Re Econ Corp Ltd (in provisional liquidation) (No 2)
[2004] SGHC 49

Case Number : OS 1791/2003

Decision Date : 05 March 2004

Tribunal/Court : High Court

Coram : V K Rajah JC

Counsel Name(s) : Anthony Lee and Gan Kam Yuin (Bih Li and Lee) for applicants; Ameera Ashraf and Tan Yi Tyng (Wong Partnership) for interim judicial managers

Parties : —

Insolvency Law – Winding up – Provisional liquidator – Application by former provisional liquidators seeking court's determination of appropriate remuneration for work done – Principles and factors to be considered – Sections 268(2), 311 Companies Act (Cap 50, 1994 Rev Ed)

5 March
2004
Judgment reserved.

V K Rajah JC:

1 This application deals with an important aspect of insolvency practice: How does an insolvency practitioner justify the remuneration he should receive for his services? This is definitely a matter of public interest, given that our insolvency practitioners play a significant role in lubricating the wheels of commerce. They are, in a number of insolvency situations, officers of the court, instrumental in ensuring that returns from failed commercial enterprises are maximised. Their fees could range from a few thousand dollars for routine work to perhaps millions of dollars in major corporate insolvencies. There is no question that they must be adequately remunerated. They have no charter, however, to charge excessive or unnecessary fees.

2 The law requires all liquidators in Singapore to have their remuneration "determined" by the High Court, if they cannot reach an agreement with their creditors. However by dint of legislative caprice, the Companies Act (Cap 50, 1994 Rev Ed) ("the Act") appears to allow judicial managers to fix their remuneration outside the supervisory jurisdiction of the court.

3 How does the court assess whether a liquidator's fees are excessive or have been fairly and justly earned? Our statutes, apart from merely requiring court approval of such fees, do not afford any guidelines. Unlike other jurisdictions, Singapore case law has not imposed any criteria or yardstick by which these amounts are to be assessed. Insolvency practitioners now usually value and assess their efforts on a time-costing basis, often without due regard to critical factors such as complexity, speed, actual effort and value added. This practice has crystallised into the norm over the years despite:

1. the effluxion of time which has radically changed the nature of their working practice(s); and

2. the ever-widening spectrum of cases they handle which range from the very simple to the highly complex.

4 Lamentably, the relevant local supervisory bodies have not attempted to regulate this aspect of practice unlike their counterparts in several other common law jurisdictions. The absence of discernible criteria has inevitably led to a widely-held perception in commercial circles that the fees of

insolvency practitioners are sometimes arbitrarily fixed and are not commensurate with either the efforts rendered or value contributed.

5 Should this current trend persist and be allowed to continue? This application squarely raises this all-important question. I observed half in jest, during the hearing, that the interim judicial managers ("IJMs") who were contesting the quantum claimed were unsheathing a double-edged sword. Admittedly, my views may not have any immediate relevance to them given the present context of liquidation and the different statutory scheme for remuneration in judicial management; but it is obvious that the principles to be applied ought to be the same.

6 Interestingly, the court in Hong Kong only addressed this issue for the very first time in 1998. This arose as a consequence of the infamous *Peregrine* saga where the court was asked to approve fees and disbursements for work done over a period of nine weeks that purportedly amounted to the mind-boggling sum of HK$76m. It should come as no surprise that this provoked a massive public outcry. While nothing of this magnitude has arisen in the local context, the present position in Singapore, bereft as it is of clearly defined guidelines, is far from satisfactory. In the circumstances, it is not only appropriate but imperative that clearly articulated criteria and parameters be firmly established so that the court, committees of inspection, creditor committees and all interested creditors can properly assess whether insolvency practitioners in Singapore are justly and reasonably remunerated.

The application

7 This is an application by the former provisional liquidators ("the applicants") of Econ Corporation Limited ("the company"). They request, pursuant to ss 268(2) and 311 of the Act, that the court determine their remuneration for the period of their appointment from 26 November 2003 to 10 December 2003. The application seeks that the remuneration of the applicants be fixed on an indemnity basis and that the assessed amount be paid out of the assets of the company as a priority debt.

8 The application is opposed by IJMs of the company who were appointed on 6 January 2004. The parties first appeared before me on 21 January 2004. The applicants had applied for an adjournment to file an affidavit in response to the IJMs' affidavit which had just been served on them. I acceded to this request and directed that the parties ascertain the legal position on the issue of remuneration in certain common law jurisdictions that I singled out, given my knowledge of specific developments in these jurisdictions.

Background facts

9 The company is the second largest local construction company. Its total liabilities exceed its assets by around $88m. On 26 November 2003, the directors resolved to place the company under a creditors' voluntary winding up and appointed the applicants as provisional liquidators. This happened after the court declined on 24 November 2003 to sanction a scheme of arrangement proposed by the company: see *Re Econ Corp Ltd* [2004] 1 SLR 273. The applicants had been the company's proposed scheme administrators in that unsuccessful application. The company's creditors had apparently not been consulted about the applicants' subsequent nomination as provisional liquidators. Some of the creditors were dissatisfied with the appointment of the applicants and sought to displace the applicants as provisional liquidators and place the company under judicial management instead. On 6 January 2004 an order was made for the appointment of the IJMs, thereby displacing the applicants. The applicants handed over the company's assets and documents to the IJMs but not before they had set aside the sum of $564,000 in order to meet their fees and disbursements.

10 The applicants' initial affidavit in support of this application was rather bare in its details. They seemed to assume that the court's sanction of their remuneration would be a mere formality – as it had been from time to time in the past. They cursorily adverted to their former appointment and appended various resolutions and forms to substantiate that they had been validly appointed. The only reference to the actual work done, is a sentence in the affidavit referring to a "copy of a summary of work done" by the applicants for the period from 26 November 2003 to 10 December 2003. This is a nine-page document which begins with a summary of their time costs for the relevant period:

	Numbers of Staff	Total no of hours Spent	Charge Out Rate	Total Costs S$
Directors	4	87	S$1,000 per hour	87,000.00
Managers	3	256	S$400 per hour	102,400.00
Assistant Manager	1	121	S$210 per hour	25,410.00
Senior Associate	1	121	S$130 per hour	15,730.00
Associate	1	121	S$110 per hour	13,310.00
Graduate Assistants	2	242	S$80 per hour	19,360.00
Administration Staff	2	11	S$45 per hour	495.00
Total	**12**	**959**		**263,705.00**

11 The remaining pages consist of abbreviated references to the various areas of work carried out by them including administrative matters, bank matters, employee matters, project matters, assets, legal matters, debtors and creditors. This first affidavit, before we even embark on an evaluation of applicable criteria, is plainly unsatisfactory. There is clearly neither sufficient nor concrete data for the court to evaluate the actual amount of work done by the applicants, let alone the complexities involved or the value the applicants brought to the matter.

12 Not unexpectedly, the IJMs took serious exception to this affidavit. In their response affidavit

they expressed incredulity that in 11 days of provisional liquidation the applicants and their supporting team had spent 959 hours of their time on matters purportedly relating to the provisional liquidation. Using simple mathematics, this would translate to each member of the 12-member staff team spending a total of 7.3 hours per day on the provisional liquidation, an assertion they found "extraordinary".

13 They took issue with the summary of work, bluntly asserting that the applicants had failed to "provide a detailed breakdown of the time taken for each type of work done, and a description of the staff involved in the particular items of work". Mr Timothy Reid, one of the IJMs, deposed that he had written to the applicants on 16 January 2004 requesting "all documentation in your custody, possession or power pertaining to the affairs of the Company that have been obtained or generated by you during your tenure as Provisional Liquidators", in order to assess the reasonableness of the costs associated with the work done. He had also written to the applicants on 19 January 2004 requesting for a detailed breakdown of the summary of work identifying the following:

(i) the persons or the grades of the persons who were involved in doing work;

(ii) the dates on which work was done;

(iii) what work was actually done on the relevant date;

(iv) the time taken for the work; and

(v) the remuneration claimed for each type of work.

14 Without the benefit of details of the summary of work as requested, the IJMs vigorously assert that the extent of remuneration sought is "excessive". They are also of the view that certain items of work included in the applicants' summary of works are *ex facie* outside the scope of the applicants' duty to preserve the status quo pending the creditors' input. The IJMs contend that unless full disclosure of the information that they have sought is made, the applicants ought to be denied the sum of $263,705.00.

15 The applicants, in their reply affidavit, filed on 24 January 2004, display their pique over these assertions. They say that the IJMs have not included Saturdays in their calculation of working days. The applicants had in fact worked on Saturdays. They strenuously argue that the initial period of liquidation is the most intensive; it is imperative during this period that control measures be implemented and protocols established. They claim they had to ensure that the company's assets were properly secured. In addition, given the number of active projects the company was handling simultaneously, a number of urgent tasks had to be carried out contemporaneously. The company had at least six ongoing projects totalling some $260m in value. The staff strength of the company equalled about 700 employees and a fair amount of interaction with them was called for. It was therefore necessary to send in the entire team of 12 persons. They explained that a substantial portion of their work was necessary for the initial ground laying and for a basic understanding and grasp of the company's business. This time spent would not be duplicated later. There was, in effect, unavoidable "front-loading". All this, they say, should be obvious to Mr Reid, whom they acknowledge is an experienced insolvency practitioner.

16 An attempt has been made to give a further breakdown in "summary form" of the actual hours spent for each category of work:

Summary of breakdown of actual time spent for work done by the Provisional Liquidators for the period from 26 November 2003 to 10 December 2003			
		Total Actual Hours Spent	Total Actual Cost S$
1	Administrative matters	88.50	30,530.00
2	Bank matters	65.50	21,075.00
3	Employees matters	223.50	50,085.00
4	Projects matters	224.75	90,032.50
5	Assets	296.00	50,745.00
6	Legal matters	70.60	32,538.00
7	Debtors	14.50	7,630.00
8	Creditors	42.00	7,885.00
	Total	1,025.35	$290,520.50
	Cost to be approved by Court	959.00	$263,705.00

17 A further breakdown of the actual number of hours spent and actual time cost incurred for each task in the different categories of work is also included.

18 The applicants seek to impress on the court that their estimation of actual time spent surpasses what is stated in the application. They maintain that the actual time spent was 1,025 hours which when translated into actual costs amount to $290,520.00. They however do not explain why and on what basis they have given this rebate. Without speculating on why or how this adjustment was made by the applicants, I can safely say that it succeeds in only raising even more issues of ambiguity and inaccuracy. By contending that in seeking approval of a reduced remuneration of $263,705.00, they have *not* in fact asked for their *actual* time cost, the applicants have somehow clouded the issue further, rather than clarified it.

19 They also ask the court not to ignore the fact that the directors had agreed to pay the applicants on a time-cost basis, though they properly concede that this is by no means decisive. They add that the IJMs have unjustifiably taken issue with some of their work and labelled it unnecessary. They cannot respond to a bald and unsubstantiated allegation. As provisional liquidators, they have done what they felt was necessary "to preserve the value of the company's assets and contracts". Finally, in relation to the details of their activities as provisional liquidators, they claim that during the handing-over phase they had given the IJMs "quite a lot of detail about what we did during our appointment". I note nevertheless that they have yet to specifically address the IJMs' subsequent letters of 16 January 2004 and 19 January 2004, seeking more information and details.

Position in other relevant jurisdictions

20 It would be helpful at the outset to understand how other jurisdictions with a similar statutory framework have dealt with the issue of remuneration. An overview of the position in these jurisdictions will assist in identifying what are the commonly accepted criteria and in distilling principles that might conceivably be applied in Singapore.

England

21 The illuminating speech delivered by Lightman J to the Insolvency Lawyers' Association in November 1995 succinctly sums up the key issues. To summarise his views would merely detract from the clarity of his expression and his elegant portrayal of the essential issues. I have therefore reproduced excerpts of his speech (from [1996] JBL 113 at 115, 116 and 118), which in my estimation are helpful in explaining these issues:

> Lawyers and accountants (like the Courts) are service providers to the community and, to justify the return they obtain for their services, they must display the three "E"s:
>
> (1) expertise;
>
> (2) expedition; and
>
> (3) economy
>
> The cream of the insolvency profession (lawyers and accountants) display an enviable degree of expertise and expedition. This is I think publicly acknowledged. But the public concern relates to the last (but far from the least important) of the three "E"s – namely economy. The public ask: can we really afford the cost today – and if the cost is referable to the quality of service, can we afford this quality of service? … The problem (as I see it) is the perceived lack of professional concern and lack of control over fees and costs in corporate insolvencies (and in particular in cases of receiverships). *There is perceived to be a particular mindframe towards costs referable to the open unguarded pocket from which the costs are paid and the absence of effective monitoring – a mindframe careless of the consequences for unsecured creditors and others.*
>
> *With a personal client, a solicitor and accountant must ask himself throughout what expenditure and what rate of charging would the client knowingly and willingly authorise paying out of his own pocket – and the client may be expected to compare the charging rates of the various competing professional firms, to be tough in negotiating charging rates and to be astute in examining any bill and vetting any proposed expenditure – with the constant refrain "is this cost really necessary?" But can the same mindframe be assumed in the case of an administrator,*

liquidator or receiver? In the case of the administrator and liquidator the pocket is the insolvent company of which the administrator or liquidator is the alter ego. In the case of administrators and liquidators committees of creditors, and indeed the Court, have theoretically a degree of control, but in practical terms doubts abound whether in practice any effective check is ordinarily made on the make up of the sum claimed.

… Amongst the insolvency profession there must be a recognition that there are special responsibilities on those (for good or ill) exploiting a statutory monopoly – in this case of acting as administrative receivers, administrators and liquidators; *and the public have a substantial interest in knowing and indeed a right to know what the returns are to insolvency practitioners, and the professionals they engage, and the justification for them.*

[emphasis added]

22 Now for the statutory framework. In England a comprehensive regime governing the remuneration of all manner of insolvency practitioners is embodied in the Insolvency Rules 1986. Liquidation is governed by rr 4.127 to 4.131 of these Rules.

23 In December 2002, the Association of Business Recovery Professionals issued a statement of insolvency practice ("statement") setting out, *inter alia,* criteria to be used for the remuneration of insolvency office-holders. This statement is meant to guide insolvency practitioners, by setting out approved practices and harmonising the approach to insolvency. It includes details of what criteria should be used in assessing fees for various types of insolvency work. Such criteria are relevant in enabling the court to fix the remuneration of a provisional liquidator. The position is largely similar for the other areas of insolvency work with the exception of receiverships. Rule 4.130(2) of the Insolvency Rules states:

[Matters to be taken into account] In fixing his remuneration, the court shall take into account:

(a) the time properly given by him (as provisional liquidator) and his staff in attending to the company's affairs;

(b) the complexity (or otherwise) of the case;

(c) any respects in which, in the connection with the company's affairs, there falls on the provisional liquidator any responsibility of an exceptional kind or degree;

(d) the effectiveness with which the provisional liquidator appears to be carrying out, or to have carried out, his duties; and

(e) the value and nature of the property with which he has to deal.

24 Appendix D of the statement includes a suggested format for information to be provided when approval for remuneration is sought; this is to be modified *mutatis mutandis* in appropriate cases depending on the level of information required. In view of the order made in these proceedings, the suggested format is reproduced as an appendix to this judgment with some carpentry, to cater to local circumstances.

25 The leading decision in England in this area of the law is a judgment by Ferris J in *Mirror Group Newspapers plc v Maxwell (No 2)* [1998] 1 BCLC 638. While this was a decision in relation to the remuneration of court appointed receivers, the principles embodied are of general application. The

decision also clarifies that the criteria set out in the legislative scheme no more than encapsulate principles of common sense fortified by the spirit of disclosure. It is also noteworthy that the criteria are largely similar to those the court employs in determining a solicitor's remuneration. In the *Mirror* case, Ferris J incisively observed at 648:

> The essential point which requires constantly to be borne in mind is that office-holders are fiduciaries charged with the duty of protecting, getting in, realising and ultimately passing on to others assets and property which belong not to themselves but to creditors or beneficiaries of one kind or another. They are appointed because of their professional skills and experience and they are expected to exercise proper commercial judgment in the carrying out of their duties. *Their fundamental obligation is, however, a duty to account, both for the way in which they exercise their powers and for the property which they deal with.*
>
> … *[I]t must be for the office-holder who seeks to be remunerated at a particular level to justify his claim.* As I see it this is simply one aspect of his obligation to account. What he retains for himself out of the property which comes into his hands as office-holder is not available for those towards whom he is a fiduciary. He cannot therefore account for it by paying it over. *The only other way in which he can account for it is by showing that he ought to be allowed to retain it for himself. But this is necessarily a matter for him to establish*.
>
> [emphasis added]

26 In July 1998 a working party, constituted by the Vice-Chancellor and chaired by Ferris J, issued a report on the remuneration of insolvency office-holders. The working party endorsed Ferris J's observations in the *Mirror* case. The report pointed out that judges do not constitute the ideal tribunal to deal with issues of *quantum* in remuneration as opposed to the applicable *principles* in the determination of quantum. They agreed with Hoffmann J's observations in *In re Potters Oils Ltd* [1986] 1 WLR 201 at 207:

> [T]he court is ill-equipped to conduct a detailed investigation of receivers' charges on an itemised basis. A judge could not do so without being expensively educated by expert evidence.

27 The working party was of the view that taxing masters are the best equipped judicial officers to deal with the assessment of the remuneration of office-holders, particularly in substantial, complex or controversial cases. After all:

> [T]he fixing of remuneration is a process not unlike that of the taxation of legal costs, in which Taxing Masters have great expertise based on long experience and well-established procedures. [at para 7.10 of the report available online at http://www.dca.gov.uk/civil/ferrisfr.htm]

28 The recommendations made by the working party included a proposal that the relevant rules of court be amended, so as to make it possible to direct that remuneration be directly assessed by a taxing master in all cases where remuneration has to be fixed or assessed by the court. This would presumably obviate the need for directions to be given on a case-to-case basis.

Hong Kong

29 The Hong Kong statutory framework is by and large identical to that in Singapore. The position is set out in s 196(2) of the Companies Ordinance (Cap 32). In the case of *Re Peregrine Investments Holdings Ltd* [1999] 3 HKC 291, the Hong Kong Court of Appeal affirmed that the principles enunciated by Ferris J in the *Mirror* case applied in Hong Kong notwithstanding the absence

of any explicit statutory criteria in fixing the remuneration of provisional liquidators. In summarising the principles gleaned from the *Mirror* case, the Court of Appeal took the view (at 305–306) that these were essentially principles of prudence and commercial efficacy and ought to apply in the Hong Kong context as well:

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

30 The Law Reform Commission of Hong Kong subsequently issued a report in July 1999 reviewing the entire area of insolvency law and practice. The report touched, *inter alia*, on the remuneration of insolvency practitioners. Taking note of the harsh comments made earlier by the courts about "cosy relationships" in the insolvency business, it observed that "the court considers that it is a matter of public interest that the matter of fees of office-holders should be open and above board". It also felt (see para 4.15 of the report which is available online at http://www.info.gov.hk/info/wind.doc):

> The Taxing Master is capable of dealing with legal fees but not necessarily with the fees of liquidators, which relate to a different discipline. There are even questions about the jurisdiction of the Taxing Master to adjudicate on liquidators' or provisional liquidators' fees. The court is probably less qualified than a Taxing Master to consider fees and, in any event, would not have the time to investigate fees in detail.

31 As a solution, the Commission recommended the setting up of a specialist panel that would adjudicate insolvency fees. The panel would operate under the auspices of the official receiver. The panel should be self-funding.

Australia

32 Section 473 of the Australian Corporations Act 2001 largely approximates s 268 of the Singapore Act. Its progenitor was similarly worded. In July 2000, the Insolvency Practitioners Association of Australia issued a "Statement of Best Practice – Remuneration". Relevant excerpts are set out here:

Recognition of Continuing Principles

> In insolvency matters, remuneration is usually dependent upon the manner of appointment and the relevant statutes. It is recognised that in work of this nature, the extent and urgency of the work, the degree of skill required, and the degree of responsibility undertaken *can and does vary considerably.*

Insolvency work tends to lack the regularity of most general practice and demands the availability of staff with particular skills, often with little or no prior notice. This generally results in the need to have sufficient staff to meet unexpected and sudden assignments and, in consequence, individual *charge out rates* for this type of work could *tend to be higher* than for other professional work.

…

The IPAA recommends that in most insolvency appointments the fixation of fees upon a basis of time spent at the level appropriate to the work performed. This is consistent with the conclusion of the Review of the Regulation of Corporate Insolvency Practitioners in 1997.

Alternative methods of calculation, such as percentage of realisations, a percentage of funds distributed, a lump sum or a combination of bases could be warranted in specific cases. However, as a general rule, fees based on time spent is the normal basis.

When calculating an appropriate fee, there should, therefore, be a careful review of the quality and quantity of work performed ensuring that the staff mix and average rate is commensurate with the nature and complexity of work done. This is the most important test of all.

Introduction to Minimum Disclosure

Where an Appointee or the Firm seeks to take remuneration calculated by reference to an hourly or time unit rate *creditors should be provided with details* of the:

- Type of work to be undertaken by the Appointee and the Firm's staff
- Estimated breakdown of the broad activity phases
- Relevant experience of each person
- Number of hours charged by each person
- Hourly rate charged for each person
- Total remuneration claimed
- Basis of recovering disbursements

Where a range of services is offered by the Firm, that might be regarded by some as ancillary to the core insolvency process, the Appointee should ensure that creditors *understand and approve these ancillary services* offered and utilised. …

The Appointee must be able to demonstrate that *a task was necessary to be undertaken* for the proper conduct of the administration and that the time charged was reasonable for the task concerned.

Creditors are to be kept informed as to progress in the administration and this will include advice as to the level of the remuneration and disbursements incurred or paid.

> The Appointee should take special care to have *regard to the understanding and views of creditors* in determining the extent of work undertaken in an administration. This applies particularly where *further enquiries* and investigation *in relation to the recovery of property* undertaken by the Appointee could have the possible effect of reducing the amount of a dividend payable to creditors from funds held in the administration if unsuccessful.
>
> [emphasis added in bold italics]

33 The assertion "This generally results in the need to have sufficient staff to meet unexpected and sudden assignments and, in consequence, individual *charge out rates* for this type of work could *tend to be higher* than for other professional work" might be viewed as being somewhat indulgent. An ebb and flow in the intensity of work commitments is an integral feature of most specialist professions. This alone cannot justify the fixing of higher charge rates. Any justification for higher charge out rates ought to be pegged to value added and other work-related factors such as complexity, degree of expertise exercised and time spent.

34 Prior to this statement, there was already a generally accepted practice throughout Australia to follow time charges. Scales had been laid down by umbrella associations at both the national and state level. The courts had however consistently held that they were in no way bound to adhere to remuneration at the published rates: see *eg Practice Note No 1 of 1994 – Remuneration of Liquidators* [1994] 2 VR 30, *Practice Note No 2 of 1995 – Remuneration of Liquidators* [1995] 2 VR 549. The courts regularly exercised their discretion to take into account, among other factors, the complexity of the particular matter. This, I am given to understand, is still the prevailing practice.

35 The instructive case of *Venetian Nominees Pty Ltd v Conlan* (1998) 16 ACLC 1653, where the Full Court of the Supreme Court of Western Australia held (as quoted from the headnote of the report):

> In an application under sec 473(2), the onus was on the provisional liquidator to establish that the remuneration claimed was fair and reasonable. It was the function of the Court to determine whether, prima facie, the liquidator had made the out a case for the determination of the remuneration claimed having regard to the material and evidence proffered by the liquidator. Once the Court was satisfied that the provisional liquidator had made out a prima facie case, the objections raised by creditors and others then became relevant.
>
> *No order should be made if the liquidator had failed to provide adequate evidentiary material*. Ordinarily the provisional liquidator should provide the Court with a statement of account reflecting in itemised form, details of work done, the identity of the persons who did the work, the time taken for doing the work and the remuneration claimed accordingly. The statement of account should be verified by affidavit.
>
> [emphasis added]

New Zealand

36 For the sake of completeness, I shall briefly allude to the position in New Zealand. The relevant statutory provision is s 276 of the Companies Act 1993. It has the same purport as s 268(2) of the Act. The applicable principles were summarised in a note of the holding in *Re Galdonost Dynamics (NZ) Ltd (In Liquidation*) [1994] 2 NZLR 605:

> 1 There was no fixed scale to be applied; each case turned on it own merits.

2 In general, the assessment of a liquidator's fee would be on the basis of normal commercial practice by persons practising in the insolvency and related areas.

…

4 In making such assessments, the Court would be astute to see that there was an adequate identification of what the real profit rates were which were being charged, and that only fair overheads were being allowed. Partner time, for instance, normally included some elements of overheads; and blind aggregation of overheads to a principal's hourly rate might lead to a distinct element of double recovery.

5 There was an obligation upon a liquidator to present fees in such a form as allowed convenient identification of true profit costs and overheads. Where there were unusual items, explanatory notes should be added.

6 All relevant factors had to be considered in setting fees, whether percentage or itemised. Without limiting the generality of that statement, the skill and efficiency with which a difficult liquidation was advanced might in itself well be relevant to the appropriate level of a liquidator's fees. So too would be the kinds of matters which had to be attended to within a given liquidation: obviously some kinds of matters required a higher degree of skill and expertise than others. Liquidations varied enormously in their degrees of difficulty, both in toto and within a given liquidation.

37 In *Re Medforce Healthcare Services Ltd (In Liquidation) (No 2)* [2001] 3 NZLR 158, Master Gambrill correctly concluded that a key factor for the court's consideration is to identify the appropriate balance, to ensure that the courts have sufficient information to enable them to reach a conclusion that the fees sought are reasonable, without imposing a cost upon insolvency practitioners that would significantly and adversely affect the returns to creditors. He stated at [8] and [9]:

Some guidance can indeed be derived from the taxation of solicitors' costs as solicitors, like provisional liquidators, are officers of the Court whose costs are fixed as part of the supervisory function of the Court. In particular it should be observed that rules of evidence are ordinarily not strictly observed in the taxation of solicitors' costs. The Courts however, have expressed the view that the onus is on the liquidator to establish the remuneration claimed is fair and reasonable. …

Balanced against the obligation to creditors generally the Court in New Zealand has rarely undertaken a taxing function, and indeed taxing functions have always been undertaken in the first instance by the Registrar. The Masters are aware that it would be inappropriate for them [*ie* the courts] to assume on the great majority of files a role of a taxing Master in attempting to deal with the issue of liquidators' fees and it would not be a good use of Court time.

Singapore

38 I now turn to examine the position in Singapore and the principles that should prevail in an application such as this. For ease of reference, ss 268(2) and 268(3) of the Act are reproduced:

(2) A provisional liquidator, other than the Official Receiver, shall be entitled to receive such salary or remuneration by way of percentage or otherwise as is determined by the Court.

(3) A liquidator, other than the Official Receiver, shall be entitled to receive such salary or

remuneration by way of percentage or otherwise as is determined —

(a) by agreement between the liquidator and the committee of inspection, if any;

(b) failing such agreement, or where there is no committee of inspection by a resolution passed at a meeting of creditors by a majority of not less than 75% in value and 50% in number of the creditors present in person or by proxy and voting at the meeting and whose debts have been admitted for the purpose of voting, which meeting shall be convened by the liquidator by a notice to each creditor to which notice shall be attached a statement of all receipts and expenditure by the liquidator and the amount of remuneration sought by him; or

(c) failing a determination in a manner referred to in paragraph (a) or (b), by the Court.

39 It is clear from a plain reading of this section that liquidators have three alternative means of settling their remuneration:

(a) by agreement with the committee of inspection;

(b) with the approval of the majority of creditors; or

(c) by the court.

It is no accident that the provision gives precedence to approval by the committee of inspection ("COI"); the COI would have the most intimate knowledge of precisely what efforts have been exerted, the complexities involved and the value that a liquidator has contributed to the process. Rule 188 of the Companies (Winding Up) Rules (Cap 50, R 1, 1990 Rev Ed) ("CWUR") allows the official receiver, subject to the directions of court, to exercise any of the functions of the COI. Section 311 of the Act accords all "*proper* costs, charges and expenses of and incidental to the winding up including the remuneration of the liquidator" priority over all other claims to the assets of the company. This is later clarified by s 328(1)(a) of the Act as priority over all unsecured debts. In passing, it should be mentioned that the liquidator, in turn, is mandated by s 219 of the Act to refer to the court the assessment of the remuneration of a receiver and manager appointed under an instrument, should the need arise.

40 Rule 142(1) of the CWUR confers on the official receiver the right to apply to court to review the remuneration of a liquidator, if he is of the view that the remuneration as fixed by the committee of inspection is "unnecessarily large". This might happen, for instance, when there is an inordinately "cosy relationship" between large creditors who may be related in some manner to the company. They may seek to reward a pliant and accommodating liquidator unnecessarily. Save for this provision, the official receiver, while having general control over unofficial liquidators pursuant to s 265 of the Act, does not play a direct role in the remuneration of insolvency practitioners. There is no requirement under our laws for such applications to be served on the official receiver. The current practice is for the official receiver to review the fees of a liquidator if and when liquidators apply for a discharge. It is not clear what criteria the official receiver employs when he reviews a liquidator's remuneration. It is noteworthy that r 142(2) of the CWUR states that the rule only applies to court appointed liquidators. It therefore appears to me that the official receiver has no right to apply to court to fix the remuneration of privately appointed liquidators such as the applicants. The court however has the inherent jurisdiction to direct the official receiver to attend any hearing where such an issue may arise: *In re Nash & Sons* [1896] 1 QB 13.

41 Rule 171 of the CWUR states that a liquidator or special manager cannot recover on behalf of

another person remuneration for work that he ought to perform himself. Rule 165 of the CWUR requires all solicitors, accountants, brokers and others employed by a liquidator in a winding up to deliver their bills or charges to the taxing master for the purposes of taxation. Rule 173 of the CWUR requires taxation to be completed before any amount is paid out of the assets of the company.

42 The official receiver when acting as a liquidator is entitled to levy fees pursuant to the Fees (Winding Up of Companies) Order ("Order") (Cap 106, O 35, 2001 Rev Ed). This is fixed on a percentage basis to the realised assets and distributions. Given that it is incongruous with commercial reality, this Order is of little assistance in fixing the remuneration of private insolvency practitioners and should not be used as a guide. While s 268(2) of the Act does indeed contemplate a liquidator's remuneration being fixed on a percentage basis, the fact remains that most jurisdictions have, quite correctly, rejected as being unfashionable any notion of rewarding insolvency practitioners on a percentage basis tied to realisation. A scale fee of this nature, despite its statutory sanction, would be arbitrary if applied as an inflexible rule, and will not fairly and reasonably remunerate insolvency practitioners. It could, arguably, be appropriate to apply such scale fees in matters where the principal task of the insolvency practitioner is to dispose of assets. He may then be viewed as a *quasi* realtor. Even in such instances the issue arises *as* to whether it would be more economical to sub-contract this role to a realtor – the litmus test being expediency and economy in the particular circumstances of each such case.

43 The only Singapore decision where the issue of a liquidator's remuneration appears to have received some mention is *Chan Ket Teck v Seet* [1994] 1 SLR 567. In that case, a shareholder had taken issue with the conduct of the liquidators in a members' voluntary liquidation. The court found that the liquidators had made errors in preparing the accounts in addition to incorrectly exercising their power of set-off. Nevertheless, it held that the liquidators were entitled to their fees as there was no evidence to suggest that "they had acted fraudulently or in a manner that disentitled them to charge in accordance with the special resolution to wind up the company". It was hinted by the present applicants, albeit somewhat faintly, that that particular decision suggested that the court should take a benign approach in dealing with the issue of the remuneration of a liquidator. Any such interpretation of the decision is untenable. Firstly, that was a case of a solvent company, agreeing by way of a valid resolution to remunerate an office-holder in a particular manner. Secondly, in the case of solvent companies, there is no reason why the directors and/or shareholders cannot agree to the remuneration of an office-holder before he takes office. This is a matter of pure contract. No policy, creditor or third party considerations are involved. The decision has no relevance in the instant scenario and does not assist the applicants.

44 It is evident that the CWUR does not really assist in this matter. As such it would appear that the duty of the court in determining the appropriate level of remuneration is to pay heed to established principles distilled by analogy from other similar matters. In this regard, it bears mention that the other common law jurisdictions have, quite correctly, drawn significant inspiration and guidance from the principles applicable in assessing a solicitor's remuneration. They are, after all, both officers of the court; save in the instance of privately appointed insolvency practitioners. The manner of appointment cannot make any difference as to how a liquidator ought to be remunerated, in the absence of an agreement with creditors and/or committees of inspection. The same principles ought to apply to both privately and court appointed insolvency practitioners should the court's determination be sought.

45 I have referred at some length to the position in the other jurisdictions to illustrate that there is indeed a common jurisprudence permeating common law case law despite some variations in the underpinning statutory provisions. Insolvency practitioners, whether they are liquidators, provisional receivers, judicial managers or IJMs, have a right to be fairly and reasonably remunerated. However,

they have no legitimate expectation to be remunerated on a time costing basis as a matter of right. The time spent by them on a particular matter may be only one of several factors, albeit an important one, that the court will take into account in determining the appropriate level of remuneration. In this context, it is apposite to refer to the *dictum* of P O Lawrence J in *In re Carton, Limited* (1923) 39 TLR 194 at 197:

> The Court as a general rule only fixes remuneration on a time-basis if there is no other method which would operate to give the liquidator a fair remuneration. … Even the best accountant may spend hours over unproductive work, let alone his more or less efficient staff of clerks. Moreover, it is quite impossible to check charges based on such a system and to gauge the value of odd hours said to have been spent on the affairs of the company. The Court has long since come to the conclusion that the proper method to adopt whenever it is practicable is to assess the remuneration according to the results attained.

46 The observations made several decades ago still hold true today *a fortiori,* given the wide spectrum of work in an insolvency matter, ranging from the mundane to the complex. The court has to be ever vigilant and astute to ensure that applications for the determination of remuneration are properly scrutinised.

47 Ferris J in the *Mirror* case rightly pointed out that the time spent by insolvency practitioners represents a measure not of the value of their service but of the cost of rendering it. In my view the critical task confronting the court in arriving at what it considers to be the appropriate level of remuneration is to assess the value that the insolvency practitioner has brought to bear in a particular case, particularly in substantial or complex matters as opposed to "plain vanilla" transactions. Furthermore, the time spent by a less experienced professional could be completely disproportionate to what he ought to properly receive as remuneration. A professional should not, generally speaking, be rewarded for learning what is commonly known or ought to be known, at the creditors' or clients' expense.

48 After considering the case law from the other jurisdictions and the scheme of both the Act and the CWUR, I am of the view that the following principles and matters ought to be taken into consideration in determining the appropriate remuneration of insolvency practitioners in Singapore. The term insolvency practitioner is employed here in a generic sense rather than as a reference to only provisional liquidators; these principles are of general application to all manner of insolvency practitioners including liquidators, judicial managers, trustees in bankruptcy and scheme administrators, should the court's determination of remuneration be sought.

Principles to be taken into account in determining remuneration

Burden of proof

49 The burden of proof is on the insolvency practitioner to satisfy the court that the remuneration sought is justifiable. The benchmark in the assessment process is fairness and reasonableness. The court need not accept what is submitted at face value but will carefully scrutinise the facts placed before it, in deciding what aspect of the remuneration claimed is reasonable and or justifiable. The court will not blindly accept that what is said as done is done.

Value contributed

50 This is probably one of the most important aspects of the insolvency practitioner's role. The court, in determining the appropriate level of remuneration, will want to assess what difference the

insolvency practitioner has made to the matter. In this exercise, it may be helpful to include the views of the major creditors and in relevant cases those of legitimate independent creditors of substance. The need for independent views is significant, particularly if the major creditors are related entities who may have had a role in appointing the insolvency practitioner. In such cases their views may have little bearing in the court's estimation. There will be of course instances where the creditors and the insolvency practitioners may not enjoy a happy congruence of views. In such instances, insolvency practitioners ought to serve the relevant papers on the creditors' committee or creditors, as the case may be, so that the court can consider the cogency of their views, if they want to be heard.

Time spent

51 As already mentioned, all things considered, time spent by insolvency practitioners is only one of many criteria that a court will take into account. The importance of this criterion will vary from case to case, from being a possibly critical factor in one case to just another matter for consideration in another. Only in exceptional circumstances would the court use this as the only criterion in its evaluation. There are instances, however, where this could conceivably be a major factor. This dovetails with how a solicitor's remuneration is to be determined. In *Sumitomo Bank Ltd v Kartika Ratna Thahir (No 2)* [1997] 1 SLR 690, Lai Kew Chai J observed at [17]:

> The process of assessment of party and party costs is not a matter of mathematical multiplication, with assumed multiplier and multiplicand, nor are time sheets conclusive of the total amount of time which reasonably would have been spent on any particular aspect of the getting-up. They are, however, valuable as guides which will assist in the process of assessment.

Rates

52 This is an important aspect. It is axiomatic that this cannot, in the absence of acceptable guidelines in Singapore, be accepted at face value, as appears to be the present practice. The rates to be determined as fair and reasonable by the court can take into account the charge out rates claimed by the insolvency practitioner but the court has, in the final analysis, a complete discretion to apply whatever rates it considers appropriate. The quintessential test must be what would be the adequate remuneration for a similarly experienced and qualified insolvency professional. Unfortunately, insolvency practitioners in Singapore do not have a recognised supervisory body or association that has considered this matter. In the absence of clearly acceptable yardsticks or guidelines, I will have to consider what parameters should indeed be imposed in setting out fair and reasonable hourly rates.

53 The answer may be found in similarities between the functions of solicitors and insolvency practitioners. I appreciate that while there are real differences in the nature and responsibilities of the two different professions, there are nonetheless striking similarities. Both solicitors and insolvency practitioners receive professional training. They have unique skills and depend upon their knowledge and experience to discharge their responsibilities. Court appointed liquidators and all judicial managers are also officers of the court. Taxing masters in Singapore, unfamiliar with the roles and responsibilities of insolvency practitioners and in the absence of any clearly defined criteria, may have been overly generous in allowing substantially higher hourly charges to insolvency practitioners. They may have been impressed by the fact that insolvency practitioners may sometimes run businesses and exercise commercial judgment. There is in fact no particular mystery or mysticism involved in discharging such a function. There may be unusual cases involving a mega insolvency, a major corporate crisis or scandal or cross-border work where entirely different considerations might apply; but this would be in the realm of exceptional cases. Only extraordinary circumstances merit extraordinary rates and rewards. For completeness, one should note that after-office and weekend

rates should not really differ from the normal charge out rates save again for exceptional cases.

54 Another approach might be to allow evidence to be given of what is currently being charged by other insolvency practitioners to aid and assist the court in determining industry rates. This was clearly not the approach taken in this application. In any event, it is not clearly apparent, in the Singapore context, that allowing evidence to be adduced to demonstrate what other insolvency practitioners charge will actually prove to be useful or meaningful. It could well be that a large majority of these rates, at this juncture, is by and large excessive. Industry practices could be a guide but should not amount to more. Interestingly, even one of the IJMs acknowledged by the applicants as an experienced insolvency professional, has taken issue with the quantum of the remuneration which he describes indirectly as "extraordinary" in the present circumstances. It also appears that rates fixed internally by major accounting firms have more to do with their internal budgeting considerations than the actual value a particular professional may add to a transaction. Charge out rates are based on a complex brew of factors that includes seniority, remuneration, overheads and other imponderables. They may not be inextricably intertwined with the skill or value an individual brings to a transaction.

55 There is yet another trend that has surfaced: in recent times, quite a few boutique insolvency firms have been established. Indeed the IJMs come from such a firm. They apparently charge different rates from the more established accounting firms. Certainly the approach of the IJMs in this application bears this out; they appear to find the time spent by the applicants "extraordinary". While I leave open the question of establishing industry rates by evidence, I have yet to be persuaded that this can be established across the board in Singapore. Even if established, such rates may not be sanctioned by court unless they are deemed to be reasonable. I am prepared however to leave the door somewhat ajar on this issue for the time being and to consider this aspect separately, should the applicants so desire: see [73] *infra*.

56 In the present circumstances, given the absence of any *acceptable* industry practice, the court could consider the rate it would allow a solicitor of similar experience on an indemnity basis as a possible yardstick in determining the applicable hourly rate for an insolvency practitioner. Needless to say, the rates awarded in any particular situation could be more or less than what a solicitor of comparable qualifications and experience might obtain. It has to be emphasised that this is meant to be a guideline, and not an immutable rule. It appears that it is not unusual for partners or directors in large accounting firms to charge $1,000.00 or more per hour for their work in insolvency related matters; certainly this is the position in the present application. The rate of $1,000.00 per hour certainly seems excessive when measured against what the courts now allow for counsel in taxation proceedings, not to mention market rates in Singapore for professionals in general. As indicated earlier, I am not particularly impressed by the argument that higher charge out rates are justified because of the irregular workflow in insolvency matters or the nature of the work involved. This rate, if ever awarded, should be reserved for those in the highest echelon of their profession both in terms of experience and standing and even then only in truly exceptional cases.

Assistance

57 The remuneration that an insolvency practitioner can command embraces compensation for the assistance of employees of their firms: *Re Trustees Executors & Agency Co Ltd* (1984) 9 ACLR 497. That said, evidence should be adduced that this compensation has been reasonably incurred. "Overmanning" will not be sanctioned. In larger insolvencies it might be persuasively argued by creditors that non-essential services like secretarial backup, non-essential accounting and other routine tasks can be outsourced; if these services could be economically and effectively performed by third parties, the insolvency practitioner has to take this into consideration when submitting his bills.

There should not be an automatic default mechanism relying solely on the appointee's firm for support, though understandably this might often make sense. Appointments in insolvency matters are personal to the office-holders and should not be interpreted as a mandate to appoint staff from the firm from which the office-holder hails, in *all* aspects of the insolvency *at* all times. There should be horses for particular courses.

Scope of work

58 It is important to understand the functions and responsibilities of the insolvency practitioner; for example, is he merely a collector of assets or does he have responsibilities "*to run*" or "*run down*" a business in a manner that maximises returns to the creditors? When should intensive investigations into the reasons for a company's demise be initiated? Should potentially costly litigation proceedings be commenced? In determining whether particular tasks are within the insolvency practitioner's mandate, the courts ought to take a practical approach. In the heat of urgent decision-making, insolvency practitioners may make decisions or take steps which may, in retrospect, prove to be unnecessary or ineffective. They should not be penalised for such decisions. If an impractical standard is set, insolvency practitioners will be crushed between the upper and nether millstones. The test postulated by Ferris J in the *Mirror* case at 649 seems a just one:

> [T]he test of whether office-holders have acted properly in undertaking particular tasks at a particular cost in expenses or time spent must be *whether a reasonably prudent man, faced with the same circumstances in relation to his own affairs, would lay out or hazard his own money in doing what the office-holders have done*. It is not sufficient, in my view, for office-holders to say that what they have done is within the scope of the duties of powers conferred upon them. They are expected to deploy commercial judgment, not to act regardless of expense. This is not to say that a transaction carried out at a high cost in relation to the benefit received, or even an expensive failure, will automatically result in the disallowance of expenses or remuneration. But it is to be expected that transactions having these characteristics will be subject to close scrutiny.
>
> [emphasis added]

Disbursements

59 There must be some measure of restraint and discipline over how disbursement items are recouped. The CWUR has addressed the issue of professionals engaged by the liquidators. These fees are considered disbursements and have to be taxed. There are however many other incidentals ranging from photocopying to employment of part-time staff. These need to be accounted for and a clear statement of the policy involved in such charges ought to be brought to the court's attention. For example, photocopying charges could be very substantial in major matters. The court ought to apply the same criteria for such disbursements as it applies to solicitors. Sufficient particulars ought to be provided to allow the court to determine whether these bills are reasonably incurred and, most importantly, if the quantum claimed is reasonable.

Summary

60 In the final analysis, it remains open for the court in any matter to decide whether the basis for the remuneration ought to be on a time basis, a realisation basis or an all-encompassing basis absorbing all or a combination of the criteria identified. The choice would turn on and be determined by the nature of the particular matter. As stressed earlier, the criteria I have set out are guidelines and not immutable rules. If a time basis is preferred, it does not automatically entitle the insolvency practitioner as of right to receive a multiplicand of the charge out rate determined to be reasonable.

The court will still have to balance various impinging considerations like reasonableness and scope of work. The court will have to satisfy itself that there are no issues of "overservicing" or "overmanning" in the matter. The basis ultimately applied must be characterised by fairness and reasonableness. In so far as liquidation cases are concerned, the determination of fees by the court ought to be a last resort, invoked only when no agreement with creditors can be reached in accordance with s 268(2) of the Act.

Details

61 It is imperative that the insolvency practitioner provides the court, and I must add, creditors' committees or committees of inspection, whenever they are constituted, with sufficient material to justify the remuneration claimed. Without attempting to exhaustively catalogue the information and documents that ought to be included, suffice it to say that there should be adequate information, supported by documents (if necessary) evidencing the following:

(a) The identity of the particular person who has done the work, together with his seniority and years of experience in the relevant area of expertise.

(b) The circumstance of the appointment, the nature of the tasks undertaken and identifying any special or unusual features of the tasks undertaken. It may be relevant to allude to any tasks that required particular urgency or special attention. The narrative ought to include a synopsis of the work done, identifying the different tasks undertaken and the identity of the persons discharging the functions. In this context certain observations made by the assessor in *Re Medforce Healthcare Services Ltd (No 2)* ([37] *supra*, at [22]) are helpful:

> Accountancy firms seem to have a number of names for different members of their staff performing different functions. This is a difference in the way the practices are administered. However, I believe the Court is entitled to know whether the particular group of staff referred to in these applications has a particular professional recognised training and skill eg it is known partners are qualified accountants. What is the status of the rest of the people who are named? In some applications it is clear, in others it is not. It is helpful to the Court to know ie are they unqualified but trainee accountants, are they qualified accounts, are they clerical workers, are they computer programmers or operators to assess the value of the job for the benefit of the creditors. Overseas eg Australia these criteria have been established identifying staff, their qualifications, contribution and function.

(c) The need for and the role of the various team members, explaining and justifying if necessary why no outsourcing was undertaken. For example, in long drawn out insolvencies, insolvency practitioners may have to justify why they have not outsourced part of their work at more economical rates or hired temporary staff to man non-essential or non-sensitive routine tasks. The emphasis is on economy and value.

(d) Time spent in carrying out the various tasks. This again calls for a breakdown identifying the tasks and persons employed to carry out the tasks. Contemporaneous documents like time sheets should be produced, if required, for verification.

Reference could also be made in this regard to the appendix annexed to these grounds.

The present application

62 In reviewing the applicable criteria, it struck me that the present application is deficient in

several areas. The initial affidavit was clearly inadequate and unsubstantiated given the paucity of details relating to precisely what the applicants did at the onset of their appointment. The very general references they provided clearly do not satisfy the detailed criteria which case law in other jurisdictions had already stipulated prior to these proceedings. The response affidavit somewhat redressed but did not cure the fundamental defect in the application – *ie* the lack of full disclosure of relevant particulars and the failure to condescend into relevant details. The focus continued to be on time spent without spelling out with any degree of clarity or precision the complexities of the matter involved, the effectiveness of what was done, the responsibilities each of the twelve persons discharged, their qualifications, expertise and experience and so on. Merely listing the persons, the number of hours worked by them and then appending the amounts claimed, decidedly does not amount to adequate material for a proper determination to be made. The work described does not shed any light on what was involved in terms of responsibility and/or complexity. Applications of this nature should not be an exercise of hide-and-seek. It is not for the court to seek. I make no personal criticism of the applicants in emphasising that the need for full disclosure in matters such as this is crucial. They could have been lulled into taking such an approach by the lack of clear criteria in our case law though it might be said in the same breath that much of what I have outlined is pure common sense.

63 My attention was also drawn to certain anomalous items on bank charges and administration. For example there was a cryptic item that stated "2½ hours writing to banks – $1,050". There was no effort to explain what this was for or exactly who wrote the notes. Examples of this nature abound. Another item states "discussing with the directors of the company to determine the current status of the company's projects on hand – 100.50 hours/$37,425". Exactly who was involved in this discussion on the applicants' side? When did these discussions take place? What were these discussions about? There are numerous other such instances. The amount claimed is not insubstantial. The applicants are under an obligation in this application to condescend into further details and particulars.

64 I accept the applicant's contention that the initial period of insolvency, immediately following their appointment, will inevitably entail some "front-loading" precipitated by intensive efforts to understand the company's business, take control, secure assets and preserve the company's value. Having said that, the affidavits do not dispel concerns about whether there was a level of "overmanning" or "overservicing" in the matter. While this admittedly was a liquidation, it is germane to reiterate that the provisional liquidators were the directors' nominees. The natural assumption must be that they had the directors' full co-operation in attending to the company's affairs during their brief appointment. The situation could be quite different if, for example, a liquidator were to urgently take charge of a company in a crisis without the assistance of the company's management or in the face of hostile management. As this was clearly not the scenario in the instant case, I am not persuaded that the issues of "overmanning" and "overservicing" have been satisfactorily addressed. The IJMs are correct in asserting that without sufficient details, the amount asked for simply cannot be properly determined. It is possible that if and when all the facts are disclosed, the IJMs may not be justified after all in asserting that the time spent was in fact "extraordinary"; but at this juncture it can safely be said that there is a factual chasm that can only be bridged by full disclosure of all relevant particulars and details.

65 The court cannot sanction nor indeed attach any significance to the alleged agreement by the company's directors that the applicants be paid on a time cost basis. The applicants, though conceding that this is not an overriding consideration, nonetheless wish that this prior agreement be viewed as a relevant factor. It would be contrary to both the statutory scheme and public policy to allow directors of an insolvent company to bind a company in any way contractually or otherwise when the parlous state of the company is obvious to all. One cannot ignore either the fact that some significant creditors of the company had from the outset opposed the applicants' appointment,

presumably because they regarded with some degree of disquiet and scepticism any appointees of the directors. I have noted the background to the applicants' appointment which has been succinctly summarised by Lai Siu Chiu J in *Re Econ Corp Ltd* ([9] *supra*).

66 The applicants maintain that their charge out rates are reasonable. They claim that these rates have been shaped and determined by market forces and their firm's internal practices. This is not a persuasive argument. To begin with, their appointment does not appear to have been conceived in the crucible of a competitive process. Furthermore, it is not apparent what market forces have been involved in settling the charge out rates for each of the individuals concerned. It appears that these rates have been fixed internally with no evidence whatsoever reflecting whether these are their standard rates applying across the board to all types of transactions or whether they vary from matter to matter.

67 On the basis of the material made available in this application, this is by no means an exceptional or particularly difficult case, although the company's assets are not insubstantial. Nor do the circumstances of the applicants' appointment seem to suggest that this was in any way an urgent appointment that required unusual exertion or skills. In any event, for the reasons adverted to earlier, the charge out rate of $1,000 per hour for four directors, without any reference to experience or standing, strikes me as both arbitrary and plainly excessive. I can understand the two applicants meriting a higher charge out rate than the others on the team because they have great responsibilities as office-holders. To see four individuals seeking a similar charge out rate is another matter altogether. The other charge out rates indicated in the summaries have to be similarly scrutinised and justified. Further details will have to precede a determination of what the proper charge out rates ought to be.

68 The applicants have clearly failed to discharge the burden of proof on them to satisfy the court that the remuneration sought is appropriate in the circumstances. In light of the observations made earlier, the applicants' remuneration ought to be determined on an all-encompassing basis and not purely by reference to the time spent by the applicants. The correct procedure in the circumstances is for the applicants to now file an affidavit with further and better particulars furnishing adequate information and substantial supporting documents. Purely as a guide, and stressing that this is to be regarded neither as comprehensive nor mandatory in all instances where the remuneration of a insolvency practitioner needs to be assessed, I have taken the liberty of attaching an appendix to this judgment; this is modelled along the lines of the format proposed by and adopted by insolvency practitioners in England. In this regard, a balance has to be struck, on a case-by-case basis, between the information to be disclosed in such matters and the inconvenience and additional costs that may be incurred in maintaining contemporaneous records for later summaries and submissions.

69 As a rule of thumb there should be disclosure in proportion to the remuneration sought. Being conversant and familiar with the practice of insolvency in Singapore, I do not foresee or anticipate any real difficulty in connection with adhering to the requirements as stipulated in the appendix. Indeed, the need for further disclosure may translate to better discipline in time management and cost allocation by insolvency practitioners. This can only be viewed in terms of serving and enhancing public interest; there can be no justification for a "mindframe careless of the consequences for unsecured creditors and others".

Procedure for determination

70 Who is in fact the ideal arbiter to determine the remuneration of insolvency practitioners? The procedure by which remuneration is to be dealt with is not addressed by s 268(2) of the Act or for

that matter by any of the other applicable provisions. One cannot fail to notice the different nuances in the report of the Law Reform Commission of Hong Kong and that of the working party led by Ferris J. An excursus into the desirability of creating a panel to adjudicate on such issues is not within the court's purview. I should however state for the record that I am inclined to agree with the findings of Ferris J's working party that the taxing master is in the best position to determine remuneration or at any rate in a better position than a judge, for the exact reasons given by Hoffmann J in *Re Potters Oil* ([26] *supra*). Some support for this view can be garnered from rr 165 and 166 of the CWUR which explicitly refer to the taxing master and his role in determining the bill of costs or charges of all persons employed by the liquidator. In Singapore, the terms "taxing master" and "Registrar" are often used interchangeably in subsidiary legislation. In this connection, I note also that pursuant to rr 4 and 6 of the CWUR the Registrar is empowered to hear the same matters as a judge with the exception of those expressly excluded in r 5. Section 62 of the Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed) and O 32 r 9 of the Rules of Court (Cap 322, R 5, 1997 Rev Ed) are also relevant in defining the jurisdiction of the Registrar to hear matters to which the CWUR do not apply.

71 The taxing master, equipped with a wealth of experience in determining solicitors' remuneration and litigation costs, not to mention assessing damages and the taking of accounts, would be the best arbiter to determine the appropriate remuneration with the assistance of the guidelines mapped out. This is also consistent with the practice prevailing in some of the other jurisdictions referred to. The court may, in its discretion, invite the official receiver to assist in the process. In complex cases, the court may wish to appoint an assessor to assist with this responsibility. Consideration needs to be given, however, to the extent of the additional costs that might be incurred.

Result

72 In the result, the applicants are directed to file a fresh affidavit which includes in so far as relevant and available the details set out in this judgment and the appended form. The taxing master is to hear the application. The remuneration is to be assessed on an all-encompassing basis taking into account the criteria set out. The amount so determined shall be paid as a priority debt in accordance with s 311 of the Act. Pending a determination by the court of the appropriate remuneration and disbursements, the sum of $564,000 now held by the applicants ought to be kept in an interest-bearing account. Any disbursements not yet assessed by the court ought to be determined before they are deducted from this amount. The applicants are to file this fresh affidavit within 21 days hereof.

73 If the applicants wish to establish by expert evidence what "industry" rates are or should be, I direct that this aspect of the application be heard before me. The applicants are granted 21 days from the date hereof to do so, failing which the taxing master will hear the application on the basis of the criteria identified.

Final observations

74 Professionals of all types and stripes need to be fairly, reasonably and adequately remunerated. They perform significant roles both in maintaining and enhancing Singapore's status as a hub for services. There is however a very strong public interest element dictating that costs in Singapore be kept competitive and reasonable at all times. To that extent, decisions in other jurisdictions, while helpful on issues of principle, cannot be relied on for the actual assessment of the quantum of remuneration. The actual quantum, inevitably, has to be a function of the economic environment in a particular country.

75 The challenge for the courts is to strike the right balance embracing fairness and adequacy. Professionals are bound by integrity and should strive for excellence. Professionalism is essentially an attitude and not merely about discharging duties. Professionals should not wield a hammer to attack every nail in sight. By this, I mean, that proportionality and the rendering of value are integral to professionalism. There may be a tendency to lose sight of this in insolvency matters because of the lack of direct client accountability. Having said that, remuneration should be pegged at and tailored to cater to different levels of experience and expertise; it should be sufficiently attractive to continue to encourage and entice a cadre of talented professionals secure in the knowledge that their efforts will be duly and properly acknowledged and rewarded. Inadequate recognition or remuneration will never be an impetus for inspiring professionals to resolutely and uncompromisingly strive for the highest standards of excellence in the discharge of their duties. Suppressing remuneration irrationally is therefore not necessarily the most advantageous option to creditors.

76 To date, insolvency practitioners have been reluctant to challenge or question each other on issues involving their remuneration – hence my observation on unsheathing a double-edged sword. Having had this matter brought to its attention, the court cannot afford to risk engendering any perception that insolvency practitioners without direct client responsibility or accountability enjoy *carte blanche* when it comes to remuneration. The court cannot countenance or rubber-stamp claims that fail to be fairly measured by acceptable criteria. The court will be shirking its responsibilities if it should allow unbridled claims to pass muster. The fact that a particular claim is unchallenged will not in any way diminish the court's obligation to scrutinise carefully every application that comes before it.

77 Whilst the practice of law and practical insolvency are two separate and distinct disciplines, one cannot deny that they overlap in some instances and complement each other in other instances. Save in unusual cases, I fail to see why the remuneration of an insolvency practitioner when assessed by the court should substantially surpass that of solicitors, as appears to be the case now. The higher overheads of large organisations alone cannot justify this stark disparity. A proper and thorough audit of the value and skill a particular insolvency practitioner brings to a transaction is warranted. It cannot be invariably presumed that an insolvency practitioner has been audited by his conscience when he seeks the determination of his remuneration.

78 For the sake of completeness, the issue of the remuneration of judicial managers ought to be also addressed. In fairness, it should be made abundantly clear that these observations are of a general nature and are by no means specifically directed at the IJMs in this application.

79 Judicial managers (this includes interim appointees), as officers of the court, should pay heed to the criteria identified in this judgment. They run the gauntlet of having their conduct and fees challenged, if creditors and or the court's approval, is neither sought nor received in the determination of their remuneration. At present, scrutiny of the remuneration of judicial managers may take place if and when the claim for remuneration is submitted to the committee of creditors – a process that does not invariably take place.

80 All judicial managers *should* submit their claim for remuneration to the company's committee of creditors for approval. If there is no such committee of creditors, or in the case of interim judicial managers, they should then submit their claim for remuneration to court for approval. This could take the form of directions pursuant to s 227G(5) of the Act. IJMs are under an obligation, *qua* officers of the court and fiduciaries, to account to the court for work done and for any consequential claim for fees. They cannot arrogate to themselves the right to appropriate whatever remuneration they alone consider reasonable, as they have neither the power nor the right to determine their own remuneration.

81 Judicial managers need to satisfy the court before sanction is given for their discharge from office, pursuant to s 227Q of the Act, that their remuneration has been properly determined by the committee of creditors or by court. The absence of a specific statutory provision in the Act dealing with a specific procedure for determining their remuneration should not be construed as an adventitious statutory licence to determine their own remuneration. As officers of the court entrusted with dealing with property, they are fiduciaries upon whom the court has imposed an obligation to account. Transparency and accountability in all facets of insolvency practice are paramount and indispensable. The label, "officer of the court" goes well beyond being a catchy or fancy turn of phrase. By definition it presupposes and connotes that those so anointed have obligations and responsibilities in upholding the legal framework. This, all said and done, is the crux of the matter.

82 Finally, I would like to thank counsel for helpfully drawing to my attention relevant case law and materials from the various jurisdictions. While I did not always agree with their arguments in this application, I am nevertheless particularly grateful to Mr Lee and Ms Gan for directing my attention to several authorities that were adverse to their clients' position. They more than adequately discharged their obligations as officers of the court. While the practice of drawing to the court's attention adverse authorities is expected of counsel, this is not invariably observed; to that extent they have set a commendable example.

Application disallowed pending further disclosure by the applicants.

APPENDIX

SUGGESTED FORMAT TO BE OBSERVED BY INSOLVENCY PRACTITIONERS SEEKING APPROVAL FOR REMUNERATION

CLAIM FOR REMUNERATION/BILL OF COSTS

Office-holder's name (background and experience)	
Type of appointment Date of appointment	

1. AN OVERVIEW OF THE CASE

This overview should be framed in terms that will enable the approving body to determine:

- The complexity and/or unusual features of the case,

- Any exceptional responsibility falling on the office-holder,
- The office-holder's effectiveness, and
- The value and nature of the property in question.

This overview would normally be expected to include an explanation of the nature of the assignment and the office-holder's own initial assessment of the assignment (including the anticipated return to creditors) and the outcome (if known). This should refer to the initial views on how the assignment was to be handled, including decisions on staffing or sub-contracting and the appointment of advisers. It should also explain:

- Any significant aspect of the case, particularly those that affect the amount of time spent.
- Subsequent changes in strategy (if any).
- Any comments on any figures in the summary of time spent accompanying the request office-holder wishes to make. Practitioners should recognise that if they are not able to provide a clear and sufficient explanation of time spent then this is likely to have an adverse impact on the fee assessment.
- The steps taken to establish the views of creditors, particularly in relation to the sanctioning of any strategy for the assignment, budgeting, time recording, fee drawing, or the fee agreement.
- Any existing agreement about fees with creditors, if any.
- Details of how other professionals, including sub-contractors, were chosen, how they were contracted to be paid, and what steps have been taken to review their fees.

In larger cases, particularly if it involves trading, the office-holder should be prepared to support his explanation with evidence of his considerations about staffing and managing the assignment and how he set and reviewed his strategy. Where they have been agreed with creditors or their representatives, he should also provide copies of his time budgets and fee reports.

2. EXPLANATION OF OFFICE-HOLDERS CHARGING AND DISBURSEMENT RECOVERY POLICIES

This section should comprise:

- A statement of the office-holder's charging policy in relation to time to enable those receiving the application to make a comparison with other applications. It should be made clear what grades of staff were charged to the assignment and what sort of staff working on the assignment were not charged to it directly. For example, were secretaries and administrative and support staff charged to the assignment for all the time they worked on it, only in respect of large blocks of time devoted to it or, being accounted for as an overhead cost of the office-holder's firm, or not at all?
- A statement of the office-holder's policy in relation to recharges of disbursements. This should explain payments made to the office-holder's firm, whether simple reimbursement of actual payments made on behalf of the assignment, such as statutory advertising costs, photocopying,

transport, postage or charges relating to the recovery of overhead costs.

3. NARRATIVE DESCRIPTION OF WORK CARRIED OUT

This narrative should provide details of work undertaken during the period and should be related to the table of time spent for the period.

An explanation should be given regarding the grades of staff used to undertake the different tasks carried out and the reasons why it was appropriate for those staff to be used.

Mention should also be made of any additional value brought to the estate during the period, for which the office-holder wishes to claim increased remuneration.

To aid understanding of the narrative it may be appropriate to divide it into separate time periods. These might be, for example, periods of 12 months, or periods devoted to trading or some other significant activity. In smaller or routine cases it may be appropriate for the narrative to treat the case as a whole.

4. TIME AND CHARGE OUT SUMMARIES

A table of time spent and charge out rates should be provided for each of the time periods chosen by the office-holder under paragraph 3 above. The summary should be in the following (or similar) format.

Hours						**Time Cost**	**Average hourly rate**
Classification of Work	**Partner* (Names)**	**Manager* (Names)**	**Other Senior Professionals* (Names)**	**Assistants & Support Staff**	**Total Hours**	**$**	**$**
Administration and planning							
Investigations							
Realisation of assets							
Trading							
Creditors							
Case specific matters (Specify)							

Total Hours							
Total fees claimed ($)							

** background and experience to be given if charge out rates are submitted as a basis for remuneration.*

(Further analysis may be necessary in larger cases. In smaller cases these categories of activity may not always be relevant. See sub-paragraph b) below.)

To be able to produce this information the following points should be noted:

a) For each individual working on the case, hours spent, by activity; will need to be collated, together with the total fees attributed to that time and a resultant average hourly rate.

b) The five standard activities – administration and planning, investigations, realisation of assets, trading and creditors – should be shown in every case (although, clearly, not all of these activities will always take place). However, there may well be additional activities that need to be identified separately in a particular case such as, for example, insurance litigation, managing investments in subsidiaries or negotiating settlement of claims against directors. A guide to what might be included in the standard activities is:

Standard Activity	**Examples of work**
Administration and Planning	Case Planning Administrative set-up Appointment notification Maintenance of records Statutory reporting
Investigations	Compliance reviews Investigation Reports (if any) Investigation of antecedent transactions

Realisation of Assets	Identifying, securing, insuring assets Retention of title Debt collection Property, business and asset sales
Trading	Management of operations Accounting for trading On-going employee issues
Creditors	Communication with creditors Creditors' claims (including employees' and other preferential creditors)

5. DISBURSEMENTS

Details of disbursements paid during each of the time periods should be provided in the following or similar format:

Other amounts paid or payable to the office-holder's firm or to any party **in which the office-holder or his firm or any associate has an interest**	
Type and purpose	$
Total	

6. SUPPORTING DOCUMENTS

Any relevant documents should be attached and details should be supplied here. Documents which will

normally be required include:

- An up-to-date receipts and payments account which complies with current best practice;
- A schedule of charge-out rates applied from time to time; and
- Relevant resolutions (if any).