SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

[2020] SC GLA 22

GLW-L13-13

JUDGMENT OF SHERIFF AISHA Y ANWAR

in the note

ONE OPTICAL LIMITED (in Liquidation)

For remuneration

Noters: Ms Ower, advocate, Harper Macleod, solicitors

Glasgow, 17 March 2020

Background

[1] This is an application by way of a Note in the liquidation of One Optical Ltd ("the company"). The noters seek approval of their remuneration in terms of Rules 5.9 and 7.11 of the Insolvency (Scotland)(Receivership and Winding Up) Rules 2018.

[2] The noters were appointed as joint provisional liquidators of the company on 11 February 2013, joint interim liquidators on 27 February 2013 and joint liquidators on 25 March 2013. The court appointed a reporter ("the first reporter") to examine and audit the accounts of the noters for the period from (i) 11 February 2013 to 26 February 2013; (ii) 27 February 2013 to 24 March 2013; and (iii) 25 March 2013 to close of the liquidation. No previous applications for approval of remuneration have been made during the six or so years since the noters' first appointment as joint provisional liquidators.

[3] The noters sought approval of their remuneration in the sum of £107,725.81 which represented the funds on hand less the court reporter's anticipated fee of £3,500. The first reporter recommended approval of the noters' remuneration in this sum and sought a fee of £3,500 for his own fee.

[4] Having examined the terms of the first reporter's report, I was not satisfied that it contained sufficient information to allow the court to be properly informed as to the correct level of remuneration for the noters. The report was very brief. The report did not explain why the level of remuneration recommended was justified, whether the work was reasonably undertaken, was necessary or appropriate, why the first reporter considered the liquidation to be "complex" nor indeed why a fee of £3,500 for the first reporter was justified. I invited the first reporter to re-submit his report and drew his attention to the decision of *Equal Exchange Trading Ltd* [2018] CSOH 35 in relation to the role of the reporter. The first reporter responded "this case was particularly difficult and the Time and Trouble Statement detailed the extensive nature of the enquiries which were required. The Liquidators' fee was substantially reduced to the funds on hand and my own enquiries in to the work undertaken by the Liquidators was not restricted by that fact." No further details were provided. No supplementary report or re-drafted report was lodged. In the circumstances, I remitted the noters' accounts to an alternative reporter ("the reporter").

[5] The reporter issued a report in which he made a number of criticisms of the work undertaken by the noters ("the Report"). He recommended that the noters' remuneration be fixed at £62,000. The noters made various representations to the reporter, to which he responded. The reporter lodged a document comprising the "noters' representations and the reporter's comments thereon" ("the Second Report").

[6] Having considered the Report, and the Second Report, I assigned a hearing. The reporter attended the hearing. The noters' lodged and relied upon an affidavit from Mr Jacobs, a chartered accountant and insolvency practitioner. The reporter lodged a further summary of his report ("the Third Report").

The Liquidation

[7] To understand the criticisms made by the reporter, it is helpful to set out in brief the nature of the company's business and the role of the noters in this case, much of which was set out in detail in Mr Jacobs' affidavit.

[8] The company specialised in the manufacture and sale of optical frames and lenses to retailers and directly to consumers. It had a turnover of £1.2M for the year ending 30 November 2012.

[9] In early February 2013, one of the directors contacted the noters' accountancy practice as he was concerned about the company's financial viability. A valuation of the company's assets was obtained. The company held title to premises in Rutherglen from which it traded. It also held title to a retail outlet in Dunoon which was operated by a related company. The company's main assets comprised these heritable properties, stock, debtors, work in progress and plant and machinery.

[10] It became clear that the company was insolvent. Accordingly, a winding up petition was presented by the directors and the noters were appointed as provisional liquidators. The company had 14 employees.

[11] The noters concluded that it would not be feasible to trade the business and sell it as a going concern. However, one of the directors indicated that he may have an interest in purchasing the business and assets of the company, through a limited company, Bluebird Creative Ltd ("Bluebird"). The noters formed the view that (i) as the director had agreed to indemnify the noters for all trading costs incurred during a short trading period (ii) the sale of the business as a going concern would generate a better return for the creditors; and (iii) a transfer of employees to a purchaser would help reduce the preferential and unsecured claims against the company, continuing to trade was appropriate in the short term.

[12] An offer by Bluebird to purchase the business and assets of the company was accepted by the noters who concluded that the offer presented the best outcome for the company's creditors. The sale of the stock, work in progress and plant and machinery was concluded in February 2019 and 11 employees were transferred to Bluebird. Bluebird occupied the properties in Rutherglen and Dunoon and paid rent to the noters in the sum of £12,000 per annum (being the market value rental recommended by surveyors). In February 2013, surveyors were instructed to value the properties for sale. The properties were valued together at £85,000 as investment properties or at £110,000 with vacant possession. The surveyors indicated that a vacant possession sale would take between 12-24 months.

[13] Discussions with a potential buyer over a protracted period (during which the noters continued to receive rental income) were ultimately unsuccessful. The noters then received an offer from the former director of the company of £100,000 for both properties. A non-refundable deposit was obtained from the director and the sale of the properties completed in September 2015. During that period, Bluebird continued to pay rent for the occupation of the properties.

[14] The majority of the company's debtors were subject to a factoring agreement. With the assistance of the noters, the factoring company recovered the outstanding debts and a small surplus was transferred to the company. Further sums were recovered by the noters in respect of book debts which were not subject to invoice financing.

[15] It is the noters' position that from the date of appointment to 30 September 2018, they have incurred WIP of £216,378.75. They have sought to have their fee restricted to the sums in hand, namely £107,725.81 (under deduction of the estimated costs of the reporter of £3,500).

Submissions for the Noters

[16] Ms Ower, advocate, appeared on behalf of the noters. She helpfully provided a note of arguments. The court was assisted by her considerable experience and knowledge of insolvency law and her familiarity with a number of the relevant authorities.

[17] Ms Ower invited the court to approve the noters' remuneration in the restricted sum of £107,725.81. She submitted that the reporter's criticisms were unfounded and that he had exceeded his remit as court reporter.

[18] Ms Ower referred me to *Hyndman* v *Readman* 2004 SLT 959 and to *Dempster, Petitioner* 2011 SC 243. She submitted that the purpose of a remit to a reporter is to provide the court with guidance as to whether or not the fees charged for the word done are appropriate. The reporter is required to consider whether the work done was necessary and appropriate and whether it was done at an appropriate level.

[19] Ms Ower submitted that the reporter in the present case was the same reporter in *Liquidation of Equal Exchange Trading Ltd, Noter* 2018 SLT 710. In that case, Lord Bannatyne made a number of observations regarding the extent of a court reporter's remit. Lord Bannatyne considered the issues again recently in *Thomas Auld & Sons Ltd (in Liquidation)* 2019 CSOH 83. She submitted that the facts and circumstances of that case were very similar to the present case and again, involved the same reporter. She submitted that notwithstanding the observations made by Lord Bannatyne, the criticisms made by the reporter are similar to those made by him in previous cases.

[20] She invited me to follow the approach of Lord Bannatyne in both *Equal Exchange Trading* and *Thomas Auld*. She submitted that the reporter's task is not to oversee the conduct of the liquidation in general. He is entitled to bring any concerns regarding the conduct of the liquidation to the attention of the court, to enable the court to consider what

effect, if any, the issues raised ought to have on the level of remuneration sought (*Re Quantum Distribution (UK) Ltd (in Liquidation)* 2013 SLT 211). The reporter's remit is to audit the accounts of the noter to determine whether the work undertaken has been properly done. It is not part of his function to examine and opine on the strategy adopted by the liquidator, or the commercial decisions made by the liquidator in the exercise of his professional judgment. The costs involved in any such investigation are significant and ought not to be unnecessarily incurred, to the detriment of the creditors of the company. While the court retains a power, in an appropriate case, to take into account any failings of a liquidator when fixing his remuneration (*Re Echelon Wealth Management Ltd* [2011] CSOH 87), such a power should only be exercised in circumstances where the liquidator's conduct is deserving of strong criticism (*R D Simpson* v *Beare* (1908) 15 SLT 375). The appropriate forum for raising any complaint is by way of proceedings for misfeasance under section 212 of the 1986 Act.

[21] The approach taken in any case by a provisional liquidator to safeguard assets, or by an interim liquidator to ingather assets and commence investigations, will be a matter of judgement for the insolvency practitioner. The court will not interfere with the decisions of a liquidator unless the decision is one which no reasonable liquidator, properly instructed and advised, could have reached (*Re Edennote Ltd* [1996] BCC 718; *Re Greenhaven Motors Ltd* [1997] BCC 463).

[22] In relation to the particular criticisms made by the reporter, Ms Ower referred me to the affidavit of Mr Jacobs. She explained that one of the joint liquidators, who had been primarily responsible for the day to day management of the liquidation, retired in 2018. Mr Jacobs, who is a qualified chartered accountant and insolvency practitioner with 20 years of insolvency experience, took on responsibility for this liquidation. As the only outstanding

matter in 2018 related to the noters' remuneration, it was decided that the joint liquidator who has retired would not be formally replaced.

[23] She submitted that the noters are officers of the court and are experienced, respected insolvency practitioners who take very seriously the criticisms made of them. However, the reporter's criticisms, in the main, arise out of the reporter's view as to the steps which he might have taken, in the event that he had conducted the liquidation; he makes those criticisms on the basis of a "paper exercise" or solely by reference to the noters' files. He has not had the benefit of meeting with the directors, he has not seen the assets, nor dealt with the trading of the business. He is plainly at a disadvantage in considering the strategy most appropriate to the conduct of the liquidation. He has also made serious allegations in relation to the noters' time recording. It is precisely because of these serious allegations that the noters were advised to produce an affidavit and lodge that with the court.

[24] On behalf of the noters, Ms Ower fully accepted that the liquidation ought to have been brought to a close earlier. She referred me to Mr Jacobs' affidavit which explained that the retirement of one of the joint liquidators and changes of personnel had caused delays. She accepted that it was entirely appropriate for the reporter to raise issues of concern with the court, however the reporter should be prepared to engage in meaningful discussions with the noters to ascertain whether such matters can be addressed and explained to allow for a more balanced report to be made available to the court. Instead, the language used by the reporter in his report came uncomfortably close to, at best, an allegation that the noters had acted in bad faith; at worst, that they had acted fraudulently.

Presence of the Reporter

[25] The reporter was present at the hearing. The noters did not object to his attendance. The reporter's presence at the hearing was helpful in terms of being on hand to answer any queries which the court had in relation to the content of his report. However, the Third Report lodged by the reporter included extensive submissions on the law. I do not regard it as part of the reporter's function to make legal submissions to the court.

Discussion

The role of the reporter

[26] It is not necessary to rehearse the authorities dealing with the practice of remitting accounts to a reporter nor those which deal with the matters which fall within that remit. Lord Bannatyne helpfully did so in *Equal Exchange Trading Ltd* and I adopt his careful analysis and his approach.

[27] While accepting that he is not qualified to opine on matters of law, the reporter made some criticisms of the decision in *Equal Exchange Trading Ltd* (and of the subsequent opinion of Lord Bannatyne in *Thomas Auld, supra*). His criticism focussed on the use of affidavits or statements by noters in proceedings such as the present, a practice which he described as 'frightening'; he objected to what he regarded as a lack of scrutiny of such affidavits or statements. It is however, for the court to determine what information the court requires in order to be properly informed before exercising its judgment as to the appropriate remuneration to be awarded. It is for the court to consider the competing information before it and to thereafter form a view. It is for the court to decide whether it is prepared to accept the explanations tendered by the noter. In doing so, the court is mindful of the

competing interests of liquidators and those of the company's creditors. As Lord Glennie observed in *Dempster, petitioner:*

> "Often the court holds the balance between the interests of secured and unsecured creditors. The level of fees claimed by liquidators can give rise to concerns, and the court will be astute to guard against the liquidators being rewarded at the expense of unsecured creditors. It will generally wish to examine the claim for outlays and remuneration critically to ensure that the liquidators, as officers of the court, are properly remunerated."

[28] What form any critical examination will take is for the court to determine. It may take the form of written submissions (*Dempster, petitioner)* or a statement or affidavit followed by a hearing on submissions (*Equal Exchange Trading Ltd; Thomas Auld & Sons Ltd)* or a hearing to address specific questions set out by the court (*Re Quantum Distribution (UK) Ltd (in Liquidation).* The court requires to be mindful of the significant costs of evidential hearings, costs which should not be unnecessarily incurred to the detriment of the company's creditors. The use of affidavits, where accepted by the court as offering a credible and reliable explanation of the issues of concern raised by a reporter, avoids those unnecessary costs.

The reporter's criticisms

[29] The reporter had clearly carried out a thorough exercise and had properly analysed the noters' accounts in considerable detail. While various concerns were raised by the reporter, at the stage of the hearing before me, his specific criticisms were focussed broadly on the following matters:

(a) the inadequacies of the noters' time keeping records and the discrepancies between the activities recorded in the noters' time records and the entries in the noters' files;
(c) the number and experience of staff involved in what he considered to be neither a large nor a complex liquidation;
(d) the scale of the charge out rates applied by the noters;

(e) the scale of the time recorded for the 15 day period in which the noters acted as joint provisional liquidators and thereafter as joint interim liquidators;
(f) the scale of the time recorded for the period from 25 March 2013 to 10 August 2015, when the noters acted as joint liquidators;
(g) the failure of the noters to allocate the proposed restricted remuneration claim to specific chronological periods; and
(h) the failure of the noters to progress the liquidation to closure when the last asset had been realised in September 2015.

[30] Separately, there were a number of issues which the reporter raised as issues of concern. His concerns related to (a) the degree of involvement of the noters' firm prior to the noters' appointment as joint provisional liquidators; (b) the sale of assets to Bluebird, an entity associated with the director of the company; (c) the alleged "total abrogation of responsibility" for monitoring assigned debt; (d) a lack of evidence that that the noters gave "any serious consideration" to continuing to trade with a view to a sale on a going concern basis; (e) the lack of payment of goodwill for the business; (f) that the price achieved for stock and plant and machinery was approximately £9,000 less than the market value in-situ value; (g) that the price achieved for stock was significantly below the company's stock record values; (h) that the sale of the property at Rutherglen for a price of £65,000 was £10,000 below the market price for vacant possession – as the former director was associated with the entity which held a licence to occupy, it ought to have been sold on a vacant possession basis; (i) that no marketing of the heritable properties had taken place and the noters waited two and a half years to sell it to a former director.

The matters of concern

[31] Before dealing with the matters of concern raised by the reporter, it is helpful to note Lord Bannatyne's observations in *Equal Exchange Trading Ltd* (at paragraphs [30]-[33]):

> "As regards what the court would expect to be reported as 'concerns' by a court reporter I would make the following observations:

> 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 Edennote Ltd* at [1996] BSS p722).
>
> If the court 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.
>
> Overall, I am persuaded that counsel for the noter 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.
>
> I would like to 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 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 Ltd* 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."

[32] The type of concerns which ought properly to be drawn to the court's attention are concerns which may have consequences, either because of the failure by the liquidator to discharge his or her professional duties timeously or efficiently, or indeed at all, or because the actings of the liquidator have been, or had the potential to be, to the detriment of the creditors of the company. The court expects there to be a constructive dialogue between the

reporter and the liquidator in relation to any matter of concerns before they are raised with the court. Only in the event that the reporter's concerns have not been assuaged by that dialogue or by the disclosure of further information, should these matters be properly raised before the court. The reporter must be robust in his analysis but must also guard against simply disagreeing with a course of action taken by a liquidator, or steadfastly refusing to accept a reasonable explanation; the objectionable course of action must be "unreasonable" and the reporter requires to consider carefully whether it is one no reasonable insolvency practitioner would have taken.

[33] It must be borne in mind that these proceedings are not adversarial in nature. The reporter is appointed as an officer of the court to assist the court in a fact finding exercise. Regrettably, in the present case, the approach of the reporter was unnecessarily adversarial. The reporter provided his detailed and voluminous Report in draft to the noters with an email which required a response within 3 working days. His email noted "I see no benefit in meeting or discussing matters on the telephone as the appropriate medium is in written form which is beneficial for evidential purposes." The role of the reporter is not to 'prove his case'. The reporter requires to robustly challenge the liquidator yet also to work constructively with him or her to ensure that the court is provided with the full facts in relation to matters of concern.

[34] Finally, the reporter should avoid insinuations or aspersions and report only on the facts. Inflammatory language creates unnecessarily adversarial positioning. In the present case, the reports contained references to the noters' representations as 'spurious', 'paranoid', grossly misleading' and 'disingenuous'. Such language is unhelpful. A degree of professional detachment ought to be employed.

[35] Turning to the matters of concern raised by the reporter:

(a) The reporter noted (para 1.2.1.1 of the Report) "*there is a tangible moveable property valuation prepared by GMG Asset Management (UK) Ltd but dated 31 January 2013*" prepared on the instructions of the noter. He commented that "*this evidences a degree of involvement by the Noters' firm prior to the appointment of the Noters*". The valuation is in fact dated 8 February 2013 and states that the valuation has been undertaken based on an asset position "as at 31 January 2013". I do not regard this matter as having been properly and accurately reported by the reporter, nor is it clear to me what conclusions the reporter was inviting the court to draw. Mr Jacobs stated (para 71 of his affidavit) that "*the Noter had no involvement in the case prior to meeting the Director on 8 February 2013*." I accept that position.

(b) The reporter noted (at para 1.2.1.1(iv) of the Report) that the sale of company assets had been made to a company associated to the company in liquidation by a common director. The reporter has however also noted (at para 2.1 (iv) of the Report) that "the sale of assets to a connected party is acceptable if it is for value and duly disclosed to creditors". Mr Jacobs explained (para 99 of his affidavit) that such transactions are not unusual in insolvency situations; that the strategy adopted resulted in the best outcome to the general body of creditors; that disclosures were made within the reports to creditors about the transactions with a connected party and that no creditor raised any concerns. In my judgment, to whom the sale has been made is a matter of strategy and a decision which the noters are entitled to take, provided it is in the best interests of the general body of creditors. The reporter has not identified why a sale to a connected party *per se* would be objectionable, unreasonable or would be a course of action no reasonable insolvency practitioner would take. This matter has not been correctly identified as a matter of concern.

(c) The reporter noted (at para 2.1(v) of the Report) that the "*Noters totally abrogated any responsibility for monitoring the assigned debt position*". The company's debtors were subject to a factoring agreement with a factoring company, Aldermore Invoice Finance. The reporter noted that he had been unable to locate any meaningful communications with Aldermore or any post liquidation monthly statements. In his affidavit, Mr Jacobs explained (at paras 33, 34, and 76) that while the noters were unable to locate any statements, with the assistance of the noters and Bluebird, Aldermore had been able to recover all of their outstanding debt of £78,000 along with an additional sum of £4,648.23 which was transferred to the company on 11 October 2013. In my judgment, that was clearly an outcome which was of benefit to the general body of creditors. While the absence of post liquidation statements is a matter which has properly been raised by the reporter, had he discussed this matter with the noters and considered the outcome and the recoveries made, he ought to have caveated his concern with an acknowledgment that the absence of such statements was not ultimately prejudicial to the company's creditors and the recovery of debts by Aldermore had in fact been successful.

(d) The reporter noted (at para 2.1(i)(a) of the Report) that a "*lack of evidence that the noters gave serious consideration to continuing to trade with a view to selling the business as a going concern*". This criticism is only well founded if the reporter has concluded that such a course of action would have secured a better outcome for the company's

creditors and as such, a failure to do so is 'unreasonable and absurd'. He does not. In any event, Mr Jacobs explained (at para 94 of his affidavit) that "*the risks of trading the business for an extended period (a matter where we have significant experience, expertise and credibility) far outweighed the potential upside of a 'going concern' sale. All potential options were considered in the context of achieving the best possible outcome for creditors. . . the offer received from Bluebird was considered to be the best option available, and was progressed accordingly*". Mr Jacobs notes that selling the business as a going concern would have required holding costs to be incurred (such as the retention costs of employees) and carried with it a risk of generating a trading loss. The sale to Bluebird had a number of advantages (listed at para 21 of Mr Jacobs' affidavit) including securing employment for 11 employees. Notwithstanding that this is a matter of strategy and not one which is properly raised by the reporter, I am satisfied with the explanation tendered on behalf of the noters.

(e) The reporter noted the lack of payment of goodwill for the business (at para 2.1(c) of the Report). This is again a matter of strategy and the comments I have made at paragraph (d) above apply. In any event, I am satisfied with the explanation tendered by Mr Jacobs (at para 95 of his affidavit) namely that a payment of goodwill for a business in a liquidation scenario is an unrealistic expectation and in any event, it would have required the noters to take on what they had considered to be unacceptable risks associated with continuing to trade the business.

(f) The reporter noted that the price achieved for the stock and plant and machinery was approximately £9,000 less than the market value in situ (para 2.1(i)(d) of the Report). This matter is correctly raised as a concern by the reporter, however, the explanation tendered by the noters ought to have assuaged his concern. Mr Jacobs explained (at para 21 of his affidavit) that the offer for the stock and plant and machinery was £11,000 above the ex situ or break-up value of these assets. He explained that the director owned the right to the brand name and the majority of the stock was branded, therefore the ability to sell stock to other parties was limited. To sell the stock and plant and machinery in situ would also have required the noters to continue to trade the business. He pointed out that the likelihood of securing a trade sale was minimal and no interest in the business was received at any point following the appointment of the noters.

(g) The reporter noted that the price achieved for the stock was below the company's stock record values and that he could find no evidence to corroborate the sale price of the work in progress (para 2.1(i)(e) and (f) of his Report). Again, the explanation tendered by Mr Jacobs ought to have assuaged the reporter's concern; what was reported by the reporter was a 'mere disagreement' and not a matter of concern which ought to have troubled the court. Mr Jacobs dealt with this matter (at para 96 of his affidavit) and I accept the explanation tendered by him. He explained that the company's stock records are not an appropriate basis for considering valuation in an insolvency scenario; rarely can net book value be achieved in an insolvency situation unless in exceptional circumstances. In any event the stock was valued by an accredited third party agent (GMG). He also explained that GMG had not included the work in progress in their valuation and that the additional £2,500 payment had

been secured by the noters over and above the stock value. The director had included the work in progress in his draft statement of affairs as a zero value and thus this was seen as a positive asset realisation which secured additional value.

(h) The reporter noted that the sale of the property in Rutherglen was £10,000 below the market value with vacant possession (at para 2.1(ii)(a) of his Report). Again, the explanation tendered by Mr Jacobs ought to have assuaged the reporter's concern. He explained (at para 97 of his affidavit) that the property agents had recommended that the offer to purchase the property at Rutherglen be accepted. The noters followed that recommendation. In my judgment, they cannot be criticised for having done so.

(i) The reporter noted that no marketing of the properties took place and that it took two and a half years to sell the properties to a former director (at para 2.1(ii)(a) of the Report). Again, the explanation tendered by the noters ought to have assuaged the reporter's concerns. Mr Jacobs explained (at paras 97 and 98 of his affidavit), that the property agents had advised it would take between 12-24 months to secure a sale of the properties with vacant possession. The marketing strategy had been set in conjunction with the property agents. Throughout the two and a half year period, Bluebird paid rent at a market value and met all property related costs such as insurance which would otherwise have been borne as a cost in the liquidation. The noters' strategy avoided the costs of securing and holding properties with vacant possession, the costs of marketing and the uncertainty of securing a purchaser. These were strategic decisions which the noters were entitled to take.

The specific criticisms

[36] The reporter made a number of specific criticisms:

(a) At paragraph 2.3 of Appendix 1 of the Report, the reporter has noted "the time records in the main do not record details of the actual activity conducted. This is a serious failing and can do no other than cast doubt on the veracity of time recorded as it is not capable of being checked to any actual activity evidenced from a file review." As I understood the reporter's criticism, it related to the absence of a narrative in the noters' time keeping records; the noters had recorded the type of activity undertaken in increments of 6 minutes, by reference to a code, the grade of the staff and the date upon which the activity was undertaken. Ms Ower referred me to Statement of Insolvency Practice 9 ("SIP9"). She submitted that the time keeping records provided the information required in terms of SIP 9 and that when read in conjunction with the noters' statements of time and trouble, there was sufficient information available to the reporter to assess the remuneration sought. Mr Jacobs stated that the noters' time records and files strictly adhered to SIP 9 (para 46 of his affidavit). Both Mr Jacobs and Ms Ower conceded however that further information would have been helpful. In my judgment, while it is correct that SIP 9 does not expressly state

that a narrative of the activity undertaken requires to be recorded, paragraph 13 of SIP 9 also provides that "when seeking remuneration, an office holder should provide sufficient supporting information to enable the approving body, having regard to all the circumstances of the case, to make an informed judgement as to whether the remuneration sought is reasonable. The nature and extent of the information provided will depend on the stage during the conduct of the case at which approval is being sought." Moreover, the appendix to SIP 9 makes reference to the need for a "description of the work carried out" (para 5) and notes that where "cumulative costs exceed, or are expected to exceed, £50,000, further and more detailed analysis or explanation will be warranted" (para 7(c)). In the present case, the remuneration sought by the noters was substantial and spanned over six years and three periods of appointment. For there to be meaningful scrutiny and an informed judgment of the level of remuneration sought, time keeping records ought to have properly recorded the description of the work carried out by more than mere reference to one of approximately 30 time codes. This matter is correctly raised by the reporter as a criticism of the information provided to him. However, I note that the reporter had not identified any particular entries (or even a sample of entries) which had given rise to concern on his part. Had he done so, the noters might have provided him with additional information. I am not satisfied that it is appropriate to conclude that the only explanation for the inadequate time keeping records is dishonesty, as the reporter appeared to imply. On balance, I am prepared to accept that the work has been done, by reference to the noters' statement of time and trouble and the contents of the noters' files (the court was advised that an ebook containing approximately 5,000 documents was made available to the reporter). In any event, even if there are entries in the time recording which cannot be cross referenced to files, the level of remuneration sought has been restricted to around less than 50% of the WIP borne out by the time recording entries, owing to the level of funds in hand. It is unlikely therefor that any question of prejudice to the creditors arises. However, the court must have confidence in the headline WIP figure presented to it; if it does not, a significant reduction in the level of remuneration will be merited. Finally, I should note that Mr Jacobs advised the court that since July 2016, the noters' firm has implemented a policy of requiring staff to record in narrative form, the activity undertaken on all insolvency files. That approach was applied to the present case from July 2016.

(b) The reporter observed that "I do not consider this liquidation to have been either large or complex and consequently I fail to understand the alleged degree of staff involvement in the administration of the same."(para 5.1 of the Third Report). I regret that I have considered carefully the comments made by the reporter in all three reports lodged by him and I am unable to discern in what sense he regards the involvement of staff as excessive (except to the extent that he has questioned the time recording entries, a matter which I have addressed above). The reporter has suggested a level of remuneration based upon "the appropriate staff mix" (see e.g. para 2.6 of Appendix 1 to the

Report), however, I am unable to discern what he regarded as the appropriate staff mix and why the work done was excessive.

(c) The reporter observed that the scale of the charge out rates applied were excessive and far exceeded those applied throughout Scotland (para 2.2 of Appendix 1 to the Report and para 5.1 of the Third Report). Mr Jacobs explained that the liquidation was handled primarily by a senior manager and an assistant manager, rather than by the noters, to reduce the hourly fees which would otherwise be charged. He also attached to his affidavit a schedule of the hourly rates of various staffing grades applied by comparable firms in Scotland (paras 52-54 of his affidavit). I am satisfied that the rates applied by the noters are broadly comparable to those applied by other firms. In any event, the effective hourly rate in the present case, were the remuneration to be restricted to the funds in hand, would be around 50% of the hourly rates normally applied by the noters.

(d) The reporter has made specific criticisms of the scale of the time recorded for each of the three periods of appointment. These criticisms are, in the main, based upon the reporter's opinions on the noters' time recording entries, the number and experience of staff involved and the scale of the charge out rates applied by the noters. These are all matters I have dealt with above. One matter however is worthy of note. Mr Jacobs explained that a number of individuals who had been dealing with this case had left the noters' firm during the currency of the liquidation. Inevitably, that turnover of staff would have required some 'reading in' time while new staff became familiar with the files. It is not clear to me whether that 'reading in' time was identified in the noters' time keeping records. Again in light of the limited funds available, this matter may be of little consequence. However, in my judgment, it is important that such 'reading in' time is correctly identified and deducted.

(e) The reporter states "the noters have failed to specifically identify the sums claimed as remuneration for each of the components of the remit despite being requested by me to do so" (para 2 of the report). That failure is also noted in the Third Report (para 5.1). Mr Jacobs explained (at para 86 of his affidavit) that the noters sought to respond to the reporter's queries in a timely manner and in fact had specifically asked whether any queries were outstanding. They had inadvertently failed to respond to this query. I accept that explanation and note that the remuneration claimed for each component of the remit is now specified in Mr Jacobs' affidavit (para 40).

(f) Finally, the reporter made a number of criticisms of the failure to progress the administration of this case to a close, particularly as there were no assets awaiting realisation after September 2015. In my judgment, this is a fair and well founded criticism and is one which both Mr Jacobs and Ms Ower quite correctly accepted. Mr Jacobs explained (at para 55-59 of his affidavit) that the turnover of staff and the retirement of one of the noters had caused delays

> in bringing the liquidation to a close, however those delays had not prejudiced the creditors. He explained that following the sale of the final asset, the noters were aware that the funds in hand were significantly less than the cumulative WIP and thus no recovery for any class of creditor was expected. I accept that the creditors have not been prejudiced by the delay.

[37] In terms of Rule 4.32 of the Insolvency (Scotland) Rules 1986, the noters were required to submit accounts of their intromissions and a claim for outlays and remuneration within 14 days after the end of an accounting period. For over six years and for around 11 accounting periods, the noters have failed to submit such accounts and claims. While often the court is invited to dispense with the requirements of rule 4.32 because of the costs of repeated applications to the court (and the consequential depletion of funds available to creditors), inordinate delays in submitting accounts leads inevitably to the type of issues the court has faced in this case; difficulties with reconciling time recording with file entries; an absence of personnel with intimate knowledge of the progress of the case who can assist the reporter with his or her queries; an excessive amount of information and documentation for the reporter to examine meaningfully. Inordinate and unnecessary delays in submitting accounts and claims must be avoided if the court is to be properly informed and satisfied as to the appropriate level of remuneration. Such delays, in an appropriate case, may lead to the court fixing a level of remuneration which reflects some sanction for the failure to submit accounts timeously (*Re Echelon Wealth Management Ltd (in liquidation)* [2011] CSOH 87*)*. In light of recovery by the noters of less than 50% of the value of the time incurred by them, and in the absence of any prejudice to the creditors, I do not regard it as necessary or appropriate to sanction the noters in this case (except in relation to the recovery of the costs associated with the hearing before the court).

Decision

[38] The reporter recommended a fee of £62,000. He stated that this figure was not "*the result of a definitive forensic exercise but an indicative figure*" based on the actual work required, the appropriate staff mix and "*the attributable charge out rates and time required to carry out that work*". I regret that I am unable to accept the reporter's recommendation. I have dealt with the premises upon which this figure is based above (namely, the charge out rates, staff mix and work done). More importantly however, in the absence of the necessary detail, such as the number of hours and the charge out rate the reporter has applied to arrive at this figure, it would appear to me that the court cannot be satisfied that the figure he has suggested is reasonable.

[39] Instead, being satisfied with the explanations provided on behalf of the noters, I will approve the noters' remuneration in the restricted sum of the funds in hand, without abatement. That figure however cannot be specified without clarity on the fees which each of the reporters might elect to charge in light of this Opinion. Accordingly, I shall arrange for a hearing to be assigned and shall invite the reporters and the noters to attend that hearing to discuss the reporters' fees, if agreement cannot be reached between all parties. In light of the comments I have made regarding the delays in submitting accounts for approval to the court, the delays in bringing the liquidation to a close and the difficulties caused by the absence of a narrative in the noters' time recording entries, I will order that the expenses of the preparation of the written response to the reporter's concerns, Mr Jacobs' affidavit and the expenses of the hearing before me should not form expenses in the liquidation but rather that these expenses should be borne by the noters personally.

[40] Finally, it is concerning that the first reporter identified this liquidation as "particularly complex", was satisfied with the quality of information provided by the noters,

recommended remuneration in the sum of over £107,000 and produced a very brief report. On the other hand, the second reporter concluded that this was "neither a large nor a complex liquidation", that there were numerous matters of concern and areas of criticism which required to be drawn to the court's attention and produced three extensive reports. He recommended a remuneration of £62,000. The stark contrast in the approaches taken by these two reporters has served to highlight the differences in the quality and content of the reports received by the court. I understand that ICAS issued an aide memoire for court reporters entitled "Work Programme: Court Reporter" in September 2019. It sets out in a series of explanatory notes, the types of "material deficiencies" which reporters ought to draw to the court's attention. I have arranged for a copy of this decision to be sent to ICAS for information purposes and to enable it to consider whether any further guidance or training of court reporters is necessary.