

BERMUDA SUPREME COURT

In the matter of a company (Ex Tempore Ruling) [2013] SC (Bda) 53 Com (3 July 2013)

JOINT PROVISIONAL LIQUIDATORS - RECOVERY OF COSTS - REASONABLE FEES - RULE 23(3) OF THE COMPANIES (WINDING UP) RULES, 1982

In this matter the JPLs sought approval from the Court for their outstanding costs which amounted to just over US\$445,000. The Company opposed that application and contended that the total sum sought was unreasonable. The Court noted that this was the first time that the Bermuda Court has had to resolve contested liquidation fees in such a hearing.

The Company's counsel referred the Court to some authorities which he contended should guide the Court, in particular Rule 23(3) of the *Companies (Winding-up) Rules, 1982* which in effect provides that a liquidator is entitled to all costs that are "reasonably incurred by him as provisional liquidator". In addition, Counsel for the Company relied on the authorities of *Mirror Group Newspapers plc -v- Maxwell and others (No 2)* [1998] 1 BCLC 638; and the more recent case of *Brook -v- Read* [2012] 1 BCLC 379; [2011] EWCA Civ 331. Both of these cases supported the proposition that the Court, in looking at the fees of office holders, should not simply look at the question of the time billed, but should have regard to the broader question of the value provided by the services in question in broad commercial terms.

Applying these principles to the present case, the Court recognised that the present case was a complicated one because the JPLs were appointed on the Petition of an unpaid creditor in circumstances where it was clear that the Company was insolvent on a balance sheet basis as well as on a cash flow basis. The Court appreciated that this was not a standard corporate rescue assignment where the JPLs and their advisers could simply tick the usual boxes. Taking all those matters into account, the Court still accepted that the global amount charged

was on the high side and that it appeared that this was a matter where there was, on the margins, excessive billing.

It was held that a discount of 15% of the total sum claimed should be. The Court took into account the fact that a significant amount of that costs figure did involve haggling over costs. Of interest, it was stated in judgment that when liquidators are unable to satisfy stakeholders of the reasonableness of their fees, they should not expect to be compensated in full for failing to do so.

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