Neutral Citation Number: [2025] EWHC 1356 (Ch)

Case No: CR-2023-004165 and CR-2019-001388

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
IN THE MATTER OF HENRY WALTERS LIMITED (IN LIQUIDATION)
AND IN THE MATTER OF OLD MANOR HOMES LIMITED (IN LIQUIDATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Rolls Building
Royal Courts of Justice
7 Rolls Buildings
London EC4A 1NL

Date: 4 June 2025

Before:

INSOLVENCY AND COMPANIES COURT JUDGE GREENWOOD

- -

Between:

1. MR STEPHEN ROBERT LESLIE CORK
2. MR ANTHONY MALCOLM CORK
(As Joint Liquidators of Henry Walters Limited and Old Manor Homes Limited)

Applicants

- and -

1. MR JOHN PENFOLD
2. MR RICHARD PENFOLD

Respondents

- -

Ms Fiona Dewar (instructed on a licensed access basis) for the Applicants

Mr Tom Gentleman and Ms Zara McGlone (instructed by CANDEY Limited) for the First Respondent
The Second Respondent was neither present nor represented

Hearing dates 28-29 January 2025:

- -

JUDGMENT

This judgment was handed down remotely at 10.00am on 4 June 2025 by circulation to the parties or their representatives by e-mail.

ICC JUDGE GREENWOOD:

Introduction

1. This is the final hearing of two applications ("**the Applications**") both dated 31 July 2023 and both made by Mr Stephen Cork and Mr Anthony Cork of Cork Gully LLP, acting, in respect of one ("**the HWL Application**") in their capacity as the joint liquidators of Henry Walters Limited ("**HWL**"), and in respect of the other ("**the OMHL Application**") as the joint liquidators of Old Manor Homes Limited ("**OMHL**"), of which they were formerly joint administrators. The companies are related: OMHL is a wholly owned subsidiary of HWL, and the Respondents to the Applications, Mr John Penfold and his brother, Mr Richard Penfold, were at all material times the sole equal shareholders of HWL and the only directors of both. In the interests of convenience, without intending any discourtesy, I shall refer to the Respondents in this judgment as "**John**" and "**Richard**", and together, as "**the Penfolds**"; I shall refer to Mr Stephen Cork as "**Mr Cork**".

2. The business of the companies was property development. As such, albeit now sold, HWL owned three commercial properties, at 321 Lee High Road, London SE12 8RU ("**321 LHR**"), 345 Lee High Road, London SE12 8RU ("**345 LHR**") and 152a Lee High Road, London SE13 5PR ("**152 LHR**"), which were sold for an aggregate sum of £5,778,111 (excluding VAT) and OMHL owned one, at 36 Old Road, London SE13 5SR ("**36 OR**"), which was sold for £4,150,000 (again, excluding VAT). The last in time of those sales, of the property at 152 LHR, was completed on 10 August 2020. Both liquidations are substantially complete: all creditors have been paid, and there is a surplus in each company; substantial distributions have been made, of £5,572,017 in the liquidation of HWL, and £700,000 in the liquidation of OMHL.

3. The liquidations were a consequence of the complete breakdown in relations between the Penfolds, which culminated in unfair prejudice proceedings issued by each against the other in July 2017, which led to a trial in December 2018. In the event, in the course of that trial, a settlement agreement was reached, contained in a Tomlin Order made on 5 December 2018. The Schedule to that Order provided for John to buy Richard's stake in HWL for £4,400,000, and in the event of his failure to pay that sum by 15 February 2019, for the brothers "*forthwith*" each to "*take all necessary steps to place HWL into Members' Voluntary Liquidation with Stephen Cork and Joanne Milner joint*

liquidators." In the event, the sum was not paid, and HWL went into members' voluntary liquidation on 22 February 2019.

4. The Applications were made under rule 18.24 and in accordance with rule 18.28 of the Insolvency Rules 2016 ("**the IR 2016**"), in respect of the Applicants' remuneration in return for their services as office-holders. In each case they sought "*an increase in the rate/amount of remuneration and/or a change in the basis*".

5. Rule 18.24 states:

> "*An office-holder who considers the rate or amount of remuneration fixed to be insufficient or the basis fixed to be inappropriate may–*
>
> *(a) request the creditors to increase the rate or amount or change the basis in accordance with rules 18.25 to 18.27;*
>
> *(b) apply to the court for an order increasing the rate or amount or changing the basis in accordance with rule 18.28*."

6. In respect of HWL, the basis of the Applicants' remuneration was fixed at the general meeting held on 22 February 2019, at which it went into members' voluntary liquidation, and at which it was resolved by the Penfolds, acting as the company's members under rule 18.19 of the IR 2016, that the liquidators (at that time, Mr Stephen Cork and Ms Joanne Milner, also of Cork Gully LLP - Mr Anthony Cork's predecessor) would be entitled to remuneration "*fixed at a rate of 5% on all realisations, to be paid as and when realisations are made*". Ms Milner was replaced by Mr Anthony Cork by an order made on 5 December 2024.

7. At a board meeting of OMHL held on the same day, it was resolved by the Penfolds to place the company into administration immediately, and to appoint Mr Stephen Cork and again, Ms Milner, as joint administrators (and where I refer to the "**office-holders**" of either company, it is a reference to the office-holders at that time, regardless of the nature of the particular insolvency process). However, the basis of the administrators' remuneration was not fixed until subsequently, on 2 May 2019, by means of a creditors' decision made in correspondence under rule 18.18(3); as in respect of HWL, it was fixed "*at a rate of 5% on all realisations, to be paid as and when realisations are made*".

OMHL's only creditors were HWL and two other companies, each of which was owned by one or other of the Penfolds. Although acknowledged that it was in fact at all times solvent, OMHL moved from administration to creditors' voluntary liquidation under paragraph 83 of Schedule B1 to the Insolvency Act 1986 ("**the IA 86**") on 14 February 2020. By virtue of rule 18.20, the liquidators' remuneration was treated as having been fixed by virtue of the decision made on 2 May 2019 in the preceding administration.

8. Accordingly, on the bases fixed in 2019, remuneration was due to the office-holders in respect of HWL in the sum of £395,300, and in respect of OMHL, in the sum of £207,685; in total, £602,985.

9. By the Applications, in respect of HWL, it was sought to increase remuneration by £316,240 to £711,540, equal to 9% of all realisations, and in respect of OMHL, to increase remuneration by £53,998.28 to £261,684, equal to 6.3% of realisations; in total, an increase of £370,238.28.

10. In addition, in respect of both companies, the Applicants sought their costs against John, who opposed the Applications, and/or an order for payment of additional remuneration, costs and expenses from the companies' estates in respect of the Applications themselves. By a document signed by Mr Cork on 27 January 2025, the court was told that the Applicants had (to date) incurred costs (in aggregate in respect of both Applications) in the sum of £566,864.80, which was £196,627 more than the aggregate amount of the increases sought, and only £36,094.12 less than the aggregate amount currently due. Although those matters will be dealt with in due course, following judgment, Mr Tom Gentleman of counsel, who appeared for John (with Ms Zara McGlone also of counsel) suggested that this sum was in such a manifestly excessive and disproportionate amount, incurred in respect of what was ultimately a two day hearing without oral evidence, as to undermine the Applicants' evidence that their remuneration should now be increased to reflect the cost of valuable work which they claim to have done in respect of the companies, but for which they say they will not be properly remunerated by virtue of payment on the basis currently fixed. Whilst ultimately there was no need to base my conclusions on that point, the costs said to have been incurred were very substantial indeed; they were certainly not such as to lend much confidence to the Applicants' claims.

11. In essence, in respect of HWL, the remuneration increase was sought on the basis that the current 5% rate was insufficient to reasonably and fairly compensate the Applicants for their services, because, so it was said:

    11.1. the scope, scale, complexity, sensitivity and duration of the work in fact required - the overall workload - exceeded that which was anticipated and allowed for when fixing the current basis; that it was thus more than had been "*accommodated within*" the agreed percentage rate;

    11.2. that in particular, the office-holders having in fact reasonably anticipated a relatively straightforward process, essentially akin to a property receivership, there had, in the event, been substantial unforeseen work to be done in respect of: claims made by John against HWL (by means of his proof of debt); John's requests that certain claims either be pursued against Richard, or assigned to John; and more broadly, in respect of the scale of engagement with the brothers, caused by the intractable hostility between them; in addition, it was said that there were certain unexpected workstreams in relation to the sales of HWL's properties (including for example, in respect of a planning application concerning 152 LHR, and the presence of squatters at the same property);

    11.3. work was therefore said to have been unanticipated (or at least, "*not allowed for*" by the office-holders) in some respects as to its extent, and in others, as to its nature, such that the overall workload demands of the process were qualitatively different from (and materially greater than) those accommodated within the agreed rate.

12. In respect of OMHL, the remuneration increase was sought on the basis that the current 5% rate was insufficient to reasonably and fairly compensate the Applicants for their services, because - and this was said to have been the main cause - 36 OR, the property which was owned by OMHL and which was sold for £4,150,000 (excluding VAT) - was or transpired to be worth (at any rate, sold for) significantly less than the office-holders had anticipated, and on which basis the current rate had been fixed; unanticipated workstreams were said to have exacerbated the problem.

13. The increases sought were said by the Applicants to reflect the "*bare minimum*" that would be fair and reasonable, and were said to represent a conservative estimate of the sums that would have been chargeable on a time properly given (rather than realisations) basis for work done in respect of each company, justified according to the principles and requirements stated at Part 6 of the Practice Direction – Insolvency Proceedings ("**the PDIP**").

14. In respect of HWL, remuneration at 9% would result in fees of £711,540.39, and Mr Cork's evidence was that on a time spent basis a bare minimum of £715,066.46 would have been due; in respect of OMHL, remuneration at 6.3% would result in fees of £261,683.99, compared with the bare minimum of chargeable costs on a time basis, said to be £263,646.10. As Mr Cork said in his evidence, "*This parity is not a coincidence*"; he said that the Applicants had identified a "*pared-back time-spent total*" that they were "*confident would be rechargeable on a time-spent basis*" and "*used that to inform our assessment of an appropriate and justifiable increase in the percentage rate*". In other words, the process by which the new proposed rates were chosen was substantially retrospective, based on, and calculated by reference to, outcomes and hindsight.

15. Accordingly, on the Applicants' case, the value of work done on a time properly spent basis had at least two potential functions: first, to show that their remuneration as currently fixed was "*insufficient*" (and that the overall workload had indeed been increased by unanticipated work properly done, uncompensated for by a requirement for less work required elsewhere) and second, to act as one appropriate measure of the increased remuneration sought.

16. Having said that, Ms Fiona Dewar of counsel (who appeared for the Applicants) also submitted that the Applicants' entitlement to relief could (and indeed should) much more simply be determined, without reference to evidence of the cost of time properly spent, because in connection with a percentage rate case, the task for the court depended not on a consideration of the time and cost of work properly done, but on the relationship between:

    16.1. remuneration as it would have been (calculated by reference to an assumed range of realisations) in return for the overall workload demands accommodated within the agreed basis; and,

16.2. remuneration as it has transpired to be (calculated by reference to the realisations in fact achieved) in return for the overall workload demands in fact;

16.3. such that the Applicants' entitlement to an order would depend on the extent to which their actual workload had exceeded the demands accommodated within the current percentage and/or realisations had fallen beneath the assumed range;

16.4. which was demonstrated in the present case by their evidence that the process in relation to HWL had taken "*three times as long as allowed for in the 5% rate and the workload demands were at least double*" (uncompensated for by higher than expected realisations) and in relation to OMHL that workload demands had been at least as great as had been accommodated within the agreed basis but the value of 36 OR had transpired to be significantly lower than had been assumed.

17. In the alternative, the Applicants' case was that if the court were to consider a change of remuneration basis to be more appropriate, then that is what would be sought, to payment of a fixed additional sum (in addition to the remuneration currently due, so therefore a combination of bases), or payment on a time properly spent basis – but in each case, to achieve the same financial/economic outcome as was sought by reference to the change of percentage (rate). It was John's case that these were not true alternatives, and that what in fact was sought by the primary case - albeit presented as an application in respect of rates - was itself a change of basis, because on any view, the relief sought was ultimately grounded on the cost of time said to have been properly spent. The significance of that submission was said to be that if correct, the Applicants would have to show, under rule 18.24, that the basis currently fixed was "*inappropriate*".

18. It should be borne in mind that although the companies were related, the Applications were nonetheless separate: each must be decided on its own merits.

19. The Applications were wholly opposed by John. Essentially, his case was that:

19.1. the Applications were both made too late, and comprised an unjustified attempt to change the agreed bases of remuneration, which on John's case remained appropriate;

19.2. no increase in the rate fixed by the terms of those agreed bases was justified or necessary:

19.2.1. first, none of the events relied upon by the Applicants were unpredictable or unforeseeable; none were outside the scope of that which might transpire in the ordinary course: they were all therefore matters in respect of which the risk of their occurrence was fairly allocated, by agreement, by means of the bases proposed by the office-holders themselves, and consensually fixed in 2019, following negotiation;

19.2.2. second, in any event, in respect of the work said to have been done beyond that which had been anticipated (or "*accommodated*") and said to justify the claimed increases (on whichever basis) the Applicants had failed to satisfy the requirements of the PDIP, and had thus failed to show (the burden being on them to do so) that time had been properly spent, resulting in value to the companies, meaning that they had failed to prove "*insufficiency*" of remuneration, and in any event failed to justify the particular sums claimed, for which the evidence was simply inadequate;

19.3. accordingly, whether characterised as a change of basis, or as a simple increase in the applicable rate but on the same basis, the Applications ought to be dismissed.

20. One significant difference between the parties was therefore the basis upon which the court ought to decide "*insufficiency*" of remuneration in a percentage basis case, and in particular whether, as the Applicants argued, it depended on the circumstances and features of the case as in fact, subjectively, even if privately, the office-holders had assumed or hoped they would be (and had thus themselves, "*allowed for*" or "*accommodated*" within the agreed rate) or whether, as was argued on John's behalf, it depended on an allocation of risks more objectively determined. On the Applicants' case, as I have explained, the matter was capable of simple resolution because, so it was said, the overall workload had exceeded the scope of that which the office-holders had subjectively, in fact, allowed for, as set out in their written evidence.

21. As to that evidence, on behalf of the Applicants, Mr Stephen Cork made three witness statements - one supporting statement in respect of each Application (both made on 31 July 2023) and a third, made on 29 November 2023, in response to that of John made in opposition on 6 November 2023. There was no oral evidence, and no cross-examination; neither was there any expert evidence (adduced in accordance with Pt 35 of the CPR). In those circumstances, there were the usual constraints on the court's willingness and ability to reject the written evidence of the witnesses: Griffiths v TUI (UK) Ltd [2023] 3 WLR 1204. Ms Dewar relied on those constraints in connection with her argument that insufficiency of remuneration was to be assessed by reference to the office-holders' subjective expectations, in respect of which she said there could not be any issue.

22. Richard, the Second Respondent, took no active part in the proceedings, having reached an agreement with the Applicants in terms stated in a letter from Cork Gully, dated 15 February 2021, to the effect that as one of the two joint equal owners, his "*share*" of the additional remuneration sought - if granted by the court - would be limited to £143,330.25 plus VAT (at most) to be deducted from any further distribution paid to him, and that the Applicants would bear any difference between that sum and 50% of the increase, if 50% of the increase was more than £143,330.25 plus VAT. It was accepted by the Applicants that were an order to be refused, they would not receive anything from Richard, or by virtue of this agreement, which would cause their remuneration to exceed that which is currently fixed.

The Law

23. The main sources of law governing the remuneration of insolvency office-holders are contained in the IR 2016 and the PDIP.

24. Rule 18.16 states that an office-holder is entitled to receive remuneration, and that remuneration "*must*" be fixed on one of the following bases, or a combination of them:

    24.1. as a percentage of the value of the property dealt with, or of assets realised and/or distributed;

    24.2. by reference to "*the time properly given by the office-holder and the office-holder's staff in attending to matters arising in the administration, winding up or bankruptcy*"; or,

24.3. as a set amount.

25. In the present case, insofar as the Applications sought an order increasing the "*amount*" of the officer-holders' remuneration, they could not succeed under rule 18.24, because their remuneration is not presently fixed in a certain "*set amount*". Necessarily, the Applications were therefore confined to the possibility of increasing the rate and/or changing the basis.

26. By rule 18.16(4), where an office-holder, other than in a members' voluntary winding up, proposes to take all or any part of the remuneration by reference to time properly given, he "*must, prior to the determination of which of the bases … are to be fixed, deliver to the creditors - (a) a fees estimate; and (b) details of the expenses the office-holder considers will be, or are likely to be, incurred*". That information is important in cases where otherwise there is (or at least may be) no fixed upper limit to remuneration; it is an aspect of fairness to those whose economic interests are affected – the paying parties – allowing them to make informed decisions and to proceed on a secure footing: accordingly, by rule 18.30, the office-holder must not draw remuneration in excess of the total amount set out in the fees estimate without prior approval, and the request for approval must specify all of the matters, reasons and details set out at rule 18.30(3).

27. Further, by rule 18.16(6), before the determination of the remuneration basis, unless the information has already been delivered under rule 18.16(4), in every case other than a members' voluntary winding up, the office-holder must deliver to the creditors the information required under rule 18.16(7), in respect of proposed work and details of likely or inevitable expenses. In the present case, because remuneration was fixed according to a percentage of value (and because HWL went into members' voluntary liquidation) there was no fees estimate, and the putative office-holders provided no specific information about the work which they proposed (or believed it would be necessary) to undertake within (and in return for) the negotiated rate.

28. By rule 18.16(9), in fixing the basis of remuneration (including its terms) regard "*must*" be had to the following non-exhaustive list of matters: the "*complexity (or otherwise)*" of the case; any respects in which there falls on the office-holder any "*responsibility of an exceptional kind or degree*"; the "*effectiveness*" with which the office-holder appears to be carrying out, or to have carried out, the office-holder's duties; and the "*value and*

nature of the property" with which the office-holder has to deal. These are all matters which may therefore, depending on the circumstances, be relevant on an application under rule 18.24.

29. A members' voluntary winding-up is to some extent treated differently because of its somewhat different character, as a solvent liquidation, willingly commenced by and subsequently proceeding to a significant extent under the control of the company's members, and therefore directly at their expense, paid for by them from what would otherwise belong to them. In such a liquidation, it is for the members (freely) to choose and appoint liquidators, and to determine the basis of their remuneration under rule 18.19, as, in respect of HWL, is what happened at the general meeting on 22 February 2019.

30. Each of the different bases of remuneration has its own particular features. But importantly, in respect of remuneration fixed on the basis of a percentage of the value of property and assets realised and/or distributed, or as a set amount, the effect of the decision is to allocate and fix certain risks at the outset (or at any rate, prospectively): in every such case, the assets' "*value*" will very likely be variable within certain limits, as will the extent and time cost of the proposed and actual work.

31. Almost inevitably therefore, in practically every such case - if judged simply by reference to the time properly given - the office-holder will be either "*over*" or "*under*" remunerated. However, to some proper degree, the relevant stakeholders must be taken to have accepted that risk (or in some cases, to have done so explicitly), and as explained by Mr Cork himself in the present case, to have done so, at least in part, because it is a basis that gives prospective "*simplicity, transparency and certainty for all concerned*": an agreement to do a certain job in return for a certain (or straightforwardly calculable) sum.

32. In Re Central A1 Ltd [2017] BCC 69, Registrar Jones (as he then was) considered certain issues arising on an application in respect of an agreement reached to pay a fixed sum for work carried out to enable a number of companies to be put into creditors' voluntary liquidation. Amongst other things, the judge held that the court had jurisdiction to assess whether or not the fee was reasonable and necessary. In that context, at [49]-[51] and [53] he said (the emphasis is mine):

49. There is no suggestion that a fixed fee was or is an inappropriate basis upon which to determine the remuneration for completion of the terms of engagement. Therefore, the assessment should be of the reasonableness for necessary work of a pre-agreed fee which will not change with the time the work in fact takes or the amount the service is used. For that purpose, account should be taken of the fact that ***a fixed fee will or is likely to involve an element of risk on both sides. In due course the work may prove to be harder or easier than envisaged, the hours spent longer or shorter and the fee may prove miserly or generous in the light of subsequent performance. Nevertheless, the fee remains fixed and any assessment must be on that basis taking account objectively of the information available at the time****.*

50. As general guidance such an assessment will normally need:—

a) to identify precisely what work was agreed to be carried out;

b) to decide whether that work was necessary taking into account the factual circumstances; and

c) to decide in respect of necessary work what was a reasonable fixed fee taking into account not the actual hours spent ***but what it was reasonable to agree at the time knowing (to the extent this was known or reasonably capable of being ascertained) the circumstances of each company relevant to the work to be undertaken and all other factors which should be taken into account when agreeing a fixed fee****.*

51. In reaching those and the final decisions, the court will apply the following principles identified within the Practice Direction: Insolvency Proceedings: justification; benefit of doubt; professional integrity; value of service; fairness and reasonableness; proportionality of information and remuneration; and the relevance of professional guidance. They will be applied in the context of assessing a fixed fee.

....

53. I approach this issue from a different route to the path the arguments on behalf of the Liquidators took. Actual performance is not the basis upon which the fee was agreed and not the basis for assessment. That does not mean the work subsequently carried out is necessarily irrelevant. It may prove to be

relevant as evidence to prove that the factors relied upon when reaching the fixed fee produced a reasonable or unreasonable result. It may also be referred to in order to evidence a case that it was correct to identify the work as necessary or unnecessary when fixing the fee. However, these are evidential possibilities which may or may not be placed before the court and may or may not be relevant or necessary depending upon the case. There is no requirement to present such evidence in order to satisfy the court that the fixed fee was reasonable and for necessary work.

33. In other words, the fixed fee involved an "*element of risk*", and the assessment of its reasonableness was held to depend on the circumstances in which it was agreed - objectively ascertained (including that which was reasonably ascertainable by the parties at the time) - albeit possibly, to some extent, illuminated by subsequent events.

34. Similarly, an office-holder's remuneration fixed as a certain percentage of realisations involves in every case a degree of risk, and outcomes which fall within the boundaries of the risks thus allocated are (at least) unlikely to justify any change. The issue in A1 was not exactly that raised by the present Applications - in that case, the question was whether the fee was "*reasonable and necessary*", whereas in the present case, it was whether the Applicants' remuneration was, in the event, in the circumstances as they now stand, either "*insufficient*" or fixed on an "*inappropriate*" basis - but the same considerations are material.

35. Rule 18.29 provides that in respect of the basis of the office-holder's remuneration, "*after*" it has been fixed, and where there has been "*a material and substantial change in the circumstances which were taken into account in fixing it*", the office-holder may "*request*" that the basis be changed; that request is to be made to the original decision making body (and thus appears to require a consideration of the circumstances which were taken into account by both that body and the office-holder) and thus to the company, where in a members' voluntary liquidation the basis was fixed by the company in general meeting, and to the creditors, in a case where it was fixed by the creditors.

36. Although rule 18.29 makes no provision for a case in which the request for an increase is refused, rule 18.24, stated above at paragraph [5], provides, in more general terms, both for requests to increase remuneration to be made to creditors, and for applications

to be made to the court where the basis fixed is considered by the office-holder to be "*inappropriate*" or the rate or amount "*insufficient*" (including, by virtue of rule 18.28(3)(d), in a members' voluntary liquidation).

37. The court's powers under rule 18.24 thus depend in the first instance on whether the application is to increase the rate or amount of remuneration (in which case, "*insufficiency*" must be shown) or to change the basis of remuneration (in which case, the current basis must be shown to be "*inappropriate*"). In either case, the burden is on the applicant office-holder to justify an alteration. The features of that burden will depend on the circumstances, including the timing of the application, and the extent to which the change sought is prospective or retrospective.

38. Mr Gentleman submitted that on an application to change the basis of remuneration, the court would have to be satisfied - to import the language of rule 18.29 into rule 18.24 - that there has been a "*material and substantial change in the circumstances which were taken into account in fixing it*", and that only in those circumstances might a certain basis be said to be "*inappropriate*".

39. I do not agree. First, simply, that is not what is said by rule 18.24; there is no good reason to gloss or limit the broad language of that rule, or rewrite it, or import into it a phrase from elsewhere. Second, moreover, the suggested limitation would not in every circumstance be either relevant or just: for example, were an office-holder's remuneration to be fixed on a certain basis to which there was an immediate (and justified) objection, there would be no good reason to prevent the court from intervening, or considering whether or not to do so, notwithstanding that "*circumstances*" were wholly unchanged.

40. However, that is not to say that the language of rule 18.29 is necessarily or wholly irrelevant to an application under rule 18.24 made in respect of basis: if, in substance, such an application were to be made by reference to the fact of circumstances having changed since the current basis was fixed, a relevant consideration, in some cases possibly even a decisive consideration, would doubtless be whether and the extent to which those changes were "*material and substantial*" changes in that which was taken into account.

41. On an application under rule 18.24, in assessing whether an office-holder's remuneration, as currently fixed, is insufficient, and/or in deciding whether or not the basis is inappropriate and ought to be changed, the court must consider the guiding principles concerning remuneration contained in the PDIP: Salliss v Hunt [2014] 1 WLR 2402 at [44], *per* Sir Terence Etherton C.

42. In that case, the remuneration of the bankruptcy trustee had been fixed by creditors, at a meeting held on 20 May 1996, "*at the first two thousand pounds realised and thereafter laid down by the official receiver's scale of fees*" – in other words, after the first £2,000 of realisations, remuneration was fixed on the basis of a percentage of the assets realised and distributed. Subsequently, by an application made on 8 August 2012, in the context of the former bankrupt's application to annul his bankruptcy, his then trustee made an application to change the basis of his remuneration to that of time properly given. On a successful appeal against the order of the deputy registrar (pursuant to which the remuneration basis had been changed) the judge held that there had been a failure to apply the guiding principles set out in the PDIP; he remitted the application to a registrar for reconsideration. He said, at [50]-[52]:

> "*50. The deputy registrar's reasoning in paras 56–57 of his judgment was that (1) if the bankruptcy was annulled, there would be no realisations and therefore no basis for* [the applicant trustee] *to be remunerated other than on a time basis, and (2) if the bankruptcy was not annulled, the time basis would still be the appropriate basis both because of the uncertainty as to future realisations and also because of the extent of the time necessarily and unavoidably already spent by* [the applicant] *and his staff and the uncertainty of further time to be spent by them.*
>
> *51. That reasoning does not adequately reflect the guiding principles.* ***The proper approach, in a case where the trustee applies to the court to change the basis of remuneration resolved by the creditors on the ground that it has ceased to be appropriate, is to begin by asking what has changed and was not foreseen and could not have been foreseen when the creditors made their decision.*** *In the present case, it was always known that the assets in the bankrupt estate were limited. According to* [the applicant's] *second witness statement,* [the original trustee] *took on the trusteeship at a time when the only asset was*

believed to be a life policy "allied" to a pension scheme with an unknown surrender value and which may have lapsed. It was subsequently discovered that the only assets in the bankruptcy were the two pension plans. Notwithstanding the limited assets the creditors resolved that the trustee be paid on the percentage basis. [The original trustee] *did not challenge that resolution and continued to act as trustee on that basis.* [The applicant trustee] *who had chaired the meeting at which the creditors resolved on the percentage basis of remuneration, took over the trusteeship on the same basis.*

52. At the date of the trustee report, it was known that the pension plans were assets of the bankrupt's estate, with an aggregate value of some £230,000 and that an aggregate tax free cash sum of over £56,000 was payable under the pension plans. On the basis of remuneration fixed by the creditors the tax free sum alone would generate some £8,000 in remuneration. The face value of the pension plans would generate considerably more. ***An important question, therefore, was not only whether the proper value of the work carried out by*** [the original and the successor trustees] ***prior to the date of trustee report exceeded the amount of remuneration recoverable in respect of realisation of the pension plans but whether the proper value of the work so far exceeded it as to make it an inappropriate basis for remuneration****. As I have said, the considerable increase in the bankruptcy fees and expenses after that date were in substance due to the time, cost and expense of litigating over the costs, expenses and remuneration at the date of the trustee's report*." (Emphasis added.)

43. At [53], the judge added, by reference to the principle set out in the Practice Direction:

"*53. The eighth guiding principle (timing of the application) is that the court will take into account whether the application should have been made earlier and if so the reasons for any delay in making it. This issue was not addressed by the deputy registrar. The remuneration application was not made until August 2012 but it is intended to reflect the time spent by* [the original and the successor trustees] *since early 1996. I was not referred to any evidence explaining the reason for the delay in applying for the change in the basis of remuneration.* ***The usual and proper course should be for the trustee to apply***

to the court for a change in the basis of remuneration as soon as it becomes clear that an application will be necessary in order to make the remuneration *(in the words of the Practice Direction)* ***fair, reasonable and commensurate*** *with the nature and extent of the work properly to be undertaken by the appointee.* ***In other words, the application should, so far as practicable, be prospective and not retrospective. Unless there is some good and proper reason to do otherwise, it is not appropriate for the trustee to wait until all the work is done and then apply to the court as a "fait accompli" for a retrospective change in the remuneration resolved by the creditors***." (Emphasis added.)

44. Salliss therefore supports the conclusions, first, that if a change of circumstance is relied upon - if it is said that a certain basis has "*ceased*" to be appropriate (having therefore, by implication, previously been appropriate) - the court will consider that which was and ought to have been known and foreseen at the time when the basis was first fixed, and second, that where a percentage basis has been fixed, it is not enough, or likely to be enough, merely to show that in the event, proper time costs have exceeded the remuneration previously fixed - the applicant will have to show that "*the proper value of the work so far exceeded* [remuneration as previously fixed] *as to make it an inappropriate basis for remuneration*". Outcomes resulting from variations within the boundaries of the allocated risks are unlikely to justify the court's intervention.

45. Finally, Salliss supports the principle that as far as possible, applications under (what is now) rule 18.24 should be prospective, not retrospective – the court (and of course, those being asked to pay) ought not to be presented with a *fait accompli*. In the context of remuneration fixed according to a percentage of realisations and/or distributions there is obvious force in that point. As in the present case, to change that basis retrospectively and/or to increase the agreed rate with retrospective effect, might threaten to deprive it in significant part of its very rationale; no longer does it expose both sides to risk, or allocate risks between them in respect of future events; from the perspective of the office-holder, the change may be such as to remove the element of risk completely. Furthermore, a retrospective change of this sort undermines the future certainty and transparency which were compensating advantages of the originally chosen basis, being the basis upon which the paying parties were entitled to (and in fact did) proceed; it

involves the parties and the court in the more complicated (and expensive) process of considering the value of work carried out (and recorded) on one basis, but by reference to a different basis, with different features.

46. As I have said, Part Six of the PDIP is concerned with applications relating to the remuneration of office-holders, including applications under rule 18.24.

47. The overall objective is stated at paragraph 21.1 of the PDIP: "*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.*" (Emphasis added.)

48. The stated objective reflects two important public policy objectives, both of which must be borne in mind: first, ensuring that office-holders' remuneration is not excessive and that what is charged does not exceed what is fair, reasonable, proportionate, substantiated by sufficient evidence of the work done and value of the services rendered; and second, the public interest in seeing that office-holders' duties are competently and properly carried out, which requires that office-holders expect to be fairly and reasonably remunerated for their services as such: see Brook v Reed [2012] 1 WLR 419, at [22], *per* David Richards J (as he then was).

49. Paragraph 21.2 of the PDIP sets out the guiding principles for such applications. The following principles are of particular relevance in the context of the present Applications:

    49.1. Justification: "*It is for the office-holder who seeks to be remunerated at a particular level and/or in a particular manner to justify their claim.*" (paragraph 21.2(1));

    49.2. The benefit of the doubt: "*if after having regard to the evidence and guiding principles there remains any doubt as to the appropriateness, fairness or reasonableness of the remuneration sought or to be fixed (whether arising from a lack of particularity as to the basis for and the nature of the office-holder's*

claim to remuneration or otherwise), such element of doubt should be resolved by the Court against the office-holder" (paragraph 21.2(2));

49.3. Professional Integrity: the Court should "*give weight to the fact*" that the Applicants are members of a regulated profession and, as such, are subject to rules and guidance as to professional conduct (paragraph 21.2(3));

49.4. The value of the service rendered: "*The remuneration … should reflect the value of the service rendered by the office-holder, not simply reimburse the office-holder in respect of time expended and cost incurred"* (paragraph 21.2(4));

49.5. Proportionality of information and remuneration: the nature and extent of the information provided on the application and the amount or basis of the remuneration to be fixed must each be proportionate to the nature, complexity and extent of the work to be completed (and, also in the case of the information provided, proportionate to the amount of the remuneration): (paragraphs 21.2(6) and (7));

49.6. Timing of application: "*The Court will take into account whether any application should have been made earlier and if so the reasons for any delay*" (paragraph 21.2(9).

50. In addition, where remuneration is sought on a percentage basis, the office-holder is required to provide a statement that to the best of his belief the percentage rates are similar to the percentage rates or other bases that are applied or have been applied in respect of other appointments of a similar nature: PDIP at paragraph 21.5(c). The provision of such a statement is mandatory, although not given in the present cases; Mr Cork's evidence was that it was not possible to give that information because of their idiosyncratic features; instead, as comparators, some reference was made to the remuneration that would have been chargeable under Schedule 11 to the IR 2016 (the default basis under rule 18.22, which would have produced remuneration at 6.87% of realisations in respect of HWL and 7.3% in respect of OMHL – and a "blended rate" of 7%) and in certain cases where the Official Receiver is the liquidator (and receives 15% of realisations).

51. In Brook, the Court of Appeal considered the predecessor to Part Six of the PDIP, namely the Practice Statement: The Fixing and Approval of the Remuneration of Appointees [2004] BCC 912, which was in very similar terms to the PDIP. David Richards J emphasised the need to show that work had been of benefit to the insolvent estate, and the fact that the benefit or value of the work done is more important than a mere assessment of the time spent. The same point was made in earlier cases which the judge cited: see [8], [16], [17], [18], [26], [30], [49] and [51]. As the judge said at [18], "*The aim, if the court is fixing the remuneration, is to reward the value of the services rendered by the office-holder. This does not necessarily equate to time spent…*". Further, value is "*the touchstone for an office-holder's remuneration*" and is not measured by "*a mechanical totting-up of hours multiplied by charge-out rates*" [51].

52. Ultimately, the court will consider all the relevant circumstances. In Re Tony Rowse NMC Ltd [1996] BCC196, Mr M.E. Mann QC (as he then was, and sitting as a deputy judge of the Chancery Division) considered an application made by the former voluntary liquidator of a company (under the predecessor of rule 18.24) that his remuneration was "*insufficient*" and ought to be increased (having been fixed in accordance with the rules, rather than by the liquidation committee, in accordance with the scale laid down for the official receiver). At [1996] BCC 196, 200E-F, he said:

> *In terms, r. 4.130 places the onus upon the liquidator applying for an increase of remuneration to explain why it is that the remuneration to which he is entitled under r. 4.127 is insufficient. Beyond that, all that the liquidator need do is to demonstrate to the court that the case is a proper one for an increase, i.e. that his existing level of remuneration really is insufficient. Clearly this must depend on all the circumstances, tested, doubtless, by some if not necessarily all of the criteria set out in r. 4.217(4) . In this case, there are practical difficulties in the way of demonstrating that it is a proper one for an increase because Mr Mills objects that the claim is in part referable to an imprudent course of conduct which necessarily predicated a replication of work in the compulsory winding up.*

53. Then, at page 202D-E, he said:

With regard to remuneration, I start from the premise that a voluntary liquidator who is able to show that his remuneration is insufficient according to objective standards ought to have it enhanced according to the same objective standards, and that in this regard the court has an unfettered discretion both as to basis and amount.

54. In assessing whether time spent on particular workstreams has been reasonable and proportionate, the court may need to carry out a detailed review of timesheets. In Simion v Brown [2007] B.P.I.R. 412, David Richards J was able to review specific items contained in timesheets provided by the applicant to assess whether time spent on certain workstreams had been excessive (see for example his comments at [31] and [34]). While I accept that the provision of timesheets is not mandatory under Part Six of the PDIP, it may be appropriate in particular cases, having regard to the requirement to provide schedules or other documents supporting the information regarding remuneration required by paragraph 21.4 where they are likely to assist the Court in considering the application, and bearing in mind that the burden lies on the office-holder to justify his claim.

A Summary of the Principles

55. In my judgment, the relevant principles are therefore as follows:

55.1. on an application under rule 18.24, the burden is on the office-holder to show insufficiency of rate or amount and/or inappropriateness of basis, and to justify the terms of the increase or change sought; any doubt will be resolved against the applicant office-holder;

55.2. the court will consider all the circumstances in order to decide whether a proper case for change has been established, and if so, what that change ought to comprise;

55.3. although it is not strictly necessary, on every application to change the basis of remuneration under rule 18.24, to satisfy the court that there has been (in the language of rule 18.29) a "*material and substantial change in the circumstances which were taken into account in fixing it*" – nonetheless, if, in substance, such an application were to be made by reference to the fact of such circumstances

having changed since the current basis was fixed, a relevant consideration - in some cases possibly even a decisive consideration - would be whether and the extent to which those changes were material and substantial;

55.4. in cases where remuneration has been fixed as a percentage of realisations and/or distributions (or as a fixed fee) the parties are exposed to, and are taken to have accepted, a certain degree of risk - that is part of the rationale of those bases; even though the court's approach to an application under rule 18.24 is not simply contractual (because office-holders' remuneration is fixed and controlled in a broader statutory context) it is only where the outcome goes beyond the scope of the risks thus treated as having been allocated that any change is likely to be justified – real weight should be attached to the agreed terms; the court will consider the extent to which the actual outcome was or was not foreseeable and probable (or foreseen) when the current basis was fixed; it will consider the circumstances of the original agreement or decision, and the context in which it was made, objectively ascertained, including the communications between the parties, and the information which they shared and/or to which they had or could have sought access;

55.5. in every case, the principles stated in the PDIP will be relevant, and the objective will be to ensure that the office-holder's remuneration is fair, reasonable, commensurate with the nature and extent of the work properly undertaken, and in particular, reflective of the value provided;

55.6. insofar as possible, applications under rule 18.24 ought to be prospective rather than retrospective; that is an important factor in all cases, but perhaps all the more so where the current basis is by reference to a percentage of realisations or a fixed sum; the parties are entitled to proceed by reference to the extant terms.

56. It follows that I do not accept Ms Dewar's submission that the scope of that which was, in the present case, accommodated within the current basis, turns on that which the office-holders themselves, privately and subjectively (even if reasonably) allowed for; it is not a question of whether or not it was "reasonable" or "unreasonable" to assume certain risks or hope for a certain outcome (the reasonableness of the office-holders'

proposal was not in issue); it is the scope of the risks allocated that matters, which depends on the circumstances surrounding the agreement, the extent to which future events were foreseeable and/or foreseen, and on the parties' communicated positions; to measure sufficiency of remuneration by reference to the office-holders' uncommunicated hopes, expectations or intentions would not achieve fairness to the decision-making paying parties – they are entitled to rely on the information which was available to them when they make their decisions, and particularly so where, as in the present case, the decision to engage the office-holders was a commercial one.

57. Further, I do not accept the submission that the court could, in the present case, determine the Applications simply by reference to the apparent temporal dimensions of the "overall workload" in contrast with that which was said (privately) to have been accommodated within the agreed terms – the submission explained at paragraph [16] above. Amongst other things, that approach would wholly fail to meet the crucial requirement that remuneration rewards value, not just the time or amount of work in fact undertaken, regardless of worth, merit or necessity. The court cannot simply award an increase without any understanding of what it is supposed to reward.

The Terms of the Current Remuneration Basis

58. The current basis was fixed, in respect of HWL, at the general meeting on 22 February 2019, and in respect of OMHL, by a creditors' decision in correspondence, made on 2 May 2019. In each case, before each decision was taken, the Applicants were of course free to propose a different basis, or indeed, not to act at all.

59. It was plain from the evidence that well before 22 February 2019, Mr Cork knew that the Penfolds' relationship, both commercial and personal, was extremely troubled.

60. In a commercial context, Mr Cork has known the Penfolds for some time; between February 2015 and February 2016, he acted (with Ms Milner) as one of the two liquidators in the members' voluntary liquidation of Penfold Motors Limited ("**PML**") of which the brothers were the sole directors and shareholders.

61. On 19 February 2016, at the conclusion of its liquidation, PML was dissolved. Subsequently, as I have said, the relationship between the Penfolds broke down irretrievably - according to John, it was "*broken beyond repair*"; unfair prejudice

proceedings were commenced by both, and were settled by the Tomlin Order of 5 December 2019.

62. At about that time, before HWL went into liquidation, Mr Cork appears to have met Richard twice, on 20 November 2018 and 16 January 2019, and (according to Mr Cork's email of 4 April 2019 to the Penfolds' solicitors, although this was disputed by John) to have spoken to John twice, on 29 January 2019 and 12 February 2019. Even on his own evidence, he knew that they were and had been "*locked in litigation about HWL*", and that there were still "*significant tensions*".

63. In that context, some days before the relevant Meetings, on 18 February 2019, Mr Cork and Ms Milner circulated draft documentation (including a draft Engagement Letter dated 15 February 2019) which included provision for their remuneration to be fixed at 5% of gross asset realisations plus VAT and disbursements (in other words, the current basis as subsequently agreed and fixed).

64. Emails exchanged subsequently, but before the appointment on 22 February 2019, showed that Mr Cork knew that relations between the brothers were very poor indeed: he knew that it would even cause problems were it to be necessary for Richard and John to be in the same room as each other, which meant that alternative arrangements had to be made, and he was aware of "*deadlock*" in respect of OMHL.

65. Thus, by his email of 21 February 2019, in respect of the meetings planned for the following day, Mr Cork wrote to John's solicitor:

> "*Given the circumstances we would suggest that the board meetings are held via telephone conference call at our offices …. We would request that John and Richard attend our offices at this time. We will then arrange for them to dial into the call from separate meeting rooms …. I will then read out the proposed minutes, as previously circulated which John and Richard will agree. The board minutes will then be signed by the directors immediately thereafter at our offices.*

Following the board meetings each brother will be asked to separately swear the declaration of solvency for [HWL] *in the presence of an independent solicitor ….*"

66. In the event, although John expressed a willingness at least to be in the same room as his brother, Richard refused, and so the Meetings of 22 February 2019 took place with Richard and John in separate rooms. The Minutes of the Board Meeting recorded, amongst other things, that John had read out the following statement:

> "*In consideration of the three options made available to me on conducting this board meeting as a result of notification on 21st February 2019 at 19:34 of a 'medical element' being introduced by a fellow director at the last hour, which one option being this meeting could be postponed until a full recovery is made, I have decided in the best interest of the company to attend this meeting.*
>
> *I do not believe as a director of the company that holding a board meeting in this manner is in the best interest of the company or its shareholders as in my opinion, it denies the directors joint responsibility to question and negotiate all costs that the company is presented with. It is my view that this opportunity has been denied by my fellow director's behaviour by such a late notification of his health condition. Furthermore, if there is a 'medical element' of such gravity that necessitates the board meeting being held in such a manner, it raises the question of the board's H&S responsibilities and whether this director is of a fit and well condition and of a sound state of mind to continue his position as a director.*
>
> *In summation, I strongly object to this extremely irregular and inappropriate manner in which this board meeting being conducted and consider it to be prejudicial to the whole process. I respectfully request that this statement be noted and included in the minutes of this meeting*."

67. The Minutes continued:

> "*There was a general discussion as to the level of proposed liquidators' remuneration between John Penfold and Stephen Cork. John Penfold was under*

the impression that the liquidators' remuneration would depend upon the strategy to be adopted by the liquidators and would flex accordingly. Stephen Cork stated that he considered that it was appropriate for the liquidators to be remunerated on a percentage basis. The liquidators would consult with the shareholders following which the liquidators would adopt a strategy which would result in the best level of recoveries that could be achieved in the circumstances."

"*John Penfold, Joint Chair, addressed the following questions to Richard Penfold, Joint Chair:*

- *Did he consider that the option completing development site owned by Old Manor Homes Limited to be realistic?*
    - *Richard Penfold responded to say that he would be willing to look at any and all options.*
- *Where did the option come from in respect of completing the development?*
    - *Stephen Cork responded that this idea had come from Cork Gully LLP.*

John Penfold, Joint Chair, requested that the liquidators should take into account the following issues prior to making a distribution to the shareholders:

- *An apparent loan to Richard Penfold of £115,000;*
- *Further £85,000 loan to Richard Penfold;*
- *Richard Penfold's expenses;*
- *Interest would need to be charged on the above-mentioned loans;*
- *Payment for services rendered by John Penfold to the Company would need to be assessed as part of the liquidation;*

John Penfold stated that he was prepared to make an offer to settle

the dispute between them and that he was hoping this might lead to a final resolution and some future relationship.

There was no response received by Richard Penfold.

The Directors agreed that given the circumstances and the deadlock between them it was advisable to wind up the Company. After the discussion detailed above, it was resolved that the winding up should proceed."

68. Accordingly, although Richard's solicitor (Ms Christina Dianellou of Pittalis LLP) had previously sent an email to Mr Cork (copied to John's solicitor, Mr Clive Ince, of Goodman Derick LLP) on 13 February 2019, asking him (and Ms Milner) to act as liquidators in the "*Friendly Liquidation*" (as it was referenced in the subject line of the email) of HWL, it was, or ought to have been obvious that it was "*friendly*" only (if at all) in the rather limited sense that it would be begin by agreement between the company's owners, not that there was no relevant hostility or disagreement between them otherwise. John's evidence was that it would have been "*completely unrealistic for anyone to assume that the liquidation would be "friendly", or at any rate would be simple and straightforward"*; he said that *"from the very beginning of the MVL, therefore, (and even before then) the* [Liquidators] *knew that there was likely to be a significant friction at the very least, and that the MVL would not be straightforward*." That evidence was consistent with the documents and circumstances, and was credible – a members' voluntary liquidation in which the two members were unable even to be together in the same room, was unlikely to be straightforward.

69. Moreover, there were references at the Meetings to the prospect of disagreement in respect of the development of 36 OR, owned by OMHL, and to various claims that John intended to raise for determination before a final distribution; there was an opportunity to discuss those matters.

70. In those circumstances, before they were appointed as Liquidators of HWL (and of course before they were subsequently appointed as Administrators of OMHL) the office-holders' evidence was that they considered but consciously rejected the possibility of charging a higher percentage rate, or of fixing remuneration on the basis of time properly spent. In his first statement in respect of HWL, Mr Cork said:

37 …. The Board Meeting was long (lasting around three hours) and, as summarised in the minutes, a number of different issues were raised. Although I was aware prior to the meeting that significant tensions remained between the brothers, the Board Meeting was more difficult than I had anticipated. Although both brothers attended, [Richard] *declined to be in the same room as* [John] *with a result the each sat in different rooms with everyone else shuttling between them. As the Minutes record,* [John] *started the meeting by reading out a statement criticising his brother's conduct in relation to the meeting and questioning his mental capacity to be a director. The Minutes also record* [John's] *request that the liquidators take certain sums (loans, expenses and fees due for services rendered) into account prior to making any distribution to the shareholders.*

38. The state of relations between [the Penfolds] *caused Joanne Milner and me some concern about how "friendly" this liquidation would really be. It seemed to us that there was a risk that these hostilities might "spill over" into the liquidation and I did briefly consider during the course of the meeting whether we should seek a last-minute upwards revision of the 5% basis for our remuneration (or attempt to switch to remuneration on the basis of time properly spent) in case the poor state of the* [Penfolds'] *relationship ended up increasing the workload in the MVL.*

39. However, in the end, we did not consider that anything that we had observed at the Board Meeting warranted a last-minute adjustment to the fee basis we had worked up and agreed in principle in advance of the Board Meeting. Although there was clearly significant antipathy between [the Penfolds] - *which had the potential to make the MVL a bit more complicated - at that stage we still expected that, whatever the state of relations between them, they would each cooperate with us and assist the liquidation process in order to maximise recoveries, given it was in their common interest to do so. In this respect, we drew comfort from the productive working relationship with and cooperation we had enjoyed from each of them in the earlier PML MVL; and the fact that this MVL was borne out of an agreement made between the brothers*

(with the benefit of legal advice) that a solvent liquidation was the best mechanism for bringing their business relationship to an end.

40. Although we were troubled by the obvious hostility, so far as I can recall, the various issues raised by [John] *at the Board Meeting …. did not cause us any particular concern at that stage. We understood that these were matters of accounting that we would need to look at before making a final distribution, but assumed that this could be done in a reasonably straightforward way by reference to the Company's books and records. We did not at the time appreciate that what* [John] *was referring to here was in fact a number of complex historic disputes between* [the Penfolds], *which he would attempt to re-open through the proof of debt and appeals processes in such a way as to generate very significant additional work, costs and complexities*.

71. In those circumstances, they nonetheless chose to agree a fixed rate of 5%, because it offered "*simplicity, transparency and certainty for all concerned*"; because "*given the poor state of relations between the members, we were concerned that a time properly spent basis carried with it a greater risk that disputes would arise between the members in relation to our fees*"; and because it offered the members a "*guarantee that a certain percentage of realisations (in this case 95%) would (after relevant deductions) be available for distribution*".

72. John's evidence was that at the Board Meeting, "*Mr Cork refused to negotiate the percentage rate, and so I felt that we had to accept 5% as the rate for remuneration, even I took the view at the time that this was too high*."

73. The outcome was therefore the product of an active negotiation - indeed, Mr Cork said that the decision to fix remuneration at the proposed rate "*essentially reflects a commercial agreement between ourselves and the* [Penfolds]" albeit an agreement, he said, "*based on the nature of the liquidation then envisaged*" by the office-holders.

74. The terms of that commercial agreement in respect of HWL were contained in a signed Letter of Engagement dated 22 February 2019. Paragraphs 3.1 and 3.2 of that letter provided:

3.1 Our fees will be fixed at a rate of 5% percent on all realisations, to be paid as and when realisations are made. Should we cease to act for any reason the fees will become immediately payable based upon our assessment of the value of the remaining realisations. By way of comparison the Official Receiver would charge a rate of 15% on all realisations for the work undertaken as a liquidator. The rate is fixed by the Insolvency Proceedings (Fees) Order 2016.

3.2 Our fixed rate is based on the Company being solvent and the liquidation being completed within 12 months of the commencement of winding up. If, however, as a result of matters coming to light during the liquidation, additional work is required that is currently not envisaged, and/or the liquidation goes beyond 12 months, then we will consult with you to ask the members to increase the fixed rate to reflect the additional work undertaken.

75. As I have said, remuneration in respect of OMHL was agreed subsequently, on 2 May 2019, on the same terms (5% of all realisations) save that there was no reference to the possibility of consultation or increase in the event of the matter lasting longer than 12 months.

The Evidence in Relation to HWL

76. In relation to HWL, the scheme of Mr Cork's evidence was that:

76.1. at the time when the current 5% basis was "*identified ... as a suitable one*" (which as I have said, appears to have been on or before 15 February 2019), the office-holders "*would have been relying on the information then available to* [them]" in respect of the scale and amount of both anticipated work and realisations;

76.2. in terms of "*anticipated work*", the liquidation was expected to be "*friendly*" - in the nature of a property receivership in which "*most*" of the work would relate to the sale of the properties, and there would be a "*straightforward 50-50 distribution*"; that was reflected in the Engagement Letter which provided that the proposed rate was based on the liquidation being completed within 12 months; when that rate was fixed, Mr Cork "*expected the total chargeable "time cost" value of the work*" required, would be about £400,000;

76.3. it was anticipated that the required work would comprise:

76.3.1. work in relation to routine administration and planning of the kind required in any solvent liquidation, which "*to give the court some sense of the scale of what we would have expected … in an MVL of this type*" would usually (by reference to time), be expected to cost in the order of £12,000 in the first year;

76.3.2. work in relation to the realisation of the properties, such as liaising with agents and surveyors, overseeing the management of the properties and "*securing 152 LHR (which was empty)*" pending sale, and marketing and selling the properties; although it was expected that sales would be achieved fairly quickly and efficiently, it was "*obviously sensible*" to assume that there may be some additional costs and workstreams, such as in relation to the planning application pending in respect of 152 LHR, interaction with tenants and light maintenance work – but "*overall, our understanding was that very limited work would be required before the Properties could be put on the market*"; on the basis that he expected a total time spent cost of about £400,000, Mr Cork's evidence was that that he would have expected asset realisations costs on that basis to have been somewhere between £350,000 and £375,000;

76.3.3. although he would "*not normally expect to have to spend any time investigating former officers in an MVL*" the office-holders "*would have allowed for the possibility that some small amount of work might be required … given historic issues between the* [Penfolds] *and, in particular, the points raised by* [John]" at the meeting on 22 February 2019; he would not have expected that work to generate time costs of more than about £5,000;

76.3.4. work in relation to creditors was expected to be straightforward and generate time costs of no more than about £3,000;

76.3.5. a degree of engagement with the Penfolds was expected, and "*in an MVL of this size*" would ordinarily generate time costs of about £5,000 (being less than 10 hours work); in respect of HWL – given their "*obviously fraught business relationship*" Mr Cork thought he would have allowed for more, but he would not have expected its cost to exceed about £10,000;

76.4. the figures explained above in respect of each such anticipated workstream, "*were not contemporaneous figures. At the time of agreeing the Current Basis, we did not work up a detailed pre-estimate of our likely time-costs in relation to the work of realising the Company's assets, given that this was an MVL and we were seeking remuneration based on a percentage of realisations*"; accordingly, although Mr Cork was working on the basis of total time-based costs in the sum of about £400,000 (albeit uncommunicated to the Penfolds) the sums in relation to specific work areas (by reference to "*roughly what our workload expectations would have been in relation to each area*") were the product of an admittedly "*retrospective assessment*" based on his (subjectively held) general expectations at the time, in relation to the varieties of work that would be required;

76.5. as to HWL's properties, Mr Cork said that both John and Richard, in advance of the liquidation, had expressed the view that they were worth something in the order of £5 million (and that with 36 OR, owned by OMHL, the properties were worth "*upwards of £8 million*" – in fact, something in the order of £10 million); in respect of the value of the companies' properties his evidence was that on the morning of the Meetings of 22 February 2019, he had been sent (but had not read) the "**RP Valuation Report**" - a report recently obtained by Richard which contained open market valuations as at 15 November 2018; he said that Richard had told him that his (Richard's) assessment "*was supported by the RP Valuation Report*"; the brothers' views were consistent with the Tomlin Order (which provided for a share sale in return for £4.4 million) and the RP Valuation Report (which stated a combined property value, across both companies, of £10.155 million);

76.6. in respect of OMHL's financial position, the office-holders had "*virtually no documentary information*", and there were no recent approved accounts

(because of disagreements between the Penfolds); there was therefore uncertainty about the value of HWL's interest in OMHL; nonetheless, "*when it came to estimating the likely gross asset realisations in HWL for the purposes of setting our remuneration basis, we essentially took the valuations in the RP Valuation report for the properties and then estimated around a further £3 - £4 million for HWL's interest in OMH, giving total realisations of around £7.8-£8.8 million*", and remuneration (in respect of HWL alone) "*somewhere between*" £390,000 and £440,000; of course, in relation to OMHL, the office-holders were also to receive 5% of the realisations, before charging a further 5% in respect of HWL's ownership of OMHL (which in itself, once 36 OR was sold, would presumably have cost very little to realise);

76.7. in fact, in respect of HWL, the estimated realisations were reasonably accurate – the total was just over £7.8 million, of which 5% is £395,300.22;

76.8. however, in the event, and taking a "*careful and conservative approach*", Mr Cork's evidence was that the "*work properly done*", on the basis of time spent, cost at least £715,066.56, primarily as a result of unforeseen workstreams, and unforeseen factors, falling broadly within two classes – first, issues relating to the management and sale of the properties, and second, issues relating to the Penfolds themselves (albeit not as a result of their failure to co-operate, which was not an allegation made against them - on the contrary, said Mr Cork, "*we had the benefit of significant assistance from both members in terms of providing us with information, documents, insights and opinions (although the latter were generally conflicting)*");

76.9. that work was said to comprise 160.9 hours in relation to administration and planning, which on a time basis cost £64,420.80; 868.766 hours in relation to the realisation of assets, which on a time basis cost £426,042.76; 234.55 hours in relation to investigations, which on a time basis cost £139,325.40; 6.7 hours in relation to unsecured creditors which on a time basis cost £3,379; and 148.9 hours in relation to the Penfolds, which on a time basis cost £81,898.50;

76.10. Mr Cork then sought to apportion those costs, falling within each category, to work said to have been unanticipated, whether because "*wholly*" unanticipated,

or unanticipated by virtue of its scale if not nature; by that process, and by comparison with the retrospectively generated figures in respect of each class of work, he derived sums representing the amount by which work properly done exceeded that for which he said there had or would have been an allowance, being £52,000 in respect of administration and planning, £56,000 in respect of the realisation of properties, £134,325.40 in respect of investigations, and £71,898.50 in respect of shareholder engagement not otherwise dealt with, such that about £315,000 of the proper costs on a time basis was, so he said, attributable to unanticipated work;

76.11. the remuneration increase sought was therefore from £395,300.22 as currently calculated, to £711,540.39 calculated as 9.3% of realisations (£316,240) against a "*bare minimum*" of at least £715,066.46 that would have been chargeable on a time spent basis.

77. In respect of both Applications, the Applicants refused John's requests for time-sheets, because, they said, it would have been disproportionate to produce them and that given the state of relations between the members, and the approach taken by John, in particular, to the processes generally, provision of those documents was likely to generate significant further disputes, workload and cost.

78. As to the "*huge amount of work*" that would have been required to produce them, Mr Cork said, amongst other things, that "*we have kept careful and appropriate internal records of work done but, given that this was an MVL in respect of which we were acting on a percentage recoveries basis, we did not incur time and cost on a contemporaneous basis doing the work that would have been required to adapt them for external circulation to members/the Court - such as revising line entries so that they would make sense to external parties …*".

The Circumstances Surrounding the Agreement of Remuneration in respect of HWL

79. On the evidence described above:

79.1. the office-holders themselves thought that their total time based costs in respect of HWL would probably be about £400,000, based on their broad expectations

about the probable nature and scale of the work that would be required, and which they hoped not to have to exceed; however, there was no contemporaneous exercise of assessing or predicting the cost or extent of that which might be required in respect of each class of work, and no written record of that or any other expectation, and it was not shared with the Penfolds;

79.2. similarly - as to the other element of the calculation - they seem to have had a broad, but undetailed expectation of the value of the company's property, and thus of the realisations that might be hoped for, based on various discussions with the Penfolds and the terms of the Tomlin Order;

79.3. on that basis, they seem to have thought, anticipated or perhaps more accurately, reasonably hoped, that their remuneration would be in the sum of about £390,000-£440,000, based on realisations of about £7,800,000-£8,800,000;

79.4. inevitably however, they must have understood that their remuneration might transpire to be significantly more or less (in return for time spent) both because, (a) there was a chance that more or less work would be required, at a greater or lesser cost; and (b) the amount of realisations was subject to serious uncertainty, both because of uncertainty regarding the properties' values, and because of uncertainties regarding OMHL's financial state (and therefore the value of HWL's ownership of its shares);

79.5. 5% was not the product of a specific assessment of the time that would need to be spent; in his evidence, Mr Cork set out an allocation of "*roughly what our workload expectations would have been in relation to each area*", but stated that the Liquidators "*did not work up a detailed pre estimate of our likely time costs*", given that they were seeking remuneration on a percentage value basis;

79.6. the office-holders did not communicate to the Penfolds the basis of their 5% proposal - how it had been arrived at, or to what extent it was hoped to profit from it; it was simply proposed, following a private deliberation and then agreed, following a negotiation;

79.7. the office-holders knew that relations between the Penfolds were extremely fractious, and they knew and considered the possibility of that hostility affecting the conduct of the liquidation; the liquidation was "*friendly*" only in the irrelevant sense of having been commenced by agreement; they were also aware of the various matters raised by the Penfolds (in particular, John) at the Meeting on 22 February 2019, in relation to possible claims and in relation to the development of OMHL's property; as a result, they consciously considered whether their interests would be better served by agreement of remuneration on a different basis, but following a discussion at the Meeting on 22 February 2019, ultimately decided, for commercial reasons, and in the interests of clarity, certainty and transparency, to agree to act on the basis that had been proposed several days beforehand, and agreed in principle;

79.8. accordingly, they had an idea of time costs as they would be, were the liquidation to be reasonably straightforward, and then they hoped that it would indeed be reasonably straightforward and/or that the realisations would be such as to "*overcompensate*" them, whilst nonetheless being aware that neither of those things might happen;

79.9. in fact, on the present basis, the amount of their remuneration will be £395,300.22, which is very much like the anticipated sum: essentially, the Applicants would receive the sum they bargained for, albeit in return for more work than they had hoped to have to undertake in order to earn it.

The Evidence in Relation to OMHL

80. In relation to OMHL, the scheme of Mr Cork's evidence was that:

80.1. again, at the time when the current basis of remuneration was proposed, it was anticipated that this would be a "*straightforward "friendly" administration with the only significant work stream being the sale of 36 OR*", which "*we would not have anticipated … would take longer than 12 months*";

80.2. as such, the officeholders would have expected to carry out routine administration planning; valuing, managing and realising 36 OR; liaising with

secured creditors; and paying a single distribution to the unsecured creditor and HWL (as its only member);

80.3. there was an allowance made (within the office-holders' own deliberations) for a degree of unforeseen complexity;

80.4. whilst "*we did not carry out any kind of detailed pre-estimate of our likely time costs .... I would have allowed for the possibility of time costs reaching up to £260,000 to £270,000. Specifically, looking at matters somewhat in the reverse in this case (compared to HWL), I would have been satisfied that using the same 5% basis as the HWL would - based on the level of assets realisations suggested by the RP Valuation Report and the value ascribed to 36 OR by* [John] *in the Consent Order – result in remuneration that was broadly in line with our expected time costs*";

80.5. that the "*main factor*" causing the insufficiency of remuneration in respect of OMHL was not that (overall) the work required was more time-consuming and complex than had been anticipated, but that 36 OR transpired to be worth significantly less than had been expected, "*compounded by the fact that the workload exceeded (albeit by a relatively small margin) even the ... generous estimates of the work that would be required*";

80.6. that both the administration and the CVL required a significant amount of unforeseen work, in particular in respect of: (a) issues relating to the Penfolds, both as creditors and directors; (b) the management and sale of 36 OR; and (c) tax issues;

80.7. the total time calculated cost of work properly done in the administration and the CVL was £263,646.10, based on 559.65 hours at an average hourly rate of £471.09 (likely to rise, it was said, to £275,646 once certain outstanding work had been completed);

80.8. having said that, "*but for 36 OR proving to be worth significantly less than the RP Valuation Report suggested, this slight overrun would not have been sufficient for us to seek additional remuneration. However, the effect of the work*

done being right at the top end in terms of time and complexity (and, ultimately, value) meant that the lower-than-expected realisations resulted in remuneration … significantly below what would be fairer and reasonable compensation for the work done"; presumably therefore, the need for additional, "*unanticipated*" work, must have been compensated for by other "*anticipated*" work having transpired to be unnecessary: that was in the nature of the arrangement;

80.9. the cost of the unanticipated work in relation to the claim made by John (on a time basis) was about £26,147; in relation to the realisation of assets, attributable to the time required to deal with the directors, the cost was around £48,155; and in relation to taxation issues was around £21,215; accordingly, at least £74,518 properly incurred time costs were attributable to unanticipated work, leaving no "*buffer*" against the lower than expected realisations from the sale of 36 OR;

80.10. 36 OR was sold for £4,150,000 (or at least, that was the sum received by the office-holders) on 20 December 2019; the RP Valuation Report, which was available before the current basis was fixed but not before it was proposed, stated that its open market value was £5.35 million. Had it sold for that sum, remuneration on the current basis would have been (5% of £5.35 million) £267,500;

80.11. on the current basis, the joint liquidators were entitled to remuneration in the sum of £207,685.70, and on the proposed basis (6.3% of realisations) would be entitled to £261,683.99, an increase of £53,998.28. The proposed basis was reverse engineered, to produce a number similar to that (£263,646.10) which would have been produced by a calculation of remuneration on a time properly spent basis (and in fact, similar to that which would have been produced had the property sold at the price stated in the RP Valuation Report).

Additional Circumstances Surrounding the Agreement of Remuneration in respect of OMHL

81. Remuneration in respect of OMHL was agreed more than 2 months after the Meetings of 22 February 2019. In the meantime, the office-holders had seen and had time in which to consider the RP Valuation Report, and indeed, to conduct any other preliminary

investigations they might have thought to be useful. It was not said that their understanding of the surrounding circumstances had otherwise materially changed.

82. As I have said, Mr Cork's evidence was that no detailed pre-estimate of likely time costs was made, but that the office-holders "*would have allowed for the possibility of time costs reaching up to £260,000 to £270,000*". Although it was not entirely clear, I understood Mr Cork's (somewhat obscure) evidence that "*looking at matters somewhat in the reverse in this case (compared to HWL), I would have been satisfied that using the same 5% basis as in HWL would - based on the level of assets realisations suggested by the RP Valuation Report and the value ascribed to 36 OR by* [John] *in the Consent Order – result in remuneration that was broadly in line with our expected time costs*" to mean that having proposed 5% in relation to OMHL, and having had in mind that time based costs might be about £260,000-£270,000, he "*would have been satisfied*" (whatever precisely that might mean about what in fact he thought at the time) that those costs would be met, were there to be a sale at the sum stated in the RP Valuation Report.

83. The process thus described was certainly to some extent an act of retrospective imagination; it appeared not in fact to have entailed, at the time, any particular enquiry into (or conclusions about) the specific work that might be required; essentially, it was that Mr Cork had in mind an amount which the process might cost by reference to time (about £260-270,000, albeit not based on specific items of anticipated work) and which he hoped to recover - or exceed - by means of a sale of 36 OR at or above a certain price. Implicit in that "*hope*" was that he assumed a risk of loss, but also secured the possibility of greater profit or reward. None of that was shared with the Penfolds, or agreed with them.

84. In those circumstances, it appears that the real basis of the office-holders' complaint that they were under-remunerated in respect of OMHL was not that the aggregate workload exceeded that which was anticipated or allowed for, or - crucially - that therefore their time spent costs were to any degree exceptional (they were not – they were almost exactly what Mr Cork said he "*would have allowed for*"; almost exactly the "number" he had in mind) but that in the event, 36 OR sold for less than it might otherwise have done. However, the sale of 36 OR for £4,150,000 was not a result of some change of circumstance, or other unexpected event – it was simply that it yielded that amount rather than more: it was apparently the outcome of the ordinary operation of the market, an

ordinary fluctuation - no doubt unwelcome from Mr Cork's perspective, but not beyond or outside that which might have been foreseen or predicted.

The Nature and Timing of the Applications

85. In my judgment, both Applications were in substance for a change of remuneration basis, and ought therefore to be treated and considered as such, albeit principally advanced in terms of applications for an increase in the rate of remuneration.

86. My reasons for that conclusion are that the proposed increased rates were a product of reverse engineering - explicitly advanced as nothing more than a simple mathematical means of achieving remuneration in sums in fact calculated and said to have been justified on the basis of time actually spent: as Mr Cork said (in relation to HWL, but the point was true in respect of OMHL) "*this application essentially relates to work done, as a percentage of known recoveries*", so that it was "*not a coincidence*" that the amount calculated by reference to time spent was substantially the same as the amount calculated by reference to the proposed increased rates. Indeed, one of the "alternative" claims – for payment of an additional set amount in the sum of the costs calculated by reference to time spent, underlined that conclusion. It follows from what is said above at paragraph [55], that it is important to consider whether there has been a "*material and substantial*" change in the relevant circumstances since the current basis was fixed.

87. In any event, there were fundamental issues in respect of the timing of the Applications.

87.1. The remuneration bases were agreed on 22 February 2019 and 2 May 2019. The first time the Penfolds were told that the office-holders wanted to increase the amount of their remuneration - albeit briefly, and without an explanation of how much or on what basis - was by email sent on 11 August 2020: "*You both agreed at the outset that if matters became protracted, which they have we could increase our fees (signed engagement letter para 3.2). It is therefore our intention to increase our fees as per this agreement.*" That comment was a reference to the Letter of Engagement explained above at paragraph [74]. In fact, that term was agreed only in respect of HWL, and in any event, did not entitle the office-holders simply to increase their remuneration, without discussion or further agreement. It was a consultation right, but no more than that, and in the event, it was not (certainly not at that point) pursued.

87.2. The amount of the proposed increase was not communicated until Cork Gully's letter of 27 January 2021, which was sent after most of the work in the insolvencies had been completed. Even then, the Applications were not issued until well over two years later, on 31 July 2023. As I have explained, three of the companies' properties were sold between 16 October 2019 and 27 January 2020, and 152 LHR was sold on 10 August 2020; John had submitted a proof of debt in the liquidation of HWL in May 2019. It must have been apparent to the office-holders well before January 2021 (and indeed, well before 11 August 2020) that they would be engaged in work which they have described as "*unanticipated*" (even if that work continued or expanded after the moment at which it ought first to have been appreciated).

87.3. In his evidence, Mr Cork explained the passage of time by reference to the "*nature and scale of the process*" (of making the Applications) as well as to the Applicants' decision to instruct counsel directly (rather than through solicitors) and by the departure of certain key personnel from the firm, in particular, Mr Smail, Mr Parsons and Mr Habgood. He said that in any event, the sums now sought had been calculated without reference either to events attributable to delay and the passage of time (such as enquiries in the meantime from the Penfolds) or to events which caused the delay (such as the cost of handover between different personnel). Nonetheless, whilst I acknowledge that the Applications have caused some substantial work, I am not persuaded that the reasons given satisfactorily explained all of the time that has passed, which was, as I have said, some three years between the point first being raised in correspondence, and the Applications being made (and a good deal longer since the point at which the fact of "unanticipated" work would have become apparent).

87.4. I have explained that before the original basis was fixed in 2019, the office-holders considered whether to propose and seek to agree to remuneration on a time spent basis, but that they were concerned that remuneration on that basis would carry a greater risk of dispute in relation to fees in the course of the liquidation, so that in the event they agreed a certain percentage figure to be paid, to avoid such disputes (and despite John's initial opposition to that basis,

and his apparent preference at that time for remuneration to be paid according to time properly spent).

87.5. However, the Applications seek a change to that basis, retrospectively, the work having been done, and it being too late to limit it, or complain about its content: by agreement of a simple rate, the office-holders "bought" the avoidance of disputes, but now seek the benefit of that which they gave up (remuneration by reference to time) as its price.

88. As I have said, different bases of remuneration have different features, which potentially affect parties' behaviour in different ways. A percentage realisations basis provides for future certainty, but exposes both sides to a degree of future risk - its prospectivity is an important feature; a time spent basis is more open-ended, and exposes the members/creditors to a greater degree of risk than the office-holders (albeit they themselves are exposed to a different risk - the risk of dispute). In a case where a realisation percentage was agreed, and on that basis the work has been done and completed, there is therefore potential for real unfairness if remuneration is retrospectively assessed on a far more generous time-spent basis.

89. For example, had the basis been fixed at the outset by reference to time (to be) spent, the Penfolds might have conducted themselves quite differently; they might even have instructed another firm altogether - a fee proposal is made by practitioners for good commercial reasons, including no doubt its relationship to the broader competitive market in which they operate and seek to win business for themselves.

90. Moreover, the office-holders might have conducted themselves and the insolvencies differently. For example, Mr Gentleman submitted that there had been failures to control costs – in respect of HWL, of 1,419.82 hours of work, 301.5 hours were carried out by Mr Cork (30 years' experience, average hourly rate £644.26) and 822.9 hours were carried out by Mr Smail (15 years' experience, average hourly rate £522.10); in respect of OMHL, of 559 hours given in the administration and CVL, 99.2 hours were given by Mr Cork (average hourly rate £624.25) and 302.8 hours by Mr Smail (average hourly rate £504.86). So it was that Mr Cork and Mr Smail – both senior and expensive – between them carried out 79% of the work done (by time) in respect of HWL and 72% in respect of OMHL. Had it been anticipated that the value of time given would be the

basis of remuneration, the court cannot assume that the processes would not have unfolded differently.

91. Moreover, as Mr Cork himself expressly said in his evidence, the companies engaged the office-holders on a realisations percentage basis, and thus it was that on that basis the insolvencies were in fact conducted, that remuneration has been drawn, and that there were discussions with the Penfolds concerning the possibility of increased remuneration. It was for those reasons, he said, that the Applications had (purportedly) been made on the basis of an increase in rate, rather than a change of basis. However, whilst his evidence therefore identified certain grounds on which positively to conclude that a change of basis would possibly be inappropriate and unfair, that was what, in the end, the Applications themselves, in my judgment, in substance sought.

92. The Applicants' proposed change – not only of one basis to another, but of one basis to another, retrospectively - would deprive the Penfolds of the benefits of the basis and terms originally agreed. It was no answer to that problem that the sums sought were not calculated by reference to the period of delay. Inevitably, given that their substance was the same in either case, the same was true even if the Applications were treated as having been made for an increase in the rate of remuneration, but on an unchanged basis, because the orders sought would nonetheless deprive the Penfolds of the certainty and future risk allocation entailed by the original basis.

93. The PDIP states at paragraph 21.2(9) that delay is a factor which the court should take into account. As was said in Salliss: "*the application should, so far as practicable, be prospective and not retrospective. Unless there is some good and proper reason to do otherwise, it is not appropriate for the trustee to wait until all the work is done and then apply to the court as a "fait accompli" for a retrospective change in the remuneration resolved by the creditors.*"

94. Naturally, the weight to be attached to be that factor, amongst others, will depend on all the circumstances. In the present case, given the nature of the proposed change (in effect, from a realisations percentage basis to a time spent basis) and given the stage at which the Applications were made (after the work had been substantially completed), and given also the length of time that has passed, unsatisfactorily unexplained, it is a factor to which, in my judgment, considerable weight should be attached.

The Allegedly Unanticipated Work in Relation to HWL

95. However approached, as I have said, and as the PDIP and the authorities make clear, remuneration must ultimately reward the "value" of that which was rendered. In the present case, in substance, the office-holders sought additional sums by reference to time spent doing certain classes of work (which they described as having been unanticipated). As one of the factors centrally relevant to these Applications, it was therefore necessary to consider carefully the value of that work to the estates.

96. The Applicants' case was that unanticipated work in relation to HWL fell broadly within two classes – first, issues relating to the Penfolds themselves, and second, issues relating to the management and sale of the properties.

[A] *Issues relating to Members*

John's Proof of Debt and the Requests for Assignments of Claims

97. John submitted a proof of debt in HWL's liquidation dated 10 May 2019, soon after the liquidation had started. That proof comprised nine discrete claims with an aggregate value of just over £1.1 million, and it was accompanied by various supporting documents. Claims were made in respect of: "*company office & all other duties*"; "*imbalance withdrawal of company monies*"; "*imbalance of expenses and purchase of company vehicles*"; the costs of an "*aborted*" buy-out in 2018; the costs of a legal dispute "*as a result of company director's conduct*"; loss of office; loss of future earnings (to be determined); and liquidation fees (also to be determined).

98. Mr Cork's evidence was that the basis of these alleged claims was not clear to the office-holders, so that John was asked to provide further evidence. There then followed, he said (in his first statement) an "*18-month period of investigation*" during which John supplied additional materials which were reviewed, including by Edwin Coe solicitors, and John repeatedly pressed the office-holders to accept his claims. In his third statement however, somewhat differently, Mr Cork accepted that investigations in respect of John's proof had not in fact commenced until about September 2020, only after OMHL had been put into liquidation (in February 2020) and all of the properties had been sold (the last of which sales was on 10 August 2020). Thus, on 28 August 2020, John was invited to

submit any further materials, which he did under cover of emails sent on 22 September and 28 September 2020.

99. In the event, each of John's claims was rejected for reasons stated in a two page letter from Cork Gully dated 6 October 2020, only about a week after receipt of his further materials. The claims were rejected because they were unevidenced, and in several cases, simply misconceived or advanced without any discernible legal basis (for example, in respect of 152 LHR, John's claim to payment of 5% of the increased value of the property over and above that contained in a 2014 valuation).

100. On 27 October 2020, John issued an application under rule 14.8 of the IR 2016, seeking to reverse the rejection of his proof. Solicitors were instructed on both sides: John instructed Candey LLP, and the office-holders continued to use Edwin Coe. After some correspondence between solicitors, John apparently decided to withdraw his appeal and a consent order was negotiated and made by the court on 14 January 2021; it provided for the withdrawal of the application, and that there be no order as to costs.

101. Notwithstanding that order, John subsequently continued (through Candey) to assert that he had a claim based on his brother's allegedly unlawful withdrawal of various sums. He sought an assignment to himself of HWL's claim. In the event, following correspondence over the next 14 months, the claim was assigned to Richard (and thereby "settled") on 15 March 2022 in return for £51,000.

Other Member Engagement

102. In addition, Mr Cork's evidence was that throughout the liquidation the Penfolds had both raised numerous questions, concerns, demands and complaints which the office-holders had been compelled to deal with. Much of this arose from the brothers' continuing hostility towards one another. For example, on 5 November 2019, John wrote to Mr Cork an email in which he said (in relation to a bid for one of the properties), "*Please inform that absolute piece of garbage, because you are apparently the only one that can make contact with him, that the flood gates of litigation are going to open and during that process, I am going to find out what Cork Gully and he were discussing while under a court order and before. This is an outrageous and disgusting outcome where a cheat, liar and outright dishonest thief is allowed to behave in such a manner. This whole process has been a shame*". Again, as an example, on 15 August 2019, John sent Richard

a letter over several pages (also sent on by Richard to the office-holders, although of no obvious concern to them) including a 27 verse poem which he had written, in which he accused Richard of greed, fraud and treachery, and the destruction of their "*perfectly healthy*" family company.

103. Further in this regard, Mr Cork exhibited a collection of documents:

    103.1. minutes of meetings held with John on 26 April 2019 and 13 June 2019;

    103.2. emails sent on and about 4 November 2019 concerning a bid for 36 OR (although 36 OR belonged to OMHL, not HWL, so that the relevance of this material in the context of the HWL Application was perhaps questionable);

    103.3. an email sent by Mr Cork on 11 August 2020, in which he pointed out that it was not the office-holders' role to broker or be involved in a broader resolution of the brothers' various arguments, but simply to adjudicate upon claims and make distributions – a point which was correctly made; it was in that email that Mr Cork reminded John that if matters became protracted it had been agreed (so he said, albeit incorrectly) that Cork Gully could increase their fees, and said that it was their intention to do so, albeit the matter was not then raised again until 27 January 2021;

    103.4. various emails concerning the office-holders' intention to seek higher fees.

104. In respect of the work concerning the Penfolds, Mr Cork set out in his evidence the amount which, he said, Cork Gully would have been entitled to charge if remunerated on the basis of time properly spent, which he described as "*the work properly done*", and which was said to have been calculated on "*a careful and conservative approach*".

105. He said that the total cost of that work was £139,325.40, which included £77,587.90 in respect of "*Legal*", £18,979.50 "*General – including Claims*", £15,192.50 in respect of "*John Penfold – Claims*", £32,164.40 for dealing with Candey's correspondence, and £47,663.70 in respect of "*Dealings with*" John and Richard. In respect of the withdrawn appeal, time costs of £5,392 (based on 9.2 hours) were said to have been incurred. In total, the time properly spent was said to have been just under 234 hours, at an average

cost of about £594/hour, being just under six weeks of continuous work, for 8 hours/day, and five days/week.

106. In addition, he said that work concerning the investigation of possible claims against former officers of a company was not foreseeable in a "*standard MVL*" of this kind, and was not foreseeable in this particular case; insofar as John had raised claims on or before 22 February 2019, he said that it had been assumed by the office-holders that they would have involved no more than a straightforward "*accounting exercise*".

107. As a result, he concluded that, "*by not choosing to seek a higher rate*" at the outset, "*I would say that we effectively allowed for that small exercise*" which would have cost about £5,000, so that at least £134,325.40 of the time costs incurred was attributable to this unanticipated workload. In other words, that the office-holders had not themselves hoped or intended that their agreed remuneration would be in return for these classes of work.

Discussion

108. In my judgment, this high-level evidence was completely inadequate to support a claim for payment of the additional sum of £134,325.40.

108.1. Fundamentally, there was no real detail of what work was done, and how it was proportionate or reasonable or provided value; there were no timesheets, and the position was not much illuminated by the documents exhibited. For example, despite the size of the amount, in respect the broad claim concerning the costs caused by engagement with the Penfolds, Mr Cork simply exhibited about 35 pages of communications, including emails, but without explaining what happened and what was done as a result, and how it represented good value.

108.2. Whilst I accept, as I have said, that there was no obligation as such to produce timesheets, the Applicants were required by some satisfactory evidential means to justify the increases sought by reference to value provided.

108.3. Similarly, John's proof was rejected on grounds which certainly appeared to have been comparatively simple, and not to have required much analysis or investigation of evidence; in any event, the office-holders were assisted by

solicitors (who were themselves paid substantial sums as disbursements) and the time between the commencement of their investigations and the communication of their decision was only about a week; work done on John's appeal appears not have been costly; nonetheless, the sum said to have been incurred in respect of "*Legal*" was £77,587.90, based on 123.5 hours at an average cost of £630.54/hour.

108.4. I bear in mind that in respect of remuneration, the office-holders bear the burden, and that any doubt must be resolved against them – they must justify their claims; I bear in mind that as explained above, the value of services in return for which reward is sought does not necessarily equate to "*time spent*", or to a "*mechanical totting-up of hours multiplied by charge-out rates*". The available material was not such as to enable the court to conclude that this work, whether or not anticipated, was valuable to the extent asserted.

109. Moreover, none of this work was inherently unpredictable, or unpredictable in the context of these companies and the relationship between the Penfolds; none ought to have been a matter of particular surprise. Indeed, in the circumstances, I would not describe any of it as improbable (although I acknowledge the hazards of hindsight); none of it arose out of some change of circumstance (certainly not a material and substantial change); it was all contingently implicit in the state of affairs understood by the Applicants in 2019, and present to their senses.

110. Further, the office-holders' assumptions (if and to the extent actually made, at the time) that investigations against former officers were not foreseeable, and that any claims made by John (or Richard) would involve no more than a straightforward "*accounting exercise*" were neither expressed nor communicated or agreed; neither were they obviously warranted in circumstances where there had recently been unfair prejudice proceedings, and where the Penfolds' continuing hostility towards one another was manifest, as was the fact of their continuing and pronounced interest and engagement in the (erstwhile family) business; furthermore, John explicitly various raised claims at the Meeting on 22 February 2019. Insofar as a "*standard*" MVL might be thought to exist, there was ample reason to think that HWL's liquidation would not be a prime example. As I have said, "sufficiency" of remuneration in the context of an agreement based on rate cannot be said to turn on the office-holders' own uncommunicated hopes.

111. Thus, of John's claims stated in his proof, at least the first three (regarding his claims to payment for work; for an adjustment in relation to sums paid previously but unequally to the members; and for an adjustment in relation to various expenses) might be said to have been raised by him at the meeting on 22 February 2019. Further, John met Mr Cork on 14 March 2019 and he met some of the office-holders' staff on 26 April 2019 to discuss the liquidation of HWL and his claims; his evidence was that he was advised that he should submit "*as much as he could*" in respect of his claim and that he could submit a further claim in due course – these were matters raised at the outset.

112. In those circumstances, the risk of the outcome which transpired was present, not insubstantial, and was broadly, even if not in every particular, consciously appreciated by the office-holders (who specifically considered as a result whether to propose an alternative basis). The risk of its occurrence was, in my judgment, allocated by the negotiated commercial agreement, in the same manner as the Penfolds took the risk of an increase in the value of the properties; it was part of the price paid for the benefits that each side secured. In those circumstances, the officer-holders cannot complain of "*insufficient*" remuneration – it was remuneration in a sum fixed by an agreement which allocated the risk of the events which transpired, but which no doubt, they had hoped would not.

Additional Shareholder Engagement

113. In addition to the sum claimed by reference to investigations, Mr Cork's evidence was that work properly done in respect of "*shareholders*" (by which he meant work comprising communications and dealings with the Penfolds but falling outside the categories otherwise specifically considered, and including in particular "*work relating to distributions*" and "*work relating to fee issues*" including work done in communicating and seeking to reach an agreement in relation to an increase in remuneration) comprised 148.9 hours (equivalent to about 19 days' work at 8 hours/day, almost 4 weeks) and would, on a time given basis, have been charged at £81,898.50 (at an average rate of £550.02).

114. On the basis that Mr Cork "*would have expected*" this work to have generated costs of no more than £10,000 (albeit not obvious whether that meant that he did in fact at the time have that expectation) the sum said to have been attributable to this unanticipated

workload was £71,898.50, caused by the "*huge amount of time* [that] *had to be dedicated to dealing (individually) with two members who would not speak to one another; and, in the particular case of* [John], *the litany of questions, complaints, observations, concerns and allegations raised on top of those directed at the specific areas*" otherwise considered.

115. In this respect, again, I was not satisfied that the evidence supported a claim for payment of the particular additional sum sought:

    115.1. the small collection of exhibited documents came nowhere near supporting a claim for £71,898.50, or explaining satisfactorily, or to any real extent, the work that was actually done, or its value to the insolvent estate; again there were no timesheets; in truth, the court was simply asked by Mr Cork to accept that the work was done and that it was proper, justified and valuable;

    115.2. again, whilst I appreciate that weight should be attached to the office-holders' evidence, I bear in mind that the burden is on them, and that doubts must be resolved against them, and importantly, that as has been stressed in the authorities, it is not simply a matter of totting-up time spent.

116. Furthermore, again, none of this work was inherently unpredictable, or unpredictable in the context of these companies and the relationship between the Penfolds; none ought to have been a matter of particular surprise. I repeat my conclusions at paragraphs [109] above.

[B] *Unanticipated Workload in respect of Property Realisations*

117. HWL owned three properties, 152 LHR, 321 LHR and 345 LHR.

    117.1. 152 LHR was sold on 27 July 2020 for £2,388,000 plus VAT, giving a gross figure of £2,865,600. That sum was in considerable excess of the open-market value stated in the RP Valuation Report, of £1.9 million (as well as being more than the Red Book valuation, which was not consulted at the time, and which in any event appears to have been materially inaccurate).

117.2. 321 LHR was sold for £2,629,000 (plus a development overage which ultimately realised £21,111). Again, that sum was in significant excess of the open-market value stated in the RP Valuation Report of £2.18 million (as well as being more than the Red Book valuation, of £1.555 million).

117.3. 345 LHR was sold for £740,000, which again, was more than the figure stated in the RP Valuation Report, of £725,000 (as well as being more than the Red Book valuation, of £680,000).

118. However, Mr Cork's evidence was that in respect of each property, there had been significant unanticipated work. The scheme of his evidence was that he thought "*he would say that* [he] *would have expected asset realisation time costs to come out at somewhere between £350,000 and £375,000, so that it should have been possible to keep total time costs at around the £400,000 mark overall, bearing in mind the likely (relatively limited) demands of other areas*" – again, the language was tentative as to actual recollection; that in the event, as a result of unanticipated work, the time spent costs of property realisations had in fact been £426,042.76, so that there had been an "*over-run*" of about £56,000 (apparently calculated as £426,000 minus £370,000), which he attributed in particular (although "*our pre-estimate of likely time cost was too high level to admit of any kind of granular retrospective analysis*") to the proper time costs (of £76,000) incurred in respect of work related to a planning application in respect of 152 LHR (as to £30,000), work related to the removal of squatters at 152 LHR (as to another £30,000), and work related to dealing with John in respect of the management and sale of the three properties. The sum claimed (£56,000) was therefore – by comparison with the sum said to have been allowed for (£370,000) - comparatively small.

119. Mr Cork said that other time spent costs attributable to unanticipated work in respect of the properties had been absorbed by the "*allowances made for the kind of complexities that can frequently arise in relation to the sale of commercial properties and realising*" assets. Overall, he said:

> "*This is the most difficult category to analyse and identify those costs generated by the unanticipated workload because, as explained above, there was always a significant degree of uncertainty about exactly how much work would be required in relation to the Properties. As I said above, very high-level terms, I*

would have made a fairly generous allowance for time costs of around £370,000 under this head: making significant allowances for the various additional workstreams that often arise in relation to selling commercial property; as well as hoping that, with careful management and costs control and minimal unexpected workstreams, we might manage to achieve something slightly under that."

120. In this regard, there was a logical incoherence in the Applicants' case. Whilst said that other unanticipated work had been necessary in respect of 321 LHR and 345 LHR (and indeed, in respect of 152 LHR, in addition to the three classes relied on, and mentioned above at paragraph [118]), it was nonetheless accepted that the cost of that work was capable of being "*absorbed by allowances made for … complexities that can frequently arise*". However, that was to acknowledge that future work is unpredictable, and that if remuneration is in the amount of a fixed sum or a sum fixed by a certain percentage of realisations, then there is an obvious risk that it will be in an amount less than that calculated according to time - and a virtual certainty that it will be in an amount which is either more *or* less than such a sum (but not precisely equal to it); other than by reference to his privately held estimate, it was internally inconsistent to accept that the cost of some classes of "*unanticipated work*" should be absorbed (that being in the nature of the broad arrangement) but to assert, for some reason, that others - said to equally unanticipated - should be additionally and separately charged for and remunerated.

121. Equally, it made no sense to assert that although the three classes of unanticipated work had resulted in costs of £76,000, additional remuneration in the sum of only £56,000 ought to be allowed: the figure of £370,000 was not fixed by agreement between the parties, such that any variation would result in a compensating payment – it was, at best, an approximate figure which privately the Applicants had in mind as that which they hoped the process would cost. It was not suggested that had the cost transpired to be much <u>less</u> than £370,000, the Applicants would have offered to <u>reduce</u> their remuneration, any more than they did so as a result of having sold the properties for sums in excess of their estimated value. As Mr Cork said: "*there was always a significant degree of uncertainty about exactly how much work would be required in relation to the Properties*". Accordingly, in this regard, without proper foundation, the Applicants' case

relied on the cost of some (but not all) unanticipated work, and only to some (but not its whole) extent.

Planning Application in respect of 152 LHR

122. Turning to the classes of work relied on - as to planning, the office-holders were aware of the company's planning application in relation to 152 LHR when they were appointed. They were also aware that it had been in the course of negotiating with the relevant Council an agreement under section 106 of the Town and Country Planning Act 1990. In the event, the (successful) completion of those processes, which were conducted with the benefit of legal advice and assistance, and with the assistance of planning and other "*consultants*", required more work than had apparently been anticipated by the office-holders, so that having decided (relatively shortly after their appointment) to pursue the planning application, "*we had initially hoped that this could be done relatively swiftly, but, in the event, this proved a significant undertaking that took just over a year to complete*". Eventually, a section 106 Agreement was executed, and a permission notice was issued, on 1 May 2020.

123. It follows from this evidence that not only was work in this regard inevitable as at the point of the office-holders' appointment, but that to a significant degree, the work done resulted from their own decision to pursue the planning application, taken with the benefit of advice, albeit in the hope that it would be granted "*relatively swiftly*".

124. Although Mr Cork provided a broad narrative account of the course of discussions and negotiations (conducted with the Council primarily by various agents/advisors) and various references to the involvement of Mr Neil Smail (a Senior Manager and Director of Cork Gully) there was no detailed or granular breakdown of the work that he (and/or others at Cork Gully) had undertaken in this respect, and the sum of £30,000 (said to be the amount calculable by reference to time-costs in respect of this work, to the extent "*unanticipated*") was not specifically justified. This was an example of a broader, pervasive problem created by the Applications, which required the court to attempt an assessment of the value of time spent in circumstances where time spent was not - and so was not at the time recorded or treated as being - the basis of remuneration.

Squatters at 152 LHR

125. As to work concerning the squatters, there were two incidents, the first in about February 2020, the second in July 2020. In respect of the first, solicitors (Edwin Coe) were instructed, and a possession order was obtained on 9 March 2020. The squatters were evicted on 11 March 2020 by High Court enforcement officers. Edwin Coe's fees were £11,492 plus VAT.

126. In respect of the second, which was said to have been "*slightly more straightforward on this occasion as we were able to rely on the previous possession order*", possession was retaken on 4 August 2020, about a week after the problem arose.

127. Again, although there was a broad narrative account of the work said to have been done, there was no detailed or granular breakdown of that work, and the sum of £30,000 (said to be the amount calculable by reference to time given in respect of this work) was not specifically justified. Curiously, although the second incident was said to have been simpler than the first, it was said to have cost £19,000 (as against £11,000 in respect of the earlier incident); that discrepancy was not explained. Moreover, the second incident was resolved – with the assistance of solicitors and others – in about a week; £19,000 is the equivalent of 38 hours at £500/hour, which is about 8 hours/day, for five days – I was not persuaded that work on that scale by the office-holders or their firm, would have been required or valuable (and/or not duplicative of work done by advisors and other agents).

Engagement with the Penfolds

128. In respect of engagement with the Penfolds concerning the sale of the properties, Mr Cork's evidence was that in respect of dealings with John, time given costs were (or would have been) £13,573, and in respect of Richard, £8,263, and so in total, £21,836, compared with the sum of £5,000, which he "*would have expected or allowed for*" (rather than in fact allowed for). Again, there was no detail provided of the composition of the work done, the appropriateness and value of which was impossible to assess. Some of the work appears to have resulted from John's desire (and offers) to buy the company; some from the degree of the Penfolds' engagement in the whole process, and the extent of their critical scrutiny, none of which was inherently unpredictable (or improper).

Conclusions

129. Of the three classes of work relied on in respect of the properties to support the proposed increase, two (in relation to planning and engagement with John) were implicit and inevitable in the circumstances extant at the moment of the office-holders' appointment; the third (in relation to the squatters) was an ordinary vicissitude of managing and realising the vacant property of a company in liquidation (indeed, Mr Cork's evidence was that shortly after his appointment, he was told by both Respondents that they had in the past had problems with squatters at 152 LHR, so that he was "*particularly alive to the question of security*").

130. In the circumstances, in respect of this work, and the claims made by reference to it:

    130.1. there was a logical incoherence in the Applicants' case, explained above at paragraphs [120]-[121]; the sum of £56,000 was calculated by reference to a base figure (£370,000) of no actual or principled significance;

    130.2. the work relied on was of a character which was inevitable or predictable, and in respect of planning, which resulted from the Applicants' own decision; I repeat my conclusions at paragraphs [109] above;

    130.3. the sum sought - £56,000 - was comparatively small by comparison with the sum apparently allowed for, and within the margins of reasonable variation;

    130.4. in any event, it was not possible on the evidence to conclude that the Applicants had established that the relevant components - of £30,000, £30,000, and £16,000 - were justified in those amounts by reference to valuable work.

131. In conclusion, again, I was not satisfied that the evidence supported a claim for payment of the particular additional sum sought.

[C] <u>*Administration and Planning*</u>

132. The final class of "*unanticipated work*" in respect of HWL was said to have been in relation to "*administration and planning*", by which was meant work of the kind required in any solvent liquidation, including compliance with statutory requirements, the maintenance of case files, planning and discussion of strategy, dealing with correspondence, the preparation of statutory reports, the management of bank accounts,

liaising with the company's former accountants, liaising with HMRC, and ensuring that the company's tax liabilities were met. Mr Cork's evidence was that "*in very general terms*" in an "*MVL of this type, we would usually expect to incur time costs*" in the order of around £12,000 within the first year, and about £6,000/year in respect of each subsequent year.

133. Instead, in respect of HWL, it was said that in carrying out this work, calculated by reference to time given, costs in the sum of £64,420.80 had been incurred (by reference to 160.9 hours at an average hourly rate of £400.38). The work said to have been properly done was sub-categorised into work relating to the office-holders' appointment, work relating to the preparation of statutory reports, cashiering functions (£17,922.60), and general administration; the total sum also included £8,540 in relation to work carried out pre-appointment.

134. The Applicants' case was that the current basis of remuneration had been agreed on the footing that the MVL would last no more than 12 months, and that the costs overrun had been caused not only because it had lasted longer than that, but because of the impact of the other unanticipated work which I have referred to above, and which, so it was said, generated far more administration and planning work than would otherwise have been the case. Mr Cork referred in particular to "*the extensive litigation*" and to the number of technical work streams such as in respect of the planning application (regarding 152 LHR) and the continuing disputes between the Penfolds; he said that most of the key work streams were (or became) significantly more onerous because of other unanticipated work, for example the time it took to prepare statutory reports was "*significantly increased*" because of the need to deal with the other various (themselves unanticipated) matters such as planning and the eviction of squatters. In the event, he concluded that based on this "*high-level assessment*", the difference between £12,000 and £64,000, being £52,000, was the additional cost of administration and planning caused by the unanticipated workload.

135. Whilst I accept that the insolvency lasted longer than the period referred to in the Letter of Engagement, I was not satisfied that the evidence supported a claim for payment of the particular additional sum sought.

135.1. First, the alleged cause of the increase - the "*unanticipated workload*" – was work which, as I have held, fell within the scope of that which was provided for within the agreed basis of remuneration. In any event, as I have explained, there was no justification for describing HWL's liquidation as (or considering that it would be) simple and straightforward – an MVL "*of this type*"; it was far from typical, and obviously so from the outset.

135.2. Second, although I do accept that some such work must have been done, it was not possible to assess or justify its value on the basis of the evidence given. To take an example, there was reference to "*extensive litigation*", albeit that the only litigation in which the company and/or office-holders had been engaged was in connection with John's proof (which, as I have said, on Mr Cork's evidence required only 9.2 hours of work) and in respect of the squatters; neither could sensibly be described as "*extensive*", and neither required a great deal of work to be done by the office-holders in respect of planning and administration. Similarly, although Mr Cork referred to the "*significant*" additional work in relation to the preparation of progress reports, the passages in those reports which dealt with matters such as planning in respect of 152 LHR, and the eviction of squatters, were short and simple; they would or certainly ought to have taken very little time. Again, I repeat, the burden is on the Applicants and doubt is to be resolved against them.

The Allegedly Unanticipated Work in Relation to OMHL

136. I repeat the point made above at paragraph [95]: however approached, remuneration must ultimately reward (and certainly cannot exceed) the "value" of the services rendered.

137. The Applicants' case was that in respect of OMHL, the cost of the unanticipated work in relation to the claim made by John (on a time given basis) was about £26,147; in relation to the realisation of assets, attributable to the time required to deal with the directors, the cost was around £48,155; and in relation to taxation issues was around £21,215. Accordingly, it was said that at least £74,518 properly incurred time costs were attributable to unanticipated work, leaving no "buffer" against the lower than expected realisations from the sale of 36 OR.

138. First, as to John's claim, a proof was lodged in the company's liquidation, dated 18 February 2020, in the aggregate sum of £2,932,312 (which included sums said to be due to a company associated with John, Dito Developments Ltd ("**DDL**")). Although an earlier similar claim had been lodged in the company's prior administration (in respect of which remuneration was fixed by creditors' decision) it appeared not previously to have been actively considered by the office-holders. The claim comprised five components, concerning a loan made by DDL; loss of earnings due to the failure to complete the development of 36 OR; a further sum in respect of that development; loss of office; and a claim in respect of costs said to have been incurred in relation to the aborted purchase of 36 OR in late 2019 (as a result of Richard's alleged failure to act in the company's best interests).

139. The claim was rejected about two months later, by Cork Gully's (short, single page) letter dated 23 April 2020. As in respect of the rejected claim made in HWL's liquidation, the office-holders had the benefit of legal advice and assistance, and their grounds of rejection were straightforward: the loan had been satisfied; lost earnings were not a provable debt; there was no contractual relationship with OMHL in respect of remuneration; there was no contractual relationship to support the loss of office claim; and the costs of the aborted sale were incurred after the administration had begun, and so were not provable.

140. Second, in respect of the realisation of 36 OR, there were said to be two main reasons for the unexpected workload. First, the time required to deal with the Penfolds in relation to the sale, and second the time required to take expert advice in order to decide whether or not to complete the development before sale.

141. As to the second of those, Mr Cork said that the office-holders had always known that expert advice would be required, but that the process proved to be unexpectedly difficult and protracted. As to the first, the process of achieving sale was said to be significantly more difficult and time-consuming than could have been foreseen because of the dispute between the Penfolds, which "*repeatedly flared up*" and interfered in the office-holders' ability to progress the sale. For example, they disagreed about sales strategy (John wished for sale without development); in addition, John made two offers to buy the property, both of which were rejected.

142. Other unforeseen work in respect of 36 OR was said to have included time spent liaising with the company's insurer and dealing with their specific requirements, and dealing with the Council in respect of breaches of planning control. However, Mr Cork said that those kinds of issues "*would be within the margin of the "expected unexpected" work streams likely to attend any sale of commercial property*". For reasons similar to those explained above, at paragraphs [120]-[121], that raised a problem: other than by reference to his privately held (and thus irrelevant) costs estimate, it was internally inconsistent to accept that the cost of some classes of "unanticipated work" should be absorbed (that being in the nature of the broad arrangement) but to assert, for some reason, that others - said to have been equally unanticipated - should be additionally and separately charged for and remunerated.

143. The third class of unanticipated work was said to have been in relation to taxation issues - unforeseen complications in relation to the taxation consequences of making distributions. In particular, expert advice was taken in connection with the question whether HWL could rely on the substantial shareholder exemption in order to mitigate its tax burden.

Discussion

144. Again, I was not satisfied that the evidence supported a claim for payment of the particular additional sum sought.

145. First, as before, I bear in mind that in respect of remuneration, the office-holders bear the burden, and that any doubt must be resolved against them – they must justify their claims; I bear in mind that as explained above, the value of services in return for which reward is sought does not necessarily equate to time spent, or to a mechanical totting-up of hours multiplied by charge-out rates.

146. Fundamentally, in real substance, there was not enough detail of what work was done, and how it provided value; there were no timesheets, and the position was not much illuminated by the documents exhibited. As I have said elsewhere, that may in part have been a product of the fact that when the work was done, it was not anticipated that it would ever be charged for on the basis of time spent. Thus:

146.1. in relation to the proof – as in respect of HWL – the office-holders' decision to reject was based on apparently straightforward grounds, which would not, on their face, have required much investigation or analysis of evidence or law; in any event, the office-holders were assisted by solicitors; nonetheless, the time based costs said to have been incurred in this respect were £26,147;

146.2. in relation to 36 OR, as to which time costs were said to have been about £48,155, again the evidence was at a high-level; there was no breakdown or real detail of work done and value provided: for example, in respect of the broad claim concerning the costs caused by engagement with the Penfolds, Mr Cork simply exhibited a collection comprising various communications, including emails, but without explaining what happened and what was done as a result, or how it represented good value to the estate;

146.3. similarly, concerning the issue of whether to sell immediately or develop first and then sell, a collection of documents were exhibited, which referred to a small number of meetings which dealt with that but also with other issues; the evidence did not justify the conclusion that the office-holders had given value worth £48,155;

146.4. similarly, in relation to the taxation issues – as to which again, independent advice was taken – it was said that the office-holders' work comprised 40 hours, and cost £21,215 – but the evidence came nowhere near showing what that work had actually involved, or achieved; neither was the issue itself explained, other than in the briefest terms, or were any reasons given to think that it was of any particular degree of complexity.

147. Moreover, none of this work was inherently unpredictable, or unpredictable in the context of these companies and the relationship between the Penfolds; none ought to have been a matter of particular surprise. As before, in the circumstances, I would not describe any of it as improbable; none of it arose out of some change of circumstance (certainly not a material and substantial change); it was all (at least) contingently implicit in the state of affairs understood by the Applicants in 2019, or ascertainable by them.

148. For example, the issue concerning whether to develop or immediately sell the property at 36 OR was explicitly highlighted in the Administrators' Proposals in April 2019 – before remuneration was fixed (in May). Having stated the issue, the Proposals said, "*upon completion of the valuation and strategy report, the Joint Administrators will make a determination as to the appropriate course of action for the Company*". Moreover, before that, on 14 March 2019, according to the Minutes of a meeting between Mr Cork, John and others, a whole series of "*property specific matters*" had been discussed, including in respect of the possible development of 36 OR – to which John made known his adamant opposition: he said that "*he had already been through 4 years of turmoil*" which was affecting his health; he said that whilst he "*didn't want the companies liquidated in the first place*" he now wanted "*to get his money and go … he doesn't want to be in a situation where in 12 months' time the properties are complete and the properties don't sell that means he is still in business with his brother*". As I have said, the continuing hostility between the Penfolds – and its potential effect on other issues – was manifest and was or ought to have been obvious and understood.

149. I do not accept the case that work in respect of breaches of planning control or dealing with insurers was within the margin of the "*expected unexpected*", but that work in respect of the other 36 OR issues was not: in my judgment, all of this work was potentially within the scope of the remuneration agreement.

150. Similarly, it was not said that the taxation had arisen out of some new or changed circumstance, and the claims made by John and DDL were in large measure made before remuneration was fixed. In any event, they comprised matters of the sort that might ordinarily arise.

Conclusions in Respect of the Applications

151. It follows that in all the circumstances as I have held them to be, and on the principles explained (above at paragraphs [55]-57]) both Applications must be dismissed. Both were, in substance, applications made for a change in the basis of remuneration, and both were made very late, only after the work had been done (as explained above at paragraphs [85]-[94]): the court and the Penfolds were presented with a *fait accompli*. Furthermore, the current bases were the product of a commercial, freely negotiated agreement, made in circumstances (described above at paragraphs [79] and [81]-[84]) where the work now

said to have been "unanticipated" was more or less foreseeable from the outset given the circumstances as they existed and were present to the minds of the office-holders or ascertainable by them (as explained above at paragraphs [95]-[135] in relation to HWL and [136-150] in relation to OMHL) and in relation to which therefore the risks of occurrence were substantially allocated; the issue of insufficiency of remuneration, contrary to the Applicants' case, does not turn on and neither can it be measured by reference to their private, uncommunicated hopes or wishes (not all of which, in the present cases, were in any event reasonably held). Further, issues of value are central to issues of remuneration, but the evidence was not adequate to support claims to the particular sums sought.

152. In respect of the OMHL Application, there was a separate point, explained above at paragraph [84]: the real basis of the office-holders' complaint in respect of OMHL was not that their aggregate workload had exceeded that which was anticipated or allowed for (even by them), or that therefore their time given costs were to any degree exceptional, but that 36 OR had sold for less than it might otherwise have done. However, the sale of 36 OR for £4,150,000 was not a result of some change of circumstance, or other unexpected event – it was simply that it yielded that amount rather than more: it was apparently the outcome of the ordinary operation of the market, an ordinary fluctuation - no doubt unwelcome from Mr Cork's perspective, but not beyond or outside the scope of that which might have been foreseen or predicted, and which therefore fell within the agreed basis of remuneration. In itself, that was an answer to the claim in respect of OMHL.

Dated 4 June 2025