OUTER HOUSE, COURT OF SESSION

[2023] CSOH 27

P600/22

OPINION OF LORD BRAID

In the petition by

BLAIR CARNEGIE NIMMO AND ALISTAIR MCALINDEN, AS THE FORMER JOINT ADMINISTRATORS OF FUTURE RENEWABLES ECO PLC (IN ADMINISTRATION)

Petitioners

For

An order to fix the former joint administrators' remuneration and outlays

Petitioner: L Walker, Solicitor Advocate; Addleshaw Goddard
Respondents: Tosh; Thorntons Law LLP

25 April 2023

Introduction

[1] Future Renewables Eco plc, and nine wholly owned subsidiaries, operated ten wind turbines from nine sites across the UK, generating electricity for sale to several wholesale customers. The group was financed by four tranches of mini-bond issues between 2015 and 2018, the total amount raised being approximately £23 million from over 750 bondholders. The group did not generate sufficient revenue to cover its debt obligations, and defaulted on its bondholder payments in May 2021. The company engaged Interpath Ltd to prepare an information pack to be shared with the bondholders, in contemplation of a bondholder vote to vary the bondholder's agreements with the company.

Interpath assisted in the preparation of tables and schedules relating to the financial outcome for the bondholders in the event of the proposed variation being agreed, and in the event of an insolvency.

[2] The attempt to reach a compromise with the bondholders failed, and on 14 September 2021 the directors of the company appointed the petitioners (both of Interpath) as joint administrators of the company in terms of the Insolvency Act 1986. Eight subsidiaries have also entered administration, five of them in Scotland. In relation to the work previously done by Interpath, both petitioners were satisfied that it did not create a conflict of interest, and no issue is taken with that.

[3] However, the creditors had concerns around the petitioners' appointment by the directors, and the petitioners were, by decision of the creditors, replaced by the respondents as joint administrators on 25 November 2021.

[4] There is no dispute that the petitioners are entitled to be remunerated for their period in office. It is evident from even the foregoing brief summary that the company's affairs were complex. Nonetheless, one might be entitled to raise a quizzical eyebrow at the total remuneration claimed by the petitioners - £302,661.60, of which £70,343,90 (not far short of 25%) relates to the period from 26 November 2021 until 29 April 2022, that is, to a five month period after the petitioners had been replaced as administrators - together with outlays of £93,706.44, of which the largest is £70,971.48 for legal fees.

[5] The creditors' committee having failed to reach a decision, the petitioners have applied to the court to fix their remuneration and outlays, in terms of the Insolvency (Scotland) (Company Voluntary Arrangements and Administration) Rules 2018. (Strictly speaking, the petitioners ought first to have sought a decision from the creditors, but no point is taken about that.) The petition is opposed by the respondents, who have done more

than raise a quizzical eyebrow: they assert that the remuneration and outlays claimed are excessive, and do not fairly represent the value of the petitioners' work to the company, particularly, but not exclusively, in relation to the sum sought for the period after the petitioners were removed from office.

[6] In accordance with the usual practice, a remit was made to a reporter, Mr Matthew Henderson, Chartered Accountant, an experienced and highly regarded insolvency practitioner, as well as to the Auditor of the Court of Session. Having considered statements of the petitioners' intromissions, statements of time and charge-out summaries, and statements of the petitioners' time and trouble, the reporter has recommended a reduction to the remuneration of £40,565.20, resulting in a total fee of £262,096.40, of which £57,021.30 (just over 20%) relates to the period post-appointment. He has approved the outlays in full. After conferring with the reporter as directed, the auditor has issued a report to similar effect.

[7] The petitioners are content to accept the reporter's recommendations and have lodged a motion for approval of their remuneration and outlays in that reduced sum. The respondents have opposed that motion, and have lodged a note of objections, which in turn has been answered by the petitioners. The case called before me on the petitioners' motion and for a hearing on the note of objections and the answers thereto.

The issues

[8] Although the point was not ultimately pressed with any great enthusiasm, the solicitor advocate for the petitioners submitted that the respondents have no *locus* to oppose the petition. Assuming that they do, there is an issue as to the circumstances in which the court

might decline to follow the reporter's advice. Thereafter, the respondents have made four specific challenges to the reporter's approach to the following matters:

(i) The legal fees;

(ii) Pre-appointment costs;

(iii) Post-appointment costs;

(iv) The petitioners' refusal to hand over certain files to the respondents.

I will look at each in turn.

Locus

[9] The argument that the respondents had no *locus* was premised partly on the absence of any specific provision in the rules, or the 1986 Act, specifically entitling an administrator to challenge the remuneration and outlays claimed by a previous administrator; and partly on the fact that the only parties who may apply to the court in terms of rules 3.99 and 3.100 of the rules to increase or reduce remuneration are the administrator to whom the remuneration is payable, and creditors (to the value of at least 25%). Dealing with that point first, rules 3.99 and 3.100 have no application to the present circumstances. They apply where remuneration has been fixed by the creditors' committee or by the creditors, not the situation here. More generally, I accept the submission made by counsel for the respondents that the respondents need not point to any specific statutory provision entitling them to appear; rather, it is sufficient that they can demonstrate a title and interest at common law, which they can do if they are able to show that they would potentially be detrimentally affected by the outcome: *Norwich Union* v *Tanap Investments VK Ltd (in liquidation)* 2000 SC 515, at 525E. Here, as counsel for the respondents submitted, detriment could occur in two ways. First, the respondents are charged with the property of the company, out of

which the remuneration sought is payable. They necessarily have an interest on behalf of the company to challenge that remuneration. Second, the amount available for their own fees and outlays would inevitably be depleted by any sum payable to the petitioners.

[10] Further, even if the respondents might otherwise have had no *locus*, the petition was served on the company, as a respondent named in the schedule. That having been done, the company, through the respondents (who, as the company's agents have the power to bring or defend proceedings in name of and on behalf of the company) is entitled to appear and be heard: *Pollock* v *Turnbull* (1827) 5S 195.

[11] Further, as counsel for the respondents submitted, the objection to the respondents' title to appear simply comes too late in the day, and ought to have been taken by preliminary plea, before any remit was made, which it was not.

[12] Two final points may be made. First, the petition was served only on the company, not on the creditors (or the creditors' committee). I understand that the points the creditors wish to make are being made through the respondents; but if it were held that the respondents could not be heard, fairness would require the petition to be served on those bodies now, which would simply result in further delay and expense, to no good end. Second, the points made by the respondents are all points which the court might well have made of its own accord. Now that the points have been made, it would be difficult for me to "unhear" them, and it would be a somewhat artificial exercise if I were now to hold that the respondents had no *locus* to make the points they have in fact made, but which I could nonetheless take into account.

[13] Accordingly, I find that the respondents do have a *locus* to object to the petitioners' remuneration and outlays, and were entitled to appear and to make the points they did.

Status of the reporter's advice

[14] Although parties are agreed that the decision as to the level of the petitioners' remuneration and outlays is one for the court, not the reporter, they differed as to the circumstances in which the court might depart from the reporter's recommendation, and how the court should treat the recommendation in the present case. Relying upon *Liquidator of RC Hyndman Ltd, Noter* 2003 SLT (Sh Ct) 51 at 57E to F, the solicitor advocate for the petitioners submitted that the court should depart from the report only where the reporter had clearly gone wrong. She argued that this gained support from *Liquidator of St Margaret's School, Edinburgh, Ltd, Noter* 2013 SLT 241, where Lord Malcolm said, at para [29], that the reports of a reporter, and the auditor will always carry great weight but that the decision remained for the court and the court alone. He added that the role of the court provided a safeguard for any case where "it is apparent that…something is amiss"; and that there must be cogent and objectively justifiable reasons for departing from a reporter's advice (para [35]). At para [32] he set out the principles which should be applied in determining the level of remuneration: (i) that the office holder must tender and be able to justify an explanation of what he had achieved; (ii) that any element of doubt as to the appropriateness, fairness or reasonableness of the claimed fee should be resolved against the appointee; (iii) that weight should be given to the fact that the appointee is a member of a regulated profession; and (iv) that the fee should reflect and reward the value of the service rendered, not simply amount to reimbursement in respect of time expended and cost incurred. The respondents had not shown that the reporter in the present case had failed to apply the proper principles, and he could not be said to have erred or to have gone wrong.

[15] Counsel for the respondent was content to proceed on the basis that the court could disagree with the reporter's advice only for cogent and justifiable reasons. I find it

unnecessary to consider in detail whether the sheriff in *Hyndman* was wrong in applying a "clearly gone wrong" test, other than to say that in light of *St Margaret's School*, that does not seem to me to be the best way to express the test. If the decision is one for the court, as it is, there is no delegated decision to depart from and ultimately the report is simply one factor – albeit an important one which, as Lord Malcolm said, carries considerable weight - to be taken into account by the court in reaching its own decision as to the appropriate level of remuneration and outlays. I proceed on that basis. I accept, of course, that cogent and justifiable reasons must be given, if the reporter's advice is not followed, but that could be said of any decision reached by this court in any context. In any event, the status to be accorded a reporter's advice is perhaps a less acute issue where, as here, I am being urged by the respondents not to substitute my own view (at least, at this stage) but to remit the case back to the reporter for further inquiries to be carried out; a power which the court must always have if not persuaded by the reporter's reasoning, or if further clarification is required of a particular matter.

The four objections

(i) The outlays

[16] Rule 3.95(1)(c)(i) entitles the petitioners to claim for any outlays "reasonably incurred" by them. The sum claimed for legal fees incurred to Addleshaw Goddard is £70,971.48. The reporter's approach, at page 8 of his report, is to note that legal costs in an administration are a category 1 expense. He goes on to say:

> "These costs do not require taxation unless the legal firm concerned is an associate of the [petitioners] or are not deemed to be reasonable by the [petitioners]. In this case the [petitioners] have agreed that the costs are reasonable and correctly vouched. Accordingly, the correct approval process appears to have been followed and the costs are now due to be paid."

[17] The reference to category 1 expenses is to SIP 9 (Scotland) which provides at paragraph 27 that category 1 expenses can be paid without prior approval, and do not need approval before they are charged to the estate (in contrast to category 2 expenses, which do need prior approval). The reporter is correct to conclude that Addleshaw Goddard's fees are a category 1 expense.

[18] The petitioners submit that: there is no error in the reporter's approach; they, as officers of the court, are the final arbiters as to whether or not the costs are reasonable; they were entitled not to require the costs to be taxed; in terms of SIP 9, there is no need for the court to approve those costs, nor were the respondents entitled to query their predecessors' decision that the costs were reasonable; the court should not order a taxation, which would be binding only as between the petitioners and Addleshaw Goddard: *Joint Liquidators of Arakin Ltd, Noters* [2009] CSOH 175, Lord Glennie at [22].

[19] However, as the respondents point out in response, SIP 9 is a non-statutory statement of practice issued by regulators, with no statutory effect. It cannot trump the Rules, nor does it purport to do so. It merely states that a category 1 expense can be paid without prior approval. It says nothing about whether or not such an expense is to be taken to have been reasonably incurred. As for the petitioners' argument that, as officers of the court, they can be trusted not only to pay, but to approve, their own outlays, that is in flat contradiction to the rules, which require an administrator to seek the approval, either of the creditors or the court, for outlays reasonably incurred. *Arakin* does not assist the petitioners: if taxation cannot bind the creditors, no more can an agreement between the administrators and their solicitors.

[20] The fact of the matter is that there has been no inquiry, either by the reporter or the auditor, into whether the outlays were reasonably incurred. By referring exclusively to category 1 expenses, the reporter has, with respect, fallen into error.

[21] This issue therefore requires to be remitted back to the reporter for further consideration. The question then arises as to whether the court should leave it to the reporter to consider whether, before forming a view as to whether the legal fees have been reasonably incurred, Addleshaw Goddard's fees should be taxed. There are two issues at play. First, whether the fees are reasonable as between the petitioners and Addleshaw Goddard, and second, if they were reasonable in that sense, whether they were reasonably incurred in the administration. While a taxation cannot bind the respondents, it is only if the fees pass both tests that they ought to be charged to the administration. Given the level of the fees, and the extent of the respondents' dissatisfaction with the overall sum claimed, and in an attempt to have matters resolved as expeditiously as possible, I have concluded in the interests of transparency that the fees ought to be taxed before the reporter then gives consideration to the separate question of whether they were reasonably incurred. I make two final comments. First, there may require to be inquiry into whether all of the work charged was done for this administration or whether part of it related to the administration of one or more of the subsidiaries. Second, it is not simply the Addleshaw Goddard fees which require to be considered: the reporter should also consider whether all other outlays, be they category 1 or category 2, including other legal fees, were reasonably incurred.

(ii) Pre-appointment costs

[22] The opposing positions here can be briefly stated. There is no criticism of the reporter, since the petitioners accept that he was not provided with information about the work done by Interpath pre-appointment. The respondents argue that since the reporter was not privy to details of any such work, he cannot have properly formed a view as to whether all post-appointment work was reasonably done and provided value. The petitioners' response is that the reporter was not required to assess what the petitioners did not do, simply what they did, and that there was no need for the reporter to be provided with information about the pre-administration work. The petitioners further submit that if anything, the pre-appointment work resulted in a saving to the administration since it may have led to less work being done in the administration itself than might otherwise have been the case.

[23] Here again, although it was not expressed in this way in the petitioners' submissions, it seems to me that the petitioners are asking the court to accept their say-so that there was a saving to the administration through the pre-administration work, without any form of independent scrutiny of that assertion. However, how can either the reporter or the court be satisfied that this was so (or, at any rate, that there was no further charge made for work which had already been done, and paid for) unless details are provided of what work *was* done prior to the administration? I consider that here, too, the reporter's inquiries (through no fault of his) are incomplete and that further inquiry ought to be made.

(iii) Post-administration work

[24] This is, perhaps, the area where most explanation is required; certainly more than has been given to date. As counsel for the respondents submitted, the petitioners should

have been handing over the reins of the administration to the respondents on, or very soon after, 25 November 2021, and it is hard to envisage, on any level, how costs of even the £57,021.30 recommended by the reporter could have added value to the administration, let alone the £70,000 or so claimed by the petitioners, even granting that the affairs of the company were complicated and, undeniably, some work would be required to effect the hand-over. The breakdown of time costs provided to the reporter, and appended to his report, raises as many questions as it provides answers. Why were 3.8 hours required for "notification of appointment", resulting in a cost of £1,218? Or 9.2 hours for "checklist & reviews" (one can understand checklist, perhaps, but reviews?), resulting in a cost of £2,917.80? What purchases and trading costs were required (0.4 hours, £248)? Or sales (5.50 hours, £1996.5)? Most strikingly of all, what is meant by the somewhat anodyne description, "Fees and WIP", for which a total of 56.80 hours has been charged at a cost of £29,980? There may well be an explanation for some or all of these items (although when I raised the fees and WIP at the hearing, the solicitor advocate for the petitioners was unable to explain it, beyond pointing out that the bulk of the time charged for was incurred by a manager, which is no answer at all). On further perusal of the report, I note that the reporter does comment on fees and WIP at page 10, where he states that the majority of time allocated to this aspect relates to the preparation of the documentation for the court reporter, presumably meaning himself. However I do not understand how that can be, when the costs claimed relate to a period before the remit to the reporter. The reporter goes on to state that he considers that the time spent in respect of this is excessive, but it is unclear how much of his suggested overall reduction relates to that figure. I would in any event question whether any time spent in preparing documentation to justify the fee charged is properly chargeable against the administration. Ultimately, I do require to know precisely how much

of the £29,980 has been "disallowed" by the reporter, in case there is a legal argument to be had in due course as to whether any of the work done to justify the fee charged can itself properly be charged to the administration.

[25] Accordingly, while the reporter has already recommended a reduction to the post-administration work, I do not consider that he has given adequate consideration to the extent to which that work has provided value, nor has he explained in sufficient detail the process by which he arrived at his proposed reduction, nor which items, specifically, he considers to be excessive and to what extent. This matter, too, requires further consideration, and a greater degree of clarity.

(iv) The files

[26] The objection here is that the petitioners have done work the fruits of which they have (rightly or wrongly) failed to make available to the respondents. Two examples have been identified. The first is the engagement of a company called CAPA to investigate certain matters on a no-win no-fee basis; the second is a bank statement analysis. The respondents' note of argument states that it is clear that any report from CAPA and the bank statement analysis ought to have been delivered to the respondents under rule 3.70, but as I understood counsel for the respondents, he came to accept at the hearing that the true issue in the context of the petition is whether the petitioners are entitled to charge the administration for work which is not made available to their successors in office.

[27] In relation to those two specific items, the petitioners say that CAPA were engaged to review the group's business rates and to seek refunds in the event that the rating for each property was overpaid. Apparently the exercise was unsuccessful and CAPA were unable to identify any possible realisations. They say they are willing to provide details of this

engagement if the respondents wish. As for the bank document review, it is said to be an internal document owned and held by the petitioners, originally used as a benefit of the petitioners, not the company. As such it falls outwith the ambit of information which requires to be provided to the new officeholders under rule 3.70.

[28] That last submission may well be correct, but somewhat misses the point which is whether in those circumstances the petitioners should be entitled to charge for work from which its successors as administrators are unable to benefit: put another way, why should the company in administration reasonably bear the costs of the same work being done twice? As for CAPA, here again it seems to me that the petitioners expect the court to accept its own assertion of what the position is, without any form of oversight. Whether or not the work has reaped a benefit for the company, it is unclear why the respondents should not see the work that was done and the outcome of that work, if only to avoid their having to undertake the same exercise again. If they are not to see that, it is unclear why the petitioners should be entitled to charge for it. (This issue may become a non-issue if, as they say they are prepared to do, the petitioners now disclose the work done in relation to CAPA to the respondents without further ado).

[29] This matter, too, requires further consideration, and a greater degree of clarity; in particular it would be helpful if the reporter were able to identify how much of the sum claimed relates to the two items in dispute, and to give consideration to whether the work done provided a benefit to the company for which the petitioners are entitled to be paid. Ultimately, the decision on whether an administrator is entitled to be paid for work the benefit of which is not made available to a successor in office, will be one for the court.

Further remit

[30] For the reasons given, the case will therefore require to be remitted back to the reporter and to the auditor for specific consideration of the four issues discussed above. Although the respondents invited me to remit back to the reporter to reconsider, in the generality, the remuneration sought for the period until 26 November 2021, when the petitioners were in office, I do not consider that there is a cogent reason to justify that, save insofar as the work done in that period relates to one or other of issues (ii), (iii) or (iv). Other than in relation to the outlays, where he has erred, there is no reason to suppose that the reporter has not had regard to the proper principles in considering the appropriate level of remuneration for the period when the petitioners were in office. The reason for the remit is, in the main, because he did not have sufficient information first time round in relation to the issues which the respondents have raised. Before concluding, I need to make some further observations about the reporter's role, and the level of detail required in the report. One minor criticism of the reporter's approach made by counsel for the respondents was that at page 12 of the report, the reporter comments that the petitioners "have been informed and agree with the suggested fee proposed" (in passing, I observe that something appears to have gone wrong with the sentence which follows the one from which I have just quoted: it bears to be in the reporter's voice, but is in fact written in the first person plural and appears to be a direct quote from something the petitioners have written, which is confusing). Thus, it appears that the reporter has been in direct touch with the petitioners and sought their agreement to the proposed fee, giving the impression, rightly or wrongly, that it was something which might be negotiated. Whether or not that is normal practice where a reporter proposes a reduction, I do not know, but certainly where a fee is contentious and there is an opposing party, as here, I do not consider that it is appropriate. It is one thing to

seek clarification on a point of detail (such as in relation to the fees and WIP); quite another to suggest a fee to one party and not the other. It is not a reporter's function to negotiate a fee, rather it is to give advice to the court. In making these comments, I acknowledge that the reporter is a highly respected member of his profession, and I make no criticism whatsoever of his integrity or impartiality: it appears he may not even have known of the respondents' participation in the process. However it is important that a reporter not only is, but is seen to be, entirely impartial, and although done with the best of intentions, it would have been better had the reporter not contacted the petitioners to discuss his proposed reduction with them.

[31] Moving on from that, I have some sympathy with the reporter's task in this case, which is unusual in several respects, not least the level of fees sought for the period after the petitioners were in office, and the objections made (of which the reporter is now aware). He has clearly already given the matter careful consideration, and (although the respondents still think it is too little) he has already proposed a significant reduction to the fee claimed. Although it is the reporter's function to advise the court whether the remuneration and outlays are reasonable, as we have already seen, it is the court which must make the ultimate decision. The court must have sufficient material to enable it to reach an informed decision. That being so, in the particular circumstances of this case, I do not consider that the report provides sufficient detail about the proposed reductions. The court needs to know not simply what the total of the reductions is, but which particular items that have been claimed are considered to be excessive and to what extent. As will be evident from the discussion of the four disputed items above, the court may ultimately need to reach a decision on whether as a matter of principle the petitioners are entitled to charge for certain items of work, and it therefore needs to know not only what fee the petitioners are seeking,

but also what reduction to those items the reporter is proposing. At the very least, it would be helpful to know how much of the proposed reductions relates to the period before, and how much to the period after, the date of removal. I hope that the reporter finds these comments to be of assistance.

Disposal

[32] For the foregoing reasons, I propose to make the following further remits, first to the Auditor, to tax the files of Addleshaw Goddard LLP in respect of the legal fees incurred by the petitioners, and to report; and to the reporter, to give further consideration to the following matters:

1) whether the outlays claimed by the petitioners (including the Addleshaw Goddard fees, as taxed) were reasonably incurred, and are recoverable as outlays in the administration of the company;

2) whether, in relation to issues (ii), (iii) and (iv) identified in this opinion the work for which remuneration is claimed was reasonable, proportionate and beneficial to the creditors and the progress of the administration; and to report further on the extent to which any remuneration claimed may not be recoverable.

[33] I will not make any further orders at this stage. Doubtless the matter will come back to me following receipt of the further reports. For the avoidance of doubt, I have not overlooked the petitioners' argument that no further remit should be made because of the further expense which will be incurred. However, while that may be an unfortunate by-product of a further remit, it cannot be the determining factor. Before fixing the proper level of remuneration, the court must have the requisite information, which it currently lacks.

Besides, the expenses of the current process remain to be determined, which will have a significant bearing on the extent to which the company must suffer the costs being incurred.