

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

No. CH/2008/PTA/0359

Royal Courts of Justice
Tuesday, 7th April 2009

Before:

MRS. JUSTICE PROUDMAN

BETWEEN :

HUNT

Claimant

- and -

YEARWOOD-GRAZETTE

Defendant

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MR. J. O'MAHONY (instructed by Moon Beever) appeared on behalf of the Claimant.

MR. E. CUMMING (instructed by Oliver Bebb) appeared on behalf of the 1st Defendant.

J U D G M E N T

(As approved by the Judge)

1 MRS. JUSTICE PROUDMAN:

- 2 1. This is an appeal pursuant to s.375(2) of the Insolvency Act 1986 and Rule
3 74(2) of the Rules, against the decision of District Judge Sterlini sitting in the
4 Clerkenwell and Shoreditch County Court on 7th May 2008. I am asked
5 initially for permission to appeal, required by para.17.6 of the Practice
6 Direction and Insolvency Proceedings applying CPR 52, Rule 3. If that
7 application is successful, to hear the appeal itself.
8
- 9 2. The respondent, Mr. Yearwood-Grazette, was made bankrupt on 5th May 1999.
10 Mr. Hunt was appointed his trustee on 14th September 2004. The background
11 to this dispute is that the first respondent, Mr. Yearwood-Grazette, wanted to
12 settle his debts and put the matter behind him. By June 2005 he had fully
13 cleared the bankruptcy debts; these were for the sums of £11,000 to the Inland
14 Revenue and £858 to Essex and Suffolk Water.
15
- 16 3. The first respondent (and I will refer to him as the respondent throughout for
17 the purposes of this application) realised that he had also to pay Mr. Hunt's
18 fees and expenses, but he disputed the sums claimed. In February 2007,
19 Mr. Hunt applied for an order that the court fix the remuneration which he was
20 entitled to receive for acting as trustee. Although the application notice only
21 mentions remuneration, the District Judge also treated the application as one
22 for a determination of what other expenses were properly payable out of the
23 estate.
24
- 25 4. Mr. Hunt also sought an order for possession and sale of property jointly
26 owned by the two respondents, but that part of the claim was adjourned with
27 liberty to restore. That aspect of the District Judge's order is not subject to this
28 appeal. I note that the principal claim, on the face of the application notice, is
29 for the order for sale and possession. The request for the court to approve and
30 fix remuneration is at no.7, towards the end of the relief claimed, just before
31 the claim for consequential relief and the claim for costs. However, the issue
32 of remuneration was at the heart of the matter as, by the time the application
33 was made, the bankruptcy debts had long since been settled and there was no
34 other reason for a realisation of estate assets. The claim was, and is, for
35 £19,611.75 comprising: £11,420.50 remuneration; £500 for closure; £891.37
36 trustee's disbursements excluding legal fees; and £6,345.88 legal fees plus
37 £454 legal disbursements.
38
- 39 5. The District Judge decided that Mr. Hunt was only able to recover from the
40 estate the sum of £2,100 in respect of remuneration and the sum of £1,296.43
41 in respect of expenses and disbursements. He also ordered Mr. Hunt

1 personally to pay the respondent's costs of the application, which he
2 summarily assessed at £4,840.75.

3
4 6. The jurisdiction invoked is the court's general control of the bankruptcy under
5 s.363(1) of the Insolvency Act 1986. As the respondent had cleared his debts,
6 this is not a case where the creditors' committee had an interest in stipulating
7 the basis on which the trustee should charge remuneration. It is common
8 ground that, in exercising its discretion to fix the remuneration, the court
9 should have regard to the Practice Statement, The Fixing and Approval of the
10 Remuneration of Appointees 2004, which sets out the principles which govern
11 the fixing and approval of the trustee's remuneration. These principles are
12 reflected in the more limited statement of Insolvency Practice No.9 and also in
13 the list of factors set out at Rule 138(4) of the Insolvency Rules. I note that,
14 those Rules do not strictly apply because of the absence of a creditors
15 committee. The Practice Statement contains guidelines only. But, as I have
16 said, it is common ground that the court should have regard to them.

17
18 7. The objective of the Practice Statement is stated at para.3.2 to ensure that
19 remuneration is "fair, reasonable and commensurate with the nature and extent
20 of the work properly undertaken by the appointee".

21
22 8. I quote the following passages from para.3.4 of the Practice Statement:

23
24 (1) "Justification": It is for the appointee who seeks to be remunerated at a
25 particular level and/or in a particular manner to justify his claim and in
26 order to do so the appointee should be prepared to provide full particulars
27 of the basis for and the nature of his claim for remuneration.

28
29 (2) "The benefit of the doubt": The corollary of guiding principle (1) is that
30 on any application for the fixing and approval of the remuneration of an
31 appointee, if after considering the evidence before it and after having
32 regard to the guiding principles (in particular guiding principle (3)), the
33 matters contained in paragraph 5.2 (in particular paragraph 5.2(10)) and
34 the matters referred to in paragraph 5.3 (as appropriate) there remains any
35 element of doubt as to the appropriateness, fairness or reasonableness of
36 the amount sought to be fixed and approved (whether arising from a lack
37 of particularity as to the basis for and the nature of the appointee's claim
38 to remuneration or otherwise) such element of doubt should be resolved
39 by the court against the appointee.

40
41 (3) "Professional integrity": The court should give weight to the fact that the
42 appointee is a member of a regulated profession (where such is the case)
43 and as such is subject to rules and guidance as to professional conduct

1 and (where such is the case) the fact that the appointee is an officer of the
2 court.

3
4 (4) “The value of the service rendered”: the remuneration of an appointee
5 should reflect and should be fixed and approved so as to reward the value
6 of the service rendered by the appointee, not simply to reimburse the
7 appointee in respect of time expended and cost incurred.

8
9 (5) “Fair and reasonable”: the amount of the remuneration to be fixed and
10 approved by the court should be fair and reasonable and represent fair and
11 reasonable remuneration for the work properly undertaken or to be
12 undertaken.

13
14 (6) “Proportionality”:

15
16 (i) “proportionality of information”: in considering the nature and
17 extent of the information which should be provided by an
18 appointee in respect of an application for the fixing and approval
19 of his remuneration the court, the appointee and any other
20 parties to the application shall have regard to what is
21 proportionate by reference to the amount of remuneration to be
22 fixed and approved, the nature, complexity and extent of the
23 work to be completed (where the application relates to future
24 remuneration) or that has been completed by the appointee and
25 the value and nature of the assets and liabilities with which the
26 appointee will have to deal or has had to deal;

27
28 (ii) “proportionality of remuneration”: the amount of remuneration
29 to be fixed and approved by the court should be proportional to
30 the nature, complexity and extent of the work to be completed
31 (where the application relates to future remuneration) or that has
32 been completed by the appointee and the value and nature of the
33 assets and/or potential assets and the liabilities and/or potential
34 liabilities with which the appointee will have to deal or has had
35 to deal, the nature and degree of the responsibility to which the
36 appointee has been subject in any given case, the nature and
37 extent of the risk (if any) assumed by the appointee and the
38 efficiency (in respect of both time and cost) with which the
39 appointee has completed the work undertaken.”

40
41 (7) “Professional guidance”: In respect of an application for the fixing and
42 approval of the remuneration of an appointee, the appointee may have
43 regard to the relevant and current statements of practice promulgated by

1 any relevant regulatory and professional bodies in relation to the fixing
2 and approval of the remuneration of an appointee. In considering an
3 application for the fixing or approval of the remuneration of an appointee,
4 the court may also have regard to such statements of practice and the
5 extent of compliance with such statements of practice by the appointee.
6

- 7 (8) “Impracticability”: where the appointee has not, either upon or shortly
8 after the commencement of his appointment, sought to have the basis
9 upon which his remuneration is to be fixed approved by the members of
10 the partnership or the company, the creditors’ committee, the liquidation
11 committee or the general body of creditors (as appropriate) and in
12 circumstances where the appointee considers that it will be impracticable
13 to have his remuneration fixed and/or approved in such a manner, he may,
14 as soon as reasonably practicable after his appointment, apply to the court
15 to have the basis upon which he is to be remunerated fixed and for
16 directions as to the manner in which his remuneration is to be approved
17 (which may include provision for payments to be made on account). In
18 circumstances where such an application may be made, to the extent that
19 such an application is not made but the appointee subsequently makes an
20 application to the court for the fixing and approval of the whole or any
21 part of his remuneration, an explanation as to why no earlier application
22 was made shall be provided to the court.
23

24 The Practice Statement then sets out the criteria and information which the
25 applicant is expected to provide. In particular by para.5.2(1)(v), he should
26 have explained the benefits that accrued as a consequence of his work.
27

- 28 9. The court’s task is to balance all the various criteria, resolving any conflict
29 between them arising in the particular case, in order to arrive at the proper
30 level of remuneration. In doing so, it is settled law that the court has to reward
31 the value and benefits of the services rendered rather than the cost of rendering
32 such services. Thus, in fixing the remuneration, time spent is less relevant
33 than value provided. I was referred to the judgment of Mr. Justice Ferris in
34 *Mirror Group Newspapers v. Maxwell 2* and also *Cooper v. The Official*
35 *Receiver*. The onus of demonstrating such value or benefit is on the applicant
36 and the court must resolve any element of doubt in favour of the estate.
37
- 38 10. I note the following chronology in the present case: The respondent requested
39 from Mr. Hunt an estimate of his costs and expenses in December 2004.
40 Mr. Hunt did not respond in detail to that request until a letter dated
41 27th January 2005 in which he said:
42

1 “At present, since your intention is to settle your bankruptcy debts and
2 expenses in full along with our costs, I anticipate that our costs should
3 be no more than £2,100 including VAT.”
4

- 5 11. This fee basis of £2,100 including VAT was expressed to be by reference to
6 the Official Receiver’s scale, based on a percentage of assets realised and
7 distributed. Of course, it was, by that stage, clear that the percentage basis was
8 likely to yield nothing as Mr. Hunt was unlikely to have to realise any assets.
9 Both outstanding debts in the bankruptcy were settled with third party funds by
10 June 2005.
11
- 12 12. By telephone and letter dated 21st December 2005, the respondent requested
13 details of Mr. Hunt’s remuneration and expenses for the purpose of settling all
14 outstanding matters. Mr. Hunt did not give a substantive reply until 4th April
15 2006. Nevertheless, according to his schedule of time spent, he sought
16 remuneration relating to this period for a final review and two annual reviews
17 which took place within a month of each other and various letters. Mr. Hunt
18 was requiring more than £10,000 to bring the bankruptcy to an end, as can be
19 seen from the enclosure to his letter. That included the costs of annulment
20 proceedings and also the Secretary of State’s costs.
21
- 22 13. By letter dated 17th April 2006, the respondent took issue with the quantum of
23 remuneration and the necessity of the solicitors’ fees of the order sought. On
24 25th May 2006, Mr. Hunt told the respondent to deal directly with his
25 solicitors. On 13th June, the solicitors queried whether the bankruptcy debts
26 had, indeed, been settled.
27
- 28 14. There were negotiations for a settlement on the question of remuneration
29 which went on for a substantial period, but which did not, in the event, achieve
30 a settlement. It was not until more than eighteen months after settlement of the
31 bankruptcy debts that Mr. Hunt decided to apply to the court to have his
32 remuneration fixed. As I have said, his principal application was an order for
33 sale of the property for the purpose of applying the proceeds solely to
34 Mr. Hunt’s fees and expenses.
35
- 36 15. At the first hearing on 10th May 2007, District Judge Bowles ordered that there
37 be a detailed assessment in Mr. Hunt’s charges, disbursements and expenses
38 and gave directions for the filing and serving of evidence. Further directions
39 were given on 26th October 2007 enabling Mr. Hunt to file further evidence
40 following criticisms of the evidence he had already filed. I should add, for
41 completeness sake, that at the hearing of 7th May 2008 when the order which is
42 currently being appealed was made, the skeleton argument of Mr. Hunt’s
43 counsel addressed the question of both remuneration and solicitors’ fees.

- 1
- 2 16. The basis for Mr. Hunt’s appeal is his claim for remuneration. He has now
3 dropped his case that the court’s jurisdiction to fix the proper level of fees and
4 expenses was not properly invoked.
5
- 6 17. Under the heading remuneration a number of points arise. Mr. Hunt submits
7 that the Judge’s decision, that he should have provided evidence of why each
8 step taken in the bankruptcy was beneficial, amounted to a failure to apply the
9 proportionality of information principle set out in the Practice Statement or, at
10 any rate, a failure to apply due weight to that factor in the balancing exercise.
11 Mr. Hunt had provided extended timesheets covering his fees, a response on an
12 item-by-item basis to the matters raised by the respondent, policy statements
13 on his charging rates and a statement of his historic charging rates.
14
- 15 18. Mr. O’Mahony, on his behalf, asked rhetorically, what else Mr. Hunt could
16 proportionately have done to explain the fees which he had charged by way of
17 remuneration. Mr. Cumming responded, that he could have explained why the
18 estimate that he had provided in January 2005 fell so far short of the time costs
19 which he sought to charge in April 2006. In other words, what had happened
20 in the interim that Mr. Hunt had not been expecting?
21
- 22 19. In my judgment, Mr. O’Mahony’s submission does not give full effect to the
23 Practice Statement. Proportionality of information is to be assessed, among
24 other things, by reference to the nature, complexity and extent of the work
25 done, or to be done, by the appointee and the value and nature of the assets,
26 and liabilities, which the appointee will have to deal with or has had to deal
27 with. Mr. O’Mahony says that, because all that was in issue was Mr. Hunt’s
28 own fees and expenses, it was disproportionate to expend significant costs in
29 setting out an explanation of how those costs had been incurred and, in
30 particular, what the value of those costs was to the estate.
31
- 32 20. It seems to me to be implicit in his submission, that he submits that the value
33 was to some extent self-evident. However, proportionality of information is
34 only one of the factors to be weighed. It seems to me that, logically,
35 Mr. O’Mahony’s submission promotes it to be an overriding one. If no further
36 explanations are provided, the Judge is unable to take into account the other
37 matters and give them their due weight. In this context, I would refer to the
38 observations of Mr. Justice Ferris in the *Mirror* case where he said:
39
- 40 “If office holders seek to be remunerated upon, or partly upon, the
41 basis of time spent in the performance of their duties, they must do
42 significantly more than list the total number of hours spent by them, or
43 other fee-earning members of their staff, and multiply this total by a

1 sum claimed to be the charging rate of the individual whose time was
2 spent.”

3
4 Pausing there, Mr. O’Mahony submits, correctly, that Mr. Hunt did do more
5 than merely list the total number of hours and multiply it by the charging rate.
6 However, Mr. Justice Ferris went on to say:

7
8 “They must explain the nature of each main task undertaken, the
9 considerations which led them to embark upon that task and if the task
10 proved more difficult, or expensive, to perform than to be first
11 expected, to persevere in it. The time spent needs to be linked to this
12 explanation so that it can be seen what time was devoted to each task.
13 The amount of detail which needs to be provided will, however, be
14 proportionate to the case.

15
16 The test of whether office holders have acted properly in undertaking
17 particular tasks, at a particular cost and expenses and time spent, must
18 be whether a reasonably prudent man, faced with the same
19 circumstances in relation to his own affairs, would lay out or hazard his
20 own money in doing what the office holders have done. It is not
21 sufficient, in my view, for office holders to say that what they have
22 done is within the scope of the duties or powers conferred upon them.
23 They are expected to deploy commercial judgment, not to act
24 regardless of expense. That is not to say that a transaction carried out
25 at a high cost, in relation to the benefit received or even an expensive
26 failure, will automatically result in the disallowance of expenses or
27 remuneration. But it is to be expected that transactions having these
28 characteristics will be subject to close scrutiny.”

29
30 21. Later on in his judgment, Mr. Justice Ferris refers to the judgment of
31 Mr. Justice Lawrence in *Re Carton Limited*, where he said of time basis
32 remuneration:

33
34 “It is quite impossible to check the charges based on such a system and
35 to gauge the value of odd hours said to have been spent on the affairs
36 of the company. The court has long since come to the conclusion that
37 the proper method to adopt, whenever it is practicable, is to assess the
38 remuneration according to the results attained.”

39
40 Mr. Justice Ferris goes on to say:

41
42 “In my judgment, it is vital to recognise three things in this field: (1)
43 Time spent represents a measure, not of the value of the service

1 rendered, but of the cost of rendering it. Remuneration should be fixed
2 so as to reward value, not so as to indemnify against cost; (2) Time
3 spent is only one of a number of relevant factors. The others being, as
4 I have said, those which find expression in the Rules. The giving of
5 proper weight to these factors is an essential part of the process of
6 assessing the value as are distinct from the cost of what has been done;
7 (3) It follows from the first two points that, as the task is to assess
8 value rather than cost, the tribunal which fixes remuneration needs to
9 be supplied with full information on all the factors which I have
10 mentioned.”

11
12 22. I now turn to what the District Judge said in the present case. I start at para.12
13 of his judgment where he says:

14
15 “It has been suggested, by the applicant, that ample explanation has
16 been provided as to how the costs spiralled following the particular
17 assertion in January 2005. However, on the part of the respondents, it
18 is suggested that the evidence provided is simply inadequate to comply
19 with the requirement in the Practice Statement which is that there
20 should, according to s.5.2(1), be a narrative description and
21 explanation of a whole variety of factors.”

22
23 He went on to say:

24
25 “Simply asserting that X amount of time has been expended by the
26 trustee in undertaking work is not of itself sufficient. There has to be
27 more than that. The question then is has the trustee provided more
28 than that? In my judgment, the answer is no. The trustee has not
29 provided sufficient evidence to satisfy the requirements set out in the
30 Practice Direction. The evidence which was provided is in the form of
31 a schedule which has, in some cases, extremely bland descriptions with
32 no explanations as to [and I consider this to be very significant] the
33 benefit to the bankruptcy of any specific step. I am entitled to infer
34 that there is some benefit to the bankruptcy from the work that was
35 done by the trustee, but I am not satisfied that the evidence here even
36 gets the trustee off the ground.

37
38 It is more than surprising, it is almost shocking, that having been given
39 an opportunity since October of last year to file just such evidence,
40 which clearly sets out in a narrative format with an explanation, as to
41 why each step or each particular piece of work was required in more
42 general terms, but, certainly in the form of a narrative that somebody
43 could understand, that has not been done.

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I take the view, therefore, that the trustee has failed to provide an adequate explanation. There is no doubt that work has been done, but in determining what work is justified, proportionate, reasonable and what value has been provided and so forth, I am left largely in the dark. I am not satisfied that the documentation that has been provided, in any way, clears this particular hurdle. I am, therefore, left trying to work out just how much the trustee ought to be able to charge.”

23. Later on, when hearing further legal argument relating to permission to appeal, the District Judge added:

“The issue of proportionality was clearly a very important issue and I have taken it into account. But the important point about that is very little of what evidence was provided in relation to what work was done addressed the issue of benefit/value, which I consider to be particularly important.”

24. I accept Mr. Cummings’ submission that the District Judge decided correctly that Mr. Hunt had failed to provide the narrative description and explanation of what he had achieved as trustee, and the benefits that accrued, as a result of the work that he had completed, in accordance with the requirements of para.5.2 of the Practice Statement. What was needed was an outline of how such benefits in principle accrued to the bankruptcy as a result of the work. It is not disproportionate to require more than a schedule of time spent and costs incurred where what Mr. Hunt was supposed to do was to justify his claim on the basis of the value of the service he had rendered. In any event, the proportionality of the information principle is only one of the principles set out in the Practice Statement which need to be balanced in the exercise of the court’s discretion.

25. It is asserted, by way of appeal, that the District Judge’s use of figures provided by Mr. Hunt in January 2005 as a benchmark for his costs was unreasonable. However, the District Judge did not simply pick those figures out of the air. He had first satisfied himself that the sum which Mr. Hunt sought on 4th April 2006 had not been justified and was excessive. It is for Mr. Hunt to establish what he claims to be a reasonable figure. All he has done is to assert that his remuneration must reflect the time which he has spent and the cost to him rather than the value of the services rendered to the bankruptcy.

26. All the other grounds for appeal, other than the first, fall it seems to me to be considered together. The trustee says that it was wrong of the District Judge to

1 take the 2005 figure as a benchmark; he should have analysed the subsequent
2 work of the trustee on a detailed basis and he should have given more weight
3 to offers to settle that were made by the trustee. It seems to me that if the
4 Judge was right to take the January 2005 figure as a benchmark, or at least as a
5 starting point, it was reasonable for him to say that the respondent did not have
6 to pay costs which the District Judge had, in any event, found to be excessive
7 to stop costs rising still further and to stop him losing his house. It is also
8 relevant that the offers to settle were above what the Judge himself fixed and
9 they were above that level on both sides of the equation.

10

11 27. It seems to me that the remedy was with the trustee to apply earlier to the court
12 to fix remuneration in order to stop the costs continuing to rise. In any event,
13 I do not find that the District Judge was wrong in finding, in the exercise of his
14 discretion, that the January 2005 figure was a reasonable one or, at any rate,
15 that it was reasonable to hold the trustee to a figure that he came up with, when
16 he apparently had all the relevant information before him, in order to anticipate
17 and predict the costs that he was likely to incur in circumstances where he had
18 not justified his increase according to the factors and principles laid out in the
19 Practice Statement. It was for the applicant to demonstrate why the costs
20 which he claimed were reasonable.

21

22 28. I therefore find that there is no real prospect of success in disturbing the
23 exercise of the learned District Judge's discretion in this matter. It seems to
24 me, he weighed up all the relevant factors and came to a conclusion which
25 there is no real prospect of demonstrating was unreasonable.

26
