

The High Court clarifies the role of examiners and asserts control over fees charged in court monitored insolvency processes

In a series of cases the High Court has :

In January 2010 an interim examiner was appointed to Missford Limited, which operated the Residence Club, a private members club in St. Stephen's Green.

In a written judgment on the costs and expenses of the interim examiner, the court held that the interim examiner *"simply did more with the best of motives than his warrant permitted"*. The court proceeded to refuse the interim examiner's application for remuneration in respect of any work carried out in excess of his statutory powers.

The judgment essentially adopted a formulation of the role of an examiner set out in *re Eden Park Construction* which may be summarised as follows:

- it is not an executive role. Absent an order of the High Court he may not usurp the functions of the board of directors or officials;
- he does not have functions akin to those of a liquidator or a receiver;
- the important function which the examiner must perform is to examine the affairs of the company and to prepare and deliver a report containing the information specified in s. 16 of that Act; and
- one quasi executive role that may fall to an examiner is to review at the request of the directors liabilities intended to be incurred by the company with a view to forming an opinion as to whether the survival of the company would be seriously prejudiced if such liabilities were not in fact incurred.

The court also noted that the powers of the examiner are those set out in section 7 of the Companies (Amendment) Act 1990 and in particular noted the supervisory powers set out in section 7(5) which were relied on in this case as justifying the examiner's actions:

"Where an examiner becomes aware of any actual or proposed act, omission, course of conduct, decision or contract, by or on behalf of the company to which he has been appointed, its officers, employees, members or creditors or by any other person in relation to the income, assets or liabilities of that company which, in his opinion, is or is likely to be to the detriment of that company, or any interested party, he shall, subject to the rights of parties acquiring an interest in good faith and for value in such income, assets or liabilities, have full power to take whatever steps are necessary to halt, prevent or rectify the effects of such act, omission, course of conduct, decision or contract."

However, in the Missford case the court found that the interim examiner engaged in extensive monitoring of the operations of the company and required all purchasing decisions to be reviewed by his staff.

The court held that if the interim examiner sought to exercise management powers directly or indirectly, he should have applied to court for an order under section 9 of the Companies (Amendment) Act 1990, seeking the transfer of some or all of the powers of the directors to the interim examiner.

Comment

Where an interim examiner, or an examiner, believes that it may be necessary or appropriate that he or his staff exceed the relatively narrow role granted to an examiner by the Companies (Amendment) Act 1990 an order under section 9 of that Act should be sought, unless the examiner and his solicitors are content to engage in this additional work on a pro bono basis.

Decision on rates of remuneration

In *Missford*, the court also examined the rates of remuneration claimed by the interim examiner in respect of his time and that of his staff.

Noting that the charge out rate sought by the interim examiner had not been altered since 2007, the judge applied the reductions imposed by the State in respect of the fees paid for criminal advocacy, being two reductions of 8% each and applied a blanket reduction of 16 % to the rates sought.

In *Marino Ltd*, the court, while noting that it would not be appropriate to impose a single fixed hourly rate, as larger firms, with higher overheads and more experienced personnel may be able to complete work more efficiently than smaller firms, held that it was not appropriate to countenance a very wide disparity in the rates of remuneration payable to examiners.

The court proceeded to fix the hourly rate of remuneration for the examiner at €375.00 per hour, (exactly the same rate fixed in *Missford*) with correspondingly lower rates for members of the examiner's staff.

Finally in *ESG Reinsurance Ireland Limited*, a case concerning an administrator appointed to an insurer, the court, noting the parallels between examinership and administration and referring to the judgments in *Missford* and in *Marino* held that it would allow a partner rate of €375 per hour.

The court further held that it saw no reason to allow a higher level of remuneration in respect of the legal advisors to the administrator than to the administrator himself and fixed the partner rate in respect of the solicitors for the examiner at €375 per hour.

It further indicated that it would only make an order in respect of on-going invoicing to 30 September 2011, citing the possibility of further downward pressure on professional fees.

Comment on this thread of decisions

The courts will impose what they consider to be appropriate fees in all court monitored/controlled insolvency processes. While there has been no recent decision related to fees in compulsory liquidations, there is no reason to believe that they will be exempt from this process.

The court appears to have fixed a ceiling on the remuneration of partners, in large firms with experienced staff, in accountancy and law firms, in respect of insolvency work, where the fees fall for consideration by the court, at €375 per hour absent special circumstances.

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