

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
BRITISH VIRGIN ISLANDS
(COMMERCIAL DIVISION)**

Claim No. BVI HC (COM) 2012/0056

**AND IN THE MATTER OF THE INSOLVENCY ACT 2003
IN THE MATTER OF TITAN GROUP INVESTMENT LIMITED (IN LIQUIDATION)**

**(1) RUSSELL CRUMPLER
(2) EDWARD MIDDLETON
(3) PATRICK COWLEY**

(In their capacity as Joint and Several Liquidators of Titan Group Investment Limited (In Liquidation))

Applicants

**Appearances: Mr Ben Mays for the Applicant Liquidators
Mr Brian Child for the Objector, Titan Oil Storage Investment Limited**

JUDGMENT

(2014: 20 February, 4 March)

(Application by joint Court appointed Liquidators for interim remuneration – two out of four Liquidators Hong Kong resident insolvency practitioners – whether Hong Kong resident Liquidators to be remunerated in accordance with Hong Kong insolvency practice and procedures – meaning and effect of section 432(5)(a)(vi) of the Insolvency Act, 2003 considered – whether Liquidators' time sheets properly to be allocated discrete times for discrete tasks – whether legal services provided to Hong Kong resident Liquidators by Hong Kong lawyers to be taxed in accordance with procedures of High Court in Hong Kong)

- [1] Bannister J [Ag]: This is an application by Mr Russell Crumpler, of KPMG (BVI) Limited ('Mr Crumpler') and Mr Patrick Cowley ('Mr Cowley') and Mr Edward Middleton ('Mr**

Middleton'), each of KPMG (Hong Kong) (together 'the Liquidators'), for an interim payment of their remuneration (which includes their properly incurred expenses and disbursements¹) as liquidators of a BVI incorporated company called Titan Group Investment Limited ('the Company'). The application includes remuneration attributable to Mr Stuart Mackellar, who was appointed as an additional liquidator, with restricted, although important functions not involving the getting in and distribution of the Company's assets ('Mr Mackellar').

- [2] The application has been opposed and as a result, some points of general importance have arisen. This judgment deals only with those points.
- [3] The Company was placed into liquidation by an order of this Court made on 16 July 2012. The Company is the parent of a group whose operations, carried out through PRC registered companies, consist of the storage and manipulation of oil and petroleum products at shore based depots in mainland China ('the Group'). The operating companies are held by the Company through a structure of (mainly) Hong Kong incorporated companies, although the Company's immediate subsidiary is incorporated in Bermuda. It was for these reasons that Mr Cowley and Mr Middleton were appointed together with Mr Crumpler to be the Company's Liquidators.
- [4] The Company was until shortly before the appointments owned by Warburg Pincus² ('WP') as to 50.1% and by Titan Oil Storage Investment Limited ('TOSIL') as to the remaining 49.9%. At that time, WP and TOSIL were locked in a battle for control of the Group. At the same time, the Group's financial position was precarious to a degree. It was under pressure from lending institutions, including Bank of China, which was plainly at a point where enforcement was likely at any time. Estimated outcomes upon a liquidation of the Group ranged from nil to, at best, 13 cents in the dollar. Further, financial constraints meant that the Group's facilities were, to a large extent, in a hazardous state, both from a safety and from an environmental point of view. The staff, unsurprisingly, was disgruntled and fearful for its future. The Liquidators had to confront these problems against the notorious difficulty of obtaining control of mainland Chinese companies in cases where their current management is unwilling to co-operate.
- [5] By the application of skill, tenacity and, perhaps most importantly, tact and diplomacy, the Liquidators had managed, by the end of September 2012, to achieve a sale of the Company's assets at a price which, according to their present estimates, will pay all creditors in full and which is estimated to produce a small (relatively speaking) surplus to members. Economically speaking and in reality, the purchaser was WP, and the Company's significant pre-liquidation indebtedness to WP was used to satisfy a large portion of the purchase price. Further, WP has effectively dropped out as a shareholder

¹ Insolvency Act, 2003 section 2(1)

² through its nominee, Saturn Storage Limited

and TOSIL is, for all practical purposes, left as the Company's sole member. There is no doubt in my mind that, by reference to the criteria set out in subsections 423(5)(a)(iii), (iv) and (v) of the Insolvency Act, 2003 ('IA, 2003'), the overall quantum of claimed remuneration, particularly in light of the significant discounts which the Liquidators have voluntarily applied to their fees, is well merited when set against the benefits which have been achieved for the estate.

- [6] This application originally came before the Court on 13 June 2013. On the day before the hearing lawyers instructed by TOSIL indicated that they wished to oppose the application. In order to permit them to see the time sheets upon which the application was founded and to formulate TOSIL's opposition, the hearing was adjourned. TOSIL was given 21 days after delivery of the time sheets in which to serve and lodge any evidence in opposition. TOSIL's evidence took the form of an affirmation made by one of its directors, Mr Patrick Wong ('Mr Wong') on aspects of the law and practice of liquidations carried on under the supervision of the High Court of the Hong Kong SAR.

TOSIL's objections

(1) Hourly rates charged by KPMG (Hong Kong)

- [7] Mr Wong's evidence formed the main plank of TOSIL's objections to the Liquidators' remuneration application. Mr Wong is not and does not claim to be an expert on Hong Kong insolvency law. His affirmation relies upon what he has been told by unidentified Hong Kong lawyers. What Mr Wong says, on this basis, is that the remuneration claims show that the bulk of the liquidation work was carried out in Hong Kong. As a matter of fact, I do not think that that is strictly correct. The bulk of the work was indeed carried out from Hong Kong, but much of it was performed in mainland China. Be that as it may, Mr Wong relies upon Rule 146 of the Hong Kong Companies (Winding-Up) Rules as authority for the proposition that where (as in this case) there is no committee of inspection (or creditors' committee), a liquidator in a compulsory winding up is to be remunerated by reference to the scale of fees and percentages payable for the time being on realizations and distributions by the Official Receiver when acting as liquidator. That Rule, however, is subject to the discretion of the Court to direct that a liquidator receives remuneration calculated by some other method.
- [8] Mr Wong goes on to say that where the value of the assets of a company in liquidation in Hong Kong is believed to exceed HKD200,000, the Official Receiver, who (as I apprehend) will be the initial liquidator in a winding up ordered by the Court, may turn the case over to a liquidator chosen from a list of available appointees known as the Panel A List. Had that happened in the present case and had the Panel A Scale in force from 1 August 2012 been applied to the hours claimed by Mr Cowley and Mr Middleton, Mr Wong says that the fees which they would have been allowed, on the basis that all the

hours were properly claimable, would have been less by some USD660,000 than the claim as made, a difference, he says, of some 31%. Mr Wong accepts, as the reference to Rule 146 makes clear, that it is open to the Court to award remuneration in excess of a figure derived by a mechanical application of the Panel A rates, but he says that any such uplift would have to be justified. He implies that, given that the Panel A rates were revised upwards as recently as August 2012, such an uplift would have required special justification in the present case.

[9] Evidence in answer to this part of Mr Wong's affirmation was put in by Mr Cowley. He says that in the ordinary case, liquidators' remuneration in a compulsory winding up in Hong Kong, where an insolvency practitioner is nominated at the first meeting of creditors or appointed directly by the Court will be fixed by the committee of inspection or by the Court. Where this does not happen, typically because the case is not of sufficient value, the Official Receiver, wishing to offload the administration, will turn to one of two panels, each of which, as I understand it, consists of insolvency practitioners willing to make themselves available to handle cases which the Official Receiver desires should be taken private, as it were. One is Panel T (for cases where there are no assets) and the other is Panel A. Mr Cowley says that Panel A cases are infrequent (he knew of only 13 such cases during the period from 1 January to the end of November 2013). On this basis, Mr Cowley says that the Panel A rates offer no appropriate benchmark for cases of the magnitude and complexity of the present one, where, Mr Cowley says, rates equivalent to those sought in the present case, have been allowed. Had this case been proceeding in Hong Kong, Mr Cowley says, the rates claimed in the remuneration application by himself and Mr Middleton would have been allowed.

[10] TOSIL was represented on the application by Mr Brian Child. He pointed out that section 432(5)(a)(vi) of IA, 2003 requires the Court, in sanctioning an interim payment of, or fixing, liquidators' remuneration in a winding up proceeding in Court, to take into account the hourly rates charged by other insolvency practitioners, both within and outside the Virgin Islands and that section 432(5)(b)(iii) provides that the Court may take into account the standards and practice used for assessing remuneration in jurisdictions other than the Virgin Islands.

[11] Section 432(5)(a)(vi) of IA, 2003 is not to be read obtusely. The legislature does not require the Court, in fixing the remuneration payable to a BVI insolvency practitioner conducting a liquidation exclusively within the BVI, to take account of rates chargeable by insolvency practitioners in every single jurisdiction from China to Peru. Nor, in my judgment, is the Court required to check the rates charged by a liquidator acting out of the BVI against rates charged by liquidators acting out of offices abroad – or vice versa. The legislature is to be taken as knowing that the very nature of many, if not most, BVI Court ordered liquidations will require the appointment of liquidators operating elsewhere than in the BVI in addition to liquidators working within the Territory. In such cases,

section 432(5)(a)(vi) requires the Court to take into account the rates charged by firms of similar standing for carrying out similar work in the jurisdictions within which the foreign resident liquidators operate, as well as the rates current in the BVI in respect of the remuneration of the BVI resident liquidator. The subsection is not to be read as requiring the Court to take into account rates charged by, say, German insolvency practitioners in fixing the remuneration of a BVI resident liquidator.

[12] In this case, the hourly rates charged by Mr Cowley and Mr Middleton (USD992 per hour equivalent) are significantly higher than those charged by Mr Crumpler (USD650) or Mr Mackellar (USD700). The Court knows that the hourly rates proposed by Mr Crumpler and Mr Mackellar are not out of line with rates charged within the BVI. The evidence shows that the rates claimed by Mr Cowley and Mr Middleton (and their staff) are in line with going rates in Hong Kong for practitioners of similar standing for work of this sort. The evidence further shows that the reason for the difference in hourly rates between the two jurisdictions is down to the difference in overhead costs as between the BVI and Hong Kong. There is nothing surprising about this. Applying section 432(5)(a)(vi), therefore, the Court can be satisfied that the rates charged by KPMG (Hong Kong) are reasonable in all the circumstances.

[13] As far as section 432(5)(b)(iii) is concerned, the evidence of Mr Cowley, which I accept and which is not contradicted, is that in a 'private' case of this sort the High Court in Hong Kong would allow Hong Kong insolvency practitioners hourly rates consistent with those now claimed by KPMG (Hong Kong). Mr Wong's evidence about the Panel A practice is shown by Mr Cowley's evidence to be restricted to what I may perhaps be allowed, without intending the slightest flippancy or disrespect, to describe as the Hong Kong Official Receiver's cast offs – run of the mill cases not significant enough to excite competition between practitioners in that jurisdiction. Whatever else, this case does not fall into that category.

[14] For all these reasons, therefore, I consider that the hourly rates asked for by both BVI appointees and by the Hong Kong appointees are fair and reasonable. There is no warrant for restricting KPMG (Hong Kong) to the Panel A scales.

(2) Time spent by the Liquidators

[15] The liquidators supported their claim for remuneration with detailed time sheets. They set out, under each calendar day on which work was undertaken by the Liquidators or members of their staff, the specific tasks undertaken and a sum of the time spent during that day on the tasks listed. They do not, however, attribute a specific quota of time to each specific task.

[16] Mr Child's criticisms under this head were two pronged. He complained, generally, that the format of the time sheets was insufficiently precise to enable him to challenge the

Liquidators' use of their time by identifying duplication or obvious wastage. At the same time, he claimed to be able to identify specific instances where a particular member of staff had repeated a task already performed by a colleague or to be able to identify tasks which were pointless or otiose – for example, 'perusing emails.' The general complaint, however, was that the Liquidators should have prepared time sheets broken down into discrete tasks, each allotted a discrete segment of time. Unless that was done, he said, it made a challenge by a creditor difficult. The time sheets should be prepared in such a way as to facilitate, rather than obstruct, challenge.

- [17] There can be no doubt that best practice is to record specific tasks, when capable of being allocated discrete amounts of time, separately, although I disagree with Mr Child that the function of a liquidator's time sheet is to provide a critic with material for complaint. Even where that is done, however, unless the person making the record provides an accompanying narrative, it will be impossible for the reader to discern whether two persons, recorded as having spent time on the same task, were duplicating work done by the other or attending to different elements of what, broadly speaking, was the same piece of work. Where liquidators are seeking remuneration on a time basis, persons scrutinising their records should start from the assumptions (a) that the liquidators and their staff are honest, rather than dishonest and (b) that they will not seek to charge an estate for unnecessary or pointless work. In the present case, the records relied upon by the Liquidators to justify their firms' work are generally detailed as to subject matter. The reader is able to form a clear view of the tasks carried out by the person recording his or her time and that they were properly directed at furthering the progress of the liquidations and achieving its object. There are bound to have been elements of work which will have proved futile or which, with the benefit of hindsight, might have been done more economically or, even, not at all, but that does not mean that the time spent upon them was not properly spent, within the meaning of section 432(5)(a)(ii). I agree with Mr Child that it would have been preferable if the time sheets had allocated discrete time to discrete tasks, but I cannot accept that the fact that they do not do so means that they are not capable of vouching for time properly spent, which, in my judgment, they are successful in doing.

- [18] Mr Child made efforts to find examples of waste or duplication, but with two minor exceptions, the attempt foundered, since he was unable to show that time had been wasted. It is important to add that he would have been no better off had the tasks been separated out into discrete time packets, since, absent a narrative commentary, knowing the time spent on each element of work would not by itself have enabled the reader to know whether it was duplicative, or did not represent time properly spent in the circumstances under which it was spent.

(3) Fees of Liquidators' legal advisers

[19] Mr Child argues, as I understand it, that the bills rendered to them by the Liquidators' Hong Kong legal advisers should have been written down as if they had undergone a party and party taxation in the High Court in Hong Kong. This submission is misconceived. First, the Liquidators obtained legal advice for the purposes of a BVI winding up, not for the purposes of being represented in adversarial litigation in the High Court in Hong Kong. Secondly, the Liquidators are the legal advisers' clients. As such, they (a) negotiated what they considered to be appropriate charging rates and (b) challenged, and declined to pay for, work which they considered not chargeable in the circumstances of this liquidation. Thirdly, liquidators are entitled to recover charges by service providers for work done, provided that the charges have been properly incurred – unless the charge is manifestly excessive. It is not suggested that it was in any way improper for the Liquidators to obtain the services provided to them by their Hong Kong legal advisers, nor that any of the bills which they seek to recover from the estate are manifestly excessive. There is nothing in this point.

Conclusion

[20] With the two exceptions which I have mentioned, the Liquidators' remuneration claimed in their application of 29 May 2013 is accordingly approved.



Commercial Court Judge
4 March 2014