upon the application.

22
23 That right and interest is recognised in the Insolvency Rules - and before
24 them in the Companies (winding-up) Rules 1949, rule 159. The Insolvency
25 Rules now apply - by virtue of Grand Court Rules 1995 Order 102 Rule 17 -
26 to proceedings relating to the winding-up of Companies under Part V of the
27 Companies Law (Revised), as are these proceedings.

28
29 I set out the rules to the extent applicable to the present matters:

30
31
32 "4. 127 -

33 (1) The liquidator is entitled to receive remuneration
34 for his services as such.

35
36 (2) The remuneration shall be fixed either - (a) as a
37 percentage of the value of the assets which are

1 realised or distributed, or of the one value and the
2 other in combination, or

3 (b) by reference to the time properly given by the
4 Insolvency practitioner (as liquidator) and his staff
5 in attending to matters arising the winding-up.
6

7 (3) Where the liquidator is other than the official
8 receiver [(as here where there is no such office)], it
9 is for the liquidation committee (if there is one) to
10 determine whether the remuneration is to be fixed
11 under paragraph (2) (a) or (b) and, if under
12 paragraph (2)(a), to determine any percentage to be
13 applied as there mentioned.
14

15 (4) In arriving at that determination the committee
16 shall have regard to the following matters -

17 (a) the complexity (or otherwise) of the case,

18 (b) any respects which, in connection with the
19 winding-up, there falls on the insolvency

20 practitioner (as liquidator) any responsibility of an
21 exceptional kind or degree,

22 (c) The effectiveness with which the insolvency
23 practitioner appears to be carrying out, or to have
24 carried out, his duties as liquidator; and

25 (d) the value and nature of the assets with which the
26 liquidator has to deal.
27

28 (5) If there is no liquidation committee, or the
29 committee does not make the requisite
30 determination, the liquidators remuneration may be
31 fixed (in accordance with paragraph (2)) by a
32 resolution of a meeting of creditors; and paragraph
33 (4) applies to them as it does to the liquidation
34 committee.
35

36 (6) If not fixed as above, the liquidators
37 remuneration shall be in accordance with the scale
38 laid down for the official receiver by general

1 regulations [(There is no such scale in the Cayman
2 Islands)].

3 4. 129 -

4 If the liquidator's remunerators has been fixed by
5 the liquidation committee, and he considers the rate
6 or amount to be insufficient, he may request that it
7 be increased by resolution of the creditors.

8
9 4. 130 -

10 (1) If the liquidator considers that the remuneration
11 fixed for him by the liquidation committee, or by a
12 resolution of the creditors, [(or as under Rule
13 4.127(6))], is insufficient, he may apply to the court
14 for an order increasing the amount or rate.

15
16 (2) The liquidator shall give at least 14 days notice
17 of his application to the members of the liquidation
18 committee, and the committee may nominate one or
19 more members to appear to be represented and to be
20 heard, on the application.

21
22 (3) If there is no liquidation committee, the
23 liquidator's notice of his application shall be sent to
24 such one or more of the company's creditors as the
25 court may direct, which creditors may nominate one
26 or more of their members to appear or be
27 represented.

28
29 (4) The court may if it appears to be a proper case,
30 order the costs of the liquidator's application,
31 including the costs of any member of the liquidation
32 committee appearing (or being represented) on it, or
33 any creditor so appearing [or being represented], to
34 be paid out of the assets".

35
36 It is also significant that Insolvency Rule 4.131 provides for an
37 application by a creditor for reduction in the liquidators fees in the
38 following terms:

1
2 “4. 131 - (1) Any creditor of the company may,
3 with the concurrence of at least 25 per cent in
4 value of the creditors, (including himself), apply
5 to the court for an order that the liquidator’s
6 remuneration be reduced, on the grounds that it is
7 in all the circumstances, excessive”.

8
9 The remaining provisions of Rule 4.131 set the procedure for
10 the creditors’ application.

11
12 It will be immediately apparent from the foregoing and mandatory
13 provisions of the Rules that the ex parte manner of the present applications
14 is wholly inappropriate.

15
16 The fact that there exists a liquidation committee in but one of the
17 liquidations - that the subject of Cause 399 of 1992 - is no bar to the
18 application of the Rules in the others. The fact that - as I am told by Mr.
19 Locke - there is but a single creditor in the liquidation in Cause 436 of 1991
20 and only one or two in the liquidation in Cause 167 of 1992 will serve to
21 ease the application of the Rules, not make it more difficult.

22
23 Similarly, the fact, as I am told, that no contract for fees had arisen in the
24 context of any of the matters which started out as voluntary liquidations,
25 should be no bar to the consideration of the fees at this stage by the
26 respective creditors or, where it exists, the liquidation committee.

27
28 My order therefore in each of the Causes is that the liquidators should
29 follow the procedures laid down in the Rules (as set out above) as they
30 apply respectively to each Cause.

31
32 If following that procedure, any Cause returns before the court for an order,
33 there is authority that the court might have regard to pure economic factors
34 (such as in my view the results of the fee survey as presented in the affidavit
35 evidence and to the consumer price indices) to determine what is a
36 reasonable fee: In re Joseph Phillips Ltd [1964] 1 W.L.R. 369, 376. At page
37 377 Buckley J (as he then was) also observed that the remuneration must be

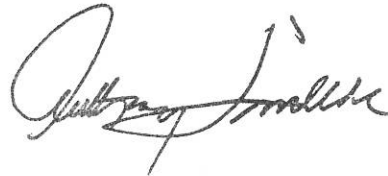
1 ascertained in relation to the liquidator's services, and not in relation to the
2 means of the remunerating party, or the fortunes of the liquidation.

3
4 The court will consider all the circumstances of the particular case and
5 determine what, in those circumstances, is a fair remuneration to pay: In re
6 Amalgamated Syndicates Limited [1901] 2 Ch. 181.

7
8 The final observation I make - to the extent that it might assist the extra-
9 judicial efforts at setting the fee scales - is that Insolvency Rule 4.127(2)(a)
10 (the fixing of fees as a percentage of the value of the assets) - may not be in
11 keeping with the established practice within the industry in this jurisdiction.
12 It follows that in invoking the Rules, I am not to be taken as necessarily
13 sanctioning or imposing that method as a particular means by which to
14 arrive at the reasonable rate of remuneration.

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16 Being of the firm view that these applications ought not to have been
17 brought in their present state, I order that the costs shall not be a charge in
18 any of the respective liquidations.

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A. Smellie Q.C.
Judge of the Grand Court

Dated this day of 1996