

**SHERIFFDOM OF SOUTH STRATHCLYDE DUMFRIES AND GALLOWAY AT
DUMFRIES**

[2017] SC DUMF 78

L6/12

NOTE BY SHERIFF GEORGE JAMIESON

In relation to

Note by Joint Liquidators in the Liquidation of

S & M LIVESTOCK LIMITED

for orders relative to their remuneration

Dumfries 25 October 2017

The sheriff, having resumed consideration of the Note No 2 of process, the written representations received on behalf of the Noters and the liquidation committee, and from the Reporter, Grants part 3 of the Note, Fixes and declares the amount of remuneration to be paid to the Joint Liquidators for the period 13 April 2012 to 27 January 2013 and for the period 28 January 2013 to 20 September 2016 in the sum of £110,057.60 excluding VAT; Authorises the Noters to take credit therefor, taking into account the £25,000 previously paid to account, for category 1 disbursements during these periods of £420.33 and for category 2 disbursements restricted from £1,186.53 to £400 during the these periods; Fixes and declares the amount of remuneration to be paid to the Reporter, in the sum of £15,000 excluding VAT; Grants part 4 of the Note, Declares in terms of rule 4.34(4) of the Insolvency (Scotland) Rules 1986 that the expenses of the Noters incurred in connection with this Note are to be expenses of the liquidation and authorises the Noters to make payment thereof; Directs that if the Noters and liquidation committee cannot agree the amount thereof then all accounts in respect of legal services incurred by the joint liquidators, shall, before payment thereof, be

submitted for taxation to the auditor of court before which the liquidation is pending;

Authorises parties to apply to the sheriff in the event any supplementary order or technical correction is required anent this interlocutor.

NOTE

Process

[1] This is a Note presented by the Joint Liquidators under rule 28(1) of the Sheriff Court Company Insolvency Rules 1986 referring the question of their remuneration to the court under rule 4.34(1) of the Insolvency (Scotland) Rules 1986.

[2] The liquidation committee fixed their remuneration for the period 13 April 2012 to 7 August 2014 at £25,000.

[3] The joint liquidators sought an order from the court under rule 4.34(1) increasing this amount to £91,767.90. They also sought an order approving remuneration of £50,885.70 for the period 8 August 2014 to 20 September 2016. The liquidation committee has not fixed any remuneration for this period.

[4] The two sums claimed total £142,653.60.

Introduction

[5] By interlocutor dated 6 April 2017, I granted part 2 of the Noters' Note to the extent of remitting their accounts for audit to the reporter. Thereafter, having received the report, I invited submissions from the reporter and the parties' agents on the terms of the report. The parties' agents agreed that I should consider their representations in chambers and a hearing in court was not required.

[6] I have considered the original report, the Noters' written submissions thereanent and the reporter's response to those submissions dated 26 September 2017. The law agents acting for the liquidation committee decided not to submit any detailed written submissions.

Reporter's Remit

[7] The remit, as set out in the interlocutor of 6 April 2017, was to "examine and audit" the joint liquidators' accounts, "to audit" the accounts and "to report what in the reporter's opinion is a suitable remuneration". This follows the language used in part, ie crave, 2 of the Note.

[8] It is obvious that the reporter was concerned about the time it was taking to wind up the company and the amount claimed by the liquidators. The reporter therefore conducted an "extensive review" of their files "to establish whether same was reasonable at all relevant times".

[9] The reporter appears, on my reading of the report, to have been influenced by rule 4.32 (8) (b) of the Insolvency (Scotland) Rules 1986 whereby the basis for remuneration would be by reference to the work "reasonably undertaken" by the joint liquidators and their staff. Consequently, the reporter has gone into a great deal of detail in criticising the joint liquidators' conduct of the liquidation, including what the reporter considers to be their "strategy failures" and suggesting an "alternative strategy and its implications". The reporter takes issue with the joint liquidators' assessment of the liquidation as "complex", opining that it was "not one which would be categorised as complex". The reporter suggests that, if the liquidation had been conducted differently, then the appropriate costs incurred by the joint liquidators over the two periods in question would have been £70,000 exclusive of VAT.

Opinion

[10] In my opinion, the recourse to the court envisaged by rule 4.34 of the Insolvency (Scotland) Rules 1986 falls to be viewed as a separate process from the “determination of amount of outlays and remuneration” by the liquidation committee provided for in rule 4.32. Indeed rule 4.32(1) renders those procedures “subject to the provisions of rules 4.33 to 4.35”.

[11] In my opinion, a proposal of £25,000 from the liquidation committee set against time charges of just over £142,000 appears *prima facie* to justify the conclusion that the remuneration fixed by the liquidation committee was insufficient.

[12] While I understand the reporter’s desire to restrict the remuneration to work “reasonably incurred” by the joint liquidators, I do not agree that the reporter had to carry out the extensive review carried out in this case. The reporter was to “audit” the accounts and, in my opinion, that meant seeing that the time charges were justified by file entries and records.

[13] In my opinion, neither the reporter nor the court in this kind of process should seek to second guess the actings of the liquidators. They were appointed by the court and exercise judgment and discretion in matters relating to the winding up of a company. The law presumes that all things are done duly and in the usual manner (*Trayner’s Latin Maxims*, page 419).

[14] While the reporter may well, if acting as liquidator, have carried out a different strategy and done better, the court would be faced with endless litigation over such collateral matters in liquidations if it were to carry out investigations of this kind. That

would not be in the public interest as it would increase litigation costs over such issues, to no particular party's advantage.

[15] Having gone through the reporter's report in detail, I cannot find anything to satisfy me that the judgment of the liquidators should be called into question either in the conduct of this liquidation or its assessment as "complex".

[16] On the principle that the labourer is worthy of hire, it is my opinion that the only reasonable and reliable basis for assessing the joint liquidators' remuneration is the time spent by them and their staff on this liquidation.

[17] However, they accepted in discussions with the reporter that their original time charges could be abated. On that basis, I have approved the restricted figure referred to in my interlocutor.

[18] Strictly speaking, I do not read rule 4.34(1) of the Insolvency (Scotland) Rules 1986 as conferring a jurisdiction on the sheriff to determine the reasonable amount of outlays, or legal fees as a specific type of outlay, incurred by the joint liquidators. It only refers to their remuneration.

[19] Outlays appear to be governed by the mechanisms in rule 4.32. One of these is indeed an application to the court, at least in respect of what the reporter describes as "category 2 disbursements".

[20] The Note asks me to authorise outlays. The reporter considers these have only been satisfactorily vouched in the sum of £400 (section 3.3 of the report). I have accordingly made provision for outlays as recommended by the reporter.

[21] I have exercised jurisdiction in terms of rule 4.34(4) of the Insolvency (Scotland) Rules 1986, referred to at crave 4 of the Note, by authorising the expenses incurred by the joint liquidators in connection with this Note to be paid as expenses of the litigation. As the

reporter has noted, these must be taxed by the auditor of court pursuant to rule 4.32(5) of the Insolvency (Scotland) Rules 1986 if their amount is not agreed upon by the liquidation committee (see report, paragraph 2.3.6). My interlocutor makes provision for this, to avoid further recourse to the court and the attendant expense involved therein.

Reporter's Remuneration

[22] The reporter has claimed a fee of £15,000 excluding VAT. On the same principle that the labourer is worthy of hire, I have no reservations as to the fee charged based on the vouching of the time spent by the reporter and the reporter's staff on preparing the report. While I agree with the reporter that there is no "typical" reporter's fee, I also agree with the assessment made by the joint liquidators that reporters' fees in remits of this kind usually come in at the range of £1,500 to £2,000; that, at least, is my experience of such cases.

[23] One view is that the reporter has exceeded the remit and ought not to be paid for work in excess of that which would ordinarily be carried out by a reporter, albeit the reporter may have acted through a superabundance of concern that the job be done well and the costs incurred by the liquidators kept within reasonable bounds.

[24] The other is that the reporter construed the remit in good faith, albeit I disagree with the reporter's views, and the reporter should therefore be rewarded for what on any view is a thorough, helpful and detailed report.

[25] My approach is that practically speaking the reporter's work resulted in reducing the liquidation costs by a significant amount. The reporter has in addition carried out further work in the course of responding to criticism in this dispute for which the reporter has not sought payment.

[26] Further, the reporter has been able to assist the court on various matters, at no extra cost to the liquidation process, such as VAT on sums due, the form of words for approval for the liquidators' remuneration as set out in the interlocutor, and on outlays and taxation of legal fees.

[27] Therefore in view of the overall value the reporter has added to this process, I am of the view that it is fair and proper that the reporter be remunerated for the work carried out on this remit.