Fee estimates in liquidation: the importance of getting in early

Insights - 07/02/2017

The recent decision from the Guernsey Royal Court of DM Property Holdings (Guernsey) Limited (in Liquidation) [1] is of fundamental importance to Guernsey insolvency practitioners ("**IP**") as it provides cautionary guidance on the practical implications of Practice Direction No. 3 of 2015 ("**Practice Direction**"). This Practice Direction provides for the submission of fee estimates by liquidators and administrators in advance of applications to wind up companies or place them into administration and for those estimates to be varied if additional information comes to light. The implications are that an accurate revised fee estimate must be submitted in a timely manner if such fees are to be recoverable where there is information or circumstances which was previously unknown or "out of the ordinary". If the information or circumstances could have been envisaged or was already known by the Liquidator/Administrator then there is a danger that the Court will not permit the revised estimate of fees.

Facts

At first blush, the scope of work to the liquidator appointed over DM Property Holdings (Guernsey) Limited ("**Company**") appeared to be a relatively straightforward exercise. The Company's primary asset was the residential home of the directors of the Company.

An initial cost cap of £15,000 was set with liberty to apply. A second application for an increase to the cost cap was granted to £36,851.50, on the basis that the liquidator incurred additional fees to evict the occupiers from their residence. Those fees had not and could not have been foreseen by the liquidator at the time of appointment. On preparation of the final report, the professional fees incurred had exceeded the revised cap and the total stood at £55,193. The justification advanced by the liquidator for not having approached the Court to seek a further increase to the cost cap, before these fees were incurred, was an effort to save fees. Several months after the final report was submitted, the liquidator then sought to revise the fee cap. The Court declined the increase and awarded fees in the reduced amount of £45,000.

Comment

The Court suggested that the very circumstances that the liquidator relied upon to justify the increase, should have been foreseeable, particularly at the time of the application of the revised fee estimate.

The guidance offered by the Court in relation to the Practice Direction is that it may, in its judicial discretion to restrict fees, introduce a "level of discipline" into a liquidation (or administration process as the case may be). The practical lesson to take away from the decision is that in circumstances where an IP is faced with circumstances that appear to be out of the ordinary and especially where they could not have been within the reasonable contemplation of the IP at the outset of the appointment, then a pragmatic and pro-active approach must be followed to seek an increase to the cost cap as soon as possible.

In those circumstances, not only should the IP set out a detailed and comprehensive affidavit for those additional and unforeseen fees, but it should apply for the fee increase before they are incurred. Failure to bring this to the Court's attention may not be a total bar to obtaining future anticipated fees, but invariably the Court has given guidance that it may create an otherwise avoidable level of difficulty for their recovery, particularly if bought late in the day and in circumstances where there has already been a previous application for an increase. It should also be born in mind that even if the creditors agree to an office- holder's fees this is not determinative for the Court as it is settled law that that such office-holders owe duties to the Court which will override the creditors agreement to the level of fees.

During the course of an insolvency process an IP may uncover a myriad of information which previously may not have been readily available. That information may lead to supplementary causes of action, it may shed light on entities related to the structure or it may point the finger at an officer of the company which previously had not been tainted. Under those circumstances and on a full and comprehensive explanation to the Court to justify an increase to the fee estimate pursuant to the Practice Direction, we consider that there should be a good prospect of such an increase being granted by the Court.

As is well known there are fairly well advanced plans to introduce a revised insolvency law into Guernsey legislation. Such plans include developing a new set of insolvency rules similar to that in place in the UK albeit not as extensive. Thought should be given to incorporating into the Guernsey insolvency rules some of the UK provisions on the methods by which fees are approved by creditors and the information needed for approval. It should be noted that in the UK there is no need to seek approval of the Court unless the creditors will not agree to the level of fees. It might be thought that where sophisticated corporate creditors are involved they are the best judges of whether an office-holders' fees are acceptable.

---

[1] Judgment 1/2017

About Ogier

Ogier is a professional services firm with the knowledge and expertise to handle the most demanding and complex transactions and provide expert, efficient and cost-effective services to all our clients. We regularly win awards for the quality of our client service, our work and our people.

Disclaimer

This client briefing has been prepared for clients and professional associates of Ogier. The information and expressions of opinion which it contains are not intended to be a comprehensive study or to provide legal advice and should not be treated as a substitute for specific advice concerning individual situations.

Regulatory information can be found under Legal Notice

Meet the Author

Alex Horsbrugh-Porter

Partner

Guernsey

E: alex.horsbrugh-porter@ogier.com

T: +44 1481 752272

Key Contacts

Michael Rogers

Managing Associate

Guernsey

E: michael.rogers@ogier.com

T: +44 1481 752264

Related Services

Dispute Resolution

Legal

Related Sectors

Restructuring and Insolvency