Determining remuneration of insolvency practitioners

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March 1, 2016

Introduction

Having performed their work, insolvency practitioners frequently find their claims for remuneration disputed by the creditors of the insolvent company. This tension is due to a clash of interests: creditors hope to obtain as much dividends as possible, while the insolvency practitioners want to be given fair remuneration for the work done. Disputes over the insolvency practitioners' remuneration can lead to contentions before the court.

The recent High Court decision in *Kao Chai-Chau Linda v Fong Wai Lyn Carolyn and others* [2016] 1 SLR 21 ("**Kao Chai-Chau Linda**") has introduced the concept of cost scheduling. This applies to matters in which the remuneration claimed is likely to exceed S$200,000. In cases where the remuneration claimed is below S$200,000, the problem persists until there is legislative intervention. The same problem may also arise even if there is a cost schedule during the final adjudication stage when the remuneration claimed is more than 15% higher than the amount stated in the cost schedule and when the cost schedule has not been contemporaneously amended.

This article seeks to highlight the principles set out in the case of Kao Chai-Chau Linda and the earlier decision of *Liquidator of Dovechem Holdings Pte Ltd v Dovechem Holdings Pte Ltd (in compulsory liquidation)* [2015] SGHC 167 ("**Dovechem**") on the determination of the remuneration of insolvency practitioners. It is hoped that these principles will provide guidance to insolvency practitioners and creditors in appreciating the relevant principles and reduce acrimony in this area.

Liquidators' remuneration in Dovechem

In Dovechem, the liquidators of the company sought to have their remuneration for work done over the 18 months determined by the court. Unsurprisingly, the majority shareholders contested the liquidators' claim for remuneration on numerous grounds. These include assertions over the number of people involved in the work, the rates charged, the hours charged and the necessity of various items of work done. It may be noted that the decision arose out of appeals filed by both parties from the decision of the Assistant Registrar (for which lengthy arguments were likely to have been canvassed). The appeal itself appeared to have been heard by Justice Judith Prakash on four different dates.

The following principles were set out in Dovechem:

1. One of the criteria that the court considers when determining the appropriate level of remuneration for a liquidator is whether the liquidator has made a difference to the liquidation process. This is not determined by the proceeds or additional proceeds recovered by the liquidator in the liquidation.

2. Whether liquidators have acted properly in undertaking tasks at particular costs or time spent depends on whether

a reasonably prudent man faced with the same circumstances in relation to his own affairs, would lay out or hazard his own money in doing what the liquidators have done.

3. Fees charged by liquidators in relation to legal proceedings are recoverable if the work done by the liquidators is different from the work done by the lawyers appointed by the company.
4. Work done by liquidators to conduct an open sales process when there is an offer made by an existing shareholder at a value accorded with the liquidators' valuation is considered unnecessary and hence disallowed.
5. Liquidators and insolvency personnel cannot include time charges in their bills for work done by administrative and support staff. These are part of the liquidators' overheads and are to be factored into the general remuneration charged by a liquidator.
6. If work done by certain staff is charged on the basis that they are fee earners , it would be necessary to demonstrate that the qualifications and type of work done by these persons justify the charge in light of industry practice. An explanation of the policy behind fixing the rates would also be required.
7. The court takes a broad brush approach in reviewing a bill of costs. The court will decide whether, taking the bill as a whole, the bill is fair and reasonable. The court will also take into account bills for services rendered by other liquidators as an indication of the charge-out rates applied in the industry.

Remuneration of receivers and managers in the decision of *Kao Chai-Chau Linda*

In Kao Chai-Chau Linda, the receivers and managers ("R&M") of a company claimed for remuneration for work done over 12 months. The respondents claimed that the R&M were inefficient in their work process, had undertaken duplicative work and that a large amount of time that was spent was unnecessary. The hearing appears to have taken over six days before Justice Steven Chong.

The following guidance was given by Justice Chong:

(1) Remuneration is to rew ard value. Expenses incurred would be recoverable only if they were reasonably incurred in the discharge of the insolvency practitioner's stewardship.

(2) Work done is not by itself a sufficient ground for remuneration to be given . It depends on whether the work done is within the scope of the insolvency practitioner's duties although some margin of appreciation is granted to the insolvency practitioner.

(3) Remuneration awarded must be commensurate with the nature, complexity and extent of work undertaken. The total amount awarded must not be out of proportion with the company's estate.

(4) Factors to consider include:

(a) the time properly given by the insolvency practitioner and his staff;

(b) the complexity of the receivership;

(c) any responsibility of an exceptional kind or degree which falls on the receiver in consequence of the receivership;

(d) the effectiveness with which the receiver appears to be carrying out or to have carried out his duties; and

(e) the value and nature of the subject matter of the receivership.

(5) In assessing remuneration ,:

- the Court court first obtains a provisional figure (usually based on time-cost) after taking into account the reasonableness of the hourly rates, the industry standards and whether the hours claimed were spent and were spent reasonably,.

- thereafter, the Court court will adjust the provisional figure to deduct quantifiable heads of claims before applying a further percentage reduction to reflect the Court's court's assessment of what a fair and just sum should be. At this stage, the Court court will take into account whether there is any inefficiency and over-management on the work done by the insolvency practitioner.

(6) Remuneration for administrative tasks done by fee earners would be disallowed.

(7) Work done by the R&M in relation to legal proceedings would be disallowed unless it can be shown that the work done was distinct from that undertaken by the lawyers appointed.

(8) Hourly charges for administrative staff would be disallowed .

Comments

The two High Court cases have expressly endorsed the value-based approach in determining remuneration. While time-costs will be taken into consideration, the court will not rubber-stamp time entries submitted by insolvency practitioners . Indeed, the two cases demonstrate that the courts are prepared to scrutinise time sheets presented to sieve out unnecessary, duplicative and administrative work undertaken by insolvency practitioners. Inefficiencies will also be discounted off the bill submitted.

Both decisions of the High Court recognised the limitation of using time entry as a basis to determine remuneration. In *Kao Chai-Chau Linda, Justice Chong* was prepared to suggest that time-based costing should perhaps be jettisoned since it bears little relation with the actual value of work done. Nevertheless, until legislative intervention is made for such remuneration to be determined on another basis, time entries remain an important factor in proving that work had been done and hence instructive in the determination of remuneration . Insolvency practitioners should thus adopt and maintain detailed time sheets setting out detailed descriptions of work done. A time entry by a fee earner that states "*preparing reconciliation of ABC bank statements by reference to management accounts on [date]* – 2 hours" would certainly be more elucidating than one which simply states "bank statement reconciliation – 2 hours".

The insolvency practitioner is expected to exercise his commercial judgment in carrying out his duties. He or she is also expected to run the insolvency just as he would the operations of his own practice. If insolvency practitioners (who are invariably accountants) would not pay time cost to carry out administrative tasks, the same logic should apply to the administration of the insolvent company. On this view, it is open to the insolvency practitioner to consider streamlining the team structure on a periodic basis, avoid duplicative work internally (within the team) and externally (with legal counsel) by setting clear areas of responsibilities and ensure that work is undertaken by persons of appropriate seniority. Where possible, administrative work should be outsourced or part-time staff could be employed.

Most importantly, the insolvency practitioner should maintain clear lines of communication with creditors. Periodic billings and reports on the progress of work done or to be done and the likely costs of the work would also aid in

preventing “bill-shock”.

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