

## THE HIGH COURT

[2018 No. 137 COS]

**IN THE MATTER OF SAMMON CONTRACTING IRELAND LIMITED  
AND IN THE MATTER OF SAMMON CONTRACTING GROUP LIMITED  
AND IN THE MATTER OF MICHEÁL SAMMON WOODCRAFT LIMITED  
AND IN THE MATTER OF THE COMPANIES ACT, 2014**

**JUDGMENT of Mr. Justice Allen delivered on the 30th day of March, 2020**

**Introduction**

1. This is an application pursuant to s. 554 of the Companies Act, 2014 for the approval and payment of the remuneration and outlay and legal costs of an examiner. The motion also raises an issue as to the relative priority of the examiner's remuneration, outlay and costs, and liabilities of the companies which were certified by the examiner in accordance with s. 529 of the Act of 2014.

**Background**

2. Micheál Sammon Woodcraft Limited ("*MSWL*") was incorporated on 29th July, 1997 and carried on a manufacturing business in the construction industry.

Sammon Construction Ireland Limited ("*SCIL*") was incorporated on 11th August, 2009 and carried on the business of building contractor. Sammon Contracting Group Limited ("*SCGL*") was incorporated on 21st July, 2009 and became the parent company of *MSWL* and *SCIL*.

3. For a good number of years the businesses prospered. By 2018 *SCIL* and *MSWL*, between them, had about 200 employees. *SCIL* had a number of valuable contracts, notably a contract from Inspired Spaces (Ireland) Limited, which was a joint venture between a large U.K. construction company, Carillion plc, and a Netherlands infrastructure fund called DIFCO, for the construction of five schools and an institute of further education, called the SB 5 contract.
4. The SB 5 contract was central to the business of *SCIL*. The business of *MSWL* was to supply *SCIL*. *SCGL* was the holding company for *SCIL* and *MSWL*. It did not trade and had no employees.
5. In January, 2018 Carillion plc went into liquidation owing the Sammon Group companies €8 million, which it could not pay. *SCIL* tried to keep the work going on the SB 5 sites but failed.
6. On 5th April, 2018 the directors of *SCIL*, *SCGL* and *MSWL* presented a petition to the High Court for the appointment of an examiner over the three companies. By order of that date the companies were granted court protection and Mr. Michael McAteer of Grant Thornton was appointed interim examiner.
7. The petition for the appointment of an examiner was based on an independent expert's report of Mr. Thomas McDonald of JPA Brenson Lawlor who expressed the view that, subject to a number of conditions, the companies had a reasonable prospect of survival as a going concern. Those conditions included the availability of funding from a third party

funder to fund the companies during the period of the examinership, and material achievement of projected cash flows during the period of protection of up to 100 days. A company called Randelswood Holdings Limited ("*Randelswood*") which is associated with a property developer called McGrath Group, was interested in investing in the companies and had provided a letter of comfort confirming support of a total of €2.15 million: €1.85 million for SCIL and €300,000 for MSWL. The cash flows projected that this funding would be drawn down in the first 50 days or so of the period of protection.

8. The petition which was presented on 5th April, 2018 was made returnable for 16th April, 2018. On 13th April, 2018 Mr. McAteer wrote an interim examiner's report for the court, summarising the work he had done to date, giving his initial assessment of the companies' prospects and his opinion on the prospects of survival. Mr. McAteer reported that in his opinion the companies had a reasonable prospect of survival subject, *inter alia*, to the continued support of employers and key sub-contractors and the receipt of funds in line with the projected cash flows. By then, he had issued s. 529 certificates for borrowings from Randelswood by SCIL of €525,000, and by MSWL of €105,000.
9. On 16th April, 2018 the court approved the appointment of Mr. McAteer as examiner.
10. On 8th May, 2018 Mr. McAteer presented to the High Court his examiner's report dated 3rd May, 2018 in which he reprised the circumstances in which he had come to be appointed and summarised the position in relation to the several contracts which had been on hand at the time of the independent expert's report. The completion of the SB 5 contracts had been put out to tender by the employer and while SCIL had not directly tendered, it had an agreement with one of the tenderers that if the contract was awarded to it, the work would be subcontracted to SCIL.
11. By the time of the examiner's report some of the SCIL's contracts had been terminated by the employers. The termination of those contracts had given rise to material change in the cash flows and Mr. McAteer duly noted that in his report. The terminations, however, were not expected to affect the companies' prospects of survival. Mr. McAteer continued to hope that a scheme of arrangement could be formulated, put to, and agreed by the creditors. In the case of each of SCIL and MSWL the report noted that the McGrath Group was reviewing its position with regard to additional funding.
12. Throughout May, 2018 the examiner continued to engage with potential investors.
13. One of the key elements in the companies' prospects of survival, and one of the conditions identified in the independent expert's report, was the ability of SCIL to secure the remaining work on the SB 5 contracts, and this was the focus of much of Mr. McAteer's work. However, there were repeated delays in the award of the contract for the completion of the work. On 31st May, 2018 the Dutch infrastructure fund, DIFCO, informed Mr. McAteer that it could not confirm when a decision would be made on the award of the contract and on the following day the principal potential investor in the companies, BAM, informed Mr. McAteer that its interest was now limited to an investment in MSWL.

14. On 5th June, 2018, on the application of the examiner, the court removed protection from SCIL and SCGL and ordered that they be wound up. The court continued protection for MSWL based on an offer of new funding of €600,000 if BAM could secure the SB 5 contract and re-engage MSWL. A proposed scheme was formulated for MSWL, approved by the creditors, and presented to the High Court but BAM was unsuccessful in its tender for the work and on 27th June, 2018 on the application of the examiner, the court removed protection from MSWL and ordered that it be wound up.
15. The liquidator appointed to all three companies was Mr. Stephen Tennant, one of Mr. McAteer's partners in Grant Thornton.

### **The application**

16. By notice of motion issued on 17th December, 2018 and originally returnable for 28th January, 2019 Mr. McAteer applied for orders pursuant to s. 554 of the Companies Act, 2014 determining the remuneration and outlay of the examiner of SCIL in the amount of €153,750 and of MSWL in the amount of €36,900; and measuring the costs of the solicitors for the examiner of SCIL at a total of €91,922.97, inclusive of VAT and outlays, and of MSWL at €12,300.
17. At the date of the application the total realisations in SCIL amounted to €597,467 and in MSWL to €100,000, before costs of sale. SCGL had no assets other than its shareholding in SCIL and MSWL. There was some prospect of further realisations, but all the appearances were, and are, that there will not be sufficient money to pay the remuneration, outlay and costs claimed, and the s. 529 expenses.
18. The notice of motion asks that the official liquidator be at liberty to retain and pay over the sums claimed for remuneration, outlay and costs, and the s. 529 expenses, as and when funds become available. In anticipation of an issue as to priority, the motion asks for a determination of the priority in which the liabilities are to be paid.
19. The application was served on the official liquidator of the three companies and on Randelswood as the creditor which will be immediately affected by the examiner's claims. It was resisted by Randelswood on a number of grounds.
20. The application was grounded on a very short affidavit of Mr. McAteer, to which I shall come. In the end, there was a protracted exchange of affidavits over about eight months but from the first affidavit of Ms. Mary McGrath filed on behalf of Randelswood five issues emerged which are:-
  1. Whether the monies owing to Randelswood, being expenses which had been certified in accordance with s. 529, should be paid in full before, alternatively *pari passu* with, the remuneration, costs and expenses of the examiner.
  2. Whether the examiner has put before the court sufficient evidence to allow the court to be satisfied as to the basis of the remuneration and costs claimed.

3. Whether the examiner has established that the work which he did was necessary: specifically whether he exceeded his powers in engaging with potential investors.
4. Whether the examiner is required to apportion part of his claim for remuneration, costs and expenses to SCGL.
5. Whether the examiner should be refused part of the remuneration, costs and expenses claimed on the basis that the examinership ought to have been ended sooner.

**Priority issue**

21. The issue as to the relative priority of the claims of the examiner and Randelswood turns on the correct construction of ss. 529 and 554 of the Companies Act, 2014.

22. Section 529 of the Act of 2014 provides:-

*"529.(1) Any liabilities incurred by the company during the protection period which are specified in subsection (2) shall be treated as expenses properly incurred, for the purpose of section 554, by the examiner.*

*(2) The liabilities referred to in subsection (1) are those certified in writing by the examiner, at the time they are incurred, to have been incurred in circumstances where, in the opinion of the examiner, the survival of the company as a going concern during the protection period would otherwise be seriously prejudiced.*

*(3) In this section 'protection period' means the period, beginning with the appointment of an examiner, during which the company is under the protection of the court."*

23. Section 554 of the Companies Act, 2014 provides:-

*"554.(1) The court may from time to time make such orders as it thinks proper for payment of the remuneration and costs of, and reasonable expenses properly incurred by, an examiner.*

*(2) Unless the court otherwise orders, the remuneration, costs and expenses of an examiner shall be paid and the examiner shall be entitled to be indemnified in respect thereof out of the revenue of the business of the company to which he or she has been appointed, or the proceeds of realisation of the assets (including investments).*

*(3) The remuneration, costs and expenses of an examiner which have been sanctioned by order of the court (other than the expenses referred to in subsection (4)) shall be paid in full and shall be paid before any other claim, secured or unsecured, under any compromise or scheme of arrangement or in any receivership or winding up of the company to which he or she has been appointed.*

*(4) Liabilities incurred by the company to which an examiner has been appointed that, by virtue of section 529, are treated as expenses properly incurred by the examiner*

*shall be paid in full and shall be paid before any other claim (including a claim secured by a floating charge), but after any claim secured by a mortgage, charge, lien or other encumbrance of a fixed nature or a pledge, under any compromise or scheme of arrangement or in any receivership or winding up of the company.*

- (5) *In subsections (3) and (4), references to a claim shall be deemed to include references to any payment in a winding up of the company in respect of the costs, charges and expenses of that winding up (including the remuneration of any liquidator).*
- (6) *Subject to subsection (7), the functions of an examiner may be performed by him or her with the assistance of persons appointed or employed by him or her for that purpose.*
- (7) *An examiner shall, in so far as is reasonably possible, make use of the services of the staff and facilities of the company to which the examiner has been appointed to assist the examiner in the performance of his or her functions.*
- (8) *In considering any matter relating to the costs, expenses and remuneration of an examiner the court shall have particular regard to subsection (7)."*
24. Mr. John Lavelle, for the examiner, submits that the clear meaning of s. 554 is that the examiner's remuneration and costs rank ahead of the certified liabilities. He points to the fact that the priority afforded by s. 554(3) is afforded to remuneration, costs and expenses "*other than expenses referred to in subsection (4)*", that is, other than certified liabilities. If, he says, the examiner's remuneration and costs rank ahead of liabilities secured by a fixed charge – which by s. 554(3) they do – and if liabilities secured by a fixed charge rank ahead of certified liabilities – which by s. 554(4) they do – the examiner's remuneration and costs must rank ahead of certified liabilities.
25. Mr. Lavelle traced the history of s. 554 of the Act of 2014 back to s. 29 of the Companies (Amendment) Act, 1990 and from there through the amendments made by s. 28 of the Companies (Amendment) (No. 2) Act, 1999, which were materially identical to what is now contained in s. 554, sub-sections (3) to (5). Mr. Lavelle recalled that in *Re: Don Bluth Entertainment Ltd.* [1994] 3 I.R. 141 and *Re: Holidair* [1994] 1 I.R. 416 the Supreme Court had found that s. 29 of the Act of 1990 in its original form meant that certified liabilities ranked with the examiner's remuneration, ahead of any secured debt, and submitted that the clear purpose of the amendment in 1999 was to introduce a distinction between examiner's remuneration and secured liabilities – which distinction was carried forward into section 554. Mr. Lavelle also recalled the observation of Keane J. (as he then was) in *In re Springline Ltd. (in liquidation)* [1999] 1 I.R. 467 that the Act of 1990, however well intentioned, was not as clearly drafted in some respects as one would wish.
26. Mr. Gary McCarthy S.C., for Randelswood, also pointed to the terms of s. 29 of the Act of 1990 as originally enacted and argued that it is important to look at the reason for the

change introduced in 1999. Citing a passage from *O'Donnell, Examinerships* (2nd Edition) he argued that the mischief to which the amendments were directed was that under the old regime a company that already had bank debt secured by a fixed charge could borrow money from another source, and that the examiner's certificate would give priority to the later borrowing over the earlier. He suggested that unless there was – which he said there was not in this case – a fixed charge, the section had no application. Otherwise, so the argument went, there would be no point in certifying expense in the manner provided for in section 529.

27. I cannot agree. Section 554 clearly distinguishes between the expenses incurred by an examiner, on the one hand, and liabilities incurred by the company which, if certified, are to be treated as expenses properly incurred by the examiner, on the other. The priority afforded by s. 554(3) to remuneration, costs and expenses is afforded to such remuneration, costs and expenses as may be sanctioned by the court. Section 554(3) expressly excepts certified liabilities, the payment of which is not subject to the sanction of the court.
28. The proposition put forward in the affidavit of Ms. McGrath was that the certified liabilities should be paid in full in priority to the examiner's remuneration, costs and expenses, alternatively *pari passu* with the examiner's remuneration, costs and expenses. This was not developed in argument. Randelswood's submission was that the construction contended for by the examiner would set at naught so much of s. 554(4) as provided that those expenses are to be "*paid in full and shall be paid before any other claim*" which, it was said, was precisely the same language used in section 554(3) in relation to the examiner's remuneration, costs and expenses. I am uncertain whether this was supposed to achieve priority for the certified liabilities over the examiner's remuneration, or parity. The argument recognises the obvious fact that the section distinguishes between the two categories of liability and focusses on sub-s. (4) while ignoring sub-s. (3) but it simply cannot be that each is to be paid in priority to the other.

**Remuneration and expenses claim – general principles**

29. The principles to be applied on an application to approve the remuneration of an examiner have been the subject of a number of judgments of the High Court and the Court of Appeal in recent years and are reasonably well settled. On this application the argument focussed on two issues, to which I shall come.
30. The starting point is O. 74A, r. 22 of the Rules of the Superior Courts which provides:-

*"An application by the Examiner pursuant to section 554 of the Act for payment of remuneration and costs and reasonable expenses properly incurred by him shall be made by application ex parte to the Court upon an affidavit of the Examiner in which he shall set forth a full account of the work carried out by him to the date of the application and a full account of the costs and expenses incurred by him and shall vouch same, and the basis for the proposed remuneration which he is seeking to be paid. The Court may, where it thinks fit, order that notice of the application be given to all such persons as the Court may direct, and may give directions as to*

*the service of the said notice and fix a date for the hearing of the application of the Examiner. The affidavit of the Examiner shall also specify what use, if any, he has made of the services of the staff and/or of the facilities of the company to which he has been appointed and the extent of such use."*

31. In *Re: Mouldpro International Limited* [2018] IECA 88 the Court of Appeal endorsed the practice which had developed over the years, and which had been adopted in that case, of putting a creditor likely to be affected by the determination of the remuneration on notice of the application and to request that person to act as a *legitimus contradictor* in holding the applicant to account. Whelan J. emphasised the importance of identifying a creditor who would be immediately affected by the application. In this case, Randelswood will be directly and immediately affected by the application and was correctly identified as the appropriate *legitimus contradictor*. Whelan J. also observed that it is important that such concerns as may be expressed by the notice party should be carefully evaluated.
32. It is clear from the authorities that the approach of the court to an application on behalf of an examiner is the same as that applicable to an application by an official liquidator. Both are officers of the court and both are fiduciaries. That is agreed.
33. It is clear from the authorities, and it is accepted by Mr. Lavelle, that the onus is on the applicant to justify his claim for remuneration, costs and expenses.
34. In *Mouldpro* the Court of Appeal undertook a comprehensive review of the jurisprudence. That was an official liquidator's application to fix his remuneration in a long running liquidation which had commenced in 2005. Whelan J. identified the judgment of Laffoy J. in *Red Sail Frozen Foods Limited* [2006] IEHC 328, which was delivered on 20th October, 2006, as a key decision in the development of the modern approach to insolvency practitioners' claims for fees and expenses. Theretofore the court had always endeavoured to bring to bear vigilant scrutiny, but notwithstanding the recognised unreliability of time costing to measure the value of work, a practice had developed of focussing on the number of hours worked. The decision in *Red Sail* marked a significant shift in the approach.
35. In *Red Sail* Laffoy J. considered the important decision of the English High Court in *Mirror Group Newspapers plc v. Maxwell and Others* [1998] B.C.L.C. 638. In that case Ferris J. first identified the fiduciary capacity of administrators, liquidators, receivers, trustees in bankruptcy and the like. He focussed on their obligation as such to account both for the way in which they exercised their powers and for the property they dealt with, and continued:-

*"Certain more particular consequences follow from what I have said so far. First, office-holders must expect to give full particulars in order to justify the amount of any claim for remuneration. If they seek to be remunerated upon, or partly upon, the basis of time spent in the performance of their duties they must do significantly more than list the total number of hours spent by them or other fee-earning members of their staff and multiply this total by a sum claimed to be the charging*

*rate of the individual whose time was spent. They must explain the nature of each main task undertaken, the considerations which lead them to embark upon that task and, if the task proved more difficult or expensive to perform than at first expected, to persevere in it. The time spent needs to be linked to this explanation, so that it can be seen what time was devoted to each task. The amount of detail which needs to be provided will, however, be proportionate to the case."*

36. Laffoy J. also cited with approval a passage from p. 652 of the judgment of Ferris J. where he said:-

*"In my judgment it is vital to recognise three things in this field. First, time spent represents a measure not of the 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 indemnify against cost. Second, time spent is only one of a number of relevant factors, the others being, as I have said, those which find expression in r. 2.47 [of the Insolvency Rules 1986] and similar rules. The giving of proper weight to these factors is an essential part of the process of assessing the value, as opposed to the cost, of what has been done. Third, it follows from the first two points that, as the task is to assess value rather than cost, the tribunal which fixes remuneration needs to be supplied with full information on all the factors which I have mentioned."*

37. The Court of Appeal in *Mouldpro* approved the decision of Laffoy J. in *Red Sail* as correctly setting out the law both as to the significance of value in the process of calculation of remuneration, and the obligation to ensure that full information is made available.

38. In *Re: Sharmane Ltd.* [2009] 4 I.R. 285, at p. 297 Finlay Geoghegan J. expressed the principle as follows:-

*"There are no statutory criteria according to which the court should determine what constitutes reasonable remuneration for the purpose of s. 29. It does not appear to me that this can be determined by reference only to the total charge out costs computed from the hours spent and relevant hourly rates for the examiner and those working with him. This may, of course, comprise one element to be taken into account in determining what reasonable remuneration is. However, in my view, it should not be the only element, and in determining what is reasonable remuneration the court must also have regard to the nature of the work carried out, the complexity of the work and the importance or value of the work to the client. These would be common elements taken into account by professionals charging or seeking to agree fees with clients."*

39. In the High Court in *Re: Mouldpro International Ltd.* [2012] IEHC 418, Finlay Geoghegan J. noted that the principles she had laid down in *Re: Sharmane Ltd.* had been followed in *Re: Missford Ltd.* [2010] 3 I.R. 756 and *Re: Marino Ltd.* [2010] IEHC 394 in relation to fixing the remuneration of an examiner, and in *ESG Reinsurance Ireland Ltd.* [2010] IEHC

365 in relation to the remuneration of an administrator, and applied the same principles to the fixing of the remuneration of an official liquidator. At para. 14 she said:-

*"Since the delivery of the judgment in Re: Sharmane Ltd, it has been clear that the Court, in determining the remuneration of persons appointed as examiners, administrators or official liquidators, will not determine the reasonable remuneration by reference only to the total charge-out costs computed from the hours spent and relevant hourly rates, but will also have regard to:*

- (i) the nature of the work carried out;*
- (ii) the complexity of the work;*
- (iii) the importance or value of the work 'to the client'.*

*In Re: Sharmane Ltd., the client was the company as an examiner was appointed to it on the basis that it was a company with a reasonable prospect of survival as a going concern. In a liquidation, the client is not the company. Insofar as the primary obligation of a liquidator in most liquidations is the realisation of the assets of the company and their distribution to those entitled on a winding up in accordance with the relevant priorities, it appears to me that in the sense used, the 'client' in the liquidation are those persons entitled on the distribution of the assets of the company in accordance with statutory priorities."*

40. The Court of Appeal in Mouldpro reviewed the application by the High Court of the principles which had been set out in the judgment of Finlay Geoghegan J. but endorsed the statement of the law in that judgment.
41. In the written submissions filed on behalf of the examiner in this case in support of his argument that the level of the fees claimed is reasonable, it was submitted that the tasks carried out by the examiner and his solicitors were reasonably necessary. In reply, Randelswood submitted that many of the tasks were not reasonably necessary having regard to the powers given to an examiner by section 524. In response, Mr. Lavelle argues that the notice party has not identified any specific work said to have been unnecessary – beyond, perhaps, engagement with the potential investors, to which I will come. In practice, if a notice party intends to challenge the relevance or necessity of work done it is to be expected that he will identify the work which is to be the subject of the challenge. In principle, however, it seems to me that the requirement to justify the claim entails justifying the nature and extent of the work done by reference to the nature of the appointment. In a case in which the work is not obviously connected with the appointment, the claimant will need to establish the link. And the requirement for vigilant scrutiny means that the court must keep a weather eye on the narrative to ensure that he has.

## **The legal issues**

42. The first of the two particular issues in this case is whether, or the extent to which the court is entitled to, or ought to, take into account in the assessment of the examiner's claim the fact that his partner is the official liquidator of the companies.
43. The second is whether, or the extent to which, the established obligation of an insolvency practitioner to justify his claim may be tempered by the cost of doing so.

**The relevance of unremunerated work**

44. The first issue arises in circumstances in which, when it became apparent that there was no prospect of the survival of the companies, Mr. McAteer's partner, Mr. Tennant, agreed to be, and was, appointed as official liquidator. Section 554(5) of the Act of 2014 subordinates any claim in respect of the costs, charges and expenses of a winding up to the remuneration, costs and expenses of the examiner, and the s. 529 liabilities. In all likelihood the realisations will be insufficient to meet the examiner's and the notice party's claims so that there will be nothing to pay the liquidator. The liquidator and his solicitors (who were also the examiner's solicitors) are said to have carried out work on the liquidation to the tune of €130,000 and €100,000 respectively and this, it is said, should be taken into account in assessing the reasonableness of the fees claimed for the examinership.
45. I recognise the professional responsibility of Grant Thornton and Arthur Cox in taking on the work of the liquidations which, in the circumstances, nobody else would have undertaken but I do not see in the requirement that the examiner should, as such, justify his claim, and that the court should subject that claim to vigilant scrutiny, any scope to have regard to the unpaid work in connection with the winding up.
46. In *Re: Marino* [2010] IEHC 394 Clarke J. (as he then was) emphasised the need to take an overall view of the reasonableness of the costs sought to be imposed on the creditors but as I understand the judgment, that overall view was to be taken on the work the subject of the claim, specifically the difficulty, importance and value of the work identified by Finlay Geoghegan J. in *Sharmane*.
47. In *Re: Missford Ltd. t/a Residence Members Club* [2010] 3 I.R. 756 one of the issues considered by the court was the appropriateness of the hourly rate proposed by an examiner. The rates proposed by the examiner for himself and his staff for their work in January, 2010 were those which had been struck on 1st January, 2007 in an economic climate which bore little resemblance to that which had pertained when the examiner had been appointed and when the work had been carried out. One of the arguments made in support of the rates claimed was that the examiner and his firm were involved in two significant areas of non-chargeable work: one in the area of providing professional training courses to the profession, and the other in assisting individuals in financial difficulty who did not have the means to pay fees. Kelly J. (as he then was) found that while the carrying out of such work was to be admired, the loss of income attributable to it could not be recovered by charging a fee which was greater than that justified in respect of the fee paying work.

48. In my view the same principle applies to the argument made in this case and it is not material that the *pro bono* work which the court is asked to take into account has been done for the same company as the paying work. As Clarke J. pointed out in *Re: Missford*, all professionals when deciding their general rates are likely to price in to the fees they charge the risk, or the fact, that they will not always be paid.
49. In this case, the rates proposed by Mr. McAteer in respect of his work in 2018 are the austerity rates fixed in *Re: Missford* but his claim is to be paid before any other. In practical terms, the effect of taking the unpaid insolvency work into account in measuring the examiner's remuneration would be that, at the expense of Randelswood, the examiner would be paid more than he otherwise would. This, it seems to me, would inevitably interfere with the statutory priority of certified liabilities over liquidation costs, and so must be wrong.

**The relevance of the cost of justifying the claim**

50. The context in which the second issue arises is that there was a tussle in the affidavits exchanged on this application as to the adequacy of the narrative supporting the claim, and whether the examiner ought to have put his time sheets before the court, or ought to be ordered to do so.
51. It will be necessary to examine the evidence in some detail but for present purposes it is sufficient to summarise the parties' positions. Ms. McGrath, in her first affidavit, protested that Mr. McAteer had not provided Randelswood (or the court) with any timesheets, narrative or vouching documents of any nature. In three supplemental affidavits Mr. McAteer repeatedly asserted that he had already provided sufficient evidence but went on – for the assistance of the court – to provide some more. There was a good deal of to-ing and fro-ing as to what detail Mr. McAteer's time recording or case management software might show, or might be expected to show. The upshot of the exchange is that Mr. McAteer's position is that he has provided as much detail as he can without undertaking a comprehensive, time consuming and expensive review of his files.
52. Mr. Lavelle places particular reliance on two decisions of Finlay Geoghegan J. In the first of these *Re: Home Payments (in liquidation)* [2013] 4 I.R. 141 Finlay Geoghegan J. said:-

*"The Court, in reviewing fees proposed to be charged by official liquidators, is faced with an extremely difficult task. It must always exercise a balance in ensuring it obtains sufficient information which permits it to form a view as to the appropriate allowable fees whilst not adding unnecessarily to the cost of the liquidation."*

53. In the second, *Re: Custom House Capital* [2018] IEHC 652 Finlay Geoghegan J. explained that:-

*"The question is whether the timesheets would assist the court in assessing the value of the work done for the liquidation or whether the time spent was necessary"*

*to achieve the work actually done or indeed whether the work was necessary for the particular aspect of the liquidation to which it related. It does not appear to me on the facts of this application that the production of the contemporaneous timesheets would assist in doing that. Accordingly, balancing the obligation of the court to be vigilant in scrutinising the remuneration claimed by the liquidator and the potential cost and likely benefit to those who might stand to gain if such additional information resulted in a greater reduction of fees, I have determined on this application in this liquidation that a direction for the production of the contemporaneous time sheets is not warranted.”*

54. The applicant submits that the decision of Keane J. in *Hughes v. Revenue Commissioners* [2016] IEHC 750 – a case in which the liquidator was directed to provide a breakdown of his fees in the form of time sheets – is exceptional.
55. Mr. McCarthy relies on the judgment of the Court of Appeal in *Mouldpro*. That case, as I have said, was an application to approve the remuneration of a liquidator in a long running liquidation in the course of which a number of payments on account had been sanctioned and in the course of which the approach of the court to claims for fees had been refocussed. Whelan J. said at para 184:-

*“The appellant contends that the burden of proof rests with the liquidator in regard to justifying the remuneration claimed. I am satisfied that this is a correct statement and it is for the official liquidator who seeks to be remunerated in the manner which he does and in particular in a manner and to an extent which exceeds substantially the estimates originally submitted and approved by the court to justify his claim. It appears to me based upon the prevailing standards of the time that a greater visibility and particulars of the actual basis for and the precise nature of his claim for remuneration especially in the second, third and fourth periods ought to have been provided. This is so to a lesser extent with regard to the second period. The appellant contends, correctly, that all relevant information was pre-eminently within the dominion and control of the liquidator. That is of course so. However the preponderance of the fees sought pertain to the first period of the liquidation. This was a time when a less thorough and conscientious approach obtained with regard to the standard of transparency and accountability to which an insolvency practitioner was being held by the court. These are overall factors which have to be taken into account.”*

56. I am unconvinced by the argument that there is any difference in principle between the approach of the High Court and that of the Court of Appeal. Whelan J., at para. 120, expressly approved the judgment of Finlay Geoghegan J. in *Re: Sharmane* (which had been applied by the High Court in *Mouldpro*) as a key decision. That said, it is clear from the reductions made by the Court of Appeal to the number of hours allowed by the High Court, that the Court of Appeal was more exacting in its scrutiny of the claim.
57. I think that it is important to note that *Home Payments and Custom House Capital* on which the applicant places particular reliance, as well, indeed, as *Hughes v. Revenue*

*Commissioners*, were all cases in which a *legitimus contradictor* sought directions in relation to the provision of further information and documents.

58. In *Custom House Capital* the fee report relied upon in support of the application had been prepared in the same form that had been approved by the court on earlier applications in the same liquidation and, with one important exception, specifically accorded with directions given in those earlier applications. The solicitor for the *legitimus contradictor* had queried the information initially provided by the liquidator and the liquidator had addressed those queries and provided some additional information. The application before the court was for directions (1) that the liquidator produce his contemporaneous timesheets, (2) that either the *legitimus contradictor* or an independent person would be permitted to inspect the liquidator's work files, and (3) that the liquidator provide a more detailed description of some of the work and the complexity and value of that work. The judgment shows that a significant factor in the decision of Finlay Geoghegan J. to refuse to make the directions sought was that the company assets had already been exhausted and the court apprehended that the expense of complying with any directions was likely to be the subject of a future application that the cost be borne by client funds. Earlier in the liquidation the court had directed that the liquidator "*keep a separate record of expenses incurred in connection with the reconciliation, recovery and distribution of misappropriated monies*". This had not been done, and for that reason Finlay Geoghegan J. declined to measure the fees payable for that work. Otherwise, however, the court was satisfied with the level of information provided.
59. It is clear from the judgment in *Custom House Capital* that the work done in the eight streams of the general liquidation work was supported by a reasonably detailed narrative, such as to allow the *legitimus contradictor* to challenge specific elements of it, and the court to rule on those challenges. As I understand the judgment, the object of the directions was to allow the notice party to interrogate the accuracy of the narrative account of the work which on its face was adequate to allow the court to understand and to value the work which had been done. The production of the timesheets would have vouched the number of hours claimed but in circumstances in which the court accepted that the number of hours had been worked, that was not necessary. The additional work and cost associated with the production of the timesheets were not referable to the production of the timesheets but the analysis of them.
60. *Re: Home Payments Ltd. (in liquidation)* was also a case in which the assets of the company had been exhausted and in which the liquidators found themselves dealing with the reconciliation, tracing and distribution of client funds. That was a very complicated liquidation in which the essential question was whether, or the extent to which, the cost associated with customer related work should be borne by customer funds. The dictum on which the applicant places particular reliance appears at para. 41 of the judgment. It is useful, I think, to set out that paragraph in full:-

*"The joint liquidators in support of this application to determine their remuneration, costs and expenses have put before the court relatively detailed information. Some*

*has been provided in response to requests from the [legitimus contradictor]. The Court, in reviewing fees proposed to be charged by official liquidators, is faced with an extremely difficult task. It must always exercise a balance in ensuring it obtains sufficient information which permits it to form a view as to the appropriate allowable fees whilst not adding unnecessarily to the cost of the liquidation. The information presently before the court appears sufficient."*

61. When seen in the context in which the *dictum* relied upon by the applicant was made, it seems to me that the cost which Finlay Geoghegan J. had in mind was the cost of interrogating a claim for remuneration, as opposed to the cost of formulating or justifying it. In each case, the court was very clear that the applicant had put before the court sufficient information to allow it to assess the claim. The additional cost to the liquidator of providing his timesheets or making his files available for inspection would have been minimal. The real cost would have been that which would be incurred by a representative creditor in sifting through the material and cross-referencing it with the narrative description of the work which had already been provided. In my view, different considerations apply to a case, such as this, where the legitimus contradictor is not representative of a class but will individually be entitled to all that is left after the remuneration, costs and expenses of the applicant has been paid. To the extent that the costs of the liquidation, or in this case examinership, might be increased by an overzealous insistence by such a creditor on the production of readily available material, those costs would be borne by the notice party.
62. In *Hughes v. Revenue Commissioners* the claim for remuneration was supported by an appendix setting out the hours of work carried out by reference to the grade of the staff member and the rate per hour claimed for each grade. The total number of hours was broken down against seven general subject headings, against each of which there was a brief narrative. The Revenue, as *legitimus contradictor*, asked for particulars of the work done, including details of each task completed, caseworker, grade and rate of pay of each case worker, the time taken to complete the task etc. In support of its request for more detailed information, the Revenue pointed to the information provided by the same accountancy firm in another liquidation and, in the case before the court, to the daily time sheets which had been provided by the applicant's solicitors showing the number of hours worked and a description of the work done by the solicitors.
63. In balancing the requirement that the notice party and the court should have sufficient information against the likely effort and expense of complying with the notice party's request, Keane J. concluded that he had no evidence that compliance with the request would entail a disproportionate "... or, indeed, any further..." expense in the liquidation to the detriment of the general body of creditors and he made an order directing the liquidator to furnish a breakdown of his fees.
64. It seems to me that while *Hughes v. Revenue Commissioners* is distinguishable from *Custom House Capital and Home Payments Ltd.*, it is not an exceptional case. If anything, *Hughes* was a garden variety liquidation whereas *Custom House Capital* and

*Home Payments Ltd.* were exceptional. The points of distinction are that in *Custom House Capital* and *Home Payments Ltd.* the applicant had provided a sufficiently detailed breakdown of the work the subject of the claim, and in *Hughes* there was no evidence to support an apprehension that the costs of the liquidation would be increased by compliance with the creditor's request.

65. The golden thread running through all the authorities since *Red Sail* is the fiduciary obligation of the insolvency professional to justify his claim for remuneration, costs and expenses. In *Mouldpro* the High Court and the Court of Appeal were willing to make allowances for the change of approach which came about during the course of that liquidation but by the time of Mr. McAteer's appointment as examiner to the Sammon companies the "new" requirements were long established and well known. The keeping of such contemporaneous records or summaries as will later allow the preparation of a sufficiently detailed and comprehensive narrative is not particularly onerous. If the cost associated with such record keeping is not sufficiently built in to the hourly rates, there is always an allowance made for general administration. I accept that if the necessary summaries are not kept on an ongoing basis, it will be an onerous and possibly expensive exercise to go back through the work files to abstract the necessary information but if that be so, the additional cost of complying with the fiduciary duty to account is not to be visited on "the client", whether it be the company or the creditors.
66. I should say, for the avoidance of doubt, that I have not lost sight of the need to ensure that the amount of detail which is to be expected is to be proportionate to the case. In the case, for example, of a very short lived examinership, the claim might be very brief. Or, perhaps, a very short account of the work done might be sufficient in a long running examinership where the realisations are far short of meeting what on any analysis would be the value of the work done. This is not such a case. The combined claim for remuneration and costs comes to €294,872.97, which, if allowed, will be paid in its entirety. The level of detail must be such as to allow the court to be satisfied that the claim has been justified, and to demonstrate to Randelswood why it is necessary that the examiner should have recourse to money that would otherwise have been available to satisfy its claims.

### **The evidence**

67. The application was grounded on a short affidavit of Mr. McAteer which gave the commencement and termination dates of the examinerships and outlined the circumstances in which he had come to be appointed. As to the work undertaken, Mr. McAteer exhibited his interim report of 13th April, 2018 and his report of 3rd May, 2018 and suggested that the work undertaken by him as examiner was "detailed" in those reports. As was immediately pointed out by Randelswood, it could not have been. The later report was dated 3rd May, 2018 but the examinership continued in the case of SCIL until 5th June, 2018 and in the case of MSWL until 27th June, 2018.
68. In his grounding affidavit Mr. McAteer deposed that he had reviewed the activities and financial position of the companies; "engaged" with the companies and their directors, management, shareholders and creditors; "dealt with" the provision of certification of

funding by Randelswood; and "*dealt with*" trade creditors, preferential creditors, retention of title queries and pre-conditional liabilities, in addition to SCIL's bondsmen, cash flow issues, prospective investors and proposed investment process. He said that he had engaged in a significant amount of work in seeking agreement in relation to the continuation of the SB 5 contract, but ultimately was unable to propose a scheme of arrangement. As to MSWL, Mr. McAteer deposed that a scheme of arrangement was proposed to, and accepted, by the company's creditors but did not ultimately come before the court due to the failure of certain conditions to which the scheme was subject, specifically the fact that a third party who would have engaged MSWL as a subcontractor if it had secured the main contract, did not secure the main contract.

69. In a table in his grounding affidavit, Mr. McAteer set out a breakdown of 564 hours worked on SCIL showing the number of hours worked by partner, director, associate director/manager, assistant manager/senior, and juniors, at rates per hour ranging from €357 in the case of a partner to €84 in the case of a junior, to give a total of €125,116 plus VAT. In a similar table for MSWL a total of 134 hours was similarly broken down, to explain a claim for €30,052 plus VAT.
70. The independent expert's report in this case ran to about 33 pages, with 64 pages of appendices. The interim examiner's report ran to seventeen pages of which three were devoted to an introduction, four to an initial assessment of the company's prospects by reference to the conditions set out in the independent examiner's report, one (comprising two short paragraphs) to his opinion, and three to summarising the action taken since his appointment. The remaining six pages comprised title and chapter pages and an index.
71. The examiner's report ran to seventeen pages. The introduction was largely the same as the interim examiner's report, save that it noted that two of SLIC's contracts had been terminated by the employers, and that rather than tendering directly for the SB 5 contract (as had initially been envisaged) SCIL had agreed with one of the tendering companies that if the contract was awarded to the tenderer, the work would be sub-contracted to SCIL. The assessment of the company's prospects in the examiner's report updated the initial assessment but was very similar. Similarly, there was not a great deal of difference in the account of actions taken since the appointment of the examiner.
72. As to the examiner's claim for remuneration, Randelswood, in the replying affidavit of Ms. McGrath, suggested that the evidence was insufficient to allow an assessment to be made of the reasonableness of the claim; protested that no timesheets, narrative or vouching documents had been provided; and observed that no allowance appeared to have been made for the work referable to SCGL. As had been noted in the examiner's report, Randelswood had not provided any funding beyond the initial €525,000 to SCIL and €105,000 to MSWL. By reference to an e-mail which she had sent to the examiner on 8th May, 2018, Ms. McGrath asserted that it must have been apparent to him by that date, at the latest, that the companies had no reasonable prospect of survival.
73. Mr. McAteer in the first of three replying affidavits maintained that he had given sufficient information to justify his claim for remuneration and expenses but, for completeness,

offered further detail. At para. 19 of that affidavit, Mr. McAteer set out in 17 subparagraphs what was suggested was a more detailed account of the work done by him and his team, starting with a review of the independent expert's report and ending with attendances at court hearings. It seems to me that this list or narrative did not really add anything to the account of action since appointment in the two reports, bar the attendances at court hearings: which in any event was obvious. The list is a list of things done without any indication as to when and by whom they were done or how long they took or what the value of them was to the companies or the examinership.

74. In a third affidavit sworn on 24th May, 2019 Mr. McAteer exhibited four schedules showing for each of SCIL and MSWL:-

- (a) An allocation of the hours worked during the examinership across different work streams and tasks;
- (b) What was said to be a detailed narrative description of the work done in respect of those work streams;
- (c) A breakdown of the hours worked during the examinership by the seniority of the fee earner; and
- (d) A breakdown of the hourly rates charged for each level of seniority.

75. Mr. McAteer's position is that it is not possible for him to provide a more granular breakdown of the matters covered by each individual's time without very considerable effort and cost which he believes would not be necessary or proportionate.

### **Prolongation**

76. As to whether the examinerships ought to have been brought to an end sooner, Mr. McAteer made three points. Firstly, he said, after 12th April, 2018 the companies had traded from cash generated by the businesses and no external funds had been required after that date. Secondly, he said that Randelswood had an accountant on site during the course of the examinership who had reviewed and approved all payments. Thirdly, he said that although the McGrath Group may have lost interest in investing in the companies on 18th May, 2018 there was interest from other investors in SCIL up to the end of May 2018 and in MSWL until near the end of June 2018. Mr. McAteer explained in some detail his ongoing engagement with DIFCO and the National Development Finance Agency, the erosion of confidence in SCIL as the award of the new SB 5 contract was delayed, and the increasing pressure on cash flow caused by the termination of SCIL's other contracts.

77. Mr. Lavelle submits, without demur on the part of Mr. McCarthy, that the applicable principles of law are to be found in a judgment of Kelly J. in *Re: Eircom Ltd.* (Unreported, High Court, Kelly J., 17th May, 2012). That was an *ex tempore* judgment on a motion for directions in the course of an examinership which is not available on the IEHC directory but is extensively quoted by Cregan J. in his judgment in *Re: Ladbroke's (Ireland) Ltd.* [2015] 1 I.R. 243. *Eircom and Ladbroke's* were both cases in which the

issue was whether a potential investor should be provided with information deemed by the examiner to be commercially sensitive.

78. Kelly J. was persuaded by a passage at pp. 361 to 362 of Lightman & Moss *The Law of Administrators and Receivers of Companies* (5th Edition, Sweet & Maxwell, 2011) that the court should only intervene in respect of the behaviour of an examiner in very limited circumstances. He said:-

*"The court has neither the experience, nor indeed the backup to make commercial decisions. The court is here in a supervisory role and to decide legal issues. And in the event of the examiner either misbehaving or doing something which is wrong in law there may well be an ability for the court to intervene in such circumstances. But in areas of commercial judgment it seems to me that the court's scope for intervention is very limited."*

79. The passage from Lightman & Moss which was approved in *Re: Eircom Ltd.* and *Re: Ladbrokes (Ireland) Ltd.* was:-

*"When called upon to review the exercise by insolvency office holders of their powers, the court has said that in the absence of fraud it 'will only interfere ... if [they have] done something so utterly unreasonable and absurd that no reasonable man would have done it'. [Re Edenote Ltd [1996] 2 B.C.L.C. 389] The question is not whether the court would have acted in the same way or would have reached the same conclusion as the insolvency practitioner. Nor will the resulting transaction be set aside where it is established merely that a reasonable practitioner may have acted differently or reached a different conclusion as long as the course of action pursued by the administrator was one that a reasonable practitioner could reasonably have contemplated. The legal basis for interference is the office-holder's perversity or irrationality. To this extent, it can be said that, in exercising his powers for their proper purposes, the administrator is under a duty to act rationally. ..."*

80. The argument made on behalf of Randelswood as to the prolongation of the examinership is simple. From the outset, it is said, one of the conditions identified for the survival of the companies was the achievement of the cash flows. Those cash flows had projected loans from Randelswood of a total of €2.15 million in the first 51 days of the 100 days. The loans from Randelswood were not drawn down; Randelswood declared that it was no longer prepared to invest; and in an e-mail of 18th May, 2018 Randelswood pointed out that most of the essential conditions for survival had been breached and suggested that the situation was then hopeless.
81. Randelswood's argument was that Mr. McAteer ought to have recognised the hopelessness of the position by 18th May, 2018 at the very latest, and possibly on 25th April, 2018 when it was pointed out that the cash flows were behind.

82. It will be recalled that the examiner's report dated 3rd May, 2018 was presented to the court on 8th May, 2018 and the period of protection was then extended. It is clear from the examiner's report of 3rd May, 2018 that by then two contracts had been lost and Randelswood was reviewing its position in relation to additional funding. The termination of the two contracts was not then expected to affect the companies prospect of survival but the significance of the withdrawal of funding by Randelswood was noted. Mr. McCarthy, on the one hand, confirmed that there was no suggestion that the court had been misled on 8th May, 2018 but, on the other, contended that the court should now review the application then made by the examiner to continue the period of protection. To do that, of course, the court would first have to review, and set aside, the order extending the period of protection or, perhaps, say that, on second thoughts, the order made on the information then correctly and properly put before the court ought not to have been made. This, it seems to me, is fundamentally wrong as a matter of basic principles.
83. I have characterised the argument in relation to the alleged prolongation of the examinership as simple. In truth, it is simplistic. The argument is based upon one column of the cashflows and a couple of e-mails which convey Randelswood's assessment – on what is acknowledged to have been the limited information available to it – of the companies' prospects of survival. Mr. McAteer's evidence that the companies' trading receipts were such that it was not necessary to borrow more money than was borrowed is uncontested. So is his evidence that Randelswood had an accountant on site who reviewed and "approved" all payments. The argument is anchored on an e-mail sent at 13:47 on 18th May, 2018 when Ms. McGrath suggested that "*surely this is now hopeless*", but earlier on the same day, at 10:49, Ms. McGrath had asked whether Mr. McAteer had heard anything further in relation to the SB 5 and asked whether he should continue to make payments "*on the basis that this is not proceeding*". Mr. McAteer had promptly replied, at 10:55, that he was continuing to liaise with the various stakeholders in relation to the SB 5.
84. I am satisfied that the legal test to be applied is whether the decision to continue to engage with DIFCO was rational. In my view the case made on behalf of Randelswood comes nowhere near meeting that test. There is no independent evidence offered that Mr. McAteer was even wrong not to have gone back to the High Court sooner than he did, still less that it was irrational not to have done so. To the extent that there is evidence of a difference of opinion during the two weeks or so between the date of Ms. McGrath's e-mail of 18th May, 2018 and 31st May, 2018 when BAM withdrew its interest in SCIL, and 26th June, 2018 when the SB 5 contract was awarded to someone other than BAM, the demonstrable objective fact is that Mr. McAteer was very much better informed than Ms. McGrath. The prospects of the companies' survival was a matter of commercial judgment, which was a matter for the examiner.
85. The 31st May, 2018 was the Thursday before the June bank holiday weekend, and Mr. McAteer was back in court on the following Tuesday. The 26th June, 2018 was a Monday, and Mr. McAteer was back in court on the following day.

86. I am satisfied that the criticism of Mr. McAteer as to the duration of the examinership is without foundation.

**Apportionment**

87. As to whether part of the claim should be apportioned to SCGL, there was a regrettable inconsistency in the answer. The grounding affidavit showed a table of hours worked and rates per hour for Mr. McAteer and his staff, and exhibited fee notes in respect of the costs claimed by Arthur Cox, for each of SCIL and MSWL. Ms. McGrath, in her replying affidavit, suggested that some of the work must have related to SCGL and that some of the remuneration and costs should be apportioned to SCGL. In response to that criticism, Mr. McAteer initially confirmed that work had been done and fees incurred in connection with SCGL which would have been recoverable if SCGL had been restructured but were irrecoverable because it had not been: but when pressed, Mr. McAteer acknowledged that no separate file had been kept for SCGL and took the position that no work at all had been done which was specifically referable to SCGL, and that because SCGL did not trade, had no employees, and had no assets other than its shareholding in SCIL and MSWL, any additional cost, if any, of that company going into examinership was negligible.
88. I detect in the further affidavits filed on behalf of Mr. McAteer a certain amount of impatience and more than a hint of indignation. The whole point of identifying a *legitimus contradictor* is to ensure that the applicant is held to account for his claim. To be sure any challenge to the claim must be legitimate but even if – perhaps especially when – it is thought that the notice party has gone too far, the response must be careful and measured. The proposition that there should have been an apportionment to SCGL was *prima facie* a fair point, based on good authority, and it should have been addressed carefully. Mr. McAteer was entitled to respond robustly to the suggestion that he had allowed the examinerships to go on too long but ought not to have allowed himself to become distracted from the requirement to deal dispassionately *seriatim* with each of the points made by Randelswood.
89. Having examined the evidence objectively and dispassionately I have come to the conclusion that the involvement of SCGL did not add to the cost or expense of the examinerships. It is common case that SCGL was not a trading company, had no employees, and had no assets other than its shareholding in SCIL and MSWL. It is clear that SCGL had no value independently of SCIL and MSWL and no prospect of survival independently of either or both of the trading companies. It was tagged onto the examinership application as having a potential role in a restructuring of the businesses but could not have been, and I accept was not, the subject of any additional work. It was mentioned only *en passant* in the interim examiner's report and the examiner's report, and its fate was sealed when the point came at which SCIL had no prospect of survival.
90. In my view this case is clearly distinguishable from *Re: Sharmane* where the court rejected a claim by an examiner to make several trading companies in a group jointly and severally liable for his remuneration in respect of each of them. Mr. McCarthy is quite

correct when he points to the fact that the examiner's and the solicitors' narratives contain references to time spent on all three companies, but it does not follow that any separate or additional time was spent on SCGL such as would have warranted any claim against the assets of SCGL, if it had had any. I do not accept the submission that the only logical conclusion is that the charges common to all three companies should be split between all three. On the uncontested evidence no application could ever have been contemplated for SCGL on its own, and the work associated with reviewing the independent expert's report, court reports, affidavits, court hearings and so forth was not measurably increased by the fact that SCGL had been joined in the application.

*Adequacy of information*

91. The fee breakdown for SCIL shows, on one page, six work streams with a total number of hours worked, and on another page, a breakdown of the number of hours by reference to the seniority of the staff engaged on the task.
92. In the two months of the examinership of SCIL, a total of 64.94 hours were spent on the review of the independent expert's report and monitoring cash flows. Of those hours, just short of fourteen are claimed at partner rates and just over 40 at manager rate. This work was obviously necessary, and the division of responsibility and the time spent appears to me to be appropriate.
93. In the same period, 223.83 hours were spent on "creditors", nine at partner level, 61 at manager level, 107 at senior level and nearly 44 by an intern, charged out at €84 per hour.
94. The narrative seeks to justify the claim by reference to attendance at an unspecified number of meetings, at unspecified times, with unidentified creditors and key suppliers, at unidentified key stages throughout the examinership. An unspecified number of creditor enquiries were received and followed up. A separate entry in respect of the review and preparation of correspondence to creditors and their representatives appears to me to amount to the same thing as, largely, does the receipt and assessment of creditor claims and maintenance of creditor register. A linked but separate element of this stream is the review of an unspecified number of retention of title claims, liaison with lawyers regarding the validity of an unspecified number of those claims, and the facilitation of the return of the goods.
95. The examiner's claim does not, as required by O. 74A, r. 22 and s. 554 of the Act of 2014 disclose what use was made of the companies' staff and facilities. The height of what is said is that the examiner made use of company staff and facilities to the fullest extent possible and relied on the unspecified input of the group's chief financial officer and business controller, with whom there was almost daily contact. This conveys to me that the examiner's team and the companies' staff were talking to each other – a lot – but not what either of them were doing. It seems to me that the return – or more likely the collection – of any goods the subject of a valid retention of title claim could have been achieved through the companies.

96. I do not understand, and in my view the fee breakdown does not explain, what it was, even generally, that occupied Mr. McAteer's staff in dealing with creditors for 224 hours. On the evidence put before the court, I cannot see the value to SCIL of most of the €37,307.99 claimed in respect of this stream.
97. Over the course of the examinership 121.27 hours were spent on "*stakeholder communication*", of which 52 were spent by partners and 61 by a manager. Some of this time was spent in meetings and correspondence in relation to the SB 5 contract and some in meetings and correspondence in relation to the company's other contracts, one of which had been terminated before Mr. McAteer's appointment and two of which were terminated in April, 2018. The examiner's report notes that these two contracts were terminated by the client issuing a termination notice and that the employer had taken possession of the sites, in one case immediately, and in the other within a few days. The narrative shows that the examiner and his staff facilitated/attended discussions with the employers for the renegotiation or repudiation of those contracts and met and corresponded and otherwise communicated with the employers, but not what, if any, contribution was made to those discussions which, inferentially, were led by SCIL.
98. One of Randelswood's objections to the claim for remuneration is that Mr. McAteer exceeded his powers and role in having anything to do with the feasibility of the SB 5 contract or SCIL's continued role in the completion of the works the subject of those contracts. I do not accept that that objection is well founded in principle. I accept the argument made on behalf of the examiner that his opinion as to the viability of the companies was dependent on his assessment of the prospect of SCIL securing the completion of the work – whether as main contractor or subcontractor – so that he needed to keep abreast of the negotiations. However, without a breakdown of the 121.27 hours between the SB 5 contract and the other contracts I find it impossible to assess the extent of the examiner's involvement in the SB 5 negotiations or the value to the company of his participation.
99. A total of 23.69 hours is claimed for court reports, affidavits and court hearings: 3.38 for Mr. McAteer, two for a director and eighteen for a manager. I am satisfied that this work was necessary and that the hours worked were reasonable and that the division of responsibility within Mr. McAteer's firm was appropriate.
100. A total of 62.99 hours is claimed for "*investment process*", 35 for partners' time, a little less than sixteen for a manager and twelve for directors. This time is shown by the narrative as having been spent on the review of an investment proposal and cash flow projections for the eighteen months following the examinership and on attending to unspecified queries from unidentified interested parties. Plainly the investment process is at the very heart of examinership. It might have been preferable for the court to have had a better insight into the nature of the work and, perhaps, a broad indication of the nature and extent of the proposed investment but I believe nevertheless that it is appropriate to allow this element of the claim. The value of the work done for the companies is not dependent on the investment being secured. I believe that there is

room in vigilant scrutiny for wide commercial discretion and judgment on the part of an examiner as to the wisdom of pursuing prospective investment.

101. A total of 67.35 hours is claimed for "*general administrative matters*", the great majority, as is to be expected, at the level of senior and below. There are four elements to this stream. The first is liaison with the company's insurance brokers and sureties in relation to bonding facilities and liaison with insurers regarding claims. I do not understand what role the examiner's office might have had in dealing with routine insurance claims or what correspondence might have been necessary with the bondsmen. The second element is "*continued discussion with essential service providers to ensure limited disruption to trade throughout the examinership*". The "*essential service providers*" have not been identified or distinguished from the "*key suppliers*" who are the subject of the claim for remuneration under the "*creditors*" work stream. The justification for this work, or the value of it to the companies, is not apparent from the narrative.
102. A further element of the general administrative claim identifies correspondence with Revenue regarding liabilities during the protection period. It was a condition of the examinership that liabilities due and owing to the Revenue Commissioners be met as they fell due and that Revenue returns be filed by the company. I do not understand what correspondence might have been necessary regarding liabilities during the protection period.
103. In principle I would be prepared to make some allowance for general administration, but I do not believe that the claim for 67.35 hours, as it stands, can withstand vigilant scrutiny.
104. In the affidavits exchanged on this application there was some debate as to the usefulness or likely usefulness of the timesheets kept by the applicant. That debate, it seems to me, tended to distract from the real issue in the case which is whether the applicant has justified his claim. The issue for the moment is expense. The time records in this case are computerised and presumably can be printed off at the touch of a button. That will cost little or nothing but if the time records do not disclose the work on which the time was spent, their production will achieve little or nothing.
105. The applicant's true apprehension is that he will be put to irrecoverable expense if he is obliged (as he puts it in his third replying affidavit) to provide a more granular breakdown of the matters covered by each individual's time. The time sheets which are kept are said to typically provide "*an indicative description of the specific tasks which have been carried out*" and are not believed by Mr. McAteer to be of assistance to the court in understanding whether the fees proposed to be charged were reasonable. To vouch his evidence that the time sheets would be of no additional assistance to Randelswood or the court, Mr. McAteer exhibited a sample print out from his firm's case management software for the period 30th April, 2018 to 14th May, 2018. This shows, on a single page, a list of dates, names, amounts, and entirely generic descriptions of tasks. The list records that on five successive days Mr. McAteer personally spent precisely €2,000 worth of time on the file. In reply to a question by the court, this was said to be a multiple of the hourly rate claimed, which is €357.00. If it was, it would show that he spent 5 hours, 36 minutes

and 13 seconds: which doesn't strike me as particularly likely. The other figures shown against the other names are similarly not divisible by the rates claimed to give any sensible record of the time spent. They could, however, provide a perfectly accurate indication of time spent at rates per hour higher than the rates claimed. If this is all that there is, I accept Mr. McAteer's evidence that the timesheets would be of no help.

106. What is at issue in this case is whether the applicant is obliged to provide a granular breakdown of the work. In the course of argument, Mr. Lavelle indicated that such a break down could be provided if the claim for remuneration could be re-opened and increased to take account of the cost of this additional work.
107. The question as to who should bear the cost of the preparation of an insolvency practitioner's claim for remuneration is important.
108. The starting point is that the applicant bears the burden of justifying his claim for remuneration. He is required by O. 74A, r. 22 to set forth a full account of the work and the basis for the proposed remuneration which he is seeking to be paid. He is required, as a fiduciary, to justify his claim having regard to the nature, importance and complexity of the work, and to do so transparently. The decisions of both the High Court and the Court of Appeal in *Mouldpro* show that following *Red Sail* there was a significant tightening of the scrutiny applied to claims. Those decisions also show that the more exacting approach was not applied to work done before the judgment of Laffoy J. but, as Whelan J. said at para. 192, "... from late 2006 and following the judgment of the High Court in *Red Sail Frozen Foods*, it ought to have been apparent that the obligations on insolvency practitioners with regard to record keeping were quite significant."
109. By the time Mr. McAteer was appointed as examiner of the Sammon companies the judgment in *Red Sail Frozen Foods* had been repeatedly endorsed and applied by the High Court and the obligations laid down by that decision embedded in practice. As is evident from all the later cases, remuneration claims were thereafter required to be justified by the standards then prescribed and practitioners were well aware of the records required to be kept to enable them to do so. As I understand the *dicta* now relied upon by the applicant, the potential additional expense that is to be taken into account is the potential additional expense of requiring the production of further evidence or vouching called for by a creditor or *legitimus contradictor* in a case in which the court otherwise has a sufficient narrative to allow it to determine the nature, necessity and value of the work done and reasonableness of the claim.
110. It seems to me that every insolvency practitioner must know that depending on the nature and outcome of the appointment, he may or will be required to justify his claim for remuneration. From the time the file is opened, it will be a reasonably straightforward exercise to keep on an ongoing basis a narrative summary of the nature of the work done and the time spent on it such as will allow the remuneration claim to be justified. That record will include sufficient granular detail to allow the preparation of a full account of the work sufficient to demonstrate the nature, complexity and value of the work and to withstand the vigilant scrutiny to which it will be subjected by the court.

### **The claim for costs**

111. In the grounding affidavit of Mr. McAteer the work of the solicitors and counsel was described in very general terms as all advices, meetings, court attendance, calls and correspondence relating to the examinership of the companies, including assisting with the examiner's reports and finalising an application in respect of pre-petition creditors omitted from the independent expert's report, section 529 certification, the investment process, retention of title queries, drafting the MSWL scheme and related court application, advising on the companies' contracts, and making two applications to withdraw court protection and appoint a liquidator to the companies, and was said to be shown on invoices from Arthur Cox Solicitors. Mr. McAteer exhibited invoices from Arthur Cox and deposed that the fees claimed by them were reasonable.
112. The general description of the legal work in Mr. McAteer's affidavit is, in fact, an elaboration of the description on the invoices which was, in respect of each of SCIL and MSWL, professional fees as relating to all advices, documentation, court appearances, calls, meetings, negotiations and correspondence in connection with the examinership. The solicitors' professional fees in respect of SCIL was €62,663.49 and in respect of MSWL was €10,000, in each case before VAT. The SCIL invoice included €12,300 inclusive of VAT for counsel fees, which is obviously €10,000 plus VAT.
113. In the replying affidavit of Ms. McGrath, the point was taken that no timesheets, narrative or vouching documents had been provided in respect of the legal fees and that no legal fees had been claimed in respect of SCGL. Objection was made, also, that no fee note from counsel had been provided, included or exhibited.
114. In his replying affidavit Mr. McAteer exhibited a letter from Arthur Cox dated 8th March, 2019 which was said to set out a more detailed account of their work. That letter described the work in two paragraphs which listed the tasks in much the same way as Mr. McAteer's affidavit had, and added to the list of tasks some unspecified work in connection with unidentified direct debit and finance leasing issues, employment law issues, liaison with the Revenue and other notice parties. It was noted that much of the work associated with MSWL was rolled into the SCIL work but pointed out that MSWL had survived longer and that additional work had been done on the draft scheme of arrangement, an escrow agreement and investment agreement in respect of MSWL, preparing for and attending meetings of the members and creditors of MSWL, seeking a date for approval of the draft scheme, and ultimately applying for the withdrawal of court protection from MSWL.
115. In his third affidavit Mr. McAteer exhibited a table in more or less the same form as that which had been prepared in respect of his own claim, showing in respect of the solicitors' claim an allocation of the hours worked during the examinership across different work streams and tasks; a narrative description of the work done in respect of those work streams; a breakdown of the hours worked during the examinership by the seniority of the fee earner; and the hourly rates charged for each level of seniority. The rates per hour claimed range from €375 in the case of a partner to €125 for a trainee. These are higher than the rates sanctioned by Kelly J. in in *Re: Missford Ltd.* but lower than the

boomtime rates claimed in that case, and in line with those sanctioned by Clarke J. in *Re: Marino Ltd.* In the light of the very considerably improved economic climate which prevailed in 2018, the rates per hour on which the claim of Arthur Cox was based were not seriously challenged.

116. Some of the allocation of hours is obviously reasonable and justified: for example the first, which is two partner hours and three associate hours for reading in. The justification for other hours is not so obvious: for example the last, which is three and a half partner hours, three associate hours and two trainee hours for the work of reporting to the High Court at the end of June, 2018 that the BAM bid had been unsuccessful and that MSWL was doomed. There is no doubt that this last task was necessary and that the work was undertaken with all due dispatch, but it is not obvious why significant enough partner input was required.
117. The breakdown of the time spent on SCIL shows that a total of 17 hours was spent reviewing the termination of an equipment lease and advising in relation to Revenue liabilities, lease rental payments, direct debits and "auto clad" (*recte AutoCAD?*) payments but – like the examiner's claim – there is no explanation of what this work was or why it was thought necessary that the examiner's solicitors would be involved with it. The justification for the claim of €7,375 referable to this work is not apparent.
118. The breakdown shows that 23 hours, 6 at partner level and 17 at associate, were spent on advising on a variety of unspecified issues associated with the two building contracts that, in the event, were unilaterally terminated by the employers. Again, it is not apparent what the solicitors were doing or why or what it was thought might have been achieved.
119. The biggest allocation of hours is a total of 32, eleven partner hours, 18 associate hours and three trainee hours, allocated to "stakeholder interaction/investment process, SB 5 contract and general advices". As previously indicated, I believe that it is appropriate to allow the examiner wide latitude in dealing with potential investors but in the case of SCIL the necessity for the solicitors to be involved is not apparent. The preparation of the draft scheme for MSWL and the advices in relation to that are the subject of a separate allocation.
120. The 27 hours spent on the winding up application in respect of SCIL, especially the seven partner hours, appears to me to be excessive. By then SCIL had run out of time and money, there was no sign of the SB 5 contract being awarded, and SCIL was unable to comply with the condition imposed by the High Court that it would pay its Revenue liabilities as they fell due. The winding up application was grounded on a very clear and well put together affidavit, but 17 associate hours looks like a lot. The direct debit and finance leasing queries have crept back into the narrative of this work.
121. Finally, I note that of the total of 37 hours and €10,000 allocated to MSWL, 11.5 hours and €2,162.50 have been allocated to "Preparation for and attending Court for a confirmation hearing. Drafting affidavit, review of examiner's report. Briefing counsel.

*Attending hearing etc.”* Perhaps in the grand scheme of things the number of hours and the amount of money are not enormous: but there never was a confirmation hearing. A proposed scheme of arrangement was drafted and approved for MSWL and on 13th June, 2018 a hearing date was fixed but because all hope for MSWL ran out in the meantime, there never was a hearing. Part, at least, of the problem appears to me to stem from the fact that in the retrospective narratives in support of both the examiner’s and the solicitors’ claims there is not a single date shown on which any of the work was done.

### **Summary and conclusions**

122. Section 554 of the Companies Act, 2014 clearly distinguishes between the expenses incurred by an examiner, on the one hand, and liabilities incurred by the company which, if certified, are to be treated as expenses properly incurred by the examiner, on the other. The remuneration, costs and expenses of the applicant are to be paid in priority to the claim of the notice party in respect of liabilities incurred by the companies during the period of protection and certified by the examiner pursuant to section 529.
123. The notice party’s complaint that the examinerships were unnecessarily prolonged has not been made out.
124. In the circumstances of the case, the fact that the non-trading parent company was brought under the protection of the court at the same time as the trading subsidiaries did not add to the work and expense of the examinerships and it is not necessary or appropriate that any part of the work should be apportioned to the parent company.
125. The onus is squarely on the applicant as a fiduciary to justify his claim by reference to the extent of the work done and the nature, complexity and value of that work to the companies, from whose assets his remuneration, costs and expenses are to be paid. The solicitors may not be fiduciaries, but they are nevertheless also required to justify their claim for fees. For the reasons given, I do not believe that the information which has been put before the court is sufficient. The summaries which have been prepared show generally the nature of the work the subject of the claims, but it is not possible to discern the necessity, or value of much of that work. Specifically, the summaries do not demonstrate that a good deal of the work was related to the examinership.
126. As the exchange of affidavits on this application developed, and in argument, there was a dispute between the parties as to whether the evidence did or did not justify the claims, but the battleground was not so much whether, or the extent to which, the claims should be allowed or disallowed but rather whether, and if so what, further evidence might be available, and at what cost and to whom, as might support the claims. For the reasons given, I am not satisfied that the evidence supports the claims in full, but I will allow the applicant an opportunity to put before the court such further evidence, if any, as he wishes.
127. If it is thought that the evidence which is before the court is sufficient to justify the claims in full elsewhere and the applicant is satisfied to nail his colours to the mast, I will rule on the claims by reference to the evidence which I have.

128. I will invite the solicitors for the applicant to indicate to my registrar and to the solicitors for Randelswood, by e-mail, within two weeks, whether they wish to file further evidence and, if so, the time within which that is proposed to be done. If and when that is some, I will invite the solicitors for Randelswood to indicate a time within which they propose to respond. Both parties will have liberty to apply in the same manner.