[2025] UKPC 41
Privy Council Appeal No 0071 of 2023

JUDGMENT

Attorney General of Trinidad and Tobago (Respondent) *v* CL Financial Ltd (in Liquidation) (Appellant)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Hodge
Lord Briggs
Lord Leggatt
Lord Stephens
Lord Richards

JUDGMENT GIVEN ON
16 September 2025

Heard on 2 October 2024

Appellant
Ben Valentin KC
Fyard Hosein SC
Sasha Bridgemohansingh
(Instructed by Lex Caribbean (Port of Spain) and Sinclair Gibson LLP)

Respondent
Deborah Peake SC
Ravi Heffes-Doon
(Instructed by Hobsons (Port of Spain) and Blake Morgan LLP (London))

LORD RICHARDS:

Introduction

1. This appeal concerns the remuneration of the liquidators of an insolvent company. As the authorities from a wide range of jurisdictions cited to the Board make clear, fixing the remuneration of liquidators and similar officeholders, such as administrators, receivers and trustees in bankruptcy, has caused considerable problems of principle and practice. As regards Trinidad and Tobago, the Court of Appeal observed that "this is a novel area in our jurisprudence".

2. CL Financial Ltd ("the Company"), a company incorporated in Trinidad and Tobago, is in compulsory liquidation, having been ordered to be wound up by the High Court in September 2017. It applied to the court for the approval of the remuneration of its liquidators for the calendar year 2019 ("the remuneration application"). The remuneration application was opposed by the Attorney General on behalf of the Government of Trinidad and Tobago ("the Government"), the largest single creditor of the Company. The High Court approved the remuneration, but its decision was reversed by the Court of Appeal. The Company appeals to the Board.

Background

3. The Company is the holding company of a group of companies with interests in a diverse range of businesses in several countries. Its accounts for 2015 recorded that it had seven sub-holding companies with over 40 subsidiaries, primarily in the insurance, real estate and spirits sectors, but with minor interests in other businesses. It had encountered financial problems in 2008, particularly in its insurance and banking businesses which included one of the largest financial institutions in Trinidad and Tobago. The Government provided financial support in excess of TT$23 billion to prevent its collapse. The Company thereafter embarked on a policy to realise its investments in some subsidiaries, with a view to reducing its liabilities to the Government. Notwithstanding the disposal of some subsidiaries, the group continued to operate in five areas of business in several countries, with some 24 active subsidiaries.

4. In July 2017, the Government presented a petition to wind up the Company and successfully applied for the appointment of provisional liquidators. At that date, the Company's debt to the Government was over TT$15.5 billion. On the Government's application, provisional liquidators were appointed on terms as to their remuneration which were agreed with the Government. The Company was wound up by the Court on 15 September 2017, on the grounds of insolvency. The court appointed Hugh Dickson and Marcus Wide, who were the provisional liquidators, as the liquidators. David Holukoff was appointed in place of Mr Wide by order made on 7 January 2019. Mr

Dickson, Mr Wide and Mr Holukoff are partners in Grant Thornton (BVI) Ltd, which is based in the British Virgin Islands and is part of the international accounting firm of Grant Thornton. They are insolvency practitioners with very considerable experience of international insolvencies. In this judgment, the Board refers to "the Liquidators" collectively as meaning those persons who were at any particular time in office as the liquidators of the Company, which in this case generally means Mr Dickson and Mr Holukoff.

5. There is no reason to doubt the evidence of Mr Holukoff, in his second affidavit in support of the remuneration application, that the liquidation of the Company is complex, particularly in view of its large and diversified corporate structure with subsidiaries operating in at least five major sectors in several jurisdictions, and with most group companies having significant liabilities. Since the subsidiaries are the Company's only assets, a principal part of the Liquidators' work has related to their business, assets and liabilities. The Liquidators say, although this is disputed by the Government and it is not a matter on which the Board can reach any view, that most of the subsidiaries had been badly managed over the previous ten years and their businesses and affairs were in substantial disarray, with no overall strategy on the direction the subsidiaries should take. Mr Holukoff also said that the liquidation was extremely labour intensive and that the Liquidators inherited very substantial litigation that had been commenced by group companies.

6. The powers of the Liquidators and the basis of their remuneration are set out in an Order dated 12 April 2018 ("the April 2018 Order") made by Ramcharan J ("the Judge"), the judge assigned to the liquidation. More detailed reference is made to the terms of the April 2018 Order later in this judgment, but at this stage it is sufficient to note that the Liquidators were entitled to draw remuneration each month from the assets of the Company "on the basis of the reasonable time expended by the Liquidator and his staff" at hourly rates for different grades of Grant Thornton personnel set out in the Order and "subject to such amounts being taxed from time to time as the Court may direct". The hourly rates are the same as had been agreed with the Government before the appointment of the provisional liquidators.

7. In May 2019, the Company applied to the court for approval of the Liquidators' remuneration, both as provisional liquidators and as liquidators, in total amounts of US$3,160,233 and TT$53,837 and for approval of the direct expenses incurred by them, in respect of the period from 25 July 2017 to 31 December 2018. The application was not opposed, and Ramcharan J approved the remuneration and expenses by an Order dated 27 June 2019.

The present application

8. On 28 July 2020, the Company applied to the court for approval of the Liquidators' remuneration, and of expenses incurred with Grant Thornton entities, for the calendar year 2019 ("the Application"). The Application sought orders in the following terms:

> "(1) that the fees and expenses of the Joint Liquidators of the Company in the sum of US$3,175,492.39 and Grant Thornton Trinidad and Tobago charges in respect of payroll and tax services in the sum of TT$43,641.95 incurred during the period from 1 January 2019 to 31 December 2019 be approved by the Court;
>
> (2) that the fees and expenses of the Grant Thornton Corporate Directors in the sum of US$321,738.33 incurred during the period from 2 October 2018 to 31 December 2018 be approved by the Court; and
>
> (3) that the Joint Liquidators' costs of this application be paid out of the assets of the Company as an expense of the liquidation."

9. The Application was supported by a short affidavit of Mr Holukoff to which he exhibited a Remuneration Report giving an account of the work undertaken by the Liquidators during 2019 and some details of the calculation of the remuneration for which approval was sought. Reference is made later in this judgment to the information provided in the Remuneration Report.

10. The Government strongly disputed the remuneration and expenses claimed by the Liquidators, first in correspondence and then in affidavits put before the court on the Application. A wide range of objections were raised which included: the Company was not an operating company but a holding company with investments in subsidiaries which had management in place; the costs of liquidation far exceeded the Company's management costs prior to liquidation; there was no proper justification for retaining the services of numerous Grant Thornton personnel when any personnel required to assist the Liquidators could instead be employed by them on fixed salaries; there was no evidence of what the Liquidators had described as the "unpicking of at least two decades of mismanagement and potential fraud in a group of over 100 companies"; the appointment of corporate directors to the operating subsidiaries was unnecessary and duplicative of work that the Liquidators were doing or should be doing; there had been a significant increase in the remuneration claimed for 2019 compared with earlier periods, when the

expectation would be for activity and hence remuneration and expenses to decline; the remuneration was very substantially higher than in what were said to be comparable liquidations.

11. It is apparent from the correspondence and the affidavits that there was a mismatch of expectations. The Government appears to have underestimated the amount of work that is inevitably involved in the liquidation of the holding company of a group operating internationally. Not only is it unrealistic to expect that other partners and staff in the Liquidators' firm will not be involved save as employees paid a salary by the liquidators, rather than being charged out by the Liquidators, but the express terms of the Liquidators' appointment provided for them to be charged out at fixed hourly rates as part of the overall remuneration. Comparisons with prior periods or other liquidations are, as the Judge rightly held, of little or no value.

12. At the same time, the Government was consistently pressing for more information and detail to substantiate the Liquidators' claim for remuneration. In presenting the Government's case in opposition to the application before the Judge, counsel focused principally on the insufficiency of the information provided by the Liquidators in their Remuneration Report, correspondence and evidence.

13. In addition to the evidence, the Judge received detailed submissions orally and in writing from counsel for both parties. He announced his decision in an email to the parties dated 6 July 2021, approving the remuneration, expenses and fees paid to the corporate directors of the subsidiaries, as asked in the Liquidators' application. An order to that effect was made on the same day.

14. The very brief reasons given in the email were:

> "With respect to the details provided, the Court is of the view that the remuneration report goes into sufficient detail as to the work done by the JLs [the Joint Liquidators] and their staff. A proper reading of the authorities does not suggest that a line by line time sheet is required, but rather sufficient information so that the court can ascertain the work done and by whom. The remuneration report in the court's view provides this information.
>
> The Court further accepts that this is a fairly complex liquidation which requires careful continuous attention and work.

> With respect to the Directors, the Court accepts that it was prudent to appoint Directors to all relevant subsidiaries in the circumstances of the liquidation.
>
> With respect to the administrative staff, it is to be noted that the order dated 21 04 2018 contemplated the use of administrative staff and prescribed an hourly rate. The Court is of the view that the work done and amounts claimed are acceptable in the circumstances."

15. The Judge added that full written reasons would be provided if further action were taken but this might take a while.

16. On 12 July 2021, the Attorney General issued a Notice of Procedural Appeal, seeking orders setting aside the Judge's order and directing the Liquidators to provide further particulars and/or information to justify their claim for remuneration and expenses, "including (a) A breakdown of the time spent on each key task/activity for each individual who performed the same; and (b) Contemporaneous documents like time sheets or bills, and bills in respect of legal expenses".

17. On 15 November 2021, the Judge, as promised in his emailed decision, delivered a judgment ("the High Court Judgment"), giving his reasons for his decision to accede to the liquidators' application. The judgment summarised the parties' evidence at paras 5 to 21 and their submissions at paras 22 to 30. As regards the provision of supporting information, the Judge said:

> "33. In determining the application to approve the remuneration and the expenses of the JLs [the Joint Liquidators], the Court must strike a fine balance between properly compensating experienced professionals and their authorised staff and preventing a 'feeding from the trough' scenario. Although the GORTT [the Government of Trinidad and Tobago] was careful not to make the allegation frontally, it is clear that there is a concern with the Company's largest creditor that the liquidation is being used to inflate the earnings of Grant Thornton and its staff, depleting the assets of the company while the earnings are not taxable in Trinidad and Tobago as the earners are domiciled abroad.
>
> 34. With respect to the details provided, the Court is of the view that the remuneration report goes into sufficient detail as to the work done by the JLs and their staff. A proper reading of the

authorities does not suggest that a line by line time sheet is required, but rather sufficient information so that the court can ascertain the work done and by whom. The remuneration report in the court's view provides this information. The JLs aver that the line by line time items amount to over 300 pages, and the GORTT submit that it would amount to about 250 pages if they were spaced at 1½ inch spacing. Even though it does not amount to 'thousands' as Senior Counsel for the JLs extravagantly stated in his oral submissions, it is in the court's view bordering on excessive, especially where a shorter description, which outlines the nature of the work done can be provided.

35. The GORTT submitted that in a complex liquidation such as this, more detail is required and therefore, greater particularisation should be provided. With respect, the Court does not accept this submission. While a complex litigation would necessarily mean that there is a greater burden on the JLs to specify and justify the work done, a complex litigation necessarily implies that there is more work to be done, from the mundane to the grandiose. If liquidators were to be required to saddle the court with the details of every phone call or email in these liquidations, then a liquidation court would find itself bogged down in trying to go through each and every item. The Court agrees that to require the JLs to do this may increase the costs of the liquidation and further, disproportionately encumber the Court in assessing the reasonableness of the charges. The GORTT submits that it is impossible to assess the reasonableness of the charges without these itemised particulars, but the Court is of the view that they can be reasonably particularised without necessarily providing every item. Of course, this information should be available so that if the Court in assessing the reasonableness of the charges determines that specific charges require more detailed justification, then it can request such information from the liquidator."

18. At para 36, the Judge said:

"The Company before it was put into liquidation was unique in Trinidad and Tobago and as the evidence in the liquidation shows, was an extremely interconnected web of subsidiaries, with subsidiaries being among its creditors, many complicated trusts with respect to ownership of various companies by the

> Company and its subsidiaries and an involvement in a vast array of businesses through the subsidiaries. The Court accepts that these are complex issues which need to be continuously considered and [disentangled] in order to complete the liquidation process. In the circumstances, while the sums claimed by the liquidators are indeed substantial, the Court is not persuaded that they are unreasonable or that they have not been reasonably justified in the materials provided by the JLs in their report and affidavits."

19. The Judge dealt with the appointment of corporate directors to the boards of subsidiaries and the payment of their fees at paras 37 to 39, with the use of Grant Thornton staff at paras 40 to 43 and with the substantial legal costs incurred during 2019 at paras 44 to 45.

20. On 16 November 2021, a copy of the High Court Judgment was filed with the Court of Appeal and thereafter the parties filed written submissions specifically addressing it.

21. The appeal was heard in February 2022 and judgment was given on 1 December 2022. The Judge's order was set aside, principally on the grounds that the Judge had not given a proper judgment and had failed to analyse the evidence or provide cogent reasons for his decision, and the application was remitted to the Judge with a direction that it be treated "with the detail that is expected of such a court".

22. Very regrettably, the Court of Appeal overlooked the High Court Judgment. It follows that the principal ground for the Court of Appeal's decision was wrong, and it cannot be upheld on that ground. It does not follow that the Judge's order was correct, and it is the responsibility of the Board to decide whether it was correct and, if not, whether to leave the Court of Appeal's order undisturbed or to make some other order.

23. There are a number of observations in the Court of Appeal's judgment, delivered by Pemberton JA with whom Moosai JA agreed, which should be noted.

24. First, the Court regarded the Government as being in a special position in view of the responsibility of the State "to account to the people as to how public funds are spent" which distinguished it from other interested parties and which distinguished this case from other insolvencies. In the view of the Board, this is a misdirection. In dealing with the Government as a creditor, the court and liquidators must treat it in the same way as other creditors. There is no basis in law for according a special position to the Government as a creditor. It is of course true that the Government is a very substantial, and indeed the largest, creditor in this liquidation and as such it is in a good position to advance and

argue for the interests of the creditors generally, but the same would be true of a similarly placed private creditor.

25. Second, the Court of Appeal said at para 23(2) that the Judge's reading of the authorities was wrong and that those authorities "suggest that an exercise akin to a line by line examination is necessary if the choice is made by the JLs to engage in a time approach rather than a job or piece approach to their task". This is an important issue in the appeal and the Board returns to it later.

26. Third, the Court of Appeal said at para 23(8) that "[a]ll expenses including legal expenses must go through the same rigorous analysis". Again, the Board returns to the question of expenses later in this judgment.

Grounds of Appeal

27. The Company appeals to the Board on four grounds. Grounds 1 and 2 relate to the failure of the Court of Appeal to take account of the High Court Judgment. As already noted, these Grounds are made out and the Court of Appeal's order cannot be upheld without examination of the merits of the Judge's order. It is not necessary to say anything further about these Grounds.

28. Ground 3 is that the Court of Appeal adopted an approach to the approval of a liquidator's fees and expenses which was unsupported in law and wrong in principle, in that it required a line by line examination by the court, it required too much detailed information to be placed before the court and it required a similar approach to be taken to expenses incurred by a liquidator. These are the central issues in the appeal.

29. Ground 4 is that the Court of Appeal erred in making a non-party costs order against the liquidators personally. The Board deals with this Ground later in the judgment.

Remuneration of liquidators: the law

30. Although the main issue on this appeal is the extent of information required to support a claim for remuneration on a time basis, it is important to set this issue in the wider context of the remuneration of liquidators and other office holders. The authorities in a wide range of common law jurisdictions to which the Board refers below concern the full range of insolvency officeholders – liquidators, provisional liquidators, administrators, receivers and managers, and others – but, in each jurisdiction, the relevant principles are applied to each type of officeholder.

31. Officeholders do not have a right to remuneration simply by virtue of holding that position. Any entitlement to remuneration of a liquidator or other officeholder appointed by the court derives from statutory provision or an order of the court or both. A wide statutory power to fix the basis of remuneration remains the norm in most jurisdictions

32. The office of liquidators was first introduced into English law by the Joint Stock Companies Act 1856 under which a liquidator in a compulsory winding-up was entitled to "such salary or remuneration by way of percentage or otherwise, as the Court directs" (section 92). The current position in England and Wales is that the basis of remuneration must be fixed (a) as a percentage of the value of the assets realised or distributed or both (which may differ as regards different items), or (b) by reference to the time properly given by the liquidator and the liquidator's staff, or (c) as a set amount, or by a combination of any of these bases: rule 18.16 of the Insolvency (England and Wales) Rules 2016 (SI 2016/1024) ("the Insolvency Rules").

33. In Trinidad and Tobago, the position is succinctly stated by section 373(2) of the Companies Act 1995:

> "Where a person other than the Official Receiver is appointed liquidator, he shall receive such salary or remuneration by way of percentage or otherwise as the Court may direct and, if more persons than one are appointed liquidators, their remuneration shall be distributed among them in such proportions as the Court directs."

34. It used to be the case in the great majority of insolvencies in the United Kingdom and elsewhere that remuneration was fixed by way of percentages of the value of assets realised and/or of distributions made to creditors. This remains the default position in England and Wales if no other basis of remuneration is fixed by the creditors or the court: see rules 18.22 and 18.24 of the Insolvency Rules.

35. For many years, there was significant opposition by courts to fixing remuneration on a time basis. The general attitude was summed up by P.O. Lawrence J in *In re Carton Ltd* (1923) 39 TLR 194, 197:

> "The court 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. Experience has shown that the time occupied by a liquidator and his clerks affords a most unreliable test by which to measure the remuneration. Even the best accountant may spend hours over unproductive work, let alone his more or less efficient staff of clerks . . . 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"

36. Nonetheless, it became apparent that remuneration as a percentage of realisations and distributions could lead to significant over-compensation for liquidators when compared to the time required to achieve some realisations and distributions. Nor did it necessarily provide proper remuneration for the performance of the liquidator's statutory duties, including the duty to investigate the affairs of the company and, where appropriate, bring proceedings to seek compensation or set aside past transactions. In the Report on Insolvency Law and Practice prepared by a committee in the United Kingdom under the chairmanship of Sir Kenneth Cork (1982 Cmnd 8558), it was stated at para 889 that, while remuneration on a percentage basis had the merit of being a payment by results, it could lead, in the case of easily realised assets, to disproportionately high remuneration and, in a complex case, to poor recompense in relation to the amount of work involved.

37. The same point was made by the Irish Court of Appeal in *In re Mouldpro International Ltd (in liquidation)* [2018] IECA 88 ("*Mouldpro (CA)*") at para 123, after referring to *Re Carton Ltd*:

> "Over the ensuing decades it became readily apparent, particularly in a rising property market, that if remuneration were to be benched as a percentage of realisations and distributions then readily realisable assets of high value could lead to disproportionately higher remuneration with little or no effort on the part of the officeholder and by contrast in a complex case to poor recompense if the value of the assets were low in relation to the amount of work undertaken."

38. A move to remuneration on the basis of time spent became apparent. As VK Rajah JC noted in *Re Econ Corp Ltd (in provisional liquidation) (No 2)* [2004] SGHC 49 (Singapore) ("*Re Econ*") at para 42:

> "…most jurisdictions have, quite correctly, rejected as being unfashionable any notion of rewarding insolvency practitioners on a percentage basis tied to realisation. A scale fee of this nature, despite its statutory sanction, would be arbitrary if applied as an inflexible rule, and will not fairly and reasonably remunerate insolvency practitioners."

39. Likewise, in the Australian case of *Korda, in the matter of Stockford Ltd* [2004] FCA 1682 ("*Korda*"), Finkelstein J noted, at para 42, that "[i]n complex or large

administrations it is inevitable that insolvency practitioners will wish to have their fees calculated on a time basis. The courts have endorsed this approach for so long time that it is now impossible to reverse the trend".

40. It is widely acknowledged that, particularly in complex cross-border insolvencies, liquidators may be required to deploy staff and other resources on a significant scale in order to fulfil their responsibilities. The leading insolvency practitioners operating in this field are themselves very experienced and develop a high level of experience which is essential to the successful completion of these assignments. The public interest in the fair and efficient administration of an insolvent estate by those with the necessary skill and integrity was acknowledged in the Ferris Report (referred to below) at para 4.2:

> "In all cases it is in the interests of those ultimately entitled to the assets, whether as creditors or beneficiaries or owners in some other capacity, as well as being in the public interest in general, that the officeholder shall carry out his duties with proper skill and care. These duties include the carrying out of certain investigations and the recognition of the public interest element as well as the administration of the assets. These factors in turn require that persons having proper qualifications, experience, skill and integrity shall be available to perform the duties of officeholders. In the long term this will only be so if such persons can expect to receive reasonable remuneration for their services as officeholders. The lowest rate of remuneration will not necessarily be the most advantageous."

41. While time-based remuneration came to be accepted, the concerns expressed by P.O. Lawrence J in *In re Carton Ltd* remained and there was widespread public disquiet in several countries at the level of fees in some high-profile cases.

42. In the United Kingdom, the fees incurred in the receivership of the estate of Robert Maxwell led not only to an examination of the applicable principles in the case directly concerned with those fees (*Mirror Group Newspapers plc v Maxwell (No 2)* [1998] 1 BCLC 638 ("*Maxwell*")) but also to the establishment of a committee under the chairmanship of Ferris J to investigate generally the question of officeholders' remuneration. It produced an influential report which was published in July 1998 ("the Ferris Report"). Similar concerns in Australia led to a number of inquiries and reports: see *Korda*, where Finkelstein J referred, at para 2, to "the vexed issues that concern the fees of insolvency practitioners, particularly registered liquidators, receivers and administrators" and to "the widespread belief, not confined to Australia, that there is overcharging and that overcharging is rife". In *Re Econ*, the Singapore High Court referred at para 6 to "the infamous *Peregrine* saga where the [Hong Kong] court was asked to approve fees and disbursements for work done over a period of nine weeks that

purportedly amounted to the mind-boggling sum of HK$76m. it should come as no surprise that this provoked a massive public outcry."

43. The various reports and decided cases which have dealt with these issues have focused attention on some basic principles which are widely accepted across common law jurisdictions.

44. First, liquidators and other officeholders appointed to administer an insolvent estate occupy a fiduciary position and they may not apply assets of the estate for their own benefit without proper authority. Secondly, as a consequence, the burden is on officeholders to justify any remuneration for which they seek approval. It follows, thirdly, that if after considering the evidence and having regard to the guiding principles there remains any element of doubt, such doubt should be resolved by the court against the officeholder. Fourthly, the court should give weight to the fact that the officeholder is an officer of the court and, where applicable, is a member of a regulated profession and as such is subject to rules and guidance as to professional conduct. It may be assumed, unless the evidence suggests otherwise, that the officeholder is behaving with integrity. It does not, however, follow that the work undertaken by the officeholder was reasonable and proportionate on an objective basis. That is an issue to be decided by the court, the creditors' committee or others responsible for approving the remuneration. Fifthly, the remuneration fixed by the court should be fair and reasonable for the work properly undertaken.

45. These principles have been accepted and applied in many of the common law jurisdictions which have grappled with the problems of officeholders' remuneration. In England and Wales, they are among those identified in a Practice Statement issued in 2004 following the publication of the Ferris Report (*Practice Statement: The Fixing and Approval of the Remuneration of Appointees* [2004] BCC 912) and now contained in para 21.2 of *Practice Direction (Insolvency Proceedings)* [2018] Bus LR 2358 ("the Practice Direction").

46. The extensive and detailed provisions of the Practice Direction and the discussion in many authorities are directed at the choice of the appropriate basis of remuneration as well as at the assessment of remuneration once that choice has been made. Moreover, in most of the authorities in all the relevant jurisdictions, there is an overall requirement that the remuneration be fair and reasonable, which will permit and indeed require the court to override the result reached by an assessment of time reasonably spent or by the application of a percentage to recoveries or distributions. For convenience, the Board will refer to this general position as remuneration being "at large". The discussion which follows of various authorities must be read in the light of that general position. In those cases, the amount of remuneration ordered may well reflect factors such as the overall return made to creditors (and, where relevant, shareholders) and the proportionality of

steps taken by the liquidator in the light of the return generally or in the light of the return from those steps.

47. By contrast, in the present case, the April 2018 Order (para 14) provides for the Liquidators' remuneration to be on a time basis and the issue directly raised is the level of detail in the information which should be provided on an application to approve remuneration calculated on that basis. There is no overriding limit to be set by reference to other factors. Nonetheless, the April 2018 Order requires that the remuneration of the Liquidators should be "on the basis of reasonable time expended". The requirement for the time to be "reasonable" means that it is not enough for the Liquidators to show that they and their staff worked a certain number of hours. It requires them to show that it was necessary or reasonable to have undertaken and continued with that work and that the work was undertaken at an appropriate level of seniority. The consideration in the authorities of the level of information which should be provided to the court in cases where the remuneration is at large is relevant to the level of information required to demonstrate that reasonable time has been expended by the Liquidators and their staff.

Sufficiency of supporting information

48. There has been considerable discussion in the case law of many jurisdictions as to the level of information which should be provided to the court. This cannot be reduced to a single formula and will always be dictated by the circumstances of the particular case. The two high-level principles are, first, that there must be sufficient information to enable the court to have a clear view of what the officeholder has done and, secondly, that the information should be proportionate to the size of the insolvency and to the cost of preparing the information. In the paragraphs which follow, the Board examines the development of the requirements as to the provision of information in a number of common law jurisdictions.

England and Wales

49. Although the remuneration of the receivers in *Maxwell* was at large, there are in particular three points made by Ferris J in his judgment which are highly relevant in a case where the court has already set the basis of remuneration as time spent with a schedule of fixed charge-out rates.

50. First, at page 648 he addressed in general terms the level of information required

> "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*." (emphasis added)

51. Second, Ferris J dealt with the question of record-keeping at page 649:

> "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."

52. Third, Ferris J addressed at page 649 the considerations that an officeholder should take into account before undertaking or continuing with a particular task:

> "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."

53. In *In re Independent Insurance Co Ltd (No 2)* [2003] EWHC 51 (Ch), [2003] 1 BCLC 640 ("*Re Independent Insurance (No 2)*"), Ferris J considered an application to approve the remuneration of joint provisional liquidators for a period of 9 months in what he described as a "mega-insolvency". The claim which he allowed, subject only to a very small deduction, was for over £11.23 million. Ferris J commended the clarity and detail of the evidence filed in support of the application. Monthly fee summaries were provided, each extending to about 50 pages, which broke down the work done in each main area into smaller subject areas, describing the kind of work involved and identifying the individuals who carried it out, with particulars of each individual's grade, hours spent and charge recorded. Ferris J commented at para 7 that "the exceptional size and complexity of this case justifies (and has received) a more elaborate degree of presentation than will be appropriate in a more typical case".

54. The Ferris Report at para 4.3 sought to strike a balance in the level of information required on the basis of proportionality (an approach which is stated in para 21.2(6) of the Practice Direction and has been widely adopted internationally):

> "An important matter which we have endeavoured to keep in mind and which needs to be kept in mind by every court or body which has to fix or approve the remuneration or disbursements of an office-holder is the need for what, in the absence of a better term, we describe as 'proportionality'. The administrations undertaken by office-holders are of almost unlimited range of size and complexity. Mega-insolvencies, or even medium sized insolvencies where the remuneration claimed is large in cash terms or as a proportion of the value of assets dealt with, justify and require a higher degree of evaluation and justification than small and straightforward cases where the suggested remuneration is comparatively modest. This makes it impossible to prescribe, except in general terms, a universal approach applicable to all cases. It would be counter-productive if, for example, an office-holder were to feel that he has to explain and prove every element which goes to make up what is self-evidently a modest charge in a simple case, regardless of the expense he incurs in doing so and hopes to recover from the estate which he is administering. Over-zealous recording of the minutiae and exact timing of an office-holder's activities is a waste of the office-holder's time and the creditors' money. What is, however, needed (and thus required by the principle of proportionality) is the provision of sufficient

> information to enable creditors or the court to have a clear view of what the office-holder has done or intends to do and of the value he has protected for the creditors."

55. It is therefore the larger insolvencies which typically will require a greater level of detail, as Ferris J noted in *Re Independent Insurance (No 2)*, but the warning against "over-zealous recording of the minutiae and exact timing of an officeholder's activities" is applicable also to the large insolvencies.

56. Para 21 of the Practice Direction, to which both parties to the appeal referred and on which they both in different respects relied, contains detailed provisions on the information to be provided in support of applications for the approval of past and prospective remuneration, not restricted to that required for approval of remuneration solely on a time basis. In *Brook v Reed* [2011] EWCA Civ 331, [2012] 1 WLR 419 at para 48, the Court of Appeal confirmed that the 2004 Practice Statement, which was replaced by the Practice Direction in substantially the same terms, was to be applied except in so far as it would be wrong in principle to do so in the circumstances of the particular case.

57. Much of the information detailed in the Practice Direction is not applicable to the present case, but some is relevant:

> (i) "A narrative description and explanation of…(b) the work undertaken or to be undertaken in respect of the appointment; the description should be divided, insofar as possible, into individual tasks or categories of task (general descriptions of work, tasks, or categories of task should (insofar as possible) be avoided); (c) the reasons why it is or was considered reasonable and/or necessary and/or beneficial for such work to be done, giving details of why particular tasks or categories of task were undertaken and why such tasks or categories of task are to be undertaken or have been undertaken by particular individuals and in a particular manner": para 21.4.1.
>
> (ii) "A statement of the total number of hours of work undertaken or to be undertaken in respect of which the remuneration is sought, together with a breakdown of such hours by individual member of staff and individual tasks or categories of tasks to be performed or that have been performed": para 21.4.3.
>
> (iii) "A statement of the total amount to be or likely to be charged for the work to be undertaken or that has been undertaken in respect of which the remuneration is sought which should include: (a) a breakdown of such amounts by individual member of staff and individual task or categories of task performed or to be performed": para 21.4.4.

(iv) "An explanation of: (a) the steps, if any, to be taken or that have been taken by the office-holder to avoid duplication of effort and cost in respect of the work to be completed or that has been completed in respect of which the remuneration is sought; (b) the steps to be taken or that have been taken to ensure that the work to be completed or that has been completed is to be or was undertaken by individuals of appropriate experience and seniority relative to the nature of the work to be or that has been undertaken": para 21.4.6.

58. In summary, the Practice Direction, if applicable, would require (i) a detailed description of the work undertaken, divided into individual tasks or categories of task; (ii) a statement of the reasons why it was considered reasonable or necessary to undertake the work and why particular individuals did the work; (iii) the amount of time spent on tasks or categories of task; and (iv) an explanation of the steps taken to ensure that the tasks were carried out by the appropriate level of staff and to avoid duplication.

59. As later explained, while the Practice Direction contains important guidance as to the information to be provided, the Board does not consider that all the information identified by it will normally be required on an application to the court in Trinidad and Tobago, even in an insolvency as large as that of the Company. In particular, the Board is not satisfied that it will usually be necessary to identify individuals who undertook work, rather than just the grade(s) of individuals involved.

60. The judgment of Ferris J in *Maxwell* and the Practice Direction (and its predecessor Practice Statement) have been influential in the development of the law in many common law jurisdictions, including Ireland, Australia, New Zealand, Singapore and Hong Kong.

Ireland

61. A line of Irish authority, culminating in the decision of the Court of Appeal in *Re Mouldpro (CA)*, establishes that the principles set out by Ferris J in *Maxwell* are applicable under Irish law. In those cases, as in *Maxwell*, the officeholder's remuneration was at large. There was therefore a judgement to be made as to whether the total hours spent represented, overall, value to the creditors. In such a case, the court's task "is not confined to identifying that the hours charged for were actually worked and were necessary" (see *Re Mouldpro CA* at para 107, citing *Re Marino Ltd* [2010] IEHC 394 at para 3.10). In cases where the remuneration is at large, the court will look not only at time spent but also at factors such as the nature of the work carried out, the complexity of the work and the importance or value of the work to the creditors. Nonetheless, there are parts of the discussion in the judgments both at first instance and in the Court of Appeal which are germane to a case such as the present.

62. First, the approach of the court to the level of information required is instructive. The liquidator had earlier made applications for approval of interim payments on account of his remuneration. The reports in support of those applications set out "the work done in the relevant period and seeking to justify the remuneration sought by reference to work done, time spent and charge-out rates in accordance with normal practice" (*In Re Mouldpro International Ltd* [2012] IEHC 418 ("*Re Mouldpro HC*") per Finlay Geoghegan J at para 19.

63. The application for final approval was opposed by a major creditor who objected that there was a lack of detailed particulars of the tasks undertaken by the liquidator and a breakdown of the time spent on each task and details of the seniority of the persons engaged in each task. In response, the liquidator provided evidence which proved, in the court's view, to be largely sufficient as regards the first period under consideration. As regards the second period, the Court of Appeal (Whelan J, with whom Ryan P and Hogan J agreed) had (para 195) "very significant reservations and concerns regarding the amount of time in respect of which payment is sought in the context of value for money and the overall value and benefit to the creditors of the work recorded as having been done. I am not satisfied that the number of hours claimed for were either reasonable or necessary." As regards the third period, Whelan J said at para 198:

> "Having reviewed all of the affidavit evidence together with the exhibits that were before the High Court I am satisfied that the hours claimed and approved in respect of time in regard to this period of the liquidation are on balance quite excessive and not reasonable[. A] vigilant and thorough scrutiny suggests that the work identified could have been carried out more efficiently in a substantially shorter period of time. The engagement of the liquidator in regard to the Sony claim does not warrant the significant volume of time attributed to it. No litigation was ever instituted."

64. The need to require only such information as is proportionate was noted by Finlay Geoghegan J in *In re Home Payments Ltd* [2013] IEHC 507 at para 41, and in R*e Mouldpro (HC)* at para 16 where she said:

> *"*It is important to try and keep an appropriate balance between requiring a liquidator to put sufficient information before the Court that it (and any creditor acting as legitimus contradictor) can form a view on what is reasonable remuneration, having regard to the above elements, and not imposing such detailed requirements as will involve extra work and expense to the liquidation."

Australia

65. The appropriate level of information has been addressed by the Australian courts in several cases. The Australian legislation makes clear that the assessment of a liquidator's remuneration is at large in the sense discussed above. As originally enacted section 473(3) of the Corporations Act 2001, and its predecessor section 473(3) of the Corporations Law, provided that a liquidator "is entitled to receive such remuneration by way of percentage or otherwise as is determined… by the Court" (in the absence of agreement with the committee of inspection or resolution of the creditors). In 2007, section 473(10) was added, requiring the court, in deciding whether the remuneration sought by the liquidator was reasonable, to take into account any or all of a list of 11 matters, including in the case of remuneration ascertained on a time basis the time properly taken in performing the work. Provisions to similar effect are now contained in the Insolvency Practice Schedule, which was introduced as a schedule to the Corporations Act 2001 and has been in force since 2017.

66. *Venetian Nominees Pty Ltd v Conlan* (1998) 16 ACLC 1653 ("*Venetian Nominees*") was a decision of the Full Court of the Supreme Court of Western Australia. It concerned the remuneration of provisional liquidators, to which the general principles and appropriate practice apply in much the same way as to other officeholders, save that the scope of their functions will usually be more limited as their main duty will generally be to safeguard the assets pending a liquidation order.

67. Giving the judgment of the court, Kennedy and Ipp JJ (with whom Wallwork J agreed) took as their starting point that it was for the provisional liquidator to establish that the remuneration claimed was fair and reasonable and to provide adequate evidence to enable the court to determine whether the amounts claimed were fair and reasonable. The mere listing of the persons who performed the work, the hours worked by each and the amounts claimed "may well be insufficient material". Ordinarily, the provisional liquidator should provide the court with "a statement of account reflecting in appropriate itemised form, details of the work done, the identity of the persons who did the work, the time taken for doing the work, and the remuneration claimed accordingly".

68. However, the court took issue with the prescriptive approach taken by Shepherdson J, sitting at first instance in the Supreme Court of Queensland, in the earlier case of *Re Solfire Pty Ltd (No 2)* [1999] 2 QdR 182, (1998) 16 ACLR 1156. Shepherdson J had said:

> "In my view, when a provisional liquidator seeks to have his remuneration determined by the court he should provide a document not dissimilar in form to the bill of costs in taxable form provided by a solicitor to his client…He should identify

> the person or persons and the grade or grades of the person or persons engaged in the particular task concerning the provisional liquidation, he should identify that task and dates on which time was spent on it, the amount of time spent on it and he should identify the relevant rate, according to the grade of the person or persons performing the work."

69. The court in *Venetian Nominees* said as regards this passage:

> "In our opinion, however, it is, with respect, unnecessary to lay down an absolute rule, in such detailed terms, concerning the statement of account to be provided by a provisional liquidator. It may well be that in a particular case information particularised as suggested by Shepherdson J would be appropriate. In other cases less detailed information may be required. Every case depends on its own circumstances. But the overriding principle remains: sufficient information must be provided to the court to enable it to perform its function under s473(2)."

70. In relation to the information provided by the provisional liquidator in *Venetian Nominees*, the court said that it was "in very general terms" and that:

> "It identified in an all-embracing fashion certain tasks that were performed, but did not specify who performed them, and how long each task took. Furthermore, many of the tasks were described in such a way that it was impossible to discern why they were necessary, what precisely was involved in performing them, and what level of complexity or responsibility attached to them. The descriptions tended more to conceal this kind of detail rather than reveal information essential to the court's function of determining whether the remuneration charged was fair and reasonable."

71. They listed examples and commented that the information gave the court little opportunity to assess what work was done and what each task involved, who performed it and how long it took for each particular category of work to be performed. It was not enough to prove that the liquidator and members of his staff had spent a certain number of hours in performing work described in very broad terms. As the evidence "did not reveal in sufficiently appropriate detail how the amounts claimed were arrived at, it was not possible for the learned Master to come to any conclusion as to the reasonableness of the remuneration as claimed".

72. The issue was considered by the Court of Appeal of Western Australia in C*onlan v Adams* [2008] WASCA 61, (2008) 65 ACSR 521. The Court cited with approval many of the passages from *Venetian Nominees* referred to above and added at para 33 that, in determining whether the information supplied by the liquidator meets the requirements set out in that case, regard should be had to one of its purposes which is "to enable a person interested in the fund from which fees will be drawn to ascertain whether there are matters to which objection should be taken".

73. It was common ground in *Conlan v Adams*, as in *Venetian Nominees*, that a time cost basis was appropriate, although subject to the overriding requirement that the remuneration should be fair and reasonable. Giving the judgment, McClure JA (with whom Buss JA and Newnes AJA agreed) quoted from the judgment of Finkelstein J in *Re Korda* that, in calculating the remuneration by reference to the number of hours reasonably spent, the tribunal must decide "whether the work performed was necessary to the [liquidation], [and] whether it was performed within a reasonable time…".

74. McClure JA identified at para 44 some categories of work that would not represent time reasonably expended, including "unnecessary work" and "work undertaken by persons of inappropriate seniority (having regard to level of training and experience)". In agreement with Ferris J in *Maxwell*, he said at para 46 that liquidators are required to exercise commercial judgement in determining whether or not to act and a "relevant exercise in that context would ordinarily be a cost-benefit analysis". This will not of course apply to steps which are specifically mandated by the legislation or to applications to the court for directions where appropriate.

75. McClure JA continued by referring at para 47 to the need for proportionality:

> "As to the performance of a task reasonably embarked upon, the work done must be proportionate to the difficulty or importance of the task in the context in which it needs to be performed. This is what is encompassed in assessing the value of the services rendered. Using an example from the law, the time spent by an appropriately qualified and experienced practitioner in drafting a statement of claim should be proportionate to the amount in issue."

76. The Court of Appeal rejected the opposing creditors' submission that the Master at first instance had found that the liquidator had not established a prima facie case for remuneration. The evidence filed by the liquidator, which comprised six affidavits and extensive time-costing records for himself and members of his staff, "by and large satisfied the purpose of an account which is to enable the respondents to ascertain whether there were matters to which objection should be taken" (para 53). Based on the

computerised records, a summary of fees by employee and task was prepared. There were 83 tasks, identifying the categories of work undertaken.

77. The issue of officeholders' remuneration was addressed by the Full Court of the Federal Court of Australia in *Templeton v Australian Securities and Investments Commission* [2015] FCAFC 137 ("*Templeton v ASIC*"). Receivers were appointed by the court over 21 unregistered investment schemes and 52 associated companies. The appointment was made on terms as to remuneration expressly but not exclusively linked to time spent. The orders provided that the officeholders were to be entitled to "reasonable remuneration and reasonable costs and expenses properly incurred in the performance of their duties… as may be fixed by the Court on the application of the Receivers, such sum to be calculated on the basis of the time reasonably spent by the [receivers], their partners and staff, at the rates specified in" an appendix to the order. The order was construed as giving the court a general power to fix reasonable and proportionate remuneration, which was not to be determined solely by reference to the time reasonably spent. Nonetheless, given the express link to time spent, the judgments contain helpful observations on that aspect.

78. The hourly charge-out rates had been fixed by the order as running from Aus$595 for a partner to Aus$140 for administration. The total remuneration claimed for a period of 15 months was Aus$3.3 million, with legal costs and disbursements of nearly Aus$1 million. The Court accepted as first principles that it was for the applicant receivers to provide sufficient information to enable the court properly to assess their claim and that the onus was on the receivers to justify the reasonableness and prudence of the tasks done.

79. The appeal arose because the judge at first instance had applied a discount of 20% to the time costs claimed by the receivers. The receivers accepted that they needed to demonstrate that (a) it was necessary and appropriate for the work claimed to be done, (b) the work was done at an appropriate level of seniority and (c) the work was done efficiently in the sense that a reasonable time was taken to do it, taking account of the quality and complexity of the work. They submitted that the judge should have made specific findings on each of those issues and awarded the resulting sum by way of remuneration.

80. The receivers' submission was rejected by the Court (Besanko, Middleton and Beach JJ) in an important passage at para 60:

> "The onus was on the Receivers to justify the reasonableness and prudence of the tasks undertaken… If there was a lack of detail in the material provided by the Receivers, that would not have enabled her Honour to make such findings. In those circumstances, it was an appropriate approach to take the

> broader claim and appropriately discount, without making specific findings. But even assuming that there was sufficiently detailed material before her Honour, we do not agree that her Honour in any event needed to drill down and make detailed findings on such matters. Her Honour was entitled to take the practical course of looking at the matter more generally in assessing reasonableness and then applying, if thought necessary, any appropriate discounts. Where we differ with respect from her Honour is in the assessment and justification of the appropriate discounts, not in her overall approach to start with the Receivers' claims and then to apply appropriate and justified discounts. *It is neither sensible nor cost effective for the Court, on reviewing the remuneration claimed, to proceed by some line by line analysis using some building blocks or bottom up approach to build up an amount which the Court then determines to be reasonable remuneration based upon detailed findings concerning the matters set out in (a) to (c) of the preceding paragraph*." (emphasis added)

81. The Court of Appeal of New South Wales considered a liquidator's remuneration in *Sanderson v Sakr* [2017] NSWCA 38, (2017) 93 NSWLR 459. Bathurst CJ, giving the leading judgment with which the other members of the Court agreed, referred at para 54 to the well settled principles that the onus is on the liquidator to establish that the remuneration claimed is reasonable and that it is the function of the court to determine the remuneration by considering the material provided and bringing an independent mind to bear on the relevant issues. Referring to *Templeton v ASIC*, he said that the question of proportionality is a well-recognised factor in considering reasonableness. The court in that case "recognised (at [32]) that the question of proportionality in terms of work done as compared with the size of the property the subject of the insolvency administration or the benefit to be obtained from the work, is an important consideration in determining reasonableness" (para 55). It must also be proportionate to the difficulty and importance of the task in the context in which it needs to be performed.

82. At paras 57-58, Bathurst CJ added two points of importance. First, the mere fact that the work performed did not increase the funds available for distribution does not disentitle the liquidator to receive remuneration for it. The most obvious example is the performance of statutory obligations. Secondly, there are commonly cases where work is undertaken in an unsuccessful attempt to recover assets. There is indeed a public interest in proceedings for breach of duty or insolvent trading or the recovery of unfair preferences. Provided it was reasonable to carry out the work and the amount charged for it is reasonable, the liquidator should be entitled to recover remuneration for it. However, the liquidator is obliged to make any decision to bring such proceedings with care.

83. The Australian authorities clearly show that officeholders must provide a significant amount of detail to support their claims for remuneration where they are based on time spent, but the passage quoted above from *Templeton v ASIC* shows that the court may, and is best advised, to approach the assessment on a basis which is broader than a line by line analysis.

New Zealand

84. The courts in New Zealand have also considered these issues at a high level. In *Re Medforce Healthcare Services Ltd (in liquidation)* [2001] 3 NZLR 145 ("*Re Medforce*"), a Full Court of the New Zealand High Court (Salmon and Paterson JJ) observed at para 15 that "the dichotomy presented for determination by the Court is between the liquidator's desire to minimise the time related to the fixing of appropriate fees in order to maximise the return to creditors and the need of the Court to have sufficient information to make a properly informed decision as to the appropriate level of fees". As with the Australian cases, the remuneration was at large. Although a liquidator could charge at rates fixed by regulations, the court could under section 284 of the Companies Act 1993 "review or fix the remuneration of the liquidator at a level which is reasonable in the circumstances".

85. In considering the level of information to be provided to the court, the court said at paras 34 and 36:

> "[34] As a minimum it seems to us that what is required is a statement of the work undertaken during the course of the liquidation, together with an expenditure account sufficiently itemised to enable the charges made to be related to the work done. The detail would have to be sufficient to enable the judicial officer to determine whether the personnel involved in the liquidation and their respective charge-out rates were appropriate to the nature of the work undertaken. This information may in some cases raise concerns as to whether there has been overservicing and overcharging. If there are suggestions of this in the information provided, the Court can request further information.
>
> [35] …
>
> [36] Accounts sufficiently itemised to provide the information referred to above should be attached to the report. In the case of those firms which keep a computer record of hours charged, some form of narrative printout of that record might be

> sufficient. Thus, in the majority of cases the information to be provided to the Court will be in a form readily available to the liquidator and should not involve any, or at worst, only minimal additional expense."

86. A Full Court of the High Court (Heath and Venning JJ) again considered the issues in *Re Roslea Path Ltd (in liquidation)* [2013] 1 NZLR 207 ("*Re Roslea*"), expressly as an opportunity to reconsider the principles laid down in *Re Medforce*, and with the benefit of full argument on issues of principle, an extensive citation of New Zealand, English and Australian authorities and evidence from the liquidator and two independent, experienced insolvency practitioners.

87. The Court referred to the analogous case of a trustee entitled to remuneration out of a trust fund, observing that in "'common fund' cases, involving legal practitioners who seek remuneration, an inquiry is undertaken both into work carried out and whether it was reasonably necessary, having regard to the nature and value of the issues at stake" (para 46). They referred to an unreported case in which the associate judge had expressed concern that the information he was requesting might be viewed as "a sledgehammer to crack a nut" but, with considerable regret, he considered there was no alternative "given the *Medforce* exhortation that the Court should have proper information before endeavouring to assess the reasonableness of fees charged by professional liquidators" (paras 55-56).

88. The Court accepted the principles laid down in *Re Medforce* and, from their review of the authorities and the evidence of insolvency practitioners, did not discern any real complaint about them: paras 113 and 121.

89. The Court considered that, because New Zealand experienced a large number of liquidations involving small or medium size enterprises, there was a need for a flexible approach to the amount of information required, to avoid the cost of seeking retrospective approval for remuneration in such cases being disproportionally high (para 139). This, it was said at para 140, "militates against the use of a detailed taxing regime to approve liquidators' remuneration, of the type discussed in the English and Australian authorities… Any process that required detailed taxation of costs would be unduly prescriptive and would increase the cost to creditors significantly" (para 140). In the context of assessing "value" (which will not be directly relevant to remuneration assessed purely on a time basis, but may have some indirect relevance, as explained later in this judgment), the Court said at para 141:

> "While there are risks that a judgment based on such information might be unfair to the liquidator, we consider that the exercise of a judicial discretion to fix an amount on a global

> basis is preferable to the liquidator being required to provide more detailed information which is likely to increase the cost to creditors and the delay in distribution of remaining funds. An approach of that type can be justified on the basis that the liquidator bears the onus of establishing that the claimed remuneration is 'reasonable' and that the benefit of any doubt, based on the inadequacy of information provided by a liquidator, should be resolved in favour of the creditors."

90. They further explained their approach at para 142 by saying that: "we consider that Associate Judges should inquire into the reasonableness of the fees on the basis of the principles outlined in [*Re Medforce*] and other cases, but have the ability to fix a global sum as remuneration (as a matter of judgment), if the liquidator had supplied too little information to enable a clear view to be formed on whether what was claimed was or was not 'reasonable'". The Court recommended an approach whereby the liquidator would in the statutory six-monthly reports to creditors disclose information on the conduct of the liquidation in perhaps greater detail than required by the legislation and give the amount of fees charged and their largest components. If no steps were taken by creditors or shareholders to challenge the remuneration by the time the application for retrospective approval was made, the court could properly approve the remuneration claimed (paras 145-152).

91. It appears that this approach is recommended for liquidations of small and medium-sized companies. At para 165, the Court said as regards the requirement for more detailed information and justification laid down in the earlier case of *Re Galdonost Dynamics (NZ) Ltd (in liq)* [1994] 2 NZLR 605n, decided under the differently drafted provisions of the Companies Act 1955: "In some cases, the *Galdonost* principles will be helpful, particularly in a large liquidation in which the amounts involved are material, both to creditors and the liquidators." They went on to comment at para 166 that: "While liquidators might regard the extent of the information to go before the Court on retrospective applications for review to be time consuming, irritating and of dubious commercial value, that additional work is the policy trade-off for allowing hourly rates to be charged".

Singapore

92. The passage at para 34 of the judgment in *Re Medforce*, quoted above and approved in *Re Roslea*, was cited with approval by Finkelstein J in the Australian case of *Korda*. VK Rajah JC in the Singapore case of *Re Econ* also referred to *Re Medforce* and at para 61 gave some guidelines as to the information to be provided to the court, including "a synopsis of the work done, identifying the different tasks undertaken and the identity of the persons discharging the functions" and "[t]ime spent in carrying out the various tasks. This again calls for a breakdown identifying the tasks and persons

employed to carry out the tasks. Contemporaneous documents like time sheets should be produced, if required, for verification".

93. In the later case of *Kao Chai-Chau Linda v Fong Wai Lyn Carolyn* [2015] SGHC 260 ("*Kao v Fong*"), the Singapore High Court was concerned with assessing the fees of receivers and managers appointed by the court. In an echo of the present case, Steven Chong J observed at para 5 that: "When the challenges over fees are closely examined, it is apparent that the sources of disagreement typically relate to the same issues: the scope and necessity of the work, allegations of over-manning and duplicity [ie duplication] of work, disagreement over the division of the work between the lawyers and the insolvency practitioner, the justifications proffered for the time spent, and the applicable rates".

94. The judge in *Kao v Fung* commended the approach taken by the receivers and managers in the presentation of the supporting information, which involved three levels of detail. First, there was a succinct summary of the work performed by the entire team for the period of the assessment, giving in respect of each team member the period of engagement, the total number of billable hours spent, the charge-out rate and the total time cost. Secondly, in respect of each general category of work, there was stated a brief description of the work and the total time spent by each team member. A third set of spreadsheets focused on individual tasks, providing in respect of each task, a brief description of what it involved, whether it was complex or urgent, detailed comments on problems faced or general remarks on the nature of the task and the time spent by each member of the team. As to this third level, the judge added: "I do not expect that every engagement will require this level of detail. The guiding principle is always one of proportionality: the level of detail should be commensurate with the complexity of the task". Information provided in this way "facilitates both a macroscopic as well as a microscopic examination of the bill, as the situation requires". A similar approach has been taken by the courts of Malaysia: see *Ong Kwong Yew v Ong Ching Chee* [2018] 1 LNS 2247 at paras 114-120, citing *Venetian Nominees* and *Re Econ*.

Hong Kong

95. The leading case in Hong Kong remains the decision of the Court of Appeal in *Re Peregrine Investments Holdings Ltd* [1999] 3 HKLRD 59. It predates many of the cases discussed above and draws heavily on *Maxwell*. Rogers JA noted at page 69 that in considering the fees of (in that case) provisional liquidators, "it will be necessary to consider whether it is appropriate that some of the steps that were taken were appropriate or justified", and at page 72 that "[a]s with all trustees, they must act in same manner as would a reasonably prudent man faced with the same circumstances in relation to his own affairs". At pages 72-73, he said:

> "The conclusion in [*Maxwell*] was that the fiduciaries had to provide full particulars to justify the amount of any claim for remuneration. Where charges are sought to be recovered on a time basis the trustee, in this case the provisional liquidators, cannot simply list the total number of hours spent by themselves and the fee-earning members of their staff and apply their normal charging rates. They must explain exactly what they did and why they did it and why they continued on any particular course if it turned out not to be advantageous. For that they must keep proper records of what they have done and why they have done it. Without contemporaneous records, they will be in difficulty in discharging their duty to account. Retrospective reconstructions are unlikely to be as reliable as contemporaneous records. 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."

Canada

96. In Canada, the leading authority is generally taken to be *Re Confectionary Yours Inc* (2002) 164 OAC 84 (CA), 219 DLR (4th) 72. Giving the judgment of the Ontario Court of Appeal, Borins JA derived from the authorities a requirement for a high level of detail, saying at para 37: "the case law provides some requirements for the substance or content of the accounts. The accounts must disclose in detail the name of each person who rendered services, the dates on which the services were rendered, the time expended each day, the rate charged and the total charges for each of the categories of services rendered… The accounts should be in a form that can be easily understood by those affected by the receivership (or by the judicial officer required to assess the accounts) …".

97. This approach was not, however, followed in *Re Nortel Networks Corporation* (2017) ONSC 673. The Nortel group operated internationally in 60 separate jurisdictions on a very large scale and its insolvency involved proceedings in many countries, including Canada, the United States, France and the United Kingdom. Its ultimate holding company was incorporated in Canada, which, together with other Canadian group companies, was a central part of the group. Newbould J, who was the assigned judge in Canada and has extensive experience of insolvency proceedings, described the Canadian proceedings as "unprecedented in terms of their size, complexity, international aspects and the vast number of competing interests" (para 63). Some sense of the scale of the proceedings can be gained from the facts that 1,146 claims with a total value of nearly CA$40 billion were filed in the claims process and asset sales realised CA$7.3 billion, the division of which

between the constituent parts of the group necessitated simultaneous proceedings and a 24-day joint trial in Canada and Delaware.

98. The application was made by Ernst & Young Inc., the Monitor appointed by the Canadian court, to pass its accounts, including provision for its remuneration. Monitors normally perform a neutral role as a court officer but the particular circumstances of the case led to the Monitor being given what Newbould J described as "extraordinary powers", similar to those of a liquidator. The same principles apply to a Monitor's remuneration as to that of a court-appointed receiver (para 13).

99. The Monitor sought approval of remuneration of nearly CA$123 million, including billings for over 200,000 hours by its partners and staff. It also sought approval of fees of approximately CA$131 million for two law firm, including billings for 181,000 hours. The judge commented that these amounts were "enormous by any measure, even taking into account that they cover eight years of work. However, when one understands the enormity of the work that had to be done by the Monitor and its counsel…, these amounts become more understandable" (para 26). Over the course of the proceedings up to the application, the Monitor delivered 132 reports and in the last of these he extensively discussed the services performed over eight years in some 113 pages and a number of attachments (para 27). Throughout the proceedings, the fees and disbursements of the Monitor, its counsel and other professionals were disclosed in the reports, with full disclosure of their activities and the estimated and resulting fees and disbursements (para 66).

100. Approval of the Monitor's accounts was not opposed by most creditors, largely because of a final settlement of the allocation issue (para 10) but the trustee of bonds issued by Nortel opposed approval on the basis that that it was not possible on the material filed by the Monitor to do the analysis required for passing accounts and suggested, as a practical solution, that the matter be referred to an assessment officer or an outside expert who "could do due diligence on staffing, hours and rates, and provide the Court with a Report organized around the major activity blocks and identifying any potential issues or matters for consideration by the Court".

101. Newbould J did not consider the suggested reference to be either necessary or a practical solution (para 12). He considered that the court had sufficient evidence on which to undertake a proper consideration of the accounts to arrive at a fair and reasonable result, while the proposed reference would be very time-consuming and lead to further expense and delay (paras 16 and 17). At para 21, the judge said:

> "This case requires an overall assessment of the work done and a consideration of the results achieved. A line by line particularization of each particular job and each particular

> invoice would involve no doubt hundreds of thousands of dollars, taken the amount of activity and time involved in various matters. As well, in this case it is by no means the case that each task was discrete and could easily be separated out. As was stated by Justice Pepall, the value provided should predominate the consideration of what a fair and reasonable amount is appropriate. A detailed assessment in this case would not be practical or serve that purpose."

102. Having regard to all the evidence before him and his own knowledge of the complexity of the proceedings, the judge approved the fees in the amounts claimed. He did so on the basis that, having regard to all relevant factors, it represented fair and reasonable remuneration.

Generally accepted principles

103. These authorities illustrate that the problems concerning the assessment of remuneration for insolvency officeholders are shared by a wide range of common law jurisdictions and that there is a largely common approach to dealing with them.

104. First, it appears that, at least in large insolvencies, time spent is either the only means by which remuneration is assessed or, more usually, it is a major component and the starting point. In many of the cases cited above, although time was the basis for remuneration, there was an overriding requirement that the remuneration should be fair and reasonable. This not only acts as an overall control, providing some link between time spent and the results achieved, but it may also benefit the liquidators in that it may lessen to some extent the level of detail required to support their claims: see *Templeton v ASIC*.

105. Secondly, while the officeholder must establish that the hours claimed were indeed worked, that is rarely the issue with a reputable officeholder who has maintained proper time records. Courts should proceed on the basis that officeholders have acted with integrity, unless there is reason to believe otherwise.

106. Thirdly, and crucially, the officeholder must establish that the time costs were reasonably incurred. The authorities cited above from many jurisdictions support the view expressed by Ferris J in *Maxwell* that the officeholder "must explain the nature of each main task undertaken, the considerations which led them to embark upon that task and… 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": see *Venetian Nominees*, *Conlan v Adams*, and *Templeton v ASIC* in Australia, *Re Medforce* and *Re Roslea* in New Zealand, *Re Econ* and *Kao v Fong* in Singapore, *Re Peregrine* in Hong Kong, *Re Mouldpro CA* in Ireland, and *Re Nortel* in Canada.

107. It is interesting to note that in *Templeton v ASIC*, the receivers themselves asserted that they needed to demonstrate that (a) it was necessary and appropriate for the work claimed to be done, (b) the work was done at an appropriate level of seniority and (c) the work was done efficiently in the sense that a reasonable time was taken to do it, taking account of the quality and complexity of the work.

108. Whether time costs were reasonably incurred depends principally on two factors. First, it must be shown that the work in question was reasonably undertaken. Secondly, it must be shown that the work was performed by a person of appropriate seniority.

109. Whether work was reasonably undertaken will involve a number of factors. First, there will be statutory duties which the officeholder must perform, whether or not any return to the estate will result; indeed, their performance will rarely produce a financial result. Secondly, there may be other legal obligations which must in any event be met; for example the company may hold assets on trust for others and, in the first instance, it will be the responsibility of the officeholder to ensure that the assets are dealt with accordingly. Thirdly, the steps taken to deal with assets forming part of the estate must be reasonable, whether that is maintaining the value of assets, including subsidiary companies or any continuing businesses, or investigating and pursuing claims to recover assets and claims for damages or other relief against directors and others.

110. Whether any particular action is reasonable will necessarily depend on the particular circumstances but, in general, where the liquidator has a discretion as to the action to be taken, it means taking those steps which make commercial sense in terms of their potential return for the benefit of the estate. As has been repeatedly said, an officeholder is expected to behave as a prudent person looking to their own commercial interests. For example, as a number of authorities have made clear, it may be reasonable, indeed essential, to investigate possible claims and it does not follow that because in due course they fail or are abandoned that it was not reasonable to commence or pursue them, although the officeholder will have to re-examine periodically whether it remains reasonable to continue with them. To a significant extent, this is an enquiry as to the proportionality, or the value, of any steps that have been taken but, it must be noted, where time spent is the sole criterion this cannot be assessed simply against the actual outcome. Where time is the sole criterion, it is the reasonableness of the step when it was taken, rather than the actual outcome, which is relevant.

111. The officeholder must be able to show that work was performed at an appropriate level of seniority. The simpler or more routine tasks should be undertaken by more junior staff, leaving the more senior members of the team to do those things which require their level of experience and expertise, recognising that the officeholder and other senior personnel will have an important supervisory role over the insolvency process as a whole. It is for this reason that orders appointing officeholders, including the order in this case, set charging rates for different levels of staff. The information provided to the court must

therefore contain details of the grade of staff undertaking particular tasks, but the Board does not consider that it will usually be necessary to identify the particular individuals concerned or to state the particular dates on which tasks were undertaken or the hours worked on each day.

112. The information presented to the court must be sufficient for the court to be satisfied that the liquidator's work did not unnecessarily duplicate work done by other members of staff or by outside advisers such as lawyers.

113. The evidence must enable the court, in those cases where applications are not opposed (which in practice make up the great majority of applications) as well as those which are opposed, to satisfy itself that the remuneration is justified. As many authorities have stated, the court must always apply its own judgement and not act as a rubber stamp to officeholders' applications. The evidence must also enable a creditor, or (where a surplus is a real prospect) a shareholder, to identify any areas of concern.

114. At the same time, the court should not be burdened with an overwhelming amount of detailed evidence, nor should the estate be burdened with the cost of producing it. It will not usually be necessary to provide all the contemporaneous time records. It is the officeholder's duty to maintain such records if their remuneration is to be wholly or partly based on time spent: see *Maxwell* at page 649 (quoted at para 51 above), *Re Peregrine Investments Holdings Ltd* at pages 72-73 (quoted at para 95 above). However, they need be produced only to meet points raised by the court or reasonably raised by a creditor or shareholder: see *Re Econ* at para 61(d). The suggestion occasionally made in some authorities that the evidence put forward by the officeholder should contain the level of detail found in a solicitor's bill of costs (see, for example, *Re Solfire Pty Ltd (in liq) (No 2)* [1999] 2 Qd R 182, 191 quoted in *Korda*) is not generally supported by decisions in any jurisdiction and is, in the Board's view, wrong.

115. Likewise, there is near unanimity in all comparable jurisdictions that the court should not engage in a line by line analysis of the officeholder's claim. In view of the burden that it would impose on the resources of both the court and the (usually insolvent) estate, this would be a wholly disproportionate way to proceed. See, in particular, in this respect *Templeton v ASIC* and other Australian cases, *Re Roslea* in New Zealand and *Re Nortel* in Canada.

Issues in the appeal

116. The April 2018 Order provided for the remuneration of the Liquidators in para 14:

> "The remuneration of the Liquidators and their reasonable expenses or disbursements including legal costs or fees, may be drawn and paid on account of the total on a monthly basis from the assets of the Company including cash and deposits on hand, on the basis of the reasonable time expended by the Liquidator and his staff or the staff of the professional services firm he is associated with at the following hourly rates for such work, subject to such amounts being taxed from time to time as the Court may direct."

117. The hourly rates in US$ set out in the April 2018 Order for the Liquidators and their staff are: partners – 522.50; directors principal – 418.00; senior manager (since re-named assistant director) – 375.25; manager – 285.00; assistant manager – 275.50; senior accountant – 199.50; administrator – 152.00. The Liquidators say, and it is not disputed, that these rates represent an overall discount of 30% on their normal charge-out rates in 2017. The rates fixed by the court have not since been increased.

118. As earlier noted, the principal issue on this appeal is the sufficiency of the information provided by the Liquidators in support of their application for approval of their remuneration, but other issues also arise which are addressed later in this judgment. These include the appointment of corporate directors by the Liquidators to the boards of the active subsidiaries which is questioned by the Government, along with the substantial part of the Liquidators' remuneration attributed to work performed directly in relation to the businesses and affairs of those subsidiaries. For the purposes of assessing the adequacy of the supporting information, the Board will treat that work as a normal part of their work as liquidators but will then separately consider the appointment of directors and its implications for the claim for remuneration.

Adequacy of information

119. The main supporting evidence filed by the Liquidators was their Remuneration Report for the year 2019. This comprised a narrative section of 11 pages and four appendices. The first page refers to the April 2018 Order and the charge out rates for partners and staff of Grant Thornton specified in that order. The last two pages set out details of the appointments of directors to subsidiaries, in support of the application for approval of the fees and expenses in respect of those arrangements. The remaining eight pages contain a narrative account of the work undertaken by the Liquidators in 2019. This is divided into eight work streams: statutory matters, creditors' correspondence and proof of debts, overseeing and assisting subsidiaries, treasury matters, asset valuations and sales, legal matters, investigations, and case management. The total number of hours and the resulting charge is shown for each work stream. So, for example, 299 hours and US$93,903 are shown for statutory matters and 1,672 hours and US$570,447 are shown for case management. Under each work stream, there appears a series of bullet points.

Many of the bullet points are one line, a fair number are two or three lines and a small number are four or more lines, although the entries are generally longer for work as regards subsidiaries.

120. The longest section (three pages) concerns overseeing and assisting subsidiaries, which is also the largest item in terms of time and cost – 4,177 hours and US$1,597,025. It is in turn divided into a number of sections: new director appointments, corporate governance and review, operational committees, human resources committees, audit committees, financial modelling, and releasing value from subsidiaries. In each section the work undertaken is described in a number of bullet points. The work is not separately attributed to each subsidiary.

121. Two appendices relate to the appointment of directors, while a third is a one-page receipts and payments account. Only Appendix A relates to the Liquidators' remuneration. It is a one-page schedule showing for each of the eight work streams the total number of hours worked (and the resulting charge) for each grade of staff as per the April 2018 Order.

122. In response to the affidavits filed by the Government in opposition to the Liquidators' application, the Liquidators filed affidavits which contained narrative accounts of some of the work which they had undertaken, and detailed difficulties they had encountered, in the performance of their duties.

123. Applying the principles that have been developed in the authorities from other common law jurisdictions, the Board has no hesitation in concluding that the Liquidators' remuneration report, supplemented by affidavit evidence, provides far from sufficient information to support their application. The description of work undertaken is, for the most part, very general and very brief. It is impossible to identify in most cases the tasks which the Liquidators have in fact undertaken and, without more information on those tasks, it is impossible to assess whether they were reasonably undertaken. It is also impossible to see how long was spent on any particular task. It may well be the case that much, perhaps all, the work was reasonable, but that cannot be tested in any particular instance. Further, there is no breakdown as to the grade(s) of partners and staff working on any task. Only the most generic information is supplied. It is therefore impossible to assess whether the tasks were undertaken at the right level. The Board is of the view that it was not open to the judge to hold, as he did at para 34, that the remuneration report goes into sufficient detail as to the work done by the Liquidators and their staff or that it provided sufficient information so that the court can ascertain the work done and by whom.

124. The Board repeats what the Judge said at para 35:

> "The [Government] submitted that in a complex liquidation such as this, more detail is required and therefore, greater particularisation should be provided. With respect, the Court does not accept this submission. While a complex [liquidation] would necessarily mean that there is a greater burden on the [liquidators] to specify and justify the work done, a complex [liquidation] necessarily implies that there is more work to be done, from the mundane to the grandiose. If liquidators were to be required to saddle the court with the details of every phone call or email in these liquidations, then a liquidation court would find itself bogged down in trying to go through each and every item. The Court agrees that to require the [liquidators] to do this may increase the costs of the liquidation and further, disproportionately encumber the Court in assessing the reasonableness of the charges. The [Government] submits that it is impossible to assess the reasonableness of the charges without these itemised particulars, but the Court is of the view that they can be reasonably particularised without necessarily providing every item. Of course, this information should be available so that if the Court in assessing the reasonableness of the charges determines that specific charges require more detailed justification, then it can request such information from the liquidator."

125. There are a number of comments to be made on this paragraph. First, contrary to the Judge's view, the Board would accept the Government's submission that more detail is, or is likely to be, required in a complex liquidation, and that it is certainly required in this liquidation. The discussions on the need for proportionality in the amount of information supplied in support of an application to approve remuneration, in many authorities including *Maxwell*, the Ferris Report and *Re Roslea*, have made this point clear. In a small liquidation, where the circumstances of the liquidation are straightforward and the costs of preparing detailed information could have a material effect on distributions, information on a more general basis will normally be sufficient. In a complex liquidation, a greater level of detail is required to enable the court, and creditors and shareholders, to assess whether the work was reasonably undertaken and at an appropriate level by the liquidator.

126. Secondly, there is no question that liquidators should be required to provide "details of every phone call or email". The level of detail required is not that seen in detailed bills of costs by solicitors for the taxation or assessment of their costs, as the authorities have made clear. The Judge was right to say that the necessary level on information can be "reasonably particularised without necessarily providing every item" but the remuneration report in this case did not contain reasonable particulars.

127. Thirdly, the Judge was right to say that the court may require a liquidator to provide more detailed information in order to assess the reasonableness of specific charges, but that pre-supposes a sufficient amount of information has been initially provided to enable the court to see if some items require closer scrutiny.

128. It follows that the Board considers that the Judge was wrong to approve the remuneration for 2019 claimed by the liquidators and that the liquidators must provide a fuller analysis of the tasks undertaken, and the levels of staff by whom they were undertaken, so as to put the court in a position to be satisfied that the work was reasonably undertaken.

129. However, it also follows from what is said above about the required level of detail, and from many of the authorities, that the Court of Appeal was wrong to say at para 23(2) of its judgment that "an exercise akin to a line by line examination is necessary if the choice is made by the [liquidators] to engage in a time approach rather than a job or piece approach to their task".

Records

130. The position as regards records kept by the Liquidators is not altogether clear. In the course of correspondence, the Government asked the Liquidators to provide, among other information, a breakdown of time spent on each of the subsidiaries. The Liquidators' lawyers replied that the Liquidators "do not record their time individually for each of CLF's direct or indirect subsidiaries… A precise exercise to provide this information would be time consuming and costly. The JLs have undertaken a review of the time incurred during the period and have compiled an approximate split of the time spent between the subsidiaries during the period". It is difficult to know what to make of this statement. It led the Government to assert that the Liquidators had not been maintaining contemporaneous records detailing tasks, time and individuals involved. This has been strongly denied by the Liquidators, who say that they have kept detailed timesheets which run to some 300 pages. In their written case, they accept that a liquidator is under a duty to keep proper records. To the extent necessary and relevant, any inadequacy in records can be investigated by the court on the re-hearing of the Liquidators' application. As the Judge said at para 35, the records should be available if specific charges require more detailed justification.

Appointment of directors

131. In their application to the court, the Liquidators sought approval to "the fees and expenses of the Grant Thornton Corporate Directors in the sum of US$312,738.33 incurred during the period from 2 October 2018 to 31 December 2019". These fees and expenses are the charges levied by three companies (collectively "GTCD") owned by

Grant Thornton which take appointments and provide services as corporate directors. The Liquidators' evidence was that, in order to exercise control over the active subsidiaries of the Company, they took steps to remove the directors of those subsidiaries and replace them with GTCD and, where the Government had a shareholding in the subsidiary, an appointee of the Government. In the case of each subsidiary, two corporate directors were appointed. In his first affidavit, Mr Holukoff states that this was done in order to pursue a strategy of safeguarding and realising assets for the benefit of the Company's creditors, by ensuring that the Liquidators had direct oversight of and input into the subsidiaries' businesses and assets. GTDC in turn appointed individuals to act on their behalf in the performance of their duties as corporate directors. The individuals are the Liquidators and one other Grant Thornton member of staff. GTDC were paid fees of just over US$312,000 for their appointments as corporate directors in 2019, at a rate of US$5,015 per corporate director.

132. In the Board's view, the appointment by the Liquidators of directors to the boards of those subsidiaries which were of any significance was a reasonable step for them to take, particularly as those subsidiaries were the Company's only assets. The subsidiaries were not in liquidation and the Liquidators' only powers were those enjoyed by the Company as their sole or majority shareholder. They had no right as such to participate in the day-to-day management of the subsidiaries which remained in the hands of their boards of directors.

133. Objection was taken by the Government to the appointment of corporate directors, not of individuals, as directors on the grounds, it appears, that there would not exist the same accountability as if individuals had been appointed. The Board does not accept this objection. The corporate directors necessarily appointed individuals to represent them on the boards and those individuals owe fiduciary obligations in and about the performance of their duties. Nor is it an objection that the individual representatives were either the Liquidators or other Grant Thornton personnel. The separate charge for the directors was paid to GTCD as they assumed the position of directors and appointed the individuals to represent them. It cannot be suggested that GTCD were not entitled to charge for this, nor in the Board's view can it be suggested that the Liquidators should themselves have taken office as directors without a separate charge as, for the reasons given above, it was not part of their duties as liquidators of the holding company of the subsidiaries to do so.

134. The more significant concern raised by the Government relates to the combination of the fees paid to GTCD and the charges for time spent by Grant Thornton personnel in overseeing and assisting subsidiaries (US$1,597,025). The level of fees paid in respect of each subsidiary strongly suggests that GTCD were intended to be non-executive, and the close engagement in the affairs of the subsidiaries would fall outside the remit of non-executive directors. It may well be that the charges for overseeing and assisting were reasonably incurred in the interests of the liquidation of the Company, but the general description of the work involved and the lack of any information on the time spent, and on the grade of individuals involved in the work, makes it impossible to assess whether

the charges are reasonable. In other words, this is an aspect of the principal issue as to the level of information provided by the Liquidators.

Charges for administrative staff

135. The Government has raised concerns that the Liquidators' claim for remuneration includes claims for time spent by staff which would usually be regarded as overheads and included in the hourly charge for the Liquidators and other fee-earners. It is widely accepted that such overhead costs should not generally be charged separately. Para 21.4.7 of the Practice Direction states that "where, exceptionally, the officeholder seeks remuneration in respect of time spent by secretaries, cashiers or other administrative staff whose work would otherwise be regarded as an overhead cost forming a component part of the rates charged by the officeholder and members of their staff, a detailed explanation as to why such costs should be allowed or should be provided". See also *Re Independent Insurance (No 2)* at paras 20-34, and *Kao v Fang* at paras 53(c), 71-72 and 80.

136. The April 2018 Order provided a charge-out rate of US$152 for an "Administrator", the lowest grade of staff included in the schedule. A total of US$44,748.91 was charged for 295 hours' work by administrators in 2019. This presumably included work such as "Filing and indexing of documents and physical records and maintaining an online database of records" included under case management in the remuneration report. At first blush, work of that sort would probably be regarded as an overhead cost. While the Liquidators have not claimed for costs such as secretarial assistance, they should make clear why the work in fact done by administrators is properly treated as a separate cost.

Expenses

137. The Liquidators' application did not seek approval for any expenses, except those paid to Grant Thornton businesses associated with the Liquidators. These comprised the fees charged by GTCD discussed above and a charge of TT$43,641.95 paid to Grant Thornton Trinidad and Tobago for payroll and tax services. The court's approval was required for these payments because the Liquidators, as fiduciaries, could not directly or indirectly make a profit without such approval. All other expenses were paid to third party suppliers.

138. Although the Liquidators had not sought approval for the payment of other expenses, the Government argued that they should have done so and the Court of Appeal at para 23(8) stated that "[a]ll expenses including legal expenses must go through the same rigorous analysis" as the claim for remuneration.

139. The position in English law is that a liquidator does not need to seek approval to the payment of third party expenses but that they may be challenged by a creditor or (where there may be a surplus) a shareholder: see *Re Independent Insurance (No 1)* [2002] EWHC 1577 (Ch); [2004] BCC 919, at para 52, and *Engel v Peri* [2002] EWHC 799 (Ch), [2002] BPIR 961 at paras 34-35. In the case of officeholders, such as receivers appointed by the court, who are or may be required to present their accounts to the court for approval, "it will technically be for the receivers to justify the disbursements which they have incurred and paid out of the estate, but they can expect the court to be supportive as regards disbursements incurred in the exercise of their commercial judgment" (*Maxwell* at p 662). The Board was not referred to any provision of Trinidad and Tobago law which requires a liquidator to present accounts for approval.

140. The position is, however, complicated by the provisions of paras 12-14 of the April 2018 Order. Para 12 authorises the Liquidators to engage solicitors, legal counsel or other professional advisors or consultants and to retain the services of private investigators, forensic analysts, accountants or other service providers and "to use the funds of the Company to pay the fees and disbursements of such service providers at their regular hourly rates and on a monthly basis". Para 13 authorises the Liquidators to "engage agents, appraisers, auctioneers, brokers, or any other experts as may be required to assist them with the liquidation process and determining claims in the liquidation". Para 14, to which reference has already been made, provides that the remuneration of the Liquidators "and their reasonable expenses or disbursements including legal costs or fees, may be drawn and paid on account of the total on a monthly basis from the assets of the Company including cash and deposits on hand, on the basis of the reasonable time expended by the Liquidator and his staff or the staff of the professional services firm he is associated with at the following hourly rates for such work, subject to such amounts being taxed from time to time as the Court may direct".

141. On the one hand, paras 12 and 13 authorise the Liquidators to incur expenses and, in the case of para 12, to pay them from the funds of the company without any need for court approval, but on the other hand it is a possible reading of para 14 that the amount of third party expenses must be taxed by the court, presumably with the consequence that the Liquidators would be required to reimburse to the estate any expenses to the extent that they were disallowed on taxation.

142. The interrelation between paras 12 and 13 and para 14 as regards expenses, and whether third party expenses require to be taxed (and, if so, only if directed by the court) is not straightforward. The matter was not fully argued before the Board nor fully considered by the courts below. Further, no reference was made to the Companies Winding Up Rules, contained in schedule 2 to the Companies Act 1995, which include rules dealing with the payment of expenses (rules 161-169). As the Liquidators have not sought to obtain the court's approval for their third party expenses, and it is therefore not a matter arising for decision, the Board considers that it is not appropriate to express a view on this point.

Withholding tax

143. As the Liquidators are not based in Trinidad and Tobago, but in the British Virgin Islands, their fees were subject to withholding tax, which in 2019 amounted to US$980,579. The Liquidators have claimed that this was an expense properly paid out of the funds of the Company, which is additional to remuneration in the full amount calculated on a time basis in accordance with the rates provided in the April 2018 Order. In other words, they have treated the amount of remuneration to which they are entitled as net of withholding tax. Tax payable on remuneration would normally not be an expense but a personal liability of the recipient of the remuneration. As the Liquidators themselves benefit from the payment of the withholding tax, it is for them to obtain the court's approval to it. This is a matter to be separately considered by the court when it re-hears the Liquidators' application.

Assessors

144. In many insolvencies, there will be a committee of creditors which can scrutinise the liquidator's claim for remuneration and raise any concerns with the court. Although not binding on the court, the committee's approval of the remuneration or any concerns will be of great assistance to it. There is no committee in this case, although of course the Government as the single largest creditor is entitled, as it has, to take issue with the Liquidators' claim.

145. In the course of argument, there was discussion initiated by the Board as to whether in a complex case such as the present there might be a role for an assessor, with relevant experience of the conduct of such liquidations, to examine a liquidator's claim for remuneration and report to the court. The court has power to appoint assessors: rule 33.13 of the Consolidated Civil Proceedings Rules 2016. It has to be said that neither party expressed much enthusiasm for such an appointment. It was pointed out that it would be difficult to identify a suitable assessor in Trinidad and Tobago, so an external appointment would be needed. The question of the assessor's costs, and who would be responsible for paying them, was also raised. Assessors have been appointed in large insolvencies in England and other jurisdictions: see *Re Independent Insurance Co Ltd (Nos 1 & 2)*, *Re Nortel Networks France SAS* [2019] EWHC 2778 (Ch) and *Re Bulb Energy Ltd* [2023] EWHC 1647 (Ch). In none of those cases did the assessor's report lead to any material reduction in the amount of the claimed remuneration but they may be said to have provided reassurance to the court and to creditors. The Board does nothing more than remind the courts below that the power to appoint an assessor exists.

Costs of these proceedings

146. The Judge ordered that the Liquidators' costs of the application be paid out of the assets of the Company as an expense of the liquidation. No order was made as regards the Government's costs. The Court of Appeal set aside the judge's order and ordered that the Government's costs of the appeal be paid by the Liquidators.

147. In their written case, the Liquidators objected that they were not parties to the remuneration application, which had been made by the Company, and their conduct did not justify the making of a costs order against them as non-parties. In his oral submissions, Mr Valentin KC, appearing for the Liquidators, made clear that he did not put their case on the basis that they were not parties. In the Board's view, he was right not to do so. An application for approval of remuneration is usually, and properly, made by the liquidators themselves. They are the interested parties, and it is not appropriate for the application to be made in the name of the company acting under their direction. The Judge clearly treated them as a party as his order was that the costs of the Liquidators (not the Company) should be paid out of the Company's assets.

148. Nonetheless, given that the Liquidators were required to apply for the approval of their remuneration by the terms of the April 2018 Order, it would be wrong in principle to deprive them of their costs in the absence of unreasonable conduct on their part. In the extensive affidavit evidence that was prepared in advance of the hearing before the Judge, the Liquidators were to a significant extent addressing concerns, many of which were ill-founded, raised by the Government. The Board is satisfied that they acted reasonably as regards that evidence and that their costs of preparing it should be treated as an expense of the liquidation.

149. More difficult are the costs of the hearing before the Judge because at that stage the main focus of the Government's challenge was the inadequacy of the information supplied in support of the Liquidators' claim. The same is true of the hearing before the Court of Appeal. The Liquidators resisted that challenge, and it is difficult to see why the creditors should in effect pay for that opposition, given the weight of authority on this issue. At the same time, both before the Judge and in the Court of Appeal, the Liquidators were right to oppose some of the Government's submissions, such as the suggested need for a line by line analysis by the court of their remuneration. The Board considers that the just order in these circumstances is that half of the costs incurred by the Liquidators at first instance and in the Court of Appeal should be paid as expenses of the liquidation.

150. When the application for approval returns to the court, the court should not hesitate to use costs orders to encourage the parties to behave reasonably, in the light of the guidance given in this judgment, both in the requests for information which the Government may make and in the provision of information by the Liquidators. Once the

Liquidators have filed further evidence in support of their application, it would likely assist the further conduct of the application if the Government were required to file specific grounds of complaint, detailing such objections (if any) as they have to the claim for remuneration.

Conclusion

151. As indicated in this judgment, the Board disagrees with significant parts of the judgment of the Court of Appeal. However, it affirms the order made by the Court of Appeal and dismisses this appeal, save as regards para 4 of the order which deals with costs for which it substitutes an order as indicated above.