Corporate Restructuring:
Some uses and abuses of provisional liquidators

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1. The appointment of "soft touch" provisional liquidators self-evidently has its uses in the context of corporate restructuring, particularly in jurisdictions which do not have an equivalent statutory regime to English administration.

2. The paradigm example of a company, with an essentially profitable business facing immediate, unsatisfiable single-creditor pressure and deciding to take advantage of the protection afforded by being in provisional liquidation with the support of its directors, shareholders and other creditors in order to restructure its business with obvious long-term benefits is easy to imagine, if seldom encountered in practice. At this end of the spectrum, there can be no doubt that provisional liquidation has its (beneficial) use. At the other end of the spectrum (perhaps) is the instance of a provisional liquidation brought about by the directors/majority shareholders in the company, with limited (or no) support from other shareholders and/or from other significant creditors to effect a re-structuring, the outcome of which – in terms of benefits – maybe relatively uncertain in scope or timing. Depending upon one's standpoint, this may amount to an abuse of the "soft touch" provisional liquidation procedure.

3. The purpose of this paper is not to postulate or debate the detailed, nuanced factual scenario of any particular case, deciding what is useful or abusive but to consider certain aspects which may arise in the context of provisional liquidation which might impact on its usefulness or bear an aspects thought to be abusive.

The re-structuring role of provisional liquidation in England & Wales

4. Provisional liquidators are frequently appointed although it is right to say that the significant majority of such appointments are in circumstances where

a. the assets of the company are in jeopardy and/or

b. it is facing a winding up petition in the public interest brought by the Secretary of State. Such a petition is often advanced in circumstances where there is serious concern about the directors' conduct and/or the company's underlying business. In that context, the application for provisional liquidation is brought where it is thought unacceptable for the directors to have unfettered conduct pending the determination of the winding up petition: see for example Re BBH Property 1 Limited [2017] EW HC 2584 (Ch) where Roth J appointed provisional liquidators over 13 companies which have been involved with 2 crowdfunding projects to purchase property in the United Kingdom and Norway and where there was an absence of any proper accounting records, of transparency in relation to the underlying property investments and evidence of the misapplication of invested funds.

However, the English Courts do not require, as a precondition of appointment, that the assets of the company are at risk – see Re Brackland Magazines Limited [1994] 1 BCLC 190 (Chadwick J).

5. Provisional liquidation remains, however, a remedy more flexible and widely granted than its more usual application suggests. The English courts have historically used (and currently use) the remedy in varied circumstances which no doubt has encouraged (and should encourage) the development and continuation of this particular jurisdiction in Bermuda.

6. Thus, in circumstances where administration was not available for insurance companies, the English Courts adopted "soft touch" provisional liquidation, and have done so since at least the early 1990s: in English & American Insurance [1994] 1 BCLC 649, Harman J observed at page 650c – in the context of the appointment of provisional liquidators that

> "[This] is all part of the developing practice of the court of using a petition by the company for its own winding up as the basis for the appointment of provisional liquidators. That practice has been developed to mitigate the difficulties caused by the fact that administration procedures are not available in respect of insurance companies and is a practice which several of the Chancery judges have dealt with and approved. It seems to me a useful practice and I do not wish in any way to cast any doubt or discredit upon it. It is a good system, particularly in cases such

> as this where there is a hope that in the future there will be a scheme of arrangement under section 425 of the Companies Act 1985".

7. Smith v UIC Insurance Company Limited [2001] BCC 11 is another example. UIC Insurance Company Limited was a claimant in arbitration, seeking to be relieved of liability under 7 excess of loss reinsurance contracts written in favour of a Lloyd's syndicate. Provisional liquidators were appointed on 18 August 1996, not only to get in the assets and prepare a scheme of arrangement but also to bring and defend the arbitration. It did so and the cited decision concerned its obligations to provide security for costs. However, it is clear from the narrative of the judgment that the petition to wind up the company remained (in 2000, some 3½ years later) outstanding, having been adjourned from time to time and in circumstances where (in January 2000, when the case was heard)

> "the directors of the company have no present intention to seek a formal winding up order at any stage. If a scheme can be negotiated and approved, this will be aware of resolving the company's financial affairs. It is right to say that no such scheme has yet been proposed or even drafted. If such a scheme is implemented and approved, an application will be made to the court to dismiss the pending petition to wind up the company and relieve the joint liquidators of their responsibilities".

8. Statutory intervention now permits (since 1 June 2002) administration for insurance companies and orders have been made (see Re AA Mutual International Insurance Company Limited [2004] EWHC 2430 (Ch)); nonetheless, provisional liquidation retains a toe-hold in English court-controlled restructuring; provisional liquidation remains the re-structuring route of choice in relation to Lloyd's members: see Glenrinnes Farms Limited v ACAL Underwriting Limited [2012] EWHC 4336 (Ch), [46].

9. Finally, the English court is prepared to prefer provisional liquidation as a re-structuring medium over administration where circumstances demand it. Thus, where provisional liquidation (as opposed to administration) would not trigger the loss of a contractual right to payment in the context of a business sale and purchase agreement and where FSA compensation would remain available to the applicant companies' customers, the Court appointed provisional liquidators: MHMH Limited v Carwood Barker Holdings Limited [2004] EWHC 3174 (Ch) (Evans-Lombe J). Moreover, in that application it

was clearly envisaged by the Court that the provisional liquidators would engage in litigation to recover the money said to be due under the business sale and purchase agreement, which activity was recognised as inevitably taking a substantial period of time. Where the companies were not trading, the Court was prepared to make an exception to the rule that a winding up petition must not be left outstanding for a substantial period of time and declined to see this as an impediment preventing the appointment of provisional liquidators.

10. It must be recognised that these circumstances are likely to be tolerably rare. Occasionally, provisional liquidation has been sought as an alternative to administration. In one case, in the context of a shareholder's dispute, the company was deadlocked and "on a knife edge", its banking facilities having been terminated. Nevertheless it is underlying business and goodwill remained extant. One shareholder sought administration; the other provisional liquidation, given the conduct of the applicant for administration in connection with the management of the company, the breakdown in trust and concerns over the nominee. In this particular case, the Court ordered administration, considering provisional liquidation unnecessarily intrusive and the Court being unsatisfied with the criticisms of the nominee: Sidpra v One World Logistics Freight Limited [2018] EWHC 264. The point of more general application from this decision is that it serves to reinforce the long-established line of authorities emphasising that provisional liquidation is "the nuclear option" of the Companies Court and thus likely to play second-fiddle to administration; MHMH Limited may represent something of the high-water mark.

Use v. abuse: the position of the provisional liquidator

11. Provisional liquidators are officers of the Court and, as such, subject to the ultimate direction of the Court; their authority is derived from the order appointing them, which also determines the scope of their duties: Smith, supra. Self-evidently, care must be taken to formulate those steps which the provisional liquidator may be required to take and, to the extent necessary, to justify the requirement for authority to take those steps in the supporting evidence.

12. Careful thought must therefore be given as to the terms of any order, since it will not only determine the provisional liquidators' authority and scope of their duties but will also have significant ramifications in terms of the costs that may be recoverable. In Hong Kong, there is a "standard recognition order" promulgated by Harris J – see Re Joint and Several Liquidators of Pacific Andes Enterprises (BVI) Limited [2017] HKEC 146 – which on occasions is (where the evidence justifies it) departed from: see Re Joint and Several Liquidators of HSIN Chong Group Holdings Limited [2019] HKCFI 805. The order made in Re Refco Capital Markets Limited [2006] Bda LR 94 and its variation is apparent from the judgment:[24], [25].

13. Those orders gave the provisional liquidators the power

a. to monitor the continuation of the Company's business under the control of its directors and under the supervision of the relevant courts;
b. to monitor and otherwise liaise with the existing directors to affect a sale or reorganisation/refinancing under the supervision of the courts
c. to consult with the Chapter 11 Trustee regarding strategy
d. to deal with claims

The orders also contained a provision (i) requiring the Company to provide the provisional liquidators with such information as they reasonably required in order to discharge their functions under the order and as officers of the Court (ii) validating under section 166 of the Companies Act 1981 any dispositions of the Company's property with the provisional liquidators' authority and (iii) directing that the directors shall continue to manage the company's affairs subject to a proviso that if the provisional liquidators consider that the directors were no longer acting in the best interests of the company and its creditors, they had power to report the same to the Court; and (iv) the provisional liquidators were permitted to render and pay invoices from the assets of the Company "*for their own remuneration at usual and customary rates (including all costs, charges and expenses of the provisional liquidators' attorneys, and all other agents, managers, accountants or other persons that the provisional liquidators may employ)*"; a further direction was given for the taxation of all costs, charges and expenses of those persons or firms employed by the provisional liquidators (including managers, accountants etc.) to be on the attorney and own client basis would be taxed on an attorney and own client basis.

14. A provisional liquidator's position both as an officer of the court and more generally warrants some further consideration. Not only are provisional liquidators subject to the control of the Court, they (like liquidators) are also fiduciaries. Liquidators are often described as trustees, with duties to the creditors and the contributories to administer the funds of the company: Re Black & Co's Case (1872) 8 Ch App 254; Re Oriental Inland Steam Co (1874) 9 Ch App 557. The duties are not owed to individual creditors but to the company and the creditors as a whole: Re BCCI (No 2) [1992] BCLC 579. In exercising their powers, liquidators must do so for a proper purpose and act *bona fide* and reasonably: Knowles v Scott [1891] 1 Ch 717. By virtue of their status as officers of the Court, liquidators must observe the rule in *Ex parte* James (1874) 9 Ch App 609 and behave honestly and fairly and do the fullest equity and, in particular cases to refrain from taking full advantage of accrued legal rights where it would be unfair to do so. None of these qualities and obligations upon liquidators should apply with any less force to provisional liquidators; nor are they confined to England & Wales. Bermudian law sets the same standards: see, for example, Re Refco, supra.

15. Acting in such a way as prevents a provisional liquidator from carrying out the duties imposed upon him under a Court order may amount to a contempt of court, which in the more egregious instances can lead to substantial periods of imprisonment: Revenue & Customs Commissioners v Munir [2015] EWHC 1366 (Ch). Such records may make a provisional liquidation more useful or constrained a threatened abuse by a director or third party

16. The extent to which any of the matters considered in paragraph 14 above might be used to enhance the utility or prevent what is or might be perceived as an abuse will clearly be fact specific, not least by reference to the particular duties and obligations imposed upon the provisional liquidators under the order appointing them. Nonetheless, professional provisional liquidators will be mindful of these obligations and ultimately of their accountability to the Court, the company and its creditors. In cases of serious doubt or difficulty, they can and should submit the matter to the Court and obtain its guidance (Re The Home & Colonial Insurance Company Limited [1930] 1 Ch 102, 125). Indeed, in cross-border insolvency/restructuring cases, the involvement of the Court and its willingness to listen and to provide flexible and sophisticated support, is

one of its unique selling points and one which, should the procedure be replaced or refined, ought to be preserved.

17. For those not "in the driving seat" of the provisional liquidation, these factors may assist them in encouraging or discouraging any particular course or ultimately to found an application to Court and/or liability for the provisional liquidators. Consider the following: –

a. In circumstances where the directors are left with an active role in restructuring the Company, to what extent are the liquidators required to "monitor" their day-to-day activities? Are they to set up a broadly equivalent executive management structure or is their role more akin to that of an auditor? In relation to a proposed sale or reorganisation, is their role to monitor and promote any particular strategy, being satisfied that it is in the interests of the creditors as a whole (presumably creditors of the company for which they are provisional liquidators) or are they to take a wider view? Or are there simply to be consulted, to advise and/or to warn?

b. If, effectively, given the power of validation to what extent should the provisional liquidators on each occasion or in relation to each category of payment perform the same exercise as that which the Court would undertake on an application seeking validation?

c. In circumstances where the provisional liquidators have some role in the restructuring and, for example, a power to sell/transfer the company/group's business, what is their position where the sale is to a rescue company with "Phoenix" characteristics (similar directors, shareholders etc.)? How might they be satisfied that both proper value is paid and, for example, if there has been a debt for equity swap with some creditors, whether the duty owed to the body of creditors as a whole has clearly been satisfied?

d. in any case, should the provisional liquidators actively and immediately investigate whether the directors' pre-provisional liquidation conduct has been such that claims against them by the company are (potentially) desirable and, if so, at what stage should those proceedings be brought or preserved or abandoned?

18. None of the duties owed by a provisional liquidator represent a panacea for all ills and obviously, there is also a wide degree of latitude afforded to a provisional liquidator; nonetheless, the duties require due care and attention by liquidators, directors, contributories and creditors. Application to the Court is one answer; the questions are only likely to become of particular interest in circumstances where no has been made.

Use v. Abuse: Costs

19. Given the nature of the orders made in relation to costs (cf in Re Refco, supra.), some consideration of the costs regimes in Bermuda and England & Wales is appropriate.

20. In England & Wales, a provisional liquidator's remuneration must be fixed by the Court. For the purposes of the CPR, the Insolvency Proceedings Practice Direction 2018 came into force on 4 July 2018 and (like its predecessors) continues to make substantive provision in relation to the manner in which and the evidence by which certain insolvency applications and procedures are to be brought. Paragraph 21 makes a specific provision about applications relating to the remuneration of officeholders, to which the Court must have regard. For those considering the appropriate remuneration for a provisional liquidator, paragraphs 21.1 and 21.2 bear being set out in full: –

> **"21.1**
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> The objective in any remuneration application is to ensure that the amount and/or basis of any remuneration fixed by the Court is fair, reasonable and commensurate with the nature and extent of the work properly undertaken or to be undertaken by the office-holder in any given case and is fixed and approved by a process which is consistent and predictable.
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> **21.2.**
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> The guiding principles which follow are intended to assist in achieving the objective:
> (1) "**Justification**". It is for the office-holder who seeks to be remunerated at a particular level and/or in a particular manner to justify their claim. They are responsible for preparing and providing full particulars of the basis for, and the nature of, their claim for remuneration.
> (2) "**The benefit of the doubt**". The corollary of the "justification" principle is that if after having regard to the evidence and guiding principles there remains any doubt as to the appropriateness, fairness or reasonableness of the remuneration sought or to be fixed (whether arising from a lack of particularity as to the basis for and the nature of the office-holder's claim to remuneration or otherwise), such element of doubt should be resolved by the Court against the office-holder.
> (3) "**Professional integrity**". The Court should (where this is the case) give weight to the fact that the officeholder is a member of a regulated profession and as such is

subject to rules and guidance as to professional conduct and the fact that (where this is the case) the office-holder is an officer of the Court.

(4) "**The value of the service rendered**". The remuneration of an office-holder should reflect the value of the service rendered by the office-holder, not simply reimburse the office-holder in respect of time expended and cost incurred.

(5) "**Fair and reasonable**". The amount and basis of the office-holder's remuneration should represent fair and reasonable remuneration for the work properly undertaken or to be undertaken.

(6) "**Proportionality of information**". In considering the nature and extent of the information which should be provided by an office-holder in respect of a remuneration application to the Court, the office-holder and any other parties to the application shall have regard to what is proportionate by reference to the amount of remuneration to be fixed, the nature, complexity and extent of the work to be completed (where the application relates to future remuneration) or that has been completed by the office-holder and the value and nature of the assets and liabilities with which the office-holder will have to deal or has had to deal.

(7) "**Proportionality of remuneration**". The amount and basis of remuneration to be fixed by the Court should be proportionate to the nature, complexity and extent of the work to be completed (where the application relates to future remuneration) or that has been completed by the office-holder and the value and nature of the assets and/or potential assets and the liabilities and/or potential liabilities with which the office-holder will have to deal or has had to deal, the nature and degree of the responsibility to which the office-holder has been subject in any given case, the nature and extent of the risk (if any) assumed by the office-holder and the efficiency (in respect of both time and cost) with which the office-holder has completed the work undertaken.

(8) "**Professional guidance**". In respect of an application for the fixing and approval of the amount and/or basis of the remuneration, the office-holder may have regard to the relevant and current statements of practice promulgated by any relevant regulatory and professional bodies in relation to the fixing of the remuneration of an office-holder. In considering a remuneration application, the Court may also have regard to such statements of practice and the extent of compliance with such statements of practice by the officeholder.

(9) "**Timing of application**". The Court will take into account whether any application should have been made earlier and if so the reasons for any delay."

21. This approach and these principles followed the decision of Mr Registrar Baister in Re Cabletel Installations Limited (in liquidation) [2005] BPIR 28, which itself drew on two earlier cases (Mirror Group Newspapers plc v Maxwell [1998] 1 BCLC 638 (Ferrris J) and Re Independent Insurance Company Limited (No 2) [2003] EWHC 51 (Ch) (Ferrris J with an assessor)). In evaluating these decisions, Mr Registrar Baister saw fit to emphasise Ferris J's dicta in Mirror Group that

a. officeholders are fiduciaries, appointed because of their professional skills and experience and in expectation of exercising proper commercial judgment;

b. that their remuneration inevitably involves a conflict between the interests of the fiduciary who is to receive the remuneration in the interests of those to whom the fiduciary duties owed, who will bear whatever remuneration is allowed;

c. officeholders who sought remuneration on the basis of time spent had (at [17]) to "*do significantly more than list the total number of hours spent by them or other fee-earning members of their staff and multiply the total sum by the sum claimed to be the charging rate of the individual whose time was spent. They must explain the nature of each main task undertaken, the considerations which led them to embark upon that task and, if the task proved more difficult or expensive to perform the first expected, to persevere in it. The time spent needs to be linked to this explanation, so that it can be seen what time was devoted to each task. The amount of detail which needs to be provided will, however, be proportionate to the case"* (*per* Ferris J).

d. Records should be contemporary;

e. (again *per* Ferris J) "*the test of whether officeholders have acted properly in undertaking a particular task at a particular cost and expenses or time spent must be whether a reasonably prudent man, faced with the same circumstances in relation to his own affairs, would layout his own money in doing what the officeholders have done. It is not sufficient for officeholders to say that what they have done is within the scope of the duties or powers conferred upon them. They are expected to deploy commercial judgment, not to act regardless of expense. This is not to say that the transaction carried out the high cost in relation to the benefit received, or even an expensive failure, will automatically result in the disallowance of expenses or remuneration. That is to be expected the transactions having these characteristics will be subject to close scrutiny*."

f. (*per* Ferris J) "*in my judgment it is vital to recognise three things in this field. First, time spent represents a measure not of the value of the service rendered but of the cost of rendering it. Remuneration should be fixed so as to reward value, not so as to indemnify against cost. Second, time spent is only one of a number of relevant factors, the others being, … those which find expression in* [what is now Insolvency Rules 2016, rr. 18.6 – 10].[1] *The giving of proper weight to those factors is an essential part of the process of assessing the value, as distinct from the cost, of what has been done. Third, it follows from the first 2 points that, as the task is to assess value rather than cost, the tribunal which fixes remuneration*

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[1] Complexity of the case; particular assumption of responsibility by the office holder, effectiveness by of his actions; value and nature of the property with which he has had to deal.

needs to be supplied with full information on all of the factors which I have mentioned.

22. Other aspects of the case worthy of note include: –

a. the disallowance of support staff costs since these costs ought to have been included in the rates charged by the core professional staff.

b. (in what was a "standard" administration) conclusion that the case was over managed – it was a non-trading administration, without any exceptional degree of responsibility.

c. The Registrar's conclusion that whilst the administrators and their staff did their best, "they have confused spending time on matters with effectiveness". In particular, the Court concluded that they should have left a particular debt collection exercise to those best placed to do it – company staff and solicitors.

d. The Registrar recognised, in reaching the conclusions he did, the dangers of hindsight and the ease with which criticism could be made, especially from the relative security of a court.

e. The instruction of replacement solicitors was considered "*so wrong-headed and so costly*" as to lead to the conclusion that it had a negative impact on the effectiveness of the administration; in those circumstances and in the absence of a quote, the Registrar concluded this amounted to a failure to exercise proper commercial judgment consistent with the obligations as a fiduciary. A significant sum of the claimed remuneration was disallowed.

f. Excessive reliance on solicitors in what was described as "handholding" aspects generated substantial costs; this had the effect of shunting onto the legal advisers some work and some decisions which experienced administrators in a large firm ought to have been able to do or make without recourse to outside assurance. This was a relevant factor in reducing the "calculated" costs by 20%.

23. In Bermuda, rule 23(1) of the Companies (Winding-Up) Rules 1982 permits the Court to appoint a provisional liquidator upon such terms as it thinks just and necessary. Rule 23(3) provides that, *inter alia*, in the event that no order is made upon the petition or the company is wound up or the petition stayed "*the provisional liquidator shall be entitled to be paid, out of the property of the company, all the costs, charges, and expenses properly incurred by him as provisional liquidator, including such sum as is*

or would be payable under the scale of fees for the time being in force where the Official Receiver is appointed provisional liquidator".

24. Rule 23(3) is materially identical to rule 32(3) of the Companies (Winding-Up) Rules 1949, which applied in England & Wales prior to its repeal on 28 December 1986; there is no relevant authority in relation to the entitlement to costs under that rule. However, costs "properly incurred" represents the description allowed for a trustee's current (and historic) entitlement to recover his costs under CPR rule 46.3 and paragraph 1 of the Practice Direction and such costs are assessed on the indemnity basis, which (if applicable in Bermuda) would, under the Rules of the Supreme Court 1985, give rise to the recovery of all costs except insofar as they are unreasonable in amount or have been unreasonably incurred, with any doubts being resolved in favour of the receiving party: RSC 1985, O.62, r. 12(2). Under CPR 46.3, the Court takes into account all the circumstances of the case, but CPR 46 PD paragraph 1.1 directs specific attention to (1) whether the trustees of obtain the directions of the Court (2) whether the trustee is acting in the interests of the trust fund or in some other interest and (3) whether the trustee acted unreasonably.

25. This state of affairs should be seen against the background that equity has always jealously protected a trustee conducting himself properly (see Turner v Hancock (1882) 20 Ch D 303, 305; des Paillieres v JP Morgan Chase & Co [2013] JCA 146) and that his rights to an indemnity are also reflected in statute: see Trustee Act 1925, s. 30(2), such that the current procedural rules and the statute are coextensive. Clearly, the English Court has not seen fit to allow any continuing direct and comparable regime for the assessment of insolvency practitioners' costs akin to those permitted for trustees, not least because the Insolvency Practice Direction expressly contemplates proportionality of remuneration, which factor is absent from any English assessment of costs upon the indemnity basis: see *Lownds v Home Office* [2002] EWCA Civ 365; *White Book* (2019), 44.3.5. (One of the factors underpinning the decision in *Lownds* was the imposition of the overriding objective in terms identical to RSC 1985, r 1A/1 which identified the "policy" on which the effectiveness of the CPR depended although it must also be recognised that "proportionality" was expressly only a consideration for the assessment of costs on the standard basis).

26. Returning to the question of the recoverable costs of provisional liquidators themselves under Rule 23, in one case (Re A Company (Liquidator's costs) [2013] Bda LR 53) the argument proceeded on the basis that Rule 23 permitted the recovery of costs "*reasonably incurred*" by the provisional liquidator (as opposed to being entitled to their costs save to the extent that they were unreasonably incurred). Thus the case proceeded, without argument it appears, on the basis that the entitlement was one to costs taxed on the standard basis (RSC O.62 r. 12(1)).

27. If the point were to be examined again by the Court, it could be argued that "properly incurred" brings with it an entitlement on the standard basis. But that does not necessarily reflect the heritage of the phrase: the use of "properly incurred" might – if the point were to be argued – be said to justify taxation on the indemnity basis, pure and simple by analogy to the position with that to which other fiduciaries are entitled and by reference to the origin of the phrase when (if something else were intended) reference could and should have been made simply to the standard basis.

28. Beyond pointing to Re A Company supra., the counter argument might point out that "properly incurred" carries within it as a concept not only the requirement of "reasonableness" but also that of propriety, thus importing the notion of "fair and reasonable" as set out in one of the guiding principles above. Might it be said that that which is not "fair and reasonable" is "unreasonable", even within the context of an analogous regime to that applicable to trustees? If that was so, fairness cuts both ways – both to the provisional liquidator and the company/creditors. Does that also import the concept of proportionality? If so, it would open up the possibility of the basis of fee determination moving towards that currently employed in England & Wales.

29. At first blush, the English principles enunciated above might seem weighted against the officeholder. For example, the notion that provisional liquidators' fees should be determined – at least in part – by the value rendered by the service for which the charges purported to be made (as opposed to the time taken in providing them) may seem harsh and (from the insolvency professional's point of view) commercially unattractive. Whilst this concern may be more prevalent in run-of the-mill cases, the basis for calculation of insolvency practitioners' fees is now relatively long-standing in England & Wales and has only led to a very small handful of reported decisions, which suggests

that the guidance and principles set out in the Practice Direction are capable of evaluation and agreement outside Court. Moreover, there is no basis for suggesting that those willing to take on either run-of the-mill appointments or those of greater complexity are any fewer in number or any less expert, which suggests that the market considers the basis of remuneration to be acceptable in practice.

30. Ultimately, perhaps, it is a question of policy. If the order appointing the provisional liquidators requires a number of relatively complex and frequent steps in the context of a provisional liquidation/restructuring crossing one or more borders, it is inevitable (and the Court must accordingly envisage) that not insignificant costs will be incurred and be prepared to sanction them. To that extent, the profession may expect a certain degree of understanding and willingness – as is apparent from the reported decisions, including Re A Company – to accommodate the provisional liquidators' claimed costs. It may take a particular set of circumstances to generate a case where concerns about proportionality, at least, are clearly in play.

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