



**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

CAUSE NO: FSD 49 OF 2018 (IKJ)

IN THE MATTER OF THE COMPANIES ACT (2022 REVISION)

AND

IN THE MATTER OF WORLD PROPERTIES LTD (IN OFFICIAL LIQUIDATION)

In Chambers

Appearances: Mr Nigel Smith, Carey Olsen, for the Joint Official Liquidators
("JOLS")

Before: The Hon. Justice Kawaley

Heard: On the papers

Date of decision: 29 September 2022

Draft Reasons Circulated: 3 October 2022

Reasons delivered: 3 October 2022

HEADNOTE

Remuneration application-Joint Official Liquidators' fees and expenses approved by 'Minority Shareholders' and objected to by 'Majority Shareholders'-suitability of application for determination on the papers-whether objecting parties impliedly consented to or waived the right to object to a hearing on the papers--correct approach to uncontested fee approval application - FSD Users' Guide-Companies Act (2022 Revision) section 109, Insolvency Practitioners Rules 2018, Order 11 rules 2-4



Introductory

1. By a Summons dated 2 August 2022 (“Summons”), the JOLs sought an Order in the following substantive terms:

“1. The remuneration of the JOLs incurred during the period 1 June 2020 to 31 January 2022 in the total amount of US\$390,705 be approved and paid out of the assets of the Company.

2. That the increase in the JOLs charge-out rates effective from 1 January 2021 and 1 January 2022 be approved as set out in paragraph 36 of the fifth affidavit of David Martin Griffin filed herein.

3. The JOLs' costs of and incidental to this Summons be paid out of the assets of the Company as an expense of the liquidation...”

2. The Summons was supported by the Fifth Affidavit of David Griffin dated 2 August 2022 and the Sixth Affidavit of David Griffin dated 8 September 2022 (“Griffin 5” and Griffin 6”). Griffin 5 explained that in addition to the Liquidation Committee, the JOLs have routinely consulted with all Stakeholders and held combined meetings of creditors and contributories. The contributory Stakeholders are all relatives and fall into two main camps described as the “Majority and the “Minority”. As deposed in Griffin 6, the Summons was listed for hearing on September 29, 2022 and served on all Stakeholders under cover of emails dated 18 August 2022. These emails informed Stakeholders that unless anyone indicated by August 29, 2022 that they wished to be heard on the present Summons, the JOLs would invite the Court to deal with it on the papers. Two of 10 Stakeholders responded by the deadline and confirmed that they did not wish to attend or participate the hearing of the Summons.
3. The JOLs accordingly proceeded to invite the Court to determine their Summons on the papers on the grounds that none of the Stakeholders had evinced an intention to appear at the listed oral hearing, nor signified their desire to actively oppose the Summons. Having determined that it was appropriate to determine the present application on the papers, I granted the relief sought by the Summons on 29 September 2022, the initially assigned hearing date.



4. In light of the fact that: (1) the application was initially (although ultimately tentatively) opposed by the Majority; and (2) my concern to ensure that there be clarity as to the legal basis for my decision to grant the application, I now give short reasons for this decision.

The appropriateness of determining the Summons “on the papers”

Governing principles

5. The FSD Users Guide sets out the following guidance about “*Interlocutory Applications on the Papers*”:

“1.1 Although contested applications are usually best determined at an oral hearing, some applications may in the discretion of the judge be suitable for determination on the papers.”

1.2 If the applicant considers that the application is suitable for determination on the papers, he should ensure before filing the papers that:

- (i) the application, together with any supporting evidence, has been served on the defendant/respondent (if any);*
- (ii) the defendant/respondent (if any) has been allowed the appropriate period of time to serve evidence in opposition;*
- (iii) any evidence in reply has been served on the defendant/respondent (if any);*
- and*
- (iv) there is included in the papers (a) the written consent of the defendant/respondent (if any) to the disposal of the application on the papers without an oral hearing.*

1.3 Only in exceptional cases will the court dispose of an application on the papers without an oral hearing in the absence of the consent of the defendant/respondent (if any).” [Emphasis added]

6. The need to consider the appropriateness of dispensing with a hearing, according to the above-cited express terms of the FSD Users’ Guide, arises primarily (but not solely) in relation to “*contested applications*”. One critical threshold consideration as to whether it is appropriate to determine an application on the papers will be whether or not it ought fairly



to be regarded as a “contested” one. As regards uncontested applications, there may be open justice considerations at play.

7. In winding-up proceedings such as the present action, the need to consider whether open justice principles require an oral hearing even in the context of uncontested applications will seldom arise. The pivotal questions will usually be (1) is the application contested, and (2) if so, do all parties agree to dispense with a ‘live’ hearing. The most significant general consideration will typically be the procedural policy goal of “saving expense” (Overriding Objective, paragraph 2 (c)). The Overriding Objective is reproduced in full in the said Guide.

Suitability of the JOLs’ Summons for determination on the papers

8. In the present case, it was clear from Griffin 6 that the JOLs had substantially complied with paragraph 1.2 of the Guide. They had:
 - (a) served the application and the supporting Affidavit (Griffin 5) on the Stakeholders;
 - (b) afforded the Stakeholder 11 days to indicate whether they wished to attend the oral hearing which had already been fixed by the Court. In the absence of any requests for more time to consider their position, and considering that two Stakeholders were able to respond the day after receiving the 18 August 2022 emails, I considered that time to be appropriate;
 - (c) there was no evidence in reply to be served; and
 - (d) the written ‘consents’ which had been obtained were placed before the Court.
9. The purpose of these procedural steps is to assist the Court to determine whether the application is indeed suitable for determination on the papers through elucidating both (1) the extent to which (if any) the matter is contested, and (2) the extent to which (if any) interested parties consider an oral hearing is required. Where the majority of the parties entitled to be heard in opposition to an application do not expressly articulate their position in writing, the judicial analysis is not an entirely simple one. In cases such as the present, an important part of the requisite analysis is assessing whether, in all the circumstances, the silent potential participants in an oral hearing:



- (a) have signified their implied consent to the applicant's request for a hearing on the papers; and/or
 - (b) waived the right to object to a hearing on the papers.
10. The JOLs' 18 August 2022 emails pithily described the relief sought by the JOLs' present application, attached the Summons together with the supporting Affidavit, referred to the fixed hearing date and then pivotally stated as follows:
- “The JOLs wish to invite the stakeholders to confirm by no later than 5pm Cayman Islands Time on Monday 29 August 2022 whether they propose to attend and be heard at the hearing. Please note that if no parties wish to be heard at the hearing, the JOLs shall ask the Court to determine the summons administratively and without a need for a formal hearing.”*
11. This was an explicit request to Stakeholders to signify whether or not they wished to have an oral hearing and an opportunity to make oral representations to the Court or whether they were content with an “*administrative*” hearing. The JOLs' emails clearly informed the Stakeholders that if they did not positively communicate their wish for a hearing, the JOLs would invite the Court to proceed “*administratively and without a need for a formal hearing*”. The JOLs emails did not require the Stakeholders to communicate a considered position on the merits of the Summons within the stated deadline, or any position at all. A hearing could have been requested by a Stakeholder by return email within the requested 11 days, most obviously because either:
- (a) the relevant party was unable to decide on its position but wished to preserve its right to decide at some point after the 29 August 2022 deadline whether or not to appear and oppose the Summons at the scheduled 29 September 2022 hearing; or
 - (b) the relevant party had already decided it wished to appear and oppose the Summons.
12. Even after 29 August 2022, any Stakeholder who had for whatever reason been unable to communicate his or her position to the JOLs within the stated deadline could have communicated their wish to the JOLs or the Court for a “formal” hearing. I was satisfied



provisionally on the basis of Griffin 6 and conclusively by 29 September 2022 (when no Stakeholder, and in particular members of the Majority, had requested a hearing), that all Stakeholders had either impliedly consented to a hearing on the papers or waived the right to object to such a hearing. The Summons was clearly suitable for determination on the papers because:

- (a) the Summons was not on any view a contested one;
- (b) no interested party objected to an administrative hearing despite being explicitly invited to do so; and
- (c) it is now common practice for uncontested fee approval applications in winding-up matters to be determined on the papers.

Uncontested fee approval applications: governing principles

13. This approach is in my judgment consistent with the somewhat broadly drafted statutory scheme. Firstly, section 109 of the Companies Act (2022 Revision) provides:

“(2) There shall be paid to the official liquidator such remuneration, by way of percentage or otherwise, that the Court may direct acting in accordance with rules made under section 154; and if more liquidators than one are appointed such remuneration shall be distributed amongst them in such proportions as the Court directs.”

14. The Insolvency Practitioners Rules 2018 treat remuneration applications as “sanction applications”. The same procedure applies where a liquidator is seeking the Court’s sanction for entering into a transaction, or taking some other action or step, as it does to a fee approval application. Order 11 rule 2 provides:

“(1) Every sanction application made by the official liquidator shall be served on

—

(a) each member of the liquidation committee; or



(b) counsel to the liquidation committee, if an attorney has been appointed by the liquidation committee with authority to act generally; and

(a) such other creditors or contributories as the Court may direct.”

15. Order 11 rule 3 provides that sanction applications should be heard in Chambers, unless the Court otherwise directs, while Order 11 rule 4 provides that the official liquidator may rely on affidavit evidence and/or reports not prepared for the hearing in question. The statutory scheme is thus designed to require official liquidators to obtain Court approval for their remuneration through applications which are served on stakeholders to enable them to, if so advised, oppose an objectionable application. The scheme effectively leaves to the Court’s inherent jurisdiction the task of deciding how to manage and dispose of the applications which are actually made.
16. Recent decisions of this Court, dealing of course with contested applications, have shed helpful light on how this broad statutory jurisdiction operates in practice. *In Re Direct Lending Income Feeder Fund Inc*, FSD 108/2019 (NSJ), Judgment dated 3 February 2022 (unreported), two passages provide valuable guidance on the general principles applicable to fee approval applications by official liquidators, both contested and uncontested. Firstly, the following conclusions of Segal J defines the onus of proof and test the Court has to apply when a remuneration application is not supported by the liquidation committee:

“58. In these circumstances and for these reasons, it seems to me that the JOLs have discharged the burden of proof laid upon them and established that the amounts for which approval is sought are fair, reasonable, and commensurate with the nature and extent of the tasks which they have properly undertaken, and that the work for which they have charged has resulted in significant and proportionate benefits to the estate. The resources used and the resulting costs were proportionate to what was needed and in particular to the benefits that have resulted and will result from the work. I am satisfied that ‘a prudent man faced with similar circumstances would [have laid out] or [hazarded] his money in the way that the JOLs have done.’”

17. Secondly, Segal J commented on the role of the committee in raising objections:

“65. I would, though, note this in conclusion. A liquidation committee’s role in reviewing the remuneration of official liquidators is an important one and its independent and commercial judgment is relied on by the Court (and creditors). It should not hesitate to challenge and oppose the approval of that remuneration where it considers that to be justified and the Court will welcome its participation on a fee approval application in such circumstances. But if it is dissatisfied with the official liquidators’ remuneration, before it opposes such an application it must ensure that not only has it identified with reasonable precision its points of dispute (with a suitably detailed explanation and reference to the evidence) but also that if it wishes to challenge the official liquidator’s professional judgment on resource allocation and case management, it is supported in its view by another professional, at least in any case where the challenge relates to a substantial part of the JOLs’ activities and remuneration claimed.”

18. In short, the JOLs have to demonstrate that the fees in relation to which approval is sought were reasonable in the sense that they were *“commensurate with the nature and extent of the tasks which they have properly undertaken, and that the work for which they have charged has resulted in significant and proportionate benefits to the estate”*. Where the Liquidation Committee wishes to object, the opposition must be based on (a) grounds which have been *“identified with reasonable precision”* and (b) if the professional judgment of the official liquidators is impugned, the objector must be *“supported in its view by another professional”*. More recently still in *Re OneTradex Ltd.*, FSD 166 /2020 (MRHJ), Judgment dated 17 June 2022 (unreported), the reasonableness of provisional liquidators’ fees was also challenged on a fully contested basis. Of assistance in terms of general guidance for the purposes of the present case are the following observations of Ramsey-Hale J, which add a further gloss to the analysis of why objections to remuneration applications should be clearly defined:

“46. The established practice is for the officeholder to provide a narrative of the work done together with the evidence of the underlying costs by reference to time sheets, invoices etc., as the PL has done here. It is then for the objecting party to make specific objections to the work claimed by reference to the underlying supporting evidence and to specifically quantify the quantum of fees to which there is objection by reference to the supporting time sheet or invoice entries. The Court will then assess the challenges to the fees claimed on a structured and informed basis.” [Emphasis added]

19. In other words, an important aspect of the rationale for requiring specific objections to be raised when the officeholder has prepared a comprehensive explanation of the fees and expenses incurred is ensuring that the Court resolves serious challenges in an efficient manner. A fee approval hearing in which the Court is not able to proceed “*on a structured and informed basis*” is likely to be itself wasteful of costs. If an objector is unable to formulate “*specific objections to the work claimed by reference to the underlying supporting evidence and to specifically quantify the quantum of fees to which there is objection*”, there is an obvious risk that:
- (a) the objections raised are unmeritorious;
 - (b) the liquidators will incur unnecessary costs dealing with unmeritorious objections to their remuneration claim; and/or
 - (c) Court time and resources will be wasted on an unnecessarily prolix contested application which the Court is unable to adjudicate in a straightforward and timely manner.
20. It is possible to extrapolate from these established principles applicable to contested remuneration applications what the approach of the Court should be in the context of uncontested applications where the liquidation committee and/or other stakeholders have simply withheld their affirmative approval rather than opposing the application. It is not an infrequent occurrence where stakeholders, in the oft-quoted words of Alexander Pope, are “*Willing to wound, and yet afraid to strike; Just hint at fault and hesitate dislike*”. When this occurs, in my judgment the Court ought to be entitled to presume, absent grounds for displacing such assumption, and provided the fee approval application is prepared in the expected manner, that no valid objections exists. The Court cannot be expected to assume a more onerous adjudicative burden in relation to an uncontested remuneration agreement than in the case of a fully contested one where the objectors are required to articulate specific and coherent objections, in part at least to assist the Court.
21. It is not customary to give reasons for uncontested liquidators’ fee approval or remuneration applications because it is typically self-evident on the face of the papers that a *prima facie* case for approval has been made out and there are no formal objections requiring adjudication. The liquidators will typically have explained the work which was done during the relevant period, set out in tabular form the workstreams and the various fee earners and their rates, demonstrating that they fall within the prescribed limits. They will also invariably have demonstrated that the liquidation committee and/or other stakeholders have been given an opportunity to review the relevant material have either (1)



consented to the application or (2) refused to approve the application, albeit without electing to make positive representations to the Court in opposition to the application. Because they are mindful of their obligations on what is analogous to an ex parte on notice application, the liquidators will invariably draw to the Court's attention the unpursued objections that the committee or other stakeholders have previously made.

22. The Court's task in such cases is essentially limited to:

(a) satisfying itself that a *prima facie* case for approval has been made; and

(b) where some stakeholders have, in effect, grumbled and griped without having the gumption to positively oppose the application, the Court in my judgment must further satisfy itself that there is, taking a high-level view, nothing 'eyebrow-raising' about the level of fees and expenses. If there is readily discernible cause for concern, the Court of its own motion should consider making appropriate disallowances after carrying out a more rigorous review.

23. In my judgment this approach is justified even where, as has occurred somewhat unusually in the present case, both the Liquidation Committee and the majority of the shareholding stakeholders have declined to 'bless' the JOLs' remuneration application. Liquidation stakeholders should ordinarily expect that comprehensively documented remuneration applications which are tentatively challenged but not actively contested will ordinarily be granted on an administrative basis without any reasons being given for the decision.

The merits of the present application

24. The JOLs' Skeleton accurately summarized the application as follows:

"8. The work undertaken by the JOLs during the Relevant Period can be characterised as predominantly attempts by the JOLs to facilitate settlement between the Majority and the Minority, with such settlement also intended to address the JOLs fees. It is now apparent that such settlement is not achievable, hence the summons.



9. *The work carried out by the JOLs is set out in detail in the JOLs' Fourth Report dated 17 February 2022 (the 'Fourth Report') (at pages 23 to 25 of DMG-5 [Tab 4/pages 23-25]) and is summarised at Griffin 5, para 39 – 42 [Tab 3/pages 9-12]. Tables of the fees incurred are located at pages 20-22 of DMG-5 [Tab 4/pages 20-22].*

10. *The Court had previously approved a Remuneration Agreement which provided that the parties would negotiate the hourly rates of remuneration to take effect from 1 January each year, failing which the JOLs would apply to the Court. The Remuneration Agreement set discounted charge out rates (which had been agreed by all of the shareholders at the commencement of the voluntary liquidation in March 2018) for the period of 9 April 2018 to 31 December 2019. The JOLs did not seek to increase their charge out rates on 1 January 2020.*

11. *As of 1 January 2021, and again as of 1 January 2022, the JOLs increased their charge out rates. This was in line the JOLs' ordinary business practice, as envisaged in the Remuneration Agreement, of revising their charge out rates at the start of each year. The change of charge out rates at the beginning of 2021 was not communicated to the Stakeholders until the Fourth Report. This is because the JOLs believed that a settlement was imminent and anticipated that the JOLs' fees and expenses of the liquidation would be resolved as part of it. The Majority raised objections about the JOLs' remuneration as they had not been advised of a fee increase in early 2021."*

25. The amount and basis for the fees and expenses was comprehensively set out the JOLs' evidence in particular in their Fourth Report. The objections to their fees and the JOLs' responses to them were set out in the evidence and summarized in the JOLs' Skeleton. The objection about the delayed notification of the fee rate application was satisfactorily answered, as was the complaint of the proportionality of the fees relative to the size of a minority stake. The underlying dispute was a family one and the annals of civil litigation history are replete with examples of family disputants' inability to deploy cold commercial logic resulting in professional fees being incurred in vain attempts at a rational settlement.
26. I found in relation to the JOLs' uncontested remuneration application that:

(a) a *prima facie* case for approval had been made out; and

- (b) taking a high level view of the matter and having regard to the fact that unpursued objections had been raised by the Majority, there was justification for the Court embarking upon its own independent investigation of complaints which the relevant Stakeholders had elected not to further pursue.

Conclusion

27. For these reasons, on 29 September 2022 I approved the JOLs' application for approval of their remuneration by Summons dated August 2022, on the papers.

A handwritten signature in blue ink, appearing to read "Ian RC Kawaley".

THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT