THE HIGH COURT
CHANCERY

[2021] IEHC 204
[2019 No. 122 COS]

IN THE MATTER OF UNITED POWER LIMITED (IN LIQUIDATION)
AND IN THE MATTER OF SECTION 645 OF THE COMPANIES ACT 2014

BETWEEN

ANTHONY FITZPATRICK

APPLICANT

AND

AIDEN MURPHY (AS OFFICIAL LIQUIDATOR)

RESPONDENT

AND

THE REVENUE COMMISSIONERS

NOTICE PARTY

JUDGMENT of Mr Justice David Keane delivered on the 24th March 2021

Introduction

1. Anthony Fitzpatrick was appointed as the provisional liquidator of United Power Limited ('the company') on the 8 April 2019. However, when the company's winding-up petition came before the court on 29 April 2019, its application to have Mr Fitzpatrick appointed as its official liquidator failed and another insolvency practitioner, Aiden Murphy, was appointed instead. Mr Murphy was the nominee of the Revenue Commissioners ('Revenue') who were a notice party to the petition and who opposed Mr Fitzpatrick's appointment as official liquidator. Mr Fitzpatrick's appointment was also opposed by a company named Bibby Financial Services (Ireland) Limited ('Bibby'), which provided invoice finance facilities to the company and claimed €417,000 as a secured creditor under a debenture.

2. Mr Fitzpatrick now applies for an order pursuant to s. 645 of the Companies Act 2014 ('the 2014 Act') fixing his remuneration for the work he carried out as provisional liquidator in the sum of €113,009.41 (representing €89.126.25 in fees, €2,751.32 in expenses and outlay, and €21,131.84 in VAT at 23% on those sums), together with further remuneration in the sum €13,196.60 (representing the legal costs incurred by him in bringing an unsuccessful interim injunction application on 25 April 2019, in plenary proceedings issued on the same date).

3. Mr Murphy and Revenue oppose that application. Relying on Mr Murphy's comparison of the fees claimed against those that might reasonably be charged for the work that was done, they submit that Mr Fitzpatrick's remuneration should be fixed in the amount of no more than €45,510, representing €37,000 in fees and €8,510 in VAT @ 23% on that sum, and that the costs of the interim injunction application should be disallowed.

Procedural history

4. A notice of motion issued on 11 July 2019, returnable for 22 July. Although it has the same record number as the company's winding up petition, it identifies Mr Fitzpatrick as the applicant; Mr Murphy as respondent; and Revenue as a notice party. The motion is grounded on an affidavit of Mr Fitzpatrick, sworn on the 20 June ('the first Fitzpatrick affidavit'). Mr Murphy swore a concise affidavit in reply on 30 August ('the first Murphy

affidavit'). Mr Fitzpatrick responded with a much lengthier affidavit of his own, sworn on 7 October ('the second Fitzpatrick affidavit').

5. Patrick Behan, an administrative officer in the Collector General's Division of Revenue, swore an affidavit on Revenue's behalf on 19 November ('the Behan affidavit').

6. Mr Murphy swore a further short affidavit on either 3 or 5 December – the date is not clearly legible ('the second Murphy affidavit').

7. Mr Fitzpatrick swore an affidavit on 23 December ('the third Fitzpatrick affidavit') in response to the Behan affidavit and another on 3 January 2020 ('the fourth Fitzpatrick affidavit') in response to the second Murphy affidavit.

8. Finally, Herbert Kilcline, Mr Fitzpatrick's solicitor, swore an affidavit on 22 January 2020 ('the Kilcline affidavit')

9. The application came on for hearing before me on 27 November 2020. I had the benefit of written and oral submissions from Mr Hudson BL on behalf of the applicant and from Ms O'Neill BL on behalf of the notice party. I also had the benefit of short oral submissions made on behalf of the respondent by Mr Cahir, solicitor, who joined in the arguments put forward by Ms O'Neill.

Background

10. The company's principal activities were electrical contracting and the provision of the specialist contract labour of electricians. It had 122 employees at the commencement of the winding up in April 2019 and contracts in Ireland, Holland, Germany and Switzerland. The director's statement of affairs estimated that the company was then €1,272,184.73 in deficit. In particular, Revenue claimed a debt of between €756, 132.43 and €812,147.27, depending on the availability to the company of certain tax credits.

11. In support of the present application, the first Fitzpatrick affidavit exhibits a document prepared by Mr Fitzpatrick entitled '*Provisional Liquidator's Fee Report and Analysis'* ('the Fitzpatrick fee report'), covering the period between 8 April and 31 May 2019. Appended to that document is another, entitled '*Time Cost Schedule for Provisional Liquidation'* ('the Fitzpatrick fee schedule'), recording total fees due of €113,009.41, comprising €89.126.25 in professional fees, €2,751.32 in expenses and outlay, and €21,131.84 in VAT at 23% on those sums. Mr Fitzpatrick furnished that report and schedule to Mr Murphy on 20 June 2019. The second Fitzpatrick affidavit exhibits the earlier '*Report of the Provisional Liquidator'*, dated 29 April 2019 ('the provisional liquidation report'), that Mr Fitzpatrick had furnished to the High Court at the hearing of the winding-up petition.

12. The first Fitzpatrick affidavit also exhibits an invoice dated 6 June 2019 from Mr Fitzpatrick's solicitor in the sum of €13,196.60 as the legal costs of Mr Fitzpatrick's unsuccessful interim injunction application.

13. In opposition to the application, the first Murphy affidavit exhibits a document entitled '*Review by Official Liquidator of the Fees and Costs claimed by the Provisional Liquidator'*,

dated 30 August 2019 ('the Murphy fee review'). Appendix A to that document is an analysis, in tabular form, of both the time and costs claimed by Mr Fitzpatrick and those deemed reasonable by Mr Murphy for the completion of the relevant tasks ('the Murphy fee schedule').

14. The Murphy fee review concludes in material part that: (a) Mr Fitzpatrick's claim for 429 hours work over the 22 days he was in office as provisional liquidator is grossly in excess of what would reasonably be expected in the liquidation of the company (para. 72); (b) a reasonable amount of chargeable time would be 191 hours at a cost of c. €37,000, based on the efficient completion of the work at an appropriate staff level at the rates applied by Mr Fitzpatrick (para. 75); and (c) based on the size of the company and Mr Murphy's experience and knowledge of insolvency cases, a fee of €37,000 for 22 days' work in the conduct of a provisional liquidation would be considered high and anything above that would likely be challenged by creditors as excessive (para. 77).

15. The first Murphy affidavit exhibits a letter that Mr Murphy received from his own solicitors on 30 August 2019, expressing the view that the figure of €13,196.60 was not unreasonable for the costs of an interim injunction application to the High Court.

16. On 5 September 2019, Revenue wrote an open letter to Mr Fitzpatrick, stating in material part:

> '[T]o avoid any further litigation costs, and subject to the Court's view, Revenue are prepared to accept the recommendation in [the review] and accordingly will not object to an order [fixing the remuneration of Mr Fitzpatrick as provisional liquidator in a sum] not exceeding €37,000 in regards the provisional liquidator's fees and a sum of €13,196.60 in regards the legal fees incurred, said legal fees should include the costs of this application.'

17. Mr Fitzpatrick's solicitor replied by open letter of 30 September 2019, responding in material part:

> 'Our client is seeking payment of €91,877.57 plus VAT in respect of his fees and remuneration, and the €13,196.60 in respect of legal fees for work carried out in the liquidation re proceedings record no 2019/3304P [that have] been approved by the liquidator Mr Murphy.
>
> For the avoidance of doubt, this liquidation fee application is incurring additional legal fees which are not included in the €13,196.60 plus VAT as per the letter of 30 August 2019 [from Mr Murphy's solicitors]. There is no question of €13,196.60 being part of or towards this provisional liquidator fee application, although our client is not accepting payment of €37,000 for his fees, this office has accepted €13,196.60 plus VAT as an amount for proceedings record no. 2019/3304P, being injunction proceedings necessary to gather in and secure assets belonging to the company and which were in peril of being dissipated.'

Fees for the provisional liquidation – report and review

i. the remuneration sought – the Fitzpatrick fee report and the Murphy fee review

18. Though not dated, the Fitzpatrick fee report recites that it covers the 22-day period of his tenure as provisional liquidator between 8 and 29 April 2019 and a further period between 30 April and 31 May 2019, during which he carried out what he describes as 'concluding works'.

19. The fee report comprises a seven-page summary of tasks followed by the 24-page Fitzpatrick fee schedule. The latter, which is in tabular form, comprises separate columns for the date; work done; individual staff member(s) involved; hours worked by each; rate of pay of each; and, finally, total fee of each for that date. As exhibited to the first Fitzpatrick affidavit, the Fitzpatrick fee schedule contains two separate consecutive versions of its final page, one showing a total of 415 staff hours worked and the other 429. On each version, the other figures remain identical. The total fee claimed for staff hours worked is €89,126.25. Itemised expenses and outlay of €2,751.32 are then added, bringing the figure up to €91,877.57, to which VAT at the rate of 23% is then applied in the sum of €21,131.84, resulting in a total claim of €113,009.41.

20. The fee report discloses that Mr Fitzpatrick engaged two consultants, Michael Murphy, an insolvency practitioner; and Pat Kelly, a business advisor, and tasked two senior staff members, two junior staff members and a secretary to assist him the liquidation. The hourly rates charged were as follows: €340 for Mr Fitzpatrick as partner/director; €185 for Mr Murphy and Mr Kelly as consultants/managers; €150 and €140 respectively for the two senior staff members; and €90 for each of the junior staff members and the secretary.

21. The analysis in the Murphy fee review commences by noting that the Fitzpatrick fee report fails to match the staff member or members involved to each of the tasks performed each day and fails to record the time devoted to each task by the staff member or members concerned, making a proper appraisal difficult.

22. Nonetheless, based on the information provided in the Fitzpatrick fee report; Mr Fitzpatrick's 22-day tenure as provisional liquidator; the size of the company; and the information Mr Murphy has since obtained as official liquidator, the Murphy fee review contends that Mr Fitzpatrick's claim for 429 staff hours at a cost of €89,126.25 is grossly in excess of that which would be reasonably expected.

23. The Murphy fee review considers 191 staff hours at a cost of approximately €37,000 to be a reasonable estimate for the tasks carried out during Mr Fitzpatrick's tenure. In support of that estimate, the review includes an appendix that provides a breakdown of both the fees claimed and those that might reasonably have been expected. The review states that the breakdown of fees reasonably expected is calculated on the basis of the efficient completion of the work at the appropriate staff level, using the staff rates charged by Mr Fitzpatrick.

24. In the second Fitzpatrick affidavit, Mr Fitzpatrick rejects the analysis and conclusions in the Murphy fee review.

ii. specific issues in the provisional liquidation

25. In the same report, Mr Fitzpatrick refers to, what he describes as, four 'key case difficulties' that he encountered as provisional liquidator.

26. First, he found difficulty in accessing the construction site of the National Indoor Arena ('the NIA') in Abbotstown, Dublin, where a significant quantity of the company's stock and equipment was present ('the NIA issue'). That difficulty resulted in the unsuccessful interim injunction application that Mr Fitzpatrick made to the High Court on 25 April 2019.

27. Second, Mr Fitzpatrick was reluctant to accept the validity of the Bibby invoice finance agreement, dated 22 March 2019, and the Bibby debenture, registered in the Companies Registration Office ('CRO') on 25 March 2019 because of the proximity in time of each to the resolution to bring a winding-up petition ('the Bibby issue').

28. Third, Mr Fitzpatrick had to make immediate arrangements for the payment of wages due to the company's electricians in Ireland, Holland and Switzerland, by reaching agreement with the customers for whom those electricians were doing work to pay those wages directly ('the employee wages issue').

29. And fourth, Mr Fitzpatrick encountered a difficulty in obtaining payment from certain of the company's overseas customers for contract labour that the company had provided because the company's failure to comply with various employment and tax law requirements in those jurisdictions left those customers liable in default, prompting them to withhold payment ('the foreign tax issue').

30. The Murphy fee review addresses each of those matters in the following way.

31. First, Mr Murphy states that, following his appointment as liquidator he wrote to the main contractor on the NIA site, as well as the sub-contractor with which the company had its contract, before visiting the site the next day. He encountered no issues with either entity, and on a consensual basis all of the company assets on site were identified and removed without any difficulty.

32. Second, Mr Murphy notes that time spent reviewing the validity of the Bibby invoice financing agreement and debenture was given significant weighting in the Fitzpatrick fee schedule, whereas, after his appointment, he was quickly able to come to a practical arrangement with Bibby that facilitated immediate collection from the company's debtors in an orderly fashion.

33. Third, Mr Murphy accepts that five specialist labour contracts were still in place at the commencement of the winding-up of the company and that significant engagement was necessary to reach agreement with the relevant counterparties to take over direct responsibility for paying the wages of the electricians concerned. Mr Murphy concludes

that the time spent in the resolution of this issue over a single day, 10 April 2019, was reasonable.

34. Fourth, Mr Murphy notes the steps taken and work done to address the issue of the withholding of payments owed to the company by its customers in Holland, Germany and Switzerland due to the company's failure to regularise its tax affairs in those countries. Based on his discussions with the tax and business advisers referred to in the Fitzpatrick fee report, Mr Murphy concludes the provisional liquidator's involvement in the issue was exploratory and 'high level', which I take to mean a general rather than detailed involvement, and resulted in limited progress towards resolving the problem.

35. Mr Fitzpatrick and Mr Murphy join issue on these points in their various affidavits without altering their respective positions. Mr Fitzpatrick, whose view on value of the provisional liquidation is necessarily one expressed in his own interest, contends that Mr Murphy's view is not a disinterested one either because Mr Murphy is on the panel of insolvency practitioners who act for Revenue and Revenue is opposing Mr Fitzpatrick's application.

iii. Revenue objections to the level of remuneration sought

36. The Behan affidavit sets out the position of Revenue.

37. Revenue's first criticism, reflecting a similar concern expressed by Mr Murphy, is that the Fitzpatrick fee report fails to match up each item of work done with the person or persons who did it and the time each spent on it. Further, Revenue echoes Mr Murphy's view that excessive time seems to have been spent on routine tasks, in many instances by inappropriately senior staff members.

38. To illustrate these criticisms, Revenue points, as an example, to certain entries in the Fitzpatrick fee report for Tuesday, 23 April 2019. The narrative for that date records that a consultant and a senior staff member travelled by van from Limerick to Dublin and back to collect the company's books and records from its office there. Those persons are listed as working for 11.5 hours each that day at an hourly rate of €185 and €150 respectively. The only other activity attributed to either of those two persons that day is the consultant's attendance at a meeting with a representative of one of the company's customers elsewhere in Dublin. The other consultant engaged by Mr Fitzpatrick is recorded as having met those two persons at the company's leased offices in Dublin to assist in, and supervise, the removal of the company's books and records, and to 'physically review' the improvements that the company had made to those premises, and is recorded as working for 8.5 hours that day at an hourly rate of €185 by reference to that work. The unloading of the van in Limerick the following day attracted separate charges, although the only persons listed as working that day were Mr Fitzpatrick (at an hourly rate of €340) and the two consultants (each at an hourly rate of €185).

39. In the third Fitzpatrick affidavit, in response to this point, Mr Fitzpatrick provides precisely the sort of breakdown of staff member, task and time that Revenue and Mr Murphy identify as absent, but only for the three staff members concerned on that single day. Mr

Fitzpatrick remains steadfast in his contention that the relevant tasks required to be performed by the senior staff member and two consultants involved.

40. Later in the third Fitzpatrick affidavit, Mr Fitzpatrick avers that contemporaneous diary notes of the work done in the provisional liquidation were maintained by his liquidation team, but he does not exhibit them nor does he explain why he has not done so.

41. By way of a further illustration of its criticisms, Revenue points to Mr Fitzpatrick's description of the resolution of the employee wages issue as a complex task but notes, just as Mr Murphy did, that it was one that – according to the Fitzpatrick fee report – was completed in a single day.

42. Revenue notes that both of the consultants retained by Mr Fitzpatrick commenced work on the date of his appointment as provisional liquidator and that, between them, they are recorded as having worked for a total of 217 hours over the 22-day period of the provisional liquidation. One consultant, in particular, is recorded as having worked an average of 12.5 hours a day, excluding weekends and public holidays. Yet, the court has not been provided with the terms of engagement of, or a single invoice from, either.

43. Revenue questions both the lawfulness and the reasonableness of the interim injunction application brought in separate proceedings issued by Mr Fitzpatrick. Revenue submits that the application was not lawful because it was not within Mr Fitzpatrick's powers as provisional liquidator and that, even if it had been lawful, was unreasonable because, by Wednesday, 24 April 2019 (when Mr Fitzpatrick's solicitor sent a warning letter threatening the injunction application that was made the following day), Mr Fitzpatrick was aware that the company's winding-up petition was due to be heard on the following Monday, 29 April, and that Revenue was going to oppose – successfully, as it turned out – the company's application to appoint him as official liquidator. Revenue contends that the short notice that Mr Fitzpatrick gave of his intended injunction application and the imminence of the winding-up petition suggest a determination on his part to bring that application – both literally and figuratively – 'at all costs'. Revenue also complains that Mr Fitzpatrick has failed to specify what portion of the remuneration that he claims as provisional liquidator represents work done on that injunction application, in addition to the €13,196.60 in legal costs he incurred in pursuing it.

44. Revenue also complains that the Fitzpatrick fee report includes, as part of the narrative of work done, the time that Mr Fitzpatrick spent, in consultation with his legal representatives (who were also those of the company), reviewing Revenue's objections to the company's nomination of him as official liquidator – work for which he cannot be remunerated as provisional liquidator.

The law on the remuneration of a provisional liquidator

45. Section 645(1) of the 2014 Act provides that a provisional liquidator is entitled to receive such remuneration as is fixed by the court, and s. 645(2) provides that s. 648 applies to the fixing of that remuneration.

46. Section 648(9) stipulates that, in fixing the amount of a provisional liquidator's remuneration under s. 645, the court shall take into account the following:

'(i) the time properly required to be given by the person as liquidator and by his or her assistants in attending to the company's affairs;

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

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

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

(v) the value and nature of the property with which the liquidator has to deal.'

47. As a fundamental principle, there is an obligation on the court to be vigilant in scrutinising an office-holders application for sanction of payment in an insolvency; per Hamilton CJ in *Re Coombe Importers Ltd* (Unreported, High Court, 22 June 1995), followed in *Re Missford Ltd* [2010] 3 IR 756, and most recently approved by the Court of Appeal in *Re Mouldpro International Limited (In liquidation)* [2018] IECA 88, (Unreported, Court of Appeal, 16 March 2018) ('*Mouldpro'*).

48. The judgment of Ferris J in the Chancery Division of the High Court of England and Wales in *Mirror Group Newspapers plc v Maxwell (No. 2)* [1998] 1 BCLC 638 ('*Maxwell'*) remains the leading exposition of the broader principles that govern the provision of that sanction (at 648-9):

> 'The essential point which requires constantly to be borne in mind is that office-holders are fiduciaries charged with the duty of protecting, getting in, realising and ultimately passing on to others assets and property which belong not to themselves but to creditors or beneficiaries of one kind or another. They are appointed because of their professional skills and experience and they are expected to exercise proper commercial judgment in the carrying out of their duties. Their fundamental obligation is, however, a duty to account, both for the way in which they exercise their powers and for the property which they deal with.
>
> Office-holders are nowadays not normally expected to act gratuitously. It is salutary to remember, however, that the rule that a trustee must not profit from his trust is a rule that applies to all kinds of person who are in a fiduciary position (see *Snell's Equity* (28th edn, 1982) pp 249–252). The allowance of remuneration in particular cases represents an exception to this rule, but it inevitably involves a conflict between the interest of the fiduciary who is to receive such remuneration and the interests of those to whom the fiduciary duties are owed, who will bear whatever remuneration is allowed. A consequence of this is that it must be for the office-holder who seeks to be remunerated at a particular level to justify his claim. As I see it this is simply one aspect of his obligation to account. What he retains for

himself out of the property which comes into his hands as office-holder is not available for those towards whom he is a fiduciary. He cannot therefore account for it by paying it over. The only other way in which he can account for it is by showing that he ought to be allowed to retain it for himself. But this is necessarily a matter for him to establish.

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 led 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. The charging rate claimed must also be proved by evidence; and what is relevant is not the charging rate of the particular individual but the broad average or general rate charged by persons of the relevant status and qualifications who carry out this kind of work....

Second, office-holders must keep proper records of what they have done and why they have done it. Without contemporaneous records of this kind they will be in difficulty in discharging their duty to account. While a retrospective reconstruction of what has happened may have to be looked at if there is no better source of information, it is unlikely to be as reliable as a contemporaneous record. Office-holders whose records are inadequate are liable to find that doubts are resolved against them because they are unable to fulfil their duty to account for what they have received and to justify their claim to retain part of it for themselves by way of remuneration.

Third, the test of whether office-holders have acted properly in undertaking particular tasks at a particular cost in expenses or time spent must be whether a reasonably prudent man, faced with the same circumstances in relation to his own affairs, would lay out or hazard his own money in doing what the office-holders have done. It is not sufficient, in my view, for office-holders to say that what they have done is within the scope of the duties or powers conferred upon them. They are expected to deploy commercial judgment, not to act regardless of expense. This is not to say that a transaction carried out at a high cost in relation to the benefit received, or even an expensive failure, will automatically result in the disallowance of expenses or remuneration. But it is to be expected that transactions having these characteristics will be subject to close scrutiny.’

49. In short summary, these principles establish the need for an office-holder in an insolvency: first, to discharge the onus of establishing a claim to the level of remuneration sought; second, to provide full particulars of all work done; third, to keep proper records of that work; and fourth, to deploy commercial judgment in doing it, rather than act regardless of expense.

50. In *Mouldpro*, Whelan J (Ryan P and Hogan J concurring) concluded that there was a significant alignment between our law, as it was under the Companies Acts 1963-2012 and Order 74, rule 46 of the Rules of the Superior Courts ('the RSC'), and that of England and Wales, as exemplified by the decision of Ferris J in *Maxwell*. Ferris J concluded that, in fixing the remuneration of an office-holder, a court should have regard to the same factors as those a creditors' committee was required to consider, under rule 2.47(2) of the England and Wales Insolvency Rules 1986, made under the UK Insolvency Act 1986, in choosing whether to remunerate an administrator in the form of a percentage of the value of the property dealt with or on the basis of time properly spent. Under r. 2.47(4), those factors were:

> '(a) the complexity (or otherwise) of the case, (b) any respects in which, in connection with the company's affairs, there falls on the administrator any responsibility of an exceptional kind or degree, (c) the effectiveness with which the administrator appears to be carrying out, or to have carried out, his duties as such, and (d) the value and nature of the property with which he has to deal.'

51. The factors adumbrated at (a) to (d) in r. 2.47(4) of the 1986 Rules are materially identical to those at (ii) to (v) in s. 648(9) of the 2014 Act. The same factors are reproduced in r. 18.16(9) of the Insolvency (England and Wales) Rules 2016, which revoked and replaced the 1986 Rules. Hence, there is still a close alignment between our law and that of England and Wales on the remuneration of an office holder in an insolvency.

52. Moreover, the principles identified in Maxwell have been approved and applied by our courts in a long line of subsequent cases, including *Mouldpro*, already cited; *Re Lucca Food Trading Co Ltd* [2019] IEHC 11, (Unreported, High Court (Allen J), 18 January 2019); *Re Cherryfox Ltd* [2018] IEHC 260, (Unreported, High Court (Gilligan J), 9 May 2018), affirmed by the Court of Appeal *ex temp*. on 11 March 2020; *Re Denis Finn Ltd [*2016] IEHC 750, (Unreported, High Court (Keane J), 21 December 2016); *Re Mouldpro International Ltd* [2012] IEHC 418, (Unreported, High Court (Finlay Geoghegan J), 9 October 2012); and *Re Red Sail Frozen Foods Ltd* [2006] IEHC 328, [2007] 2 IR 316.

53. In *Maxwell*, Ferris J went on express the view (at 651-2):

> 'It is important not to place too great an emphasis on time spent. In 1923 in *Re Carton Ltd* 39 TLR 194 at 197 PO Lawrence J, dealing with the remuneration of liquidators in the voluntary winding up of a company, said:

> "The Courts as a general rule only fixes remuneration on a time-basis if there is no other method which would operate to give the liquidator fair remuneration ... Even the best accountant may spend hours over unproductive work, let alone his more or less efficient staff of clerks. Moreover, it is quite impossible to check charges based on such a system and to gauge the value of odd hours said to have been spent on the affairs of the company. The court has long since come to the conclusion that the proper method to adopt whenever it is practicable is to assess the remuneration according to the results attained."

In more recent years the prevalence of time recording in the offices of insolvency practitioners (and, come to that, solicitors) has tended to give time an importance in the assessment of remuneration which PO Lawrence J would have denied it. But I am not aware that, in the field of remuneration for court-appointed receivers, those referred to in the Insolvency Act as 'office holders' or others in a similar position, this emphasis has received any judicial indorsement.

In my judgment it is vital to recognised three things in this field. First, time spent represents not the value of the service rendered but of the cost of rendering it. Remuneration should only 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 and similar rules. The giving of proper weight to these factors is an essential part of the process of assessing the value, as distinct from 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 costs, the tribunal which fixes remuneration needs to be supplied with full information on all the factors which I have mentioned.'

Analysis

i. Mr Fitzpatrick's remuneration as provisional liquidator

54. Mr Fitzpatrick bears the onus of establishing that he is entitled to the remuneration that he seeks.

55. The fee report that he relies on for that purpose is a retrospective narrative of both the work done on each of the 22 days when he was in office as provisional liquidator and the 'concluding works' that he carried out in the following month, accompanied by a list of the particular staff members and consultants who worked each day; the hours worked by each; and the hourly rate at which the work of each was charged out.

56. I find merit in the objection raised by Mr Murphy and Revenue that the Fitzpatrick fee report fails to match up each item of work done with the person or persons who did it and the time expended by each in doing so, making a proper appraisal of Mr Fitzpatrick's claim for remuneration very difficult. A properly particularised claim would specifically identify each task assigned to a given staff member and the time expended by that person on that task, so that a proper assessment could be made of the appropriateness of the level of expertise deployed and the time expended to address it. I am not persuaded

by Mr Fitzpatrick's explanation that, in effect, it would have been impractical to keep such records as all of his staff members were continuously switching between tasks. I do not accept that that would have precluded the proper apportionment and recording on an ongoing basis of the time expended on each task by each member of Mr Fitzpatrick's staff.

57. Further, although Mr Fitzpatrick avers that he did keep contemporaneous records of work done, he has not exhibited them or otherwise disclosed their contents. A retrospective reconstruction, such as his fee report, is not as reliable. This places Mr Fitzpatrick in obvious difficulty in discharging his duty to account and, as a result, he must expect doubts about the appropriateness of the extent of the remuneration that he claims to be resolved against him.

58. The Murphy fee review is persuasive in its analysis and, in consequence, raises a considerable doubt that any remuneration above €37,000, exclusive of VAT, is reasonable for the work done by Mr Fitzpatrick as provisional liquidator. Mr Fitzpatrick points out that insolvency practitioners nominated by Revenue agree to accept lower, scale fees in exchange for what is, in effect, a guarantee of payment from the State, whereas those who take on work at hazard of non-payment or reduced payment due to lack of funds in the company must expect to be able to strike a higher rate. Indeed, Clarke J accepted precisely that point in *Re Marino Ltd* [2010] IEHC 394, (Unreported, High Court, 29 July 2010). However, that does not lessen the force of the relevant conclusion in the Murphy fee review – a conclusion based on what an insolvent company's creditors might reasonably be expected to bear in the professional marketplace and not on what Revenue would be willing to guarantee to a professional on its panel.

59. There is no issue on this application concerning the hourly rates that Mr Fitzpatrick proposes to charge for his own work and that of his senior and junior staff members. As Mr Fitzpatrick seeks to emphasise, those rates are broadly in line with, or below, the hourly rates approved by Clarke J in *Re Marino Ltd* and by Kelly J in *Re Missford Ltd* [2010] 3 IR 756. The Murphy fee review raises a different concern – that staff members of unnecessary seniority expended an excessive number of hours on the tasks carried out during the tenure of the provisional liquidator. To take a hypothetical example, if a task can reasonably be done in one hour by a person with a level of experience and skill that commands an hourly rate of €250, then a claim for two hours work at an hourly rate of €250 to perform that task is just as unreasonable as a claim for one hour's work at an hourly rate of €500 to do so. Each would represent the same overcharge of 100%.

60. That concern is well-illustrated by the events of 23 April 2019, when two consultants and a senior member of Mr Fitzpatrick's staff were tasked over many hours in the identification and collection of the company's books and records from its offices in Dublin and their transportation to Limerick by van. There is substantial cause to doubt that a reasonably prudent man would lay out his own money in the same way or, differently put, that appropriate commercial judgment was exercised in making or approving that arrangement.

61. Revenue raises other concerns.

62. First, the Fitzpatrick fee report includes a narrative on the work that Mr Fitzpatrick did, in consultation with his legal representatives, to meet Revenue's opposition to the company's application to have him appointed as its official liquidator. Revenue submits, and I accept, that this cannot form part of the work in the liquidation, as it was plainly work done in Mr Fitzpatrick's own interest, rather than that of the company, its creditors or contributories. Indeed, there is – to use a neutral expression – considerable doubt about whether that work should have been done at all. In *Re Star Elm Frames* [2018] IECA 103, (Unreported, Court of Appeal (Peart J, Irvine and Gilligan JJ concurring), 19 April 2018) (at para. 8), Peart J endorsed the following view expressed at first instance by Humphrys J in the same case; [2016] IEHC 66, (Unreported, High Court, 3 October 2016) (at para. 13):

> 'In *Hewitt Brannan (Tools) Co Ltd* [1991] BCLC 80, Harman J. said that a voluntary liquidator had "*no business to take an attitude as to the continuation or not of his voluntary liquidation".* I consider this approach to be correct. The liquidator should stand back from an application of this type and allow the primary parties being the disagreeing creditors and, to a lesser extent, the directors, to fight the issue out.'

It seems to me that, on the same principle, Mr Fitzpatrick had no business to take an attitude on his appointment as official liquidator (beyond the expression, as appropriate, of a willingness to act), and should have stood back to allow the primary parties – in this case the company, as petitioner, and Revenue, as creditor – to fight the issue out. That the issue arose at all in this case serves to confirm the undesirability of having the same legal representatives act for both a company petitioning to be wound up and the insolvency practitioner nominated by that company as liquidator.

63. Second, it is a strange feature of this case that Mr Fitzpatrick avers to having retained two identified persons to act as consultants but, in seeking to have his remuneration fixed, claims for the hours those persons worked as though they were members of his staff. It is not clear whether the consultants concerned have failed to invoice for their work or their invoices have been withheld from scrutiny. Either would be a matter of some concern. As Gilligan J pointed out in *Re Cherryfox Ltd* [2018] IEHC 260, (Unreported, High Court, 9 May 2018) (at para. 39), there is an onus on the liquidator to satisfy the court that any payments made to consultants were necessary in the course of the liquidation. In circumstances where Mr Fitzpatrick is at pains to emphasise his own experience and that of the two senior staff members who worked on the liquidation, he has failed to discharge that onus in respect of the additional engagement of an insolvency practitioner and a business adviser as consultants. And even if the necessity to retain those consultants had been established, it would still be necessary to properly scrutinise the relevant invoices in order to be satisfied that no abuse has occurred here of the sort identified by Allen J in *Re Lucca Ltd Trading Co Ltd* (at paras. 37 and 65), where a disparity was found to exist between the hourly rate at which the work of a consultant

was being charged out and the hourly rate that that consultant was charging the liquidator as evidenced by his invoice.

64. Third, the Fitzpatrick fee report includes a charge for 29 hours' work carried out by an 'administration secretary' at an hourly rate of €90. Revenue makes the point, and I think it is a good one, that the charge out rates of professional persons are – or, at least, should be – calibrated to allow them to discharge their own overheads, such as the provision of secretarial services. Mr Fitzpatrick calls the reasonableness of his own hourly rate of remuneration into serious question in asserting that he is entitled to charge out secretarial support in addition to, rather than as part of, that hourly rate. For, as Clarke J explained in *Re Marino Ltd* (at para. 4.1):

> 'It does need to be recalled that a charge out rate by a professional in a firm is not the same as that person's pay. Those overheads of the firm which are not directly charged to clients need to be met out of the fees charged.'

In neither *Re Marino Ltd* nor *Re Missford Ltd* was the court asked to approve remuneration that included the charging out of work done by secretarial staff, in addition to that of professional staff.

ii. the legal costs of the interim injunction application

65. In his notice of motion, Mr Fitzpatrick seeks an order fixing his remuneration as the total of both the amount of €113,009.41 set out in the Fitzpatrick fee report and a further amount of €13,196.60 as the legal costs of separate plenary proceedings that he caused to be issued, and in which he brought an unsuccessful interim injunction application, on 25 April 2019.

66. The first Fitzpatrick affidavit records that Mr Fitzpatrick's solicitor has provided him with a bill of costs for those proceedings and that Mr Fitzpatrick is seeking 'approval of same and an order for payment of same at the amounts claimed or an order that the same bills be referred to taxation.' For my part, I fail to see how I could adjudicate on a claim for the legal costs of separate proceedings, since abandoned, in which an unsuccessful interim injunction application was made to another judge. To make that task more difficult, I was not provided with a copy of the pleadings, papers or any extant orders in those proceedings or in the winding up petition to assist in that adjudication until I requested them in the course of the hearing before me. I did not receive the relevant booklets until after the conclusion of that hearing.

67. Mr Fitzpatrick presents the issue as whether the figure he claims for legal costs is a reasonable one for a generic High Court interim injunction application (should such a thing exist). Bolstered by the view expressed by Mr Murphy's solicitor that such costs would not be unreasonable, Mr Fitzpatrick submits, in substance, that he has met the test for an order fixing his remuneration to include that sum. I fundamentally disagree. In my view, the issue is not whether the legal costs that Mr Fitzpatrick seeks are reasonable but

rather whether Mr Fitzpatrick has any entitlement to a sum for his legal costs as part of his remuneration as provisional liquidator, fixed by the court.

68. I have now received the papers in both the winding up petition and the plenary proceedings, and have listened to the digital audio recording ('DAR') of the interim injunction application made to Owens J in the latter.

69. The papers in the winding-up petition disclose that, on 8 April 2019, the company sought the appointment of a provisional liquidator, pending the hearing of the petition, both to protect from dissipation certain of the company's assets (comprising the tools, electrical equipment and building materials present at various sites) and to secure payments due to the company under various contracts still in progress by arranging for their completion.

70. By order made on that date, O'Regan J appointed Mr Fitzpatrick as provisional liquidator and fixed Monday, 29 April 2019, for the hearing of the petition.

71. On Thursday, 25 April 2019, just two working days before the end of his tenure as provisional liquidator, Mr Fitzpatrick procured the issue of a plenary summons in proceedings entitled *Anthony Fitzpatrick v Keith Wilson and Oran McCloskey*, Record No. 3304P of 2019. In the general indorsement of claim, Mr Fitzpatrick seeks a number of injunctions, the effect of which would have been, in substance, to direct those persons to permit him to access and remove company property (comprising conduits, trays and trunking) stored in four containers on the NIA site in Abbotstown, County Dublin, together with damages for trespass and damages for detinue against those persons.

72. Shortly before lunch on the same date, Mr Fitzpatrick applied for an interim injunction to the same effect or, in the alternative, for an order granting liberty to effect short service of a motion seeking the same injunction on an interlocutory basis, returnable for the following day – Friday, 26 April 2019. As it was then the Easter Vacation, the interim injunction application came before Owens J as duty judge.

73. In his grounding affidavit, Mr Fitzpatrick averred in material part as follows. The two named defendants were occupying the NIA site and were believed to be associated with the main contractor there. Mr Fitzpatrick's consultant business adviser had attended at the NIA site on Wednesday, 10 April, and placed locks on each of the four containers in which the company's stock was stored. When two other members of Mr Fitzpatrick's staff attended the site the following day, those locks had been changed. Mr Fitzpatrick then telephoned the second defendant (presumably, on the same day), who – according to Mr Fitzpatrick - refused to co-operate with him as provisional liquidator of the company.

74. Allowing that Easter Monday, a public holiday, fell on 22 April in 2019, it is nonetheless surprising that it was not until almost two weeks after the events of 10/11 April that, on Wednesday, 24 April, Mr Fitzpatrick wrote to a number of persons including the two defendants, demanding access to company's stock on the NIA site before 9.30 a.m. the following day, Thursday, 25 April, and threatening an immediate application to the High

Court in default of compliance. Mr Fitzpatrick does not disclose when precisely that letter was sent on that date or how it was transmitted.

75. In the written legal submissions filed on its behalf in the present application, Revenue refers to correspondence it received from Mr Fitzpatrick on 24 January 2020, providing it with a copy of an email that he received on 25 April 2019 from one of the defendants in response to that warning letter. Revenue submits that the email shows that the warning letter was not sent until after close of business on 24 April 2019. Revenue goes on to submit that the relevant defendant's email requested a copy of the order appointing Mr Fitzpatrick as provisional liquidator; stated that no formal confirmation of his appointment had yet been received; and confirmed that, until it was, no access to the site would be granted to him.

76. While I have not seen the relevant correspondence, which is not in evidence, I did not understand counsel for Mr Fitzpatrick to take issue with Revenue's assertion of its existence or description of its contents. Indeed, the only purpose of the short Kilcline affidavit, the last affidavit filed in the present application, was to enable Mr Kilcline to aver, as Mr Fitzpatrick's solicitor, that he was not furnished with a copy of that email, nor was it made available to him or counsel at the hearing of the petition on 29 April 2019 or afterwards. While I note that the second Fitzpatrick affidavit contains a bald averment that Mr Fitzpatrick provided both the relevant sub-contractor and the main contractor at the NIA site with a copy of the order appointing him as provisional liquidator, he does not depose to when or how he did so. The warning letter of 24 April 2019 recites only that Mr Fitzpatrick had been in contact with a named representative of the relevant sub-contractor and that he had forwarded a copy of the order to him – once again, without specifying when or how he had done so.

77. These are, of course, matters of grave concern. But they represent just the first in a series of difficulties with the interim injunction application.

78. From the DAR of the hearing that took place before Owens J on 25 April 2015, the following summary of what transpired can be distilled.

79. When counsel for Mr Fitzpatrick began to move the application, Owens J was immediately alert to two fundamental difficulties with it.

80. The first was that it had not been established that the institution of the proceedings was within the power of the provisional liquidator. It is trite law, most recently restated in s. 626(1) of the 2014 Act, that, where a provisional liquidator is appointed by the court, then, subject to certain limited exceptions of no relevance here, he or she has only such powers as the court orders.

81. In contrast, s. 627(1) of the 2014 Act contains a table setting out the powers conferred by that section on every (other) liquidator. For present purposes, the following two such powers are particularly noteworthy:

'1. Power to –

(a) bring any action or other legal proceeding in the name and on behalf of the company;

…

(e) appoint a legal practitioner to assist the liquidator in the performance of his or her duties.'

82. O'Regan J's order of 8 April 2019, appointing Mr Fitzpatrick as provisional liquidator, gave him given ten specific powers. Although, at VII), he was given the power 'to retain the services of solicitors, counsel and other professional advisers where necessary', he was given no power equivalent to that 'to bring any action or other legal proceeding in the name and on behalf of the company.'

83. There was, thus, a cogent argument to be made that the institution of the relevant plenary proceedings and the bringing of an interim injunction application in those proceedings were each *ultra vires* Mr Fitzpatrick as provisional liquidator.

84. In response to an enquiry from Owens J about the scope of the provisional liquidator's powers, in circumstances where it does not appear that the court had been furnished with a copy of the order of O'Regan J, counsel for Mr Fitzpatrick stated that he was relying upon the power at I) 'to take possession of the assets of the company' and also upon the recital on the face of the order that there was to be 'liberty to apply'. Of course, Mr Fitzpatrick had not sought to exercise that liberty to apply for an order granting him power to bring an action in the name and on behalf of the company; he had already issued proceedings in his own name and was now bringing an interim injunction application in the obvious absence of any such existing power.

85. The second difficulty, just as swiftly identified by the probing questions of Owens J, was the absence of any established urgency. While it was clear on the evidence that Mr Fitzpatrick was being denied access to company assets stored on the NIA site, there was no evidence whatsoever of any risk of the dissipation of those assets. Moreover, Owens J established that the hearing of the winding-up petition was due to take place on the following Monday, 29 April. Barring the outright refusal of an order winding up the company, that hearing must result in the appointment of a liquidator who would have available to him or her the full panoply of powers conferred on every liquidator under the 2014 Act.

86. Owens J ruled that he was not satisfied to make any order on the evidence presented but would allow the application to be renewed the following morning on more substantial evidence if that was the course Mr Fitzpatrick wished to pursue. Evidently, it was not.

87. Needless to say, no application was made to Owens J in respect of the costs of that hearing. Thereafter, it seems the proceedings were simply abandoned.

88. The company's application on 29 April 2019 to have the court appoint Mr Fitzpatrick as liquidator of the company failed before O'Regan J on 29 April 2019 and Mr Murphy was appointed liquidator of the company instead.

89. The Murphy fee review, exhibited to the first Murphy affidavit, records that the day after his appointment as liquidator, Mr Murphy wrote to the relevant sub-contractor and main contractor on the NIA site and, the day after that, he attended at the site unannounced, where he met with representatives of both. He encountered no difficulty with either and, after his solicitor had written to those contractors confirming his appointment, his team were able to access the site and remove the company's property on a consensual basis.

90. The second Fitzpatrick affidavit asserts that this outcome should be ascribed, not to the measured and patient approach adopted by Mr Murphy, but to the earlier confrontational stance of Mr Fitzpatrick. I will limit myself to the observation that any such conclusion on my part, based on the limited evidence before me, would be perverse.

91. If Mr Fitzpatrick's plenary proceedings had been intra vires, attended by circumstances of genuine urgency, brought in good time, and appropriate to the proper conduct of the liquidation of the company, then interim injunctive relief may well have been granted and, so far as may have been necessary, the action could later have been reconstituted to permit it to be prosecuted or compromised by Mr Murphy, as liquidator. The applicable principles on the costs of that action, and of any application brought within it, would have been those most recently clarified by the Supreme Court in *Revenue Commissioners v Fitzpatrick in his capacity as liquidator of Ballyrider Ltd (in liquidation)* (Unreported, Supreme Court, 31 July 2019).

92. In my view, it was the decision to institute those proceedings *ultra vires*, in the absence of any established urgency, shortly before the hearing at which Mr Fitzpatrick knew his nomination as liquidator was to be opposed, in order to pursue a detinue claim of – to put it no higher – dubious merit, that deprived Mr Fitzpatrick of the opportunity to apply in the ordinary way to have recourse to the assets of the company to pay his legal costs of those proceedings. Whether any such application could have succeeded had that opportunity been available is a question that, perhaps fortunately for Mr Fitzpatrick, I do not have to consider.

93. It follows that I cannot accept the argument that, having missed out on that opportunity in those circumstances, Mr Fitzpatrick should be permitted to apply to have the court fix his remuneration as provisional liquidator in a sum that includes those costs.

94. And even if I were to accept that argument in principle, I do not think that I could do so as a matter of statutory construction. Section 648(10) of the 2014 Act provides that in s. 645, under which the present application has been brought, 'remuneration' includes remuneration for services in the winding up performed by the liquidator personally and by his or her assistants on his or her authority. I share the view, expressed in Conroy, *The Companies Act 2014, Annotated and Consolidated* (2018 edn, Round Hall, 2018) (at 894) that the phrase does not extend to cover the professional fees and, in particular, the

solicitors' fees, incurred by a liquidator. Of course, under s. 617 of the 2014 Act, all costs, charges and expenses properly incurred in the winding up of a company are given a certain priority over almost all other claims. There is no longer any provision in the amended rules of court made under the 2014 Act for a requirement, equivalent to that under the old O. 74, r. 128(2) of the RSC, to apply to court to sanction the payment out of professional fees. So it is now open, it seems, to a liquidator to claim priority for appropriate professional fees out of the assets of the company. The difficulty for Mr Fitzpatrick here would be in persuading the liquidator that the legal costs he claims as provisional liquidator are professional fees that it is appropriate to pay out of those assets.

95. For those reasons, I am satisfied that Mr Fitzpatrick is not entitled to have his legal costs of those proceedings in the sum of €13,196.60, or any sum, included in the remuneration fixed by the court.

Conclusion

96. In giving judgment for the Court of Appeal in *Re Mouldpro International Limited*, Whelan J referred (at para. 179) to a celebrated address that Lightman J of the Chancery Division of the England and Wales High Court gave to the Insolvency Lawyers' Association there in November 1995 (Lightman J, '*The Challenges Ahead'* (1996) Journal of Business Law, Mar, 113-126) and, in particular, to his trenchant comment that a perceived lack of control over fees and costs in corporate insolvencies had been attributed by some to the open unguarded pocket from which those costs were paid, coupled with a mindframe careless of the consequences for unsecured creditors and others. While I would hope that any such public perception was misconceived, I cannot doubt the need that Whelan J identified to attempt to control those costs through vigilant scrutiny.

97. In attempting to apply that level of scrutiny in this case, I conclude as follows.

98. Mr Fitzpatrick has failed to discharge the onus of establishing a claim to the level of remuneration that he seeks. I accept the view expressed by Mr Murphy that, based on the efficient completion of the work by appropriately qualified and experienced staff at the charging rates claimed by Mr Fitzpatrick, a reasonable amount of chargeable time would be 191 hours at a cost of c. €37,000.

99. Mr Fitzpatrick's claim of €2,751.32 in expenses and outlay has not been challenged and I accept it.

100. Applying VAT at 23% to those sums, he is thus entitled to have his remuneration fixed in the aggregate amount of €48,804.12.

101. For the reasons I have given, I am satisfied that the sum concerned reflects the time properly required to be given by Mr Fitzpatrick and his staff to attending to the company's affairs; the complexity of the case; the responsibilities that Mr Fitzpatrick had to deal with; the effectiveness with which he carried out his duties; and the value and nature of the property with which he had to deal.

102. I will order accordingly.

Final matters

103. One year ago today, on 24 March 2020, the Chief Justice and Presidents of each court jurisdiction issued a joint statement recording their agreement that, in light of the COVID-19 pandemic and the need to minimise the exposure of persons using the courts to unnecessary risk, the default position until further notice is that written judgments are to be delivered electronically and posted as soon as possible on the Courts Service website. The statement continues:

> The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made where appropriate.'

104. Thus, I direct the parties to correspond with each other to strive for agreement on any issue arising from this judgment, including the issue of costs. In the event of any disagreement, short written submissions should be electronically delivered to the registrar (rather than physically filed in the Central Office of the High Court) within 14 days, to enable the court to adjudicate upon it.

Appearances

Ronnie Hudson BL for the applicant, instructed by Herbert Kilcline, Solicitor.

Barry Cahir, Solicitor, of Beauchamps, Solicitors, for the respondent.

Sally O'Neill BL, for the notice party, instructed by the Revenue Solicitor.