IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 108 of 2019 (NSJ)

IN THE MATTER OF THE COMPANIES ACT

AND IN THE MATTER OF DIRECT LENDING INCOME FEEDER FUND, LTD. (IN OFFICIAL LIQUIDATION)

IN CHAMBERS

Before:	**The Hon. Mr Justice Segal**
Appearances:	**Mr Matthew Dors of Collas Crill for the Joint Official Liquidators of Direct Lending Income Feeder Fund, Ltd (in official liquidation)**
	Mr David Lewis-Hall of Appleby for the Liquidation Committee of Direct Lending Income Feeder Fund, Ltd (in official liquidation)
Heard:	**22 October 2021**
Further evidence:	**To be filed by 26 November 2021**
Draft judgment circulated:	**31 January 2022**
Judgment delivered:	**3 February 2022**

HEADNOTE

Application by official liquidators for the approval of their remuneration – application opposed by the liquidation committee – what approach to be taken by the Court when reviewing the official liquidators' fees – to what extent is the Wednesbury reasonableness test relevant – the need to file sufficient evidence in advance of the hearing wherever possible

JUDGMENT

Introduction

1. This is my judgment on the fee approval application made by the joint official liquidators (the ***JOLs***) of Direct Lending Income Feeder Fund, Ltd (in liquidation) (the ***Company***). The application was made by way of summons dated 16 June 2021 (sealed on 18 June 2021) and the JOLs relied on the Fifth Affidavit of Mr Christopher Johnson, one of the JOLs, sworn on 16 June 2021 (***Johnson 5)*** and Mr Johnson's Seventh Affidavit sworn on 27 September 2021 (***Johnson 7)***.

2. The application sought the Court's approval for:

   (a). the rates to be applied for work done and to be done by the JOLs for the calendar year 2021.

   (b). the JOLs' fees incurred in the period from 1 March 2020 to 31 August 2020 (the ***Second Fee Period***) in the sum of US$679,972.70 (together with disbursement costs of US$28,383.15).

   (c). the JOLs' fees incurred in the period from 1 September 2020 to 28 February 2021 (the ***Third Fee Period***) in the sum of US$582,710.10 (together with disbursement costs of US$24,896.29).

3. The application in respect of (b) and (c) above was opposed by the liquidation committee (the ***LC***). The LC argued that some of the fees incurred in the Second Fee Period and the Third Fee Period should not be approved. The LC relied on the First Affirmation of Mr Elias Toby sworn on 10 August 2021 (***Toby 1***). Mr Toby is the chief operating officer and chief financial officer of Aubrey Dan Holdings Inc. (which is an investor in the Company). Aubrey Dan Holdings Inc has been a member of the LC (with Mr Toby as its representative) since 4 June 2010.

4. The application was heard on 22 October 2021. The JOLs were represented by Mr Dors of Collas Crill, and the LC was represented by Mr Lewis-Hall of Appleby.

5. At the end of the hearing of the application, I directed that the LC file further evidence to substantiate a number of the challenges to the JOLs' remuneration that were made during the hearing, but which had not been dealt with, or adequately dealt with, in Toby 1. I ordered that the LC serve any further evidence on which it wished to rely by 4pm on Friday 5 November 2021 and that the JOLs had until 4pm on 19 November to file any evidence in reply. I further ordered that on or before 4pm on Friday 26 November 2021, the parties should write jointly to the Court setting out their preferences (with reasons in the event of disagreement) as to whether the Court should determine the application on the basis of the further evidence but without further submissions; the further evidence and further written submissions or the further evidence and further oral submissions.

6. On 22 November 2021, Collas Crill and Appleby wrote to the Court in the following terms:

> *"The LC has elected not to file any further evidence in accordance with paragraph 1(a) of the Order. Therefore, it is not necessary for the JOLs to file any reply evidence in accordance with paragraph 1(b) of the Order.*
>
> *Accordingly, and with a view to minimising any further costs arising in relation to the Application, the JOLs and the LC have agreed:*
>
> 1. *that the Court should disregard any submissions that were made at the hearing on 22 October 2021 on behalf of the LC in so far as the Court considers that they related to matters not raised in Toby 1 and therefore that the points raised on behalf of the LC that should be taken into account by the Court in determining the reasonableness of the JOLs' fees should be confined to those set out in Toby 1;*
>
> 2. *to jointly invite the Court to determine the Application on the papers based on the evidence filed to date; and*
>
> 3. *that in the event that the Court (having considered the Application on the papers) wishes to raise further questions of the JOLs, then it can require answers in writing or list a hearing at its own instigation.*
>
> *Finally, the parties note that the Court will determine the issue of the costs of the Application in accordance with CWR O. 24 r.9 and that the usual rule would be for the parties' costs to be paid out of the assets of the company. The parties are content to leave the issue of costs to the Court, save that if the Court is minded after considering the Application, to depart from the usual rule in relation to either the JOLs or the LC, then the Court is invited to give that party the opportunity to be heard / to provide written submissions before any final order is made in relation to costs."*

7. Accordingly, I now turn to consider the application by reference to the evidence filed for the purpose of the hearing and the submissions made in writing before and orally at the hearing (to the extent, in the case of the LC, that they are based on and supported by the evidence filed in Toby 1).

The JOLs' evidence

8. Johnson 5 set out the background to the fee application. Mr Johnson noted that the LC had approved the remuneration agreement in July 2020, following amendments made at their request, and that this fixed the applicable rates up to 31 December 2020.

9. Johnson 5 exhibited the JOLs' fee report for the Second Fee Period (the ***Second Fee Report***) which contained a seven-page summary of the JOLs' work in the period broken down by workstream, as well as brief summaries of the work undertaken by the JOLs' US and Cayman counsel. The categories of work undertaken with a breakdown of the fees incurred per category were as follows: Court /Statutory - US$9,390; Receivership/Protocol - US$42,161; Asset Realisation - US$76,473; Liquidation Committee - US$159,937; Creditors/Adjudication - US$95,911; Investigations/Litigation - US$93,230; Stakeholder Consultation/Reporting - US$122,680; Accounting/Banking - US$74,473 and Administration/General - US$5,718. For each workstream, a series of bullet point headlines identifying the type of activity and work involved (labelled the "*main tasks*") were provided. Significant detail was provided in appendices in the form of a summary of the JOLs' time costs by activity and staff grade together with corresponding detailed time entries for each activity recorded by each fee earner.

10. Mr Johnson confirmed that the JOLs considered that these fees and expenses were fair and reasonable in all of the circumstances, having regard to six factors. These factors were that (a) there had been frequent and comprehensive consultation with the LC; (b) there had been a need for significant engagement with stakeholders to respond to a high volume of detailed requests, some of which were addressed by the dissemination of the FAQ document in May 2020, and some of which necessitated direct correspondence in relation to, inter alia, document requests, share transfers, the claims adjudication process, payment of distributions, fraud allegations and requests for confirmation of holdings and creditor status; (c) a large volume of work had been done in relation to claims adjudication matters,

including extensive analysis of the Company's records to determine the appropriate treatment and valuation of claims of both redemption creditors and late subscribers, detailed correspondence with redemption creditors regarding the likely valuation of their claims, extensive communications with various late subscribers (on an individual and collective basis) regarding the classification of their claims and requests to be treated as a group and consideration of various issues regarding investors with potential proprietary claims including the filing of claims in the receivership proceedings; (d) a substantial amount of work had been undertaken by the JOLs in relation to litigation claims during the period, which required significant coordination between the receiver's team and the JOLs' team (because, pursuant to the protocol between them the JOLs had responsibility on behalf of the Company for the evaluation and pursuit of all litigation claims), and produced some positive results; (e) considerable time had been spent on the negotiation and finalisation of the claims stipulation with the receiver (involving a review and analysis of the financial data regarding the Feeder Funds' respective holdings in the Master Fund and the preparation of an independent analysis with evidence to substantiate a significant uplift of the Company's net cash investment into and claim against the Master Fund) which took many months of negotiation and greatly increased the return prospects for the liquidation estate and (f) the JOLs had undertaken an exercise to identify time spent on case development which they considered should not be charged. They had treated 136 hours of time (roughly 11% of the total) equal to US$90,825 in fees as coming within this category and therefore as non-chargeable.

11. Johnson 5 also exhibited the JOLs' fee report for the Third Fee Period (the ***Third Fee Report***) which contained a five-page summary of the JOLs' work in the period, once again broken down by workstream, as well as brief summaries of the work undertaken by the JOLs' US and Cayman counsel. The categories of work undertaken with a breakdown of the fees incurred per category were as follows: Court/Statutory - US$21,672; Receivership/Protocol - US$6,668; Assets - US$38,188; Liquidation Committee - US$91,901; Creditors/Adjudication - US$136,610; Investigations/ Litigation - US$147,206; Stakeholder Consultation/Reporting - US$106,576; Accounting/Banking - US$29,525 and Administration/ General - US$4,364. Once again, for each workstream, a

series of bullet point headlines identifying the type of activity and work involved (labelled the "*main tasks*") were provided. Once again, significant detail was provided in appendices in the form of a summary of the JOLs' time costs by activity and staff grade together with corresponding detailed time entries for each activity recorded by each fee earner.

12. Mr Johnson confirmed that the JOLs considered that these fees and expenses were fair and reasonable in all of the circumstances, having regard this time to five factors. These factors were as follows:

(a). there had been frequent and comprehensive consultation with the LC and work done to brief and respond to queries raised by the LC. This included preparation of the Second Fee Report and responding to the LC's concerns about the JOLs' fees incurred in the Second Fee Period, which Mr Johnson said had been addressed initially through multiple communications at meetings and by email, and then comprehensively in the JOLs' email to the LC of 9 March 2021 and its attachment entitled *"JOLs' responses to LC queries of 23 October 2020"* (which were largely prepared during the Third Fee Period).

(b). once again a large volume of work had been done in relation to claims adjudication matters including consideration of the receiver's investigations report and the impact of fraud allegations on the rights of the Company's stakeholders together with investigations into pre-contractual representations made to investors and a detailed review of records relating to misrepresentations made to stakeholders (and there had been the need to have extensive discussions with the JOLs' legal team on these issues). The JOLs had also done a preliminary adjudication of claims by stakeholders, including reviewing records and other documents available from the Company's books and records, and proofs of debt and other documentation received from stakeholders.

(c). there was also again a significant amount of work done on litigation claims during the period which required discussions with the receiver and US legal counsel regarding the viability of all potential liquidation claims. The JOLs had also

undertaken a considerable amount of work in relation to the claims against the former auditors of the Company and related companies. Mr Johnson and his colleague Ms Zadny have considerable experience in audit negligence cases and were therefore able to provide valuable insights and input as the claim was developed, including reviewing auditor's workpapers, developing an independent assessment of the claim, undertaking alternative calculations to assess the best possible outcomes, providing the LC with this assessment including an estimated best and worst outcome scenario, reviewing the work of the receiver's auditor negligence expert, and preparing for and attending a mediation in December 2020, which appeared to have been successful.

(d). there had been a significant amount of time spent on consultations with and reporting to stakeholders, including preparing the JOLs' second statutory report to the Court, and convening and holding the second annual meeting of contributories on 22 October 2020. The JOLs had, Mr Johnson said, also dealt with numerous and ongoing enquiries about the timing of claims adjudication, the payment of distributions, the impact of fraud allegations, and the confirmation of holdings, as well as dealing with various share transfer requests.

(e). during the Third Fee Period, the JOLs had treated 179 hours of time (roughly 14% of the total) and equal to US$104,765 in fees as relating to case management and therefore as non-chargeable.

The LC's objections – a summary

13. Mr Toby summarised the LC's objections as follows (Toby 1 at [7]):

> *"6 In short, the LC objects to the following aspects of the JOLs' fees incurred in the Second and Third Periods on the basis that such fees are unreasonable:*
>
> *6.1 35% of the fees during the Second Fee Period and a proportion of the fees for the Third Fee Period relating to stakeholder engagement (as explained in paragraph 35.2 and 44.4 of Johnson 5);*

6.2 A portion of the fees during the Second and Third Periods relating to the JOLs' work in relation to adjudication matters (as detailed in paragraph 35.3 and 44.2 of Johnson 5); and

6.3 35% of the fees during the Second Fee Period and a proportion of the fees for the Third Fee Period relating to the JOLs' work in relation to litigation claims (as detailed In paragraph 35.4 and 44.3 of Johnson 5).”

Objections regarding the stakeholder engagement workstream

14. Mr Toby said that the LC considered the time spent and charged by the JOLs in relation to stakeholder engagement matters, both in the Second Fee Period and the Third Fee Period were unreasonable.

15. As regards the Second Fee Period:

(a). in the Second Fee Period a total of 204 hours had been billed and it appeared from a review of the time narratives provided by the JOLs to the LC that the majority of those hours had been spent addressing individual investor queries and that most of the time had been spent by Ms Scott and Ms Zadny.

(b). the LC considered that the time spent by Ms Scott and Ms Zadny on stakeholder engagement had been excessive and that the JOLs’ explanation did not justify the amount of time spent. The LC also considered that it should not have been necessary for Ms Scott (as a director) to have been involved in all or most of these activities and that Ms Zadny should have been able to delegate the drafting of responses to stakeholder queries to more junior staff.

(c). further, the JOLs' time spent on FAQs (approximately 30 hours) was unreasonable since the preparation of the FAQs should only have taken approximately 10-15 hours, given the fact that the information which formed part of the FAQs responses were largely related to updates provided by the receiver and general information that should have been readily available to the JOLs. Furthermore, only one FAQs document had been circulated during this period.

(d). the LC did not consider that the JOLs' management of stakeholders and their queries had been appropriate in the circumstances and that another method should have been considered.

(e). the LC had noted but not been persuaded by the JOLs' responses to their challenges as set out on the document provided by the JOLs (entitled "*JOLs' responses to LC queries of 23 October 2020"*) and attached to the JOLs' email dated 9 March 2021 in which the JOLs had said that "*During the period there were significant mailouts including FAQS and communications specific to certain groups of stakeholders...A significant number of these queries required careful management as it became clear that incorrect information and/or interpretation was being communicated between stakeholders. if left unchecked, this had the potential to create further costs for the estate."*

16. As regards the Third Fee Period, the queries from stakeholders (as summarised in Johnson 5 at [44.4]) appeared to be purely administrative and similar questions were probably raised my multiple stakeholders so that responses could have been prepared by a junior member of the JOLs' team and the 50 hours actually spent by a director and 107 hours spent by a consultant were unreasonable and unjustifiable. In addition, the LC considered that there was a significant overlap between the stakeholder engagement and creditor adjudication workstreams so that the time spent on these two workstreams needed to be assessed together. The JOLs had spent 520 hours on these two workstreams for the Third Fee Period and the LC considered this to be unreasonable, particularly having regard to the fact that the formal claims adjudication process had yet to commence.

Objections regarding the creditor adjudication workstream

17. The LC did not consider that it was reasonable for the JOLs to have spent 164 hours in the Second Fee Period and 320 hours in the Third Fee Period on this workstream in circumstances where "*a large amount of the work carried out under this category [had] been carried out by Collas Crill, and leading counsel, because of the legal issues that [were] raised by the circumstances*."

Objections regarding the investigation/litigation workstream

18. As regards the Second Fee Period:

(a). it was unreasonable for the JOLs to have spent 74 hours on the investigation and litigation workstream since most of the work on this area was being done, and should have been left to, Mr Sharp, acting as receiver of the Company and other associated companies appointed by the US District court.

(b). Mr Sharp and his US team were largely responsible for the management of the investigation of claims and for the conduct of the litigation in the US. They were the ones who gave almost all of the updates to the LC at LC meetings and through their quarterly reports. Since the Company's interests appeared to be aligned with those of the other group companies that were bringing proceedings, in particular those against the former auditors, there was no justification for the JOLs spending a substantial amount of time on this workstream and the work spent was duplicative and unnecessary, even taking into account the need for the JOLs to exercise some oversight of what the receiver was doing. Such oversight should have only required a limited amount of time and minimal expense.

(c). an example of the JOLs' unreasonable approach was to be seen in the 74 hours of time incurred in relation to calls on this subject, which involved two or three attendees from the JOLs' team on every call.

19. As regards the Third Fee Period, the JOLs had spent approximately 142 hours in relation to the mediation and settlement process with respect to the claim against the former auditors', which the LC considered unjustifiable.

Objections regarding the JOLs' approach to dealing with the LC's concerns

20. Mr Toby also complained about the approach that the JOLs had taken to dealing with the LC's concerns. He said that the LC had found the JOLs' responses to be delayed and often dismissive, and the process of providing responses had itself generated unreasonable expenses. Furthermore, the LC had found it unhelpful that the JOLs had refused to have further discussions with the LC following the LC's letter of 3 June 2021 and had instead invited the LC to set out their position to the Court in and file evidence for the purpose of this application, although Mr Toby did acknowledge that the JOLs' agreement to provide the LC with a fee report every two months (with a narrative, summary and detailed time analysis in excel) had been a positive development and that the relationship with the JOLs had improved, as evidenced by the LC's agreement to the JOLs' rates of remuneration for 2021 and the JOLs' fees for the period from 1 March 2021 to 30 April 2021.

The JOLs' responses to the LC's objections

21. In Johnson 7, Mr Johnson set out the JOLs' response to these criticisms and to Toby 1.

22. He started by saying that the JOLs appreciated that in a case where their fees had not been approved by the LC the burden was on the JOLs to establish that the remuneration sought was reasonable and justified. But, he said, in their evidence responding to Toby 1 they had adopted what he labelled "*a proportionate rather than detailed and comprehensive approach*." Significant further expense could be incurred in providing a detailed analysis of the JOLs' work product, but they considered that this was both unnecessary and unjustified. It was unnecessary since the LC's objections generally repeated objections previously made in correspondence and at LC meetings and largely ignored (and certainly failed to engage with) the detailed explanations previously provided by the JOLs. It was unjustified because the substantial further expense was not needed and would be damaging to the interests of the estate as a whole.

23. As regards the objections relating to the stakeholder engagement workstream in the Second Fee Period, Mr Johnson said that the LC's criticisms were generalised and without foundation:

(a). he said that when the LC had suggested that the JOLs should inform investors that all queries would be dealt with in the FAQ updates, the LC revealed a serious misunderstanding both of the nature of the enquiries received by the JOLs and also as to the proper and effective way of responding to them. A "*stonewalling approach*" he said was neither appropriate nor effective.

(b). he exhibited the full version of the document entitled "*JOLs' responses to LC queries of 23 October 2020*", an 11-page document in which the JOLs had responded in detail to the LC's challenges and from which Mr Toby had selectively quoted in Toby 1. Mr Johnson said that the JOLs' responses had properly and adequately addressed the LC's concerns, in particular by explaining (in passages not quoted by Mr Toby) that "*These hours accrued during the most active stakeholder consultation period of 2020. Investor enquiries always peak during times of group mailouts….The dissemination of information prompted* a *high volume of enquiries from stakeholders…Whilst the JOLs note the LC's views (the production of the FAQ as* a *cost-effective method of addressing stakeholder queries), in their considerable experience,* a *refusal to engage with stakeholder queries risks fomenting further enquiry and can often result in the engagement of counsel on irrelevantor immaterial issues. The Cayman JOL's team has tried and tested solutions regarding the management of stakeholders and adopt the most appropriate methodology or combination of methodologies to suit the specific circumstances. As expected, by adopting* a *specific and measured approach, the JOLs have seen* a *significant reduction in the volume of individual calls, emails, demands and threats to litigate during the second half of* 2020. *The JOLs maintain that the approach adopted, and the time spent is eminently reasonable."*

(c). further the JOLs' responses note had dealt with the approach taken by the JOLs to and the justification for the allocation of work between senior and junior staff. In the note, the JOLs had explained the composition of and how they managed their staff and noted that while their team was very experienced and relatively small, this produced efficiencies and cost benefits (there were fewer people needed for and engaged on particular tasks) and that although on occasions this would mean that an experienced

person performed a task that could in other firms have been done by a more junior member of staff the JOLs (where this was "*easily identifiable*") had "*sought to apply an appropriate, lower, rate to* a *particular task. However, if the delegation of* a *task would have required explanation, review, and finalisation by the senior staff member, and/or the junior staff member would have taken longer to perform the task, there [was] no basis to apply a reduced rate simply because the function could have been performed by a more junior staff member.*"

(d). the preparation of the FAQs document issued to investors in May 2020 (which Mr Johnson exhibited) was proportionately and expediently undertaken. The document did not largely relate to updates provided by the US receiver but predominantly addressed matters germane to the Company's liquidation. Furthermore, the entire work product was not identifiable from the final document. In order to prepare the document, the JOLs' team had needed to review and assess all of the stakeholder enquiries and to consider whether additional responses should be included. The entire process Mr Johnson said had been undertaken with a view to minimising costs to the estate.

(e). the LC's 30-hour estimate was a simplified over-estimate, as certain narrative entries which referred to the FAQs document had also referred to other related tasks so that they were covered by the 30-hour period.

24. As regards the objections relating to the stakeholder engagement workstream in the Third Fee Period, Mr Johnson said that the LC's criticisms once again failed to take into account the information regarding the nature of stakeholder inquiries provided in the JOLs' Third Fee Report (at page 9) and in Johnson 5 at [44.4]:

(a). Mr Johnson said that he had briefly reviewed these inquiries again and could confirm that they covered the following six subjects (which he said would in any event have necessitated oversight from a senior member of the JOLs' team):

(i). the timing of distributions and confusions between receivership distributions and the Company's distribution process.

(ii). dealing with certain nominee shareholders and underlying ultimate beneficial owners following multiple inquiries and trying to encourage centralised communications, gathering, and summarising prior communications with all related parties and explaining these and dealing with queries about how to complete the proof of debt forms.

(iii). audit and shareholding confirmations.

(iv). follow up queries regarding the JOLs' second report, including the change in solvency determination.

(v). the treatment for tax reporting purposes of the Company's investors as compared with the investors in US entities.

(vi). reviewing proofs of debt received and following-up on any queries thereon.

(b). Mr Johnson also rejected the LC's suggestion that the stakeholder engagement and creditor adjudication workstreams should be combined. He said that there was clearly some room for overlap where enquiries related to stakeholder rights or the adjudication process, but the large proportion of work in the stakeholder engagement category included the preparation of the report to stakeholders, the annual meeting, and *ad hoc* enquiries regarding shareholdings, none of which would be appropriately categorised within the adjudication workstream.

(c). Mr Johnson noted that while the formal adjudication of stakeholder claims had yet to commence, the evaluation of stakeholder rights had been continuing in earnest for some time and was an issue of critical importance which would impact on stakeholder recoveries.

25. As regards the LC's challenges to the work done and fees charged by the JOLs with respect to the litigation/adjudication workstream, Mr Johnson said that the LC had wholly misunderstood the JOLs' role in relation to and responsibility for litigation claims to be made and made by the Company. He referred to the clear explanation in Johnson 5 at

[69.3] and the statement in his Second Affidavit at [46] that *"In respect of the….. investigation and pursuit of the Litigation Claims (as defined therein), Mr Sharp and I consider that it is appropriate that the JOLs have responsibility for the pursuit of Litigation Claims of the Company (whilst the Receiver has sole responsibility for the pursuit of Litigation Claims of all other Receivership Entities (U.S. Receivership Entities).*"

26. As regards the LC's complaints regarding the information provided by the JOLs, Mr Johnson set out details of the different types of information provided including, both for the Second Fee Period and the Third Fee Period, monthly summaries of the fees incurred (uploaded to the LC data room); details set out in the "Actions of the JOLs" section in the Second Fee Report and the Third Fee Report; time costs summaries and narratives and detailed narrative entries in Microsoft Excel Format.

The LC's submissions

27. Mr Lewis-Hall referred to section 109(2) of the Companies Act (2021 Revision) and Part III of the Insolvency Practitioners Regulations 2018 (the ***IPR***). These provisions give the Court a broad power and discretion to approve the official liquidator's remuneration. Section 109 (2) states that "*There shall be paid to the official liquidator such remuneration, by way of percentage or otherwise, that the Court may direct acting in accordance with rules made under section 155 .."* and regulation 10(1) of the IPR states that *"Subject to paragraph (2), an official liquidator is not entitled to receive any remuneration out of the assets of a company in provisional or official liquidation (including liquidation under the supervision of the Court) without the prior approval of the Court."*

28 Regulation 12 of the IPR (under the heading "*Consideration of Remuneration by the Liquidation Committee*") requires (in regulation 12(2)) that the official liquidator provide sufficient information to enable a creditor or contributory to "*make an informed decision about the reasonableness of the proposed basis of remuneration and amount for which the official liquidator intends to seek the Court's approval…"* and requires (in regulation 12(1)(a)) that before seeking Court approval for his remuneration the official liquidator must seek the

liquidation committee's approval of the basis of his remuneration and the amount of the remuneration for which he (or she) intends to seek the Court's approval. Regulation 13(1) requires that the official liquidator serve his (or her) application for approval on the liquidation committee and its counsel.

29. Mr Lewis-Hall relied on various authorities including in particular the judgments of the Chief Justice in *Re Sphinx* (13 November 2012, unreported) at [10] and *In the Matter of Caledonian Securities Limited (In Official Liquidation)* [2016 (1) CILR 309] at [77], the judgment of Kawaley J in *In the Matter of Herald Fund SPC* (1 April 2021, unreported) at [20], [21] and [53] and the decision of the Court of Appeal of England and Wales in *Brook v Reed* [2012] 1 WLR 419.

30. In *Re Sphinx* the Chief Justice had said that "*In circumstances where the approval of the LC is not forthcoming, the JOLs bear the burden of proving that the remuneration sought is reasonable and justified*." In his judgment in *Re Sphinx*, the Chief Justice had referred (at [18]) with approval to the judgment of Ferris J in *Re Mirror Group Newspapers* [1998] BCC 324 at 333-334 where he had said that:

> *"Thirdly, the test of whether officeholders have acted properly in undertaking particular tasks at a particular cost in expenses or time spent must be whether a reasonably prudent man faced with the same circumstances in relation to his own affairs, would layout or hazard his own money on doing what the office-holders have done. It is not sufficient, in my view, for officeholders to say that what they have done is in 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 a transaction carried out at high costs in relation to the benefit received, or even an expensive failure, will automatically result in the disallowance of expenses or remuneration. But it is to be expected that transactions having these characteristics will be subject to close scrutiny."*

31. The language and approach of Mr Justice Ferris was reflected in the Chief Justice's judgment in *Caledonian Securities* in which he had approved the formulation by counsel of the reasonableness test in these terms: *"...whether a prudent man faced with similar circumstances would lay out or hazard his money in the way that the JOLs have done*"

32. In *Herald Fund* Kawaley J said as follows:

"20. The scheme of the [IPR] clearly envisages as a starting assumption, that the basis of remuneration and the actual remuneration received by official liquidators will be approved by the Liquidation Committee. Applications for approval of remuneration (or the basis of remuneration) cannot be made without first seeking the Committee's approval. This statutory scheme arguably, by necessary implication:

(a) enables the Court to place considerable reliance on the commercial judgment of the Committee when it has approved a liquidator's fees; and

(b) requires the Court to scrutinise a remuneration application far more closely when such approval has been positively withdrawn by the Committee.

21. What is somewhat unclear, in terms of a preliminary analysis, is the breadth of the Committee's "reasonableness" assessment jurisdiction, taking into account the wider statutory context in which substantive decision-making by the liquidators does not require the Committee's positive approval. Common sense suggests that the Committee must be able to complain that the amount of remuneration claimed is unreasonable both by reference to:

(a). the amount of time spent on a particular task relative to the corresponding benefit to the estate (assuming that the relevant work-stream was itself a reasonable one); and

(b) the fact that it was unreasonable to pursue a particular work-stream at all.

……..

53. [a liquidation committee's] true statutory function is…limited to high-level approval of workstreams coupled with practical commercial assessment of regular budgets and fee reports…"

33. In his judgment in *Brook v Reed* (a case involving an appeal by a bankrupt against an order fixing the trustee in bankruptcy's remuneration and costs) David Richards J (as he then was) reviewed the history of the UK statutory regime (including the statutes and the rules made pursuant thereto) governing the approval of insolvency officeholders' remuneration and the case law. He also referred to (and applied) the Practice Statement: The Fixing and Approval of the Remuneration of Appointees [2004] BCC 912 (***UKPS***). He summarised the role and approach of the court as follows (underlining added by me):

"49. The real task for the court in any particular case is to balance these principles in their application to the facts and circumstances of the case. In Simion v Brown I said, at para 27:

> *The task for the court is to arrive at a level of remuneration which balances the various criteria of the value of the service rendered, the proportionality of remuneration and a fair and reasonable remuneration for the work properly undertaken, as these criteria are explained in the [UKPD].. The result must resolve the conflict which may in a particular case exist between these criteria. The conflict is likely to be the more acute in cases such as the present where substantial costs have been incurred in relation to a relatively small estate."*

In Hunt v Yearwood-Grazette [2009] BPIR 810, a decision cited by Lloyd LJ when giving permission to appeal in the present case, Proudman J said, at para 9:

> *"The court's task is to balance all the various criteria, resolving any conflict between them arising in the particular case, in order to arrive at the proper level of remuneration. In doing so, it is settled law that the court has to reward the value and benefits of the services rendered rather than the cost of rendering such services. Thus, in fixing the remuneration, time spent is less relevant than value provided. I was referred to the judgment of Ferris J in [Maxwell] [1998] 1 BCLC 638 and also In re Cooper [2005] NICh 1. The onus of demonstrating such value or benefit is on the applicant and the court must resolve any element of doubt in favour of the estate."*

……..

53. It is because of their fiduciary position that the onus lies on them to justify their claim: see Maxwell [1998] 1 BCLC 638, 648D—H. Even where the issue comes before the court on a challenge to remuneration drawn on a previously approved basis, it will be for the officeholder to provide a sufficient and proportionate level of information to explain the remuneration and to enable the objector to identify with reasonable precision his points of dispute.

……

86. In my judgment the principles set out in the practice statement should have been expressly applied, but I do not consider that this omission provides a ground on which this appeal should be allowed. Judge Behrens applied what were fundamentally the relevant criteria to the facts of this case. He examined in some detail, with the benefit of the assessors, the remuneration claimed and the work done, in terms of value more than time, bearing always in mind the need to arrive at a figure which was proportionate to the circumstances of the bankruptcy. It was not open to the judge wholly to disregard the time spent by the trustee, both because it is a relevant, but not decisive, factor in any case and because the basis of the trustee's remuneration had been fixed at the meeting of creditors as "time properly given". Equally, however, this basis of remuneration does not absolve the trustee from scrutiny of his remuneration as required by the word "properly". Time is properly spent if it meets the criteria set out in the practice statement, applied with regard to all the circumstances of the case."

87 The ground of appeal rightly relates the issue of proportionality to "the circumstances of the bankruptcy." The number and size of claims and the number

and value of assets is an important, but not the only, element in those circumstances. As I have earlier endeavoured to explain, there are many ways in which costs may be incurred which are not related, principally or even at all, to the assets and liabilities of the estate."

34. The LC submitted that in light of the authorities the applicable principles were that:

(a). the burden was on the JOLs to prove that the remuneration sought was reasonable and justified.

(b). reasonableness was to be assessed on the basis of *"…whether a prudent man faced with similar circumstances would lay out or hazard his money in the way that the JOLs have done*."

(c). the Court was required to scrutinise the application far more closely given that approval of the fees has been positively withdrawn by the LC.

(d). that said, the Court (and the LC) should avoid a disproportionately detailed scrutiny of the remuneration sought by the JOLs and should focus on high level approval of work streams, combined with a practical commercial assessment of the reasonableness of the fees incurred.

35. Mr Lewis-Hall argued that Mr Toby's evidence established that the JOLs were unable to demonstrate that the remuneration for which they sought approval was reasonable, that a substantial reduction was justified and that the reductions proposed by the LC were reasonable. He reiterated that the LC considered that it was regrettable that significant expense had been incurred in dealing with the JOLs' fees and that the high costs had been at least in part the result of the significant delays and dismissive approach adopted by the JOLs in dealing with the legitimate issues raised by the LC, although the LC hoped for a more constructive relationship in the future.

The JOLs' submissions

36. Mr Dors submitted that the applicable law could be summarised as follows (in agreement with Mr Lewis-Hall on some points but disagreeing on others):

(a). where a liquidation committee did not approve the JOLs' remuneration the JOLs bore the burden of proving that the remuneration sought was reasonable and justified.

(b). the Court could place considerable reliance upon the commercial judgment of a liquidation committee when it approves a liquidator's fees but was required to scrutinise a remuneration application far more closely when liquidation committee approval had not been provided.

(c). the test of whether officeholders had acted properly in undertaking particular tasks at a particular cost in expenses or time spent must be whether a reasonably prudent man faced with the same circumstances in relation to his own affairs, would layout or hazard his own money on doing what the officeholders have done (in reliance on *Mirror Group Newspapers* [1998] BCC 324 at 333-334 (Ferris J) which had been cited in *Re Sphinx*).

(d). the objective in any remuneration application was to ensure that the amount or basis of any remuneration was fair, reasonable, and commensurate with the nature and extent of the work properly undertaken and was fixed and approved by a process which was consistent and predictable. This proposition was based on the language used in the UKPS to which I had referred in *Perry & Perry v Lopag Trust & Others* (20 April 2020, unreported) at [23(g)] and [23(h)] (a case involving a dispute over the fees of a court appointed receiver) and which I had treated as representing a helpful statement of the objective which the Court should seek to achieve (and principles to be applied) in any remuneration application, even though obviously not part of Cayman law or binding on this Court. Paragraph 21.1 of the UKPS is in the following terms:

> "*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."

(e). the Court's approach to remuneration applications was assisted by consideration of the guiding principles of, inter alia, "*Justification*", "*Benefit of the Doubt*", and "*Proportionality of Remuneration*." Once again, this proposition was based on the UKPS. Paragraph 21.2.3 of the UKPS (as mentioned in *Perry*) sets out a number of guiding principles by reference to which remuneration applications should be considered by the court. These include justification, namely that it is for the appointee to justify his claim and be prepared to provide full particulars of it; the benefit of the doubt, namely that the corollary of justification was that if the court was left in any doubt as to the appropriateness, fairness or reasonableness of the remuneration, it should be resolved against the appointee and proportionality of remuneration, namely that the amount of remuneration should be proportionate to the nature complexity and extent of the work done by the appointee, and to the value and nature of the assets and liabilities.

(f). a liquidation committee wishing to object to fees could complain that the amount of remuneration claimed was unreasonable by reference to the amount of time spent on a particular task relative to the corresponding benefit to the estate (assuming that the relevant workstream was itself a reasonable one) or the fact that it was unreasonable to pursue a particular work-stream at all.

(g). it was doubtful whether the LC could succeed in its challenge without meeting a test analogous to the public law test of *Wednesbury* unreasonableness, that is that the JOLs decisions and actions were so unreasonable that no reasonable person acting reasonably could have decided or acted as the JOLs did. This proposition relied on the judgment of Kawaley J in *Herald Fund* at [22] (a paragraph not referred to by the LC). In his judgment, Mr Justice Kawaley had said that:

> *"22. On the other hand it must be doubted that it is possible to establish any form of "unreasonableness" without meeting a test analogous to the public law test; otherwise both the Committee and the Court, at the first and second level stages of approval respectively, would be required to undertake a disproportionately detailed scrutiny of each fee approval application.*

37. Mr Dors argued that the Second Fee Report, the *JOLs' responses to LC queries of 23 October 2020* document, the Third Fee Report, Johnson 5, and Johnson 7 amply demonstrated that the amount of the remuneration sought was fair, reasonable, and commensurate with the nature and extent of the work properly undertaken. The complex nature of the work was identifiable from the JOLs' evidence, and the work undertaken by the JOLs was demonstrably proportionate, having regard in particular to:

(a). the Company's assets were substantial. The JOLs had already received an interim distribution of $45.8 million from the receivership, and they considered it prudent to assume that total distributions will not exceed $80 million.

(b). the Company's losses were also substantial. so that the potential avenues of recovery merited thorough investigation. The majority of the Cayman JOL's work in relation to litigation was in respect of the claim against the former auditor which (subject to US Court approval of the settlement) will result in the Company receiving no less than $7m on a worst-case scenario.

(c). the work undertaken by the Cayman JOL's team in relation to the claims stipulation resulted in an increase to the anticipated distribution to the Company of approximately 6%, which would reflect an increase in value to the estate of more than US$14m on reasonable assumptions.

(d). the claim adjudication work had entailed a detailed investigation and analysis of the potential priority of a substantial amount of claims which if afforded priority would drastically affect the interests of the remaining stakeholders.

38. Mr Dors submitted that the LC's objections did not establish that the JOLs' fees were unreasonable or otherwise justify a reduction in the amounts claimed by the LC or at all:

(a). the LC's objections were of a nebulous and unspecified or entirely speculative nature.

(b). the LC sought arbitrary discounts to elements of the JOLs' fees without proper justification.

(c). the LC's objections were based on a fundamental misunderstanding of the role of the JOLs.

(d), the LC had failed to scrutinise properly or at all any of the significant detail provided by the JOLs either initially or in response to the LC's queries and concerns.

(e). the LC's complaint that an insufficient level of information has been provided by the JOLs was not made out and was inconsistent with the LC's approach to the JOLs' fees in the first, fourth and fifth Periods (all of which had been approved by the LC on the basis of fee reports which provided similar information and detail to that provided in the Second and Third Fee Reports).

(f). the LC had ignored or failed to address the detailed explanations provided by the JOLs.

(g). the LC had failed to identify a workstream or single piece of work or line item that had been unreasonably undertaken.

(h). the LC's objections did not demonstrate (to any standard of unreasonableness, let alone the requisite *Wednesbury* standard) that any element of the JOLs' work was unreasonably incurred by reference to the time spent on a particular task relative to the corresponding benefit to the estate or constituted a particular workstream that had been unreasonably pursued. The JOLs had complied with their obligations under the IPR and discharged their burden of proving that the remuneration sought in relation to the Second and Third Fee Periods was reasonable and justified.

Discussion and decision

39. I must start by noting that in his oral submissions Mr Lewis-Hall strongly resisted the proposition that in order to succeed in their challenge the LC had to meet or satisfy "*a test analogous to the public law test*." He argued that the test for determining whether the challenged fees were reasonable was that set out in *Re Sphinx* (and accepted that the guidance in the UKPS was helpful and should be taken into account by the Court). The burden of proof

he said was clearly on the JOLs. But the JOLs approach suggested that the burden of proof was reversed, and this could not have been the intention of Justice Kawaley in *Herald Fund*.

40. This issue highlights an important preliminary point, namely what precisely is the LC challenging? Does the LC seek to challenge JOLs core (commercial or business) decisions relating to how to exercise their powers (and conduct the liquidation) or just the resources deployed, and time spent in implementing these decisions? It seems to me that the standard and basis for challenging these two aspects of a liquidator's decision making are different.

41. This issue was discussed by Justice Kawaley in *Herald Fund* both at [21] in the passage to which I was referred by counsel (which is quoted above) and also at [46] – [47] as follows (underlining added by me):

> *"46. The Liquidation Committee's sole express statutory function is to assess the "reasonableness" of a liquidator's fees. I find that by necessary implication, such an assessment may take into account the "reasonableness" of the proposed exercise of powers, including an evaluation of whether it is useful to take certain steps at all. As Smellie CJ in Re Sphinx FSD 16 of 2009 (ASCJ), Judgment dated November 13, 2012 (unreported), approved the following statements in the earlier case of In Re Liberty Capital [2002 CILR 606] (Smellie CJ, Sanderson J and Henderson Ag J):*
>
> > *"57. The liquidator must exercise his own best judgment and determine what has to be done and how to do it most effectively. In the liquidation field, he has extraordinary discretion and latitude. The liquidator must therefore satisfy the court (to which he is by law accountable, in the interests of the creditors and shareholders), as its officer, that the time spent is reasonable in the circumstances, is necessary, and has achieved a useful result."*
>
> *47. The combined effect of section 110(3) of the Act (which allows creditors or contributories to challenge the proposed exercise of a liquidator's powers) and the statutory role of the Committee under the Regulations is as follows. Although the Committee has no positive legal right to approve what a liquidator proposes to do, whether in relation to litigation strategy or otherwise, the convention is for an official liquidator to seek Committee approval for all significant liquidation decisions and/or all significant incurring of costs. Because the jurisdiction to sanction the exercise of liquidators' powers is vested in the Court, liquidators should ordinarily seek prospective Court sanction for any significant actions which the Committee either:*
> *(a) clearly does not support; or*

(b) clearly opposes.

A Fee Approval application ought not ordinarily to be the context in which the Court is retrospectively invited to approve high-level policy or operational level strategic decisions made by official liquidators. The reasonableness of fees should, in the ordinary case, be determined by reference to cost incurred in relation to work-streams the general pursuit of which has been informally approved by the Committee or formally approved by the Court. An operational strategic decision made by the liquidators within the rubric of furthering a legitimate liquidation purpose should not be impugned, in the fees context, unless the decision can fairly be said not to be a rational one. The decision to incur the fees would not be rational if the work done was either not "reasonable in the circumstances", not "necessary" or "achieved [no] useful result." Experience suggests in any event that 21st century professional liquidators have a vested commercial interest in demonstrating their ability to meet the expectations of their stakeholders and to achieve commercially palatable practical results."

42. It will be recalled that Justice Kawaley, at [21] of his judgment, had concluded when reviewing "*the breadth of the Committee's "reasonableness" assessment jurisdiction, taking into account the wider statutory context in which substantive decision-making by the liquidators does not require the Committee's positive approval"* that common sense suggested that a liquidation committee *"must be able to complain that the amount of remuneration claimed is unreasonable both by reference to (a) the amount of time spent on a particular task relative to the corresponding benefit to the estate (assuming that the relevant work-stream was itself a reasonable one); and (b) the fact that it was unreasonable to pursue a particular work-stream at all.*" He also concluded (at [53]) that "*[a liquidation committee's] true statutory function is…limited to high-level approval of workstreams coupled with practical commercial assessment of regular budgets and fee reports…"*

43. So Justice Kawaley considered that the liquidation committee could, when reviewing remuneration and fees, raise challenges both by reference to the official liquidators' decision to pursue a particular workstream at all and the manner in which the chosen workstream was implemented. In *Herald Fund* there was disagreement as a matter of principle as to whether or not the liquidation committee was entitled effectively to veto steps that the principal liquidators wished to take in relation to managing litigation being pursued to recover assets for the estate and the liquidation committee had argued that the principal liquidators could only properly incur costs on workstreams which it had approved.

44. In practice, challenges to an official liquidator's remuneration will be based on a variety of grounds and will focus on different aspects of the manner in which the official liquidator has carried out his (or her) tasks. The official liquidator must, under regulation 12(1)(a), seek the liquidation committee's approval (in addition to the basis of his remuneration) of "*the amount*" of his (or her) remuneration and therefore there is no limit on the aspects and areas of the official liquidator's work that the liquidation committee may consider and comment on. Justice Kawaley is therefore right, in my view, to say that the liquidation committee can in principle challenge the amount of the official liquidator's remuneration by reference both to the fact that (a) too much time or expense was spent on a particular task which was undertaken pursuant to a workstream that was reasonably and properly required and (b) any time was spent on a task which should not have been undertaken because it was done pursuant to a particular workstream that was not reasonably necessary. But in my view, where a liquidation committee wishes *in substance* to challenge a commercial or business decision going to strategy, the manner in which the liquidation generally is to be conducted or key operational issues (which involve and require the exercise of professional, commercial and business judgment), by saying that work should not have been done because the workstream (and the whole activity) pursuant to which is was done was not justified, then an objection to a fee approval application will generally not be the proper forum in which to do so. The liquidation committee could object to the Court sanctioning the official liquidator's exercise of his (or her) powers, where such approval is sought, or otherwise apply for directions (for example as creditors under section 110(3) of the Companies Act). If there is a challenge on a fee approval application to such a decision, and the Court considers it appropriate to deal with it at that time, then the Court would need to apply the same standard of review that is ordinarily applied to such decision making by an official liquidator. The Court will apply what for convenience can be labelled a *Wednesbury* unreasonableness standard before deciding whether to interfere with the liquidator's decision making, so that the Court will not interfere with a decision of an official liquidator unless the decision is such that no reasonable liquidator could, properly instructed and advised, in the circumstances arrive at it (as to the appropriateness of analysing the Court's power to review the conduct of liquidators by reference to or adopting without more the approach taken to the review of decision making by public authorities in *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223, see Re *Edennote Ltd* [1996] 2 BCLC 389 (EWCA) at 394). It is worth recording that, as Lady Hale noted in the private law context in *Braganza v*

BP [2015] UKSC 17, the test of *Wednesbury* unreasonableness has two limbs: "*The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may be still possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it.*"

45. This, as I understand it, was the point made by Justice Kawaley when he said in *Herald Fund* (in the passage quoted and underlined above) that "*A Fee Approval application ought not ordinarily to be the context in which the Court is retrospectively invited to approve high-level policy or operational level strategic decisions made by official liquidators. The reasonableness of fees should, in the ordinary case, be determined by reference to cost incurred in relation to work-streams the general pursuit of which has been informally approved by the Committee or formally approved by the Court. An operational strategic decision made by the liquidators within the rubric of furthering a legitimate liquidation purpose should not be impugned, in the fees context, unless the decision can fairly be said not to be a rational one. The decision to incur the fees would not be rational if the work done was either not "reasonable in the circumstances", not "necessary" or "achieved [no] useful result."*

46. Where however the challenge relates to the manner in which resources have been deployed to put such a strategic or high-level decision into effect, then the Court's focus is on whether the resources used, and the resulting costs, are proportionate to what is needed (having regard to the complexity of the task) and in particular to the benefits that have resulted and will result from the work, and on what is the fair value of the liquidator's work in the circumstances (testing whether expenditure of time and money is needed and justified by reference to the prudent man - or woman! - standard referred to by the Chief Justice in *Caledonian Securities*).

47. It seems to me that the Court can treat the UKPS as providing helpful guidance, even though the statutory framework in England and Wales (now contained in the Insolvency Rules 2016) is different from our own. In particular, there are rules (IR 18.16(9)) which identify the matters to

which regard must be had when determining the amount of fees to be approved (the complexity or otherwise of the case, any respects in which, in connection with the administration of the estate, there falls on the insolvency practitioner any responsibility of an exceptional kind or degree, the effectiveness with which the insolvency practitioner appears to be carrying out, or to have carried out, his duties as trustee, and the value and nature of the assets in the estate with which the trustee has to deal). Nonetheless, our jurisprudence has been based on the approach taken in England and Wales and the underlying principles, affirmed in our authorities, are essentially the same or substantially similar to those applied there. Thus, for example, the statement in paragraph 21.1 of the UKPS provides a useful indication, in summary form, of the approach to be followed on a remuneration application in this jurisdiction:

> "*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*. "

48. In my view, Justice Kawaley was not intending to say in his judgment in *Herald Fund* at [22] that the Court would in all cases only decline to allow and approve remuneration where it was shown that the official liquidator's decision to incur the relevant cost and spend the relevant time was *Wednesbury* unreasonable (or failed to satisfy an analogous test applicable to decision making by official liquidators). Such an approach would not in my view be consistent with the rest of his judgment or the authorities He was primarily concerned to make it clear that the process of reviewing remuneration (both by the liquidation committee and the Court) should not generally become an onerous and expensive task (by requiring "*a disproportionately detailed scrutiny of each fee approval application*"). The scope and costs of the costs review exercise should as a general matter be limited and not become disproportionately large. The Court's process generally involves a form of summary assessment based on affidavit evidence, which is inevitably conducted at a relatively high level. The forensic inquiry to be conducted by the Court should also generally be limited because in a case where the liquidation committee has approved the amount of the fees, the Court will take considerable comfort from their assessment, and also because of the burden on the liquidator to place before the Court sufficient evidence to justify his (or her) fees and to meet a challenge from the liquidation committee, so that if he (or she) fails to do so, the relevant fees will be disallowed (Mr Lewis-Hall questioned

whether officeholders should be given the opportunity to file further evidence and adjourn the hearing to allow this to be done if they had initially failed to satisfy the Court, as the receivers in *Perry* had with my permission been allowed to do and as the JOLs offered to do in the present case, but it seems to me that while liquidators should be discouraged from doing so and should place sufficient evidence before the Court at the outset, there may be circumstances where further supplemental evidence should be allowed to ensure that the Court can reach a just and proper result, no doubt on suitable terms as to costs). But the Court takes its task of ensuring that fees are properly scrutinised in the interests of creditors, shareholders, and the wider public interest very seriously and will, where necessary, and certainly where the liquidation committee opposes approval, consider the justification for the fees in depth and detail (as Kawaley J said in *Herald Fund* at [20], the Court, in a case where the liquidation committee has not approved or withdrawn its approval of the relevant fees, is required "*to scrutinise a remuneration application far more closely* ..", underlining added). Such an in-depth review may even require, in a suitable case, the appointment and use of assessors (as was done at first instance in *Brook v Reed*).

49. In this case, I take it that the LC was not, save in one case, challenging the JOLs' strategic decision and big-picture, directional, decision making and their selection of the relevant workstreams but instead based its challenge on the alleged failure of the JOLs to implement and action the particular workstreams in a proportionate and appropriate manner, having regard to the nature of the workstream and the need to ensure value for money and cost effectiveness in the use of the JOLs' staff. The exception relates to the challenge to the JOLs' approach in working with Mr Sharp as US receiver in investigating and managing litigation claims, and their decision to reserve to themselves the responsibility for conducting and taking decisions about the Company's own litigation claims. In relation to this challenge, the LC considered that the JOLs should have taken a much more limited role and left the conduct of the investigations and any proceedings to Mr Sharp since an active role for the JOLS resulted in unnecessary duplication and expense. This seems to me to be a challenge to a core decision of the JOLs as to how to exercise their powers and manage the liquidation.

50. As regards that challenge, in so far as the complaint made is that the JOLs incurred fees on this workstream at all, it seems to me that it must fail. The decision as to how to structure and manage the relationship with the US receiver, in particular as to the extent of the JOLs' involvement with and responsibility for investigating, deciding whether to bring proceedings and then the conduct of such proceedings, is clearly a core decision regarding the conduct of the liquidation requiring the exercise of the JOLs' professional judgment. There is no justification in this case for treating that decision as being one which no reasonable official liquidator could properly take or as being irrational and or as having been taken on the basis of irrelevant matters. There is no basis for interfering with that decision. In any event, in my view, the approach which Mr Johnson adopted was reasonable and indeed required by his duties as an official liquidator. He was unable to delegate these critical decisions to Mr Sharp or fail to ensure that he was properly and sufficiently informed of the facts and legal advice relevant to the Company's position. Furthermore, as Mr Johnson pointed out in his evidence, the allocation of responsibilities in this area had been agreed with Mr Sharp and included in the protocol which has been approved by the Court. There was no evidence that the LC had ever opposed or challenged to the terms of the protocol.

51. On the basis that the JOLs' decision to deal with the investigation and litigation process and as to how to allocate responsibilities between them and Mr Sharp as receiver was justified, a question still arises as to whether the JOLs have shown that the resources they have deployed, the time they have spent and the expense they have incurred was reasonable and justified, having regard to the test I have explained above. The JOLs have charged US$93,230 for the Second Fee Period and US$147,206 in respect of the Third Fee Period. Both are periods of six months. Appendix B to the Second Fee Report shows that in total 133.9 hours were spent and charged to the investigations and litigation workstream and that in substance three members of the JOLs' team charged for time spent (Mr Sharp and a manager charged only a small amount of time). Most of the time was spent by a director (54.9 hours) (Karen Scott I believe) and a consultant (36.1 hours) (this is Ms Zadny) although Mr Johnson (37.9 hours) also charged a material amount of time. Appendix A to the Third Fee Report shows that 222.4 hours were spent on this workstream during the Third Fee Period with Mr Johnson charging for 65 hours, Ms Zadny charging 96 hours and Ms Scott charging 48.6 hours. I have carefully considered the LC's objections. However, on reviewing the summaries of action taken

in this workstream and the entries in the time records (which give only a general indication of what was being done but for current purposes is in my view sufficient), and having regard tothe importance of the workstream to creditors and for recoveries, the evidence that the JOLs' Cayman team played an importance role and had particular expertise to offer on this workstream, the evidence of the recoveries already made or expected to be made, and recognising the time consuming and technically complex nature of these types of investigations and the related mediations and litigation, it seems to me that the time spent and charged is justifiable and should be allowed. I do note the LC's criticism that subject two or three attendees from the JOLs' team participated on every call and while I do not consider that it has been shown that this represented an unreasonable use of resources, I would urge the JOLs to think carefully about who really needs to be on such calls and to reduce numbers wherever possible.

52. As regards the stakeholder consultation and engagement workstream, US$122,680 had been charged for the Second Fee Period and US$106,576 for the Third Fee Period. 204 hours were charged in the Second Fee Period and 198.3 hours were charged in the Third Fee Period. In each period almost all of the work was done by two individuals, Ms Zadny (consultant) and Ms Scott (director). In the Second Fee Period Ms Zadny charged 64.3 hours and Ms Scott charged 137 hours, In the Third Fee Period Ms Zadny charged 107.4 hours and Ms Scott charged and 49.3 hours (although and additional 33.7 hours of Ms Zadny's time was charged out at lower rates to reflect the type of work she was doing). The LC considered, as I have explained above, that the total time spent on this workstream had been excessive and unjustified and that more junior staff should have been used for a significant part of the exercise which involved administrative and non-specialist work. I have carefully considered this complaint and Mr Johnson's evidence in response and have concluded that the JOLs have provided sufficient explanations and evidence to justify the remuneration claimed. I do not consider that it is open to the Court, on the evidence before me, to contradict Mr Johnson's evidence that work done on this workstream performed an important task of keeping stakeholders properly informed, that the range of issues and questions raised, as he outlined in Johnson 7, were such that the time spent was needed in order to be able to respond to the questions and concerns raised and that a failure to have devoted the time spent and resources deployed would have left stakeholders inadequately briefed and have been likely to generate more questions and costs. It is also clear

that the JOLs turned their mind to the need to apply a lower rate to some of Ms Zadny's time and did so. Looking in the round at Mr Johnson's explanations, reviewing the process involved in preparing the FAQs and dealing with stakeholder questions in a case such as the present, recognising how time consuming that this process can be if done thoroughly and taking into account the importance of ensuring that stakeholders are kept informed (albeit at proportionate expense), it seems to me that the time spent, and remuneration claimed is justified in the circumstances and should be allowed.

53. As regards the creditor adjudication workstream, US$95,911 was charged during the Second Fee Period and US$136,610 was charged during the Third Fee Period. 164.2 hours had been charged in the Second Fee Period and 319 hours had been charged in the Third Fee Period (this was the most time consuming workstream in the Third Fee Period). Ms Zadny had recorded 101.2 hours in the Second Fee Period (with an additional 7.5 hours charged out at a lower rate) and 44.8 hours had been charged by Ms Scott. Mr Johnson had only recorded 6.3 hours. In the Third Fee Period, Ms Zadny had charged 83.20 hours (with additional time of over 100 hours on all workstreams charged at lower rates) and 33.8 hours charged by Ms Scott. There was during this period a total of 187.80 hours charged by senior managers (including some of Ms Zadny's time charged at senior manager rates). Mr Johnson only charged 9.5 hours.

54. The Second Fee Report summarised the work done during the Second Fee Period on this workstream as follows:

> *"This work stream encompasses the JOLs' time spent on all claims' adjudication matters, which during the Period focused on extensive analysis of [the Company's] corporate records and stakeholder files.*
>
> *Liaising with legal counsel on claims adjudication matters, including the appropriate treatment and valuation of redemption creditor and late subscriber claims and late subscriber requests to be treated as a group*
>
> *Reviewing advice from legal counsel and leading counsel on the appropriate treatment and valuation of redemption creditor and late subscriber claims*
>
> *Communicating with redemption creditors regarding the valuation of their claims*

Communicating with individual late subscribers regarding the classification of their claims and requests to be treated as a group

Preparing and circulating letters to late subscribers regarding the JOLs' provisional views on the treatment of their claims

Organising conference calls with sub-groups of late subscribers to discuss the JOLs' provisional views on the appropriate classification and treatment of their claims and certain late subscribers' requests for group treatment

Reviewing advice from US legal counsel regarding trust claimants and filing of claims in the Master Fund

Liaising with the Receiver's staff regarding the US claims and distribution process and obtaining information regarding investor activity and communications with investors prior to the commencement of the US receivership

Reviewing and analysing [the Company's] accounting records and investor activity information from the Receiver's staff for purposes of confirming investor shareholdings

Reviewing potential trade creditors and assessing likelihood of them submitting claims in the liquidation

Reviewing all proofs of debt and other documentation received from stakeholders; and

Maintaining control schedules in respect of all potential stakeholder claims

55. The Third Fee Report also contained a summary (but shorter) of the work done on this workstream during the Third Fee Period as follows:

"This work stream relates to the JOLs' communications with the wider body of DLIFF stakeholders, including dealing with statutorily required annual reporting to contributories, and responding to ad hoc stakeholder enquiries. During the Period, the JOLs' activities under this work stream include:

Preparing the JOLs' second report to the contributories dated October 6, 2020, convening and holding the second annual meeting of contributories, and dealing with post-meeting reporting

Dealing with and responding to ongoing enquiries received from stakeholders across all categories, including enquiries about the timing of claims adjudication, payment of distributions, impact of fraud allegations, and requests for confirmation of holdings; and

Dealing with share transfer requests, including performing necessary due diligence reviews and obtaining required documentation."

56. It is clear, particularly from the summary and headlines in the Second Fee Report, that this workstream involved issues of real importance to investors and creditors, which required the JOLs to arrange and have various discussions and communications with creditors and subscribers and the collection and verification of a substantial body of information, as well as a detailed analysis of complex factual and legal questions, and discussions with the JOLs' legal advisers (including US and Cayman attorneys and Leading Counsel in London). The workstream therefore appears to have been necessary and produced work of real benefit to the estate. The LC objections to the amount of the JOLs' remuneration was based on the proposition that since a significant part of the work done involved obtaining legal advice from Collas Crill and Leading Counsel, it must follow that there was no need or justification for the JOLs spending a material amount of time themselves. But this (to the extent that it is not a challenge to a strategic decision by the JOLs as to the extent to which they needed to work with their legal advisers) involves an obvious *non sequitur*. The legal advisers needed to be briefed (and information collected and verified for this purpose) and their advice discussed and considered by the JOLs. In view of the topics identified in the JOLs' summaries, it seems to me reasonable to expect that the JOLs would need to spend a considerable amount of time working with the legal team and that in doing so they were both acting properly and producing a significant benefit to the estate. On looking at the JOLs' explanations, the number of hours charged, and the number and grade of fee earner allocated to the workstream, I am satisfied that the amounts charged are reasonable and of material value to the estate. There is nothing which shows that a disproportionate amount of time has been spent or that too many, or the wrong grade of staff member, has been allocated to the workstream. As I have noted, the JOLs have considered the extent to which Ms Zadny was required (because of the composition and nature of the team employed by Mr Johnson's firm) to do work that was of a type that could have been done by more junior staff and have applied a lower hourly rate to the time spent on this type of work. There is nothing in the evidence which supports the view that this exercise was not done properly or that the JOLs' allocation of time can be challenged.

57. I also note, when considering the amounts claimed by the JOLs, that they have reviewed the total time recorded and considered the extent to which some of that time was not for the benefit of the estate and instead related to internal administration (referred to as case development) so that the estate should not be charged for it. On this basis, the JOLs wrote-off material amounts

(11% and 14% of gross fees recorded for the Second Fee Period and the Third Fee Period respectively). This, of course, does not mean that the remaining remuneration for which the JOLs sought to be paid was reasonable, proportionate and value for money but it does support the point that the JOLs have undertaken a careful and proper process to review and establish the amount which can justifiably and fairly be charged.

58. In these circumstances and for these reasons, it seems to me that the JOLs have discharged the burden of proof laid upon them and established that the amounts for which approval is sought are fair, reasonable, and commensurate with the nature and extent of the tasks which they have properly undertaken, and that the work for which they have charged has resulted in significant and proportionate benefits to the estate. The resources used and the resulting costs were proportionate to what was needed and in particular to the benefits that have resulted and will result from the work. I am satisfied that "*a prudent man faced with similar circumstances would [have laid out] or [hazarded] his money in the way that the JOLs have done.*"

59. I turn now to the LC's complaints about the level of information provided to them and the manner in which their concerns and challenges to the level of remuneration charged were dealt with. It seems to me that the level of information initially provided by the JOLs in and annexed to the Second Fee Report and the Third Fee Report was sufficient. As David Richards J said in *Brook v Reed* it is for the officeholder to provide a sufficient and proportionate level of information to explain the remuneration and to enable the LC (objector) to identify with reasonable precision its points of dispute. It seems to me that the information and data provided in the Second Fee Report and the Third Fee Report allowed the LC to understand the type of work done on each workstream, the fee earners who had worked on the workstream, the amount of time spent and the charge out rates used and to have an outline of each time entry recorded by the relevant fee earner. This allowed the LC to assess the reasonableness and basis of the charges and to identify further information that they needed. It also seems to me that the JOLs did provide the LC with the further information requested and that they did so in a reasonably timely manner.

60. The LC complained about the length of time it took the JOLs to respond to their email dated 23 October 2020. As I have already noted, the main response was provided on 9 March 2021 in the document entitled *"JOLs' responses to LC queries of 23 October 2020."* However, as Mr Johnson explained in Johnson 5, information was provided before then and shortly after the email of 23 October. Accordingly, on 31 October 2020, the JOLs provided to the LC (by uploading to the LC data room) the time entry narratives for the Third Fee Period in excel format as well as the JOLs' time costs summary by grade and activity for September 2020 (see Johnson 5 at [59] and [60]). Furthermore, on 22 December 2020, the JOLs provided to the LC the JOLs' time costs summary by grade and activity for October 2020; on 4 January 2021, the JOLs provided to the LC the JOLs' time costs summary by grade and activity for November 2020 and on 31 January 2021, the JOLs provided to the LC the JOLs' time costs summary by grade and activity for December 2020, in each case by uploading the data to the LC data room (see Johnson 5 at [63]-[65]). So it would be wrong to say that the JOLs' ignored or failed to provide any response to the LC's email of 23 October for a lengthy period. They started providing information promptly, although it is not clear why the summaries provided in December and January could not have been provided in November. In Johnson 5, Mr Johnson said that the issue of the JOLs' fees had been removed from the agenda for the LC meeting scheduled for 17 December 2020 and deferred to the next meeting, presumably to allow further time for the JOLs to respond to the open queries and there is no evidence that the LC objected to this. Furthermore, in Johnson 5 Mr Johnson explained that because the JOLs considered that they were being asked to "*revisit central themes that had already been debated and resolved*" they decided to treat the task of completing the responses to the LC's questions as "*a lower priority work stream in comparison to the finalisation of the claims stipulation and the mediation with the former auditors*". This may well have been an appropriate decision as to how to allocate scarce resources but ideally the delay and decision as to how to prioritise work should have had the LC's support.

61. In these circumstances, it seems to me that the LC's objections are at best overstated and in many respects unfounded. However, I would say that something has clearly gone wrong with the relationship and channels of communication between the JOLs and the LC. It is not always possible to reach a consensus on every issue and the existence of disagreements is not of itself

evidence of misconduct or a failure on the JOLs' part. In this case, it appears that the LC failed fully and properly to grasp the proper role of the JOLs, and the amount of time required to perform necessary tasks in the key workstreams, and that the JOLs have spent a substantial amount of time seeking to explain their position to and allay the concerns of the LC. It appears from recent developments that the relationship has been repaired and significantly improved and it is to be hoped that this progress can be continued. The JOLs, while remaining conscious of the need to avoid spending a disproportionate time on LC matters, must work at restoring the trust and confidence of the LC and the LC will need, perhaps with further assistance from Appleby, to have a better appreciation of the nature of the JOLs' proper role and the time they need to spend in fulfilling the tasks allotted to them.

62. I would note one other point. In their letter to Appleby of 20 September 2020 Collas Crill referred to my judgment in *Perry*, where, as I have explained, I allowed the receivers to provide further information and evidence after the hearing of a challenge to their remuneration, to respond to points which had arisen during the hearing. Collas Crill said that:

> *"rather than expend further significant costs at this stage in preparing and filing detailed reply evidence, which might well prove to be unnecessary, the JOLs intend to adopt a proportionate approach in their evidence in reply. This approach would be taken with a view, in the event that the Court considers the JOLs' evidence to be insufficient to discharge their burden, to seeking directions along the lines expressed in Perry & Perry v Lopag Trust & others."*

I would caution insolvency officeholders and their attorneys against taking a light-touch approach to the filing of evidence before and for the purpose of the hearing of a fee approval application. All requisite evidence should be filed in advance of the hearing, and it should not be assumed that the Court will allow the officeholder more time and the opportunity to file further evidence in every case or indeed in most cases. As I have mentioned above, there will be cases where this is justified, particularly where, as in *Perry*, issues arose during the hearing that justified giving the receivers more time. But this will not always be the case and officeholders who limit the evidence they file and fail to put in sufficient evidence to justify their fees, may find that the Court declines to approve some or all of those fees.

Costs

63. In their letter dated 22 November 2021, Collas Crill and Appleby said as follows:

> *"... the parties note that the Court will determine the issue of the costs of the Application in accordance with CWR O. 24 r.9 and that the usual rule would be for the parties' costs to be paid out of the assets of the company. The parties are content to leave the issue of costs to the Court, save that if the Court is minded after considering the Application, to depart from the usual rule in relation to either the JOLs or the LC, then the Court is invited to give that party the opportunity to be heard / to provide written submissions before any final order is made in relation to costs."*

64. In the circumstances of this case, I have decided that, applying and in accordance with CWR O.24, r.9, the JOLs and the LC fees shall both be paid out of the assets of the Company. I have considered whether I should decline to make such an order in relation to the LC on the basis that its position was "*wholly unreasonable*" but have concluded that it would inappropriate and unduly harsh to do so on this occasion. The JOLs have not sought such an order, a factor of some considerable weight. In addition, while I have decided that the LC's objections and complaints were unfounded and misguided, it seems to me that they were genuinely held and based on genuine concerns as to the costs to be borne by the estate, and in this case I am not prepared to find the LC's position to be "*wholly unreasonable.*"

65. I would, though, note this in conclusion. A liquidation committee's role in reviewing the remuneration of official liquidators is an important one and its independent and commercial judgment is relied on by the Court (and creditors). It should not hesitate to challenge and oppose the approval of that remuneration where it considers that to be justified and the Court will welcome its participation on a fee approval application in such circumstances. But if it is dissatisfied with the official liquidators' remuneration, before it opposes such an application it must ensure that not only has it identified with reasonable precision its points of dispute (with a suitably detailed explanation and reference to the evidence) but also that if it wishes to challenge the official liquidator's professional judgment on resource allocation and case

management, it is supported in its view by another professional, at least in any case where the challenge relates to a substantial part of the JOLs' activities and remuneration claimed.

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Mr Justice Segal

Judge of the Grand Court, Cayman Islands

3 February 2022