



OUTER HOUSE, COURT OF SESSION

[2018] CSOH 35

P1012/17

OPINION BY LORD BANNATYNE

In the Note of

THE PROVISIONAL/INTERIM LIQUIDATOR OF EQUAL EXCHANGE TRADING
LIMITED

Noter

for

interim approval of accounts of intromissions

Noter: Ms Roxburgh; Shepherd & Wedderburn LLP

11 April 2018

Background

[1] The noter is the interim liquidator and previously was the provisional liquidator of Equal Exchange Trading Limited (“the Company”).

[2] That the noter having prepared accounts of her intromissions presented a note seeking that the accounts should be audited and a payment in respect of her remuneration fixed for her period of appointment as provisional liquidator and the period of her appointment as interim liquidator from 4 July 2017 to 7 August 2017.

[3] The court, following its usual practice on the presentation of such a note, appointed a court reporter.

[4] The material part of the interlocutor appointing the court reporter was in the following terms:

“remits to examine and audit the accounts of the noter’s intromissions as provisional liquidator and interim liquidator of Equal Exchange Trading Limited (in liquidation) (company number SC127205) for the periods from 25 May 2017 to 3 July 2017 and 4 July 2017 to 7 August 2017 and to report, and to report what in his opinion is a suitable sum to fix in respect of the noter’s remuneration and outlays for said periods;”

[5] The court reporter in his report to the court raised a number of concerns in respect to the actings of the noter and in light of these concerns recommended as follows:

“Given the circumstances set out at point 1.2 supra, I believe that it would be best to suggest to the Court that the Court declines to fix remuneration for the Noter at this time relative to her period in office as either Provisional Liquidator or Interim Liquidator for the consolidated period 25 May 2017 to 7 August 2017 subject to a later consideration of this matter when the Court is considering any subsequent claim to Remuneration, at which time the Reporter can confirm what steps have subsequently been taken by the Noter to rectify deficiencies such that the position of the general body of creditors has not been affected by the Noter’s earlier failures.”

[6] The noter lodged a written response in respect to the concerns raised in the report.

In addition to the written response which included a statement from the noter herself the court heard oral submissions by counsel for the noter. It was also very briefly addressed by the court reporter himself.

[7] I would at this stage wish to thank, Ms Roxburgh, the counsel for the noter, for her very clear and detailed submissions, which were of considerable assistance in the preparation of this opinion.

The regulatory framework

[8] Rule 4.5 of the insolvency (Scotland) Rules 1986 (“the Rules”) makes provision for the remuneration of a provisional liquidator. Rule 4.5 provides, inter alia:

“(1) remuneration of the provisional liquidator shall be fixed by the court from time to time.

(2) The basis for the court fixing the amount of the remuneration payable to the provisional liquidator may be a commission calculated by reference to the value of the company’s assets with which the provisional liquidator has had to deal but there shall in any event be taken into account –

- (a) the work which, having regard to that value, was reasonably undertaken by the provisional liquidator; and
- (b) the extent of the provisional liquidator’s responsibilities in administering the company’s assets.”

[9] Rule 4.32 of the Rules makes provision for the remuneration of a liquidator, including an interim liquidator. It provides inter alia:

“(7) within 6 weeks after the end of an accounting period –

(a) the liquidation committee or, as the case may be, the court –

(i) may audit the account; and

(ii) shall issue a determination fixing the amount of the outlays and the remuneration payable to the liquidator; and

(b) the liquidator shall make the audited accounts, scheme of division and the said determination available for inspection by the creditors and the contributories.

(8) the basis of remuneration must be fixed –

(a) as a percentage of the value of the company’s assets which are realised by the liquidator;

(b) by reference to the work which was reasonably undertaken by the liquidator and liquidator’s staff in attending to matters arising in the winding up; or

(c) as a set amount.

(9) the basis of remuneration may be fixed as any one or more of the bases set out in paragraph (8)(a) to (c), and different bases may be fixed in respect of different things done by the liquidator.”

The submissions for the noter

[10] Given the reasons for the court reporter’s recommendation a considerable amount of the discussion before me related to the issue of the role of a court reporter. It was Ms Roxburgh’s position that the criticisms made by the court reporter contained a common theme. In each case the court reporter identifies work which he would have done had he been appointed as provisional or interim liquidator to the Company. It was her general

position that the reporter's concerns amounted to a criticism of the strategy in the conduct of the liquidation which the noter had adopted. In so doing it was her position that the court reporter had stepped outwith the ambit of his role as a court reporter.

[11] Ms Roxburgh defined the role of the court reporter as being this: to provide the court with guidance in respect of the appropriateness of accountancy fees. In doing so a court reporter is required to consider whether the work done was necessary and appropriate. He must also consider whether the work was done at an appropriate level. This enables a view to be given to the court on what is an appropriate level of remuneration for the liquidator.

[12] In support of her position she referred me to a decision in the sheriff court *S & M Livestock Limited* (in liquidation) 2017 SC DUMF 78 in which the extent of a reporter's remit had been considered.

[13] The background to the sheriff's judgment in so far as material was this:

[14] The joint liquidators of the insolvent company had sought approval of their remuneration from the liquidation committee. They were not satisfied with the level of remuneration awarded and so made an application to the court in terms of Rule 4.34(1) of the Rules seeking to increase the fee from £25,000 to circa £91,767.90. On receipt of the application, the Sheriff remitted the joint liquidators' accounts to a court reporter for examination and audit. The reporter was concerned about the duration of the liquidation and the amount claimed by the liquidators. He therefore conducted an "extensive review" of their files "to establish whether same was reasonable at all relevant times". In his report the reporter criticised the joint liquidators' conduct of the liquidation, including what the reporter considered to be their "strategy failures". He went on to suggest an alternative strategy that could have been adopted and his opinion on the consequences of adopting that

alternative strategy. He recommended that a fee of £70,000 plus VAT be paid to the joint liquidators. The joint liquidators argued that the Court reporter had exceeded his remit.

[15] The sheriff held that the reporter had exceeded his remit. The reasons for his decision are set out at paragraphs 12 to 14 of his judgment:

“[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 judgement 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.”

[16] Ms Roxburgh submitted that the foregoing correctly narrated the role of the court reporter. She said this: the court reporter is given a specific task and is not appointed to oversee the conduct of the liquidation in a general sense. The court reporter is entitled, however, to bring any concerns that he has regarding the conduct of the liquidation to the attention of the court.

Discussion of the role of the court reporter

[17] Before turning to the detailed concerns outlined by the court reporter in the present case I think it is helpful to set out my views in respect to the ambit of the role of the court reporter.

[18] The background to the practice of the court, in referring such matters to a court reporter where an insolvency practitioner seeks to have his remuneration set is conveniently summarised by *Lord Glennie in Dempster Petitioner* 2011 SC 243 at paragraphs 2 and 3:

“[2] In a case, such as the present, where there is no liquidation committee, the task of auditing the accounts and fixing the amount of the outlays and remuneration payable to the liquidator falls on the court. The practice of the court in such circumstances has been (a) to remit to a reporter, normally a chartered accountant, to audit the accounts and to report to the court his views on the amount which should be paid to the liquidator in respect his outlays and remuneration, and also (b) to remit the question of remuneration to the Auditor of Court for him to report on what would be a suitable figure. Typically, the reporter and the auditor are required to confer before finalising their respective reports. The court will then consider their reports before issuing a determination.

[3] The practice of remitting to a reporter has no statutory basis. It appears to have emerged at the end of the nineteenth century and, so far as can be ascertained, has been followed fairly consistently since then.”

[19] In deciding the question of the ambit of the court reporter’s role an appropriate starting place is to consider the purpose of the remit by the court to the reporter. In *Dempster*, Lord Glennie, after considering the background to the remitting of matters to a reporter, considers the reason for the remit and observes at paragraph 3:

“The remit to the reporter no doubt arose as a practical means by which the court could be properly informed before exercising its judgment as to the appropriate remuneration to be awarded.”

[20] Given the purpose of the remit what matters properly fall within the remit of the court reporter?

[21] In order to answer that question I first turn to consider the judgment of the sheriff in *S & M Livestock Limited*. I consider the sheriff’s view as to the extent of the court reporter’s remit as too narrow for the following reasons:

[22] The sheriff at paragraph 12 observes:

“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.”

[23] The sheriff repeats this view, in a slightly different form, at paragraph 16 where he opines:

“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 liquidator’s remuneration is the time spent by them and their staff on this liquidation.”

The above two observations appear to suggest that the extent of the court reporter’s task is confined to a merely paper exercise of checking that there are file entries and records which evidence that the work claimed to have been carried out has been carried out. Clearly that is one part of the court reporter’s function. However, that is not the limit of his remit.

[24] The court in terms of rule 4.5 (2) (a) and 4.32 (8) is required to fix the amount of the remuneration by reference to the question of whether the work was “reasonably undertaken”. That is on a sound construction a wider question than merely whether there is documentary evidence supporting the work claimed for has been carried out. Thus when the court remits to a court reporter it is expecting the reporter to apply his experience and expertise to among other things the wider question of whether work was “reasonably undertaken”. Thus the reporter may quite properly report to the court that although there were entries and records to support the work claimed having been carried out nevertheless it is the court reporter’s opinion having regard to the whole circumstances of the case that that work was unnecessary and inappropriate. I do not believe that the limitation placed upon the extent of the reporter’s remit as set out by the sheriff in *S & M Livestock* is justified on a sound construction of the phrase “reasonably incurred”.

[25] In addition it is clearly part of the reporter’s remit to consider issues of technical difficulty and complexity faced by the provisional liquidator or liquidator in the conduct of liquidation. Against that background it is for the reporter to express his opinion as to the

level of seniority of staff used by the provisional liquidator or liquidator in carrying out the various tasks in the conduct of the liquidation. It is for the reporter to advise the court using his experience and expertise that the appropriate level of staff seniority has been applied to the various tasks.

[26] The sheriff in *S & M Livestock* seeks to justify his views regarding the ambit of reporter's role by first observing: "the law presumes that all things are done duly and in the usual manner (*Trayner's Latin Maxims*, page 419)." I am unable to understand the relevance of this reference in respect of the issue before the sheriff, namely: the extent of the reporter's remit. The reference does not I believe inform a proper understanding of the extent of the reporter's remit. It is a statement in the most general of terms and in any event it is only a presumption and therefore by definition rebuttable.

[27] The second basis for the sheriff's views as to the extent of the court reporter's remit is this: "The principle that the labourer is worthy of his hire."

[28] I consider that the comments which I have made regarding the first basis for the sheriff's views are with equal force applicable to this second basis.

[29] Moreover, in expressing these views and in setting out what he understands to be the extent of a reporter's remit the sheriff makes no reference to the entitlement of the court reporter to raise with the court wider concerns regarding the conduct of the liquidation. This clearly forms part of the reporter's remit. In *Re Quantum Distribution (UK) Limited* (in liquidation) 2013 SLT 211: a court reporter was appointed, and in his report was critical of and raised concerns about the manner in which the liquidator had conducted the winding up, including the negotiation of the agreement of a settlement between the petitioning creditor and the company's parent corporation, during which one solicitor's firm had acted for the liquidator and the petitioning creditor. As a result of the concerns which he

expressed he advised the court that he was unable to express an opinion as to what was suitable remuneration for the liquidator.

Against the above background Lord Hodge at paragraph 38 observes:

“It appears from counsel for the former liquidator’s submissions that the liquidator had satisfactory answers to several of Mr Crampsey’s criticisms, which did not take account of the difficulties of pursuing the claims against CI’s directors and QC. But Mr Crampsey was correct to call into question both the deal which was reached with QC and Mr Pattullo’s failure to disclose the full terms of the settlement to the creditors which eventually approved his accounts in remuneration. He was also justified in raising the problem of Brodie’s actual or potential conflicts of interest.”

At paragraph 39 Lord Hodge criticises the liquidator and the liquidator’s agents for failing to bring the reporters concerns to the attention of the court in order to allow the court to consider “whether and to what extent these concerns were valid and what the consequences should be”.

[30] As regards to what the court would expect to be reported as “concerns” by a court reporter I would make the following observations:

[31] It is not possible to list the whole range of concerns which may properly be brought to the attention of the court by the reporter. However, without being prescriptive, the following would be the type of concerns I think should be brought to the attention of the court:

- Potential compliance issues: has the liquidator complied with the various duties incumbent upon him in the conduct of the litigation?
- Potential fraud or bad faith in the conduct of the liquidation
- Potential issues regarding the way in which the liquidation has been progressed. Has the liquidation been progressed with reasonable efficiency?
- Where there have been actings by the liquidator which potentially are so unreasonable and absurd that no reasonable insolvency practitioner would have

acted in this way (the test for setting aside the actings of an insolvency practitioner, see: *Re Edenote Limited* 1996 [BCC] 718 at 722).

If a reporter were not to report such concerns to the court I am satisfied that the court could not fulfil its duties in relation to the fixing of a liquidator's remuneration.

[32] Overall I am persuaded that Ms Roxburgh is correct in saying that the reporter is given a specific task by the court and is not appointed to oversee the conduct of the liquidation in general. However, he is importantly also entitled to report his concerns to the court.

[33] I would make one final observation regarding the issue of concerns being brought to the attention of the court by the court reporter. It needs to be borne in mind by reporters that the ambit of the remit of the reporter is not such that mere disagreements between reporter and liquidator in respect of a course of action followed by the liquidator should be raised as concerns. I would agree with the sheriff in *S & M Livestock* that a liquidator in the course of the liquidation has to be able to "exercise his judgment and discretion". A reporter may disagree with the course of action followed by a liquidator but that does not of itself make the acting unreasonable and therefore something which should be raised with the court as a concern.

The detailed concerns of the reporter in the present case

[34] It was Ms Roxburgh's position that the concerns raised by the court reporter related to issues of the strategy followed by the noter and accordingly fell outwith his remit.

[35] I do not agree with the above submission. Rather it appears to me that the concerns raised by the court reporter related to whether the noter was properly performing her duties as provisional liquidator and interim liquidator. His concerns went beyond the issue of a

mere dispute about the strategy adopted by the noter. Accordingly I do not believe that the concerns raised by the reporter can be swept aside by simply saying that they raised matters which fall outwith his remit.

[36] Secondly Ms Roxburgh argued that many of the concerns raised by the reporter related to further work the noter might have done. The remuneration being fixed was based on work she had done and this concern was accordingly an irrelevant consideration. In support of this submission she directed by attention to *Hyndman v Readman* 2004 SLT 959 at 962 D-E. I do not believe that it is the core of the reporter's concerns that other things might have been done. Rather his concern is that in complying with her duties as provisional and interim liquidator other things should have been done. Such concerns I believe do inform the setting of remuneration and accordingly the reporter's concerns cannot be rejected on the basis of this argument.

[37] The first concern of the court reporter related to a failure by the noter to obtain an independent valuation in relation to a pre-liquidation assets sale by the Company.

The noter accepted in her statement that:

“one of my duties following my appointment as liquidator is to ascertain whether the value for the assets obtained by the directors for the assets sold prior to the liquidation was appropriate in all the circumstances and to satisfy myself that the transaction was not entered into to the detriment of the interests of the creditors of the Company.”

The noter in her statement gave a detailed explanation between paragraphs 18 and 22 and 33-35 as to how she had approached the issue of whether in light of that duty she required to obtain an independent valuation. Further within those paragraphs she explained her position regarding whether any such independent valuation should have covered the issue of the value of intellectual property.

[38] I am persuaded in light of the explanation which is tendered by the noter that the course she followed was an acceptable one and in conformity with the foregoing duty.

[39] However, I also believe, in the whole circumstances of the case it was appropriate for the court reporter to bring this matter to the court's attention in order for the court to consider the matter.

[40] The second concern was in relation to a sale of assets by the noter when she was provisional liquidator and her failure to obtain an independent valuation in relation to that sale.

[41] The noter again gave a detailed explanation in her statement at paragraphs 23 to 25 and 26 to 38 as to why she did not obtain such a valuation. I have decided that in light of that explanation she cannot be properly criticised as having breached any duty which she had as provisional liquidator.

[42] I also observe that following the issue being raised by the court reporter she had an independent valuation carried out, which confirmed the view which she had formed that the sale price offered was in all the circumstances one which she should have accepted. The sale I am persuaded was not to the detriment of creditors.

[43] Again, having regard to the nature of the concern raised, I believe it was correct for the reporter to bring this concern to the attention of the court.

[44] I believe it was appropriate for the court reporter to raise these concerns given the whole circumstances to which he refers in his report and in particular given that both sales were made to a connected company being a company having a number of directors who had been directors of the Company.

[45] The next concern related to a failure to make enquiries into payments made as fees by the Company to a firm of solicitors who acted for the Company and the connected purchasing company in relation to the pre-liquidation asset sale.

[46] In particular the court reporter raises a concern as to why the noter did not investigate whether said legal firm's fees were paid on 19 May as set out in their statement for settlement.

[47] The noter's short answer to this point is that she had no reason to believe what was said in the statement for settlement was incorrect. Thus she had no reason to carry out an investigation.

[48] On the above issue I believe two liquidators acting reasonably could take different views as to whether this matter should be investigated. The decision depended on the view formed as regards the whole circumstances of the case.

[49] Again, I believe in the whole circumstances it was appropriate for it to be raised as a concern by the court reporter, however, in the whole circumstances I do not believe that it can be said that the noter acted in breach of any duty.

[50] The next concern was the failure of the noter to obtain a statement of affairs in terms of section 131 of the Insolvency Act 1986. That section confers a discretion on the noter whether to require such a statement. The issue of whether such a statement should have been required in the circumstances of the present case appears given the explanation of the noter to be a matter on which two liquidators acting reasonably could disagree. I am not prepared to hold that there was a failure by the noter which could in the whole circumstances properly be the subject of criticism. However, I do think in the context of the case as a whole it was appropriate for the reporter to raise his concern.

[51] A further concern related to failures by the noter to comply with Statement of Insolvency 13. The noter accepted that there were certain failures in terms of the requirements of SIP 13. She explained in her statement the circumstances as to how these had arisen, and put certain factors forward in mitigation regarding these failures. She also explained how she intended to deal with these matters in terms of the present case and in the future when she is acting as a liquidator. I believe it was appropriate for these concerns to be brought to the attention of the court. However, I accept the points made by the noter in response thereto.

[52] Beyond that the reporter raised an issue regarding the payment of a fee to Mr Eric Nisbet. The noter admitted that this was an error and advised that she would deal with this matter.

[53] The final concern raised by the court reporter related not to the noter but to the solicitors who had prepared the petition and whether certain averments made within the petition regarding the necessity for appointment of a provisional liquidator were not justified.

[54] The noter in her statement, made it clear that she was not responsible for these averments, and I of course accept that that is the position. However, it was in my view correct for the court reporter to bring this matter to the court's attention. It is clear that it is not solely the actings of the liquidator that can be brought to the attention of the court but the wider actings generally in respect to the liquidation process (see: Quantum Distribution). Again, I feel it was proper for this concern to be raised by the court reporter, however, I am persuaded on the information now provided to the court that the averments were justified and thus the appointment of a provisional liquidator was justified.

Decision

[55] Accordingly in summary for the foregoing reasons I am of the view that all of the concerns brought to the attention of the court by the court reporter fell within his remit and were properly matters which should be brought to the attention of the court. However, in relation to a number of these concerns I have been prepared to accept the noter's explanations as now tendered. I have also noted that in respect to certain matters the noter is going to take further steps.

Disposal

[56] In light of my said decision and having regard to the whole terms of the reporter's report I will approve the noter's remuneration at the level sought. However, I will order that the expenses of the preparation of the written response to the reporter's concerns together with the expenses of the hearing before me in respect to the issue of the reporter's concerns should not form expenses in the liquidation but rather that these expenses should be borne by the noter personally.