FEDERAL COURT OF AUSTRALIA

Templeton v Australian Securities and Investments Commission   
[2015] FCAFC 137

|  |  |
| --- | --- |
| Citation: | Templeton v Australian Securities and Investments Commission [2015] FCAFC 137 |
|  |  |
| Appeal from: | Australian Securities and Investments Commission v Letten (No 23) [2014] FCA 985 |
|  |  |
| Parties: | **DAMIAN JOHN TEMPLETON, PHILIP ARTHUR HENNESSY and KPMG AUSTRALIAN PARTNERSHIP v AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** |
|  |  |
| File number: | VID 587 of 2014 |
|  |  |
| Judges: | **BESANKO, MIDDLETON AND BEACH JJ** |
|  |  |
| Date of judgment: | 18 September 2015 |
|  |  |
| Catchwords: | **CORPORATIONS** – unregistered managed investment schemes – entitlement of receivers to remuneration – appointment orders permitting remuneration – fixing of remuneration of receivers – reasonable remuneration and reasonable costs and expenses – approval of remuneration by Registrar – primary judge’s review of decision of Registrar – appeal from that review – evaluative judgment – concept of proportionality – grounds of appeal upheld in part – application for review remitted for rehearing |
|  |  |
| Legislation: | *Corporations Act 2001* (Cth) ss 425, 449E, 473, 504, 601EE, 1323  *Federal Court of Australia Act 1976* (Cth) s 35A  *Federal Court Rules 2011* (Cth) rr 14.21, 14.24 |
|  |  |
| Cases cited: | *Australian Securities and Investments Commission v Letten* [2010] FCA 140  *Bank of Nova Scotia v Diemer* [2014] ONCA 851  *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424  *Brook v Reed* [2012] 1 WLR 419  *Conlan as liquidator of Rowena Nominees Pty Ltd (in liquidation) v Adams* (2008) 65 ACSR 521  *Dwyer v Calco Timbers Pty Ltd* (2008) 234 CLR 124  *House v The King* (1936) 55 CLR 499  *Ide v Ide* [2004] NSWSC 751  *In the matter of AAA Financial Intelligence Ltd (in liquidation)* [2014] NSWSC 1004  *In the matter of AAA Financial Intelligence Ltd (in liquidation) (No 2)* [2014] NSWSC 1270  *In the matter of On Q Group Ltd (in liquidation)* [2014] NSWSC 1428  *Mazukov v University of Tasmania* [2004] FCAFC 159  *Mirror Group Newspapers plc v Maxwell* [1998] 1 BCLC 638  *Mobilio v Balliotis* [1998] 3 VR 833  *Norbis v Norbis* (1986) 161 CLR 513  *Onefone Australia Pty Ltd v One.Tel Ltd* (2010) 80 ACSR 11  *Re Korda; in the matter of Stockford Ltd* (2004) 140 FCR 424  *Re Roslea Path Ltd (in liquidation)* [2013] 1 NZLR 207  *Thackray v Gunns Plantations Ltd* (2011) 85 ACSR 144  *Venetian Nominees Pty Ltd v Conlan* (1998) 20 WAR 96 |
|  |  |
| Date of hearing: | 6 March 2015 |
|  |  |
| Place: |  |
|  |  |
| Division: | GENERAL DIVISION |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 88 |
|  |  |
| Counsel for the Appellants: | Mr R Strong |
|  |  |
| Solicitors for the Appellants: | King & Wood Mallesons |
|  |  |
| Counsel for the Respondent: | Mr P D Crutchfield QC with Dr O Bigos |
|  |  |
| Solicitors for the Respondent: | Australian Securities and Investments Commission |

|  |  |
| --- | --- |
| IN THE FEDERAL COURT OF AUSTRALIA |  |
| VICTORIA DISTRICT REGISTRY |  |
| GENERAL DIVISION | VID 587 of 2014 |

|  |
| --- |
| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

|  |  |
| --- | --- |
| BETWEEN: | DAMIAN JOHN TEMPLETON  First Appellant  PHILIP ARTHUR HENNESSY  Second Appellant  KPMG AUSTRALIAN PARTNERSHIP  Third Appellant |
| AND: | AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION  Respondent |

|  |  |
| --- | --- |
| JUDGES: | BESANKO, MIDDLETON AND BEACH JJ |
| DATE OF ORDER: | 18 September 2015 |
| WHERE MADE: | MELBOURNE |

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The primary judge’s orders made on 12 September 2014 be set aside.
3. The application for review dated 28 March 2014 be remitted for rehearing before another judge of this Court.
4. The parties’ costs of and incidental to this appeal and of the hearing before the primary judge (including the costs of the independent assisting counsel) be treated as costs and expenses of the winding up of the Schemes and be paid out of the funds on hand held by the first and second appellants.
5. Save for the costs referred to in paragraph 4, all other costs incurred to date on the application for review be reserved for further determination by the judge undertaking the rehearing of the application for review.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

|  |  |
| --- | --- |
| IN THE FEDERAL COURT OF AUSTRALIA |  |
| VICTORIA DISTRICT REGISTRY |  |
| GENERAL DIVISION | VID 587 of 2014 |

|  |
| --- |
| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

|  |  |
| --- | --- |
| BETWEEN: | DAMIAN JOHN TEMPLETON  First Appellant  PHILIP ARTHUR HENNESSY  Second Appellant  KPMG AUSTRALIAN PARTNERSHIP  Third Appellant |
| AND: | AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION  Respondent |

|  |  |
| --- | --- |
| JUDGES: | BESANKO, MIDDLETON AND BEACH JJ |
| DATE: | 18 september 2015 |
| PLACE: | MELBOURNE |

**REASONS FOR JUDGMENT**

# THE COURT

1. The present appeal challenges orders made by the primary judge concerning a review of the fixing of the remuneration of receivers.
2. The first and second appellants, Damian Templeton and Philip Hennessy (the Receivers), are joint and several receivers and managers of property of various unregistered managed investment schemes (the Schemes). They are partners of KPMG, the third appellant. The Schemes have been wound up pursuant to s 601EE(1) of the *Corporations Act 2001* (Cth) (the Act) by various orders of the Court. The Receivers’ appointment as such was made under ancillary orders of the Court (see ss 601EE(2) and 1323(1)(h) of the Act and the predecessor Order 26 rules 1 and 4 to the present rules 14.21 and 14.24 of the *Federal Court Rules 2011* (Cth)).
3. On 17 March 2014, Registrar Luxton fixed the Receivers’ remuneration, costs and expenses for the period 1 January 2012 to 31 March 2013 in the sum of $3,764,738.39. In fixing that amount, the Registrar applied various reductions to the amounts claimed by the Receivers. An application for review of the Registrar’s decision was heard and determined by the primary judge. On 12 September 2014, her Honour dismissed the application for review. The first and second appellants have challenged that dismissal.
4. In the proceeding before her Honour, independent assisting counsel acted as a contradictor to the Receivers’ application for review. Such counsel were appointed by the Australian Securities and Investments Commission (ASIC), the respondent to the present appeal. ASIC had been the original applicant for orders seeking the winding up of the Schemes and for the appointment of the Receivers. Her Honour, as part of the application for review, directed that ASIC appoint such independent assisting counsel. Her Honour in dismissing the application for review also made a costs order against KPMG, a non-party in the proceedings before her Honour but the third appellant before us. Her Honour ordered that KPMG pay the costs of the independent assisting counsel in relation to the application for review. KPMG has challenged that costs order.
5. In our opinion and for the reasons that follow, the appeal should be allowed. The orders made by the primary judge should be set aside and the application for review should be referred to another judge for rehearing in accordance with these reasons.

# Background

1. The primary judge set out in her reasons the background to the present issue and it is convenient to refer to that narrative.
2. On 25 February 2010, 4 March 2010 and 30 July 2010, the Schemes were wound up pursuant to s 601EE(1). The Schemes involved 21 unregistered managed investment schemes and 52 associated companies. The Receivers were appointed as joint and several receivers and managers of identified property of the Schemes, and as joint and several receivers and managers of certain property of identified corporate defendants who were parties to the original 2010 proceedings before her Honour (the Appointment Orders).
3. Under each Appointment Order, the Receivers were:

… entitled *to reasonable remuneration and reasonable costs and expenses properly incurred in the performance of their duties and the exercise of their powers* as receivers and managers [of] the Property of [each Scheme], as may be fixed by the Court on the application of the Receivers, such sum to be calculated on the basis of the *time reasonably spent* by the [receivers and managers], their partners and staff, at the rates specified in Annexure B to [this Order] …

[Emphasis added]

1. Annexure B to each Appointment Order stated:

|  | **$ (excluding GST)** |
| --- | --- |
| Partner | 595 |
| Director | 520 |
| Associate Director | 475 |
| Manager | 420 |
| Assistant Manager | 320 |
| Senior Analyst | 280 |
| Analyst | 210 |
| Administration | 140 |

1. On 17 June 2013, the Receivers filed an interlocutory application seeking approval for their remuneration, costs and expenses for the period 1 January 2012 to 31 March 2013 (the Relevant Period). The remuneration claim divided the Receivers’ work into seven categories — Administration and Risk Management, Assets, Creditors, Investigations, Investors / Distribution, Statutory Obligations and Trade On. The total amount claimed was $4,309,813.79 comprised of:

|  | **$ (excluding GST)** |
| --- | --- |
| Receivers’ Remuneration | $3,309,239.70 |
| Receivers’ Disbursements (other than Legal) | $10,223.04 |
| Legal Fees | $888,502.05 |
| Legal Disbursements | $101,849.00 |

1. On 17 March 2014, Registrar Luxton fixed the Receivers’ remuneration, costs and expenses for the Relevant Period at $3,764,738.39 (excluding GST) purportedly in accordance with each Appointment Order and pursuant to rule 14.24 of the Federal Court Rules. In general terms, the Registrar:
   1. applied a 20% reduction to the Receivers’ remuneration for the “Investors / Distribution” category of work;
   2. applied a 5% reduction to the Receivers’ remuneration for all work other than that identified in (a), and to the Receivers’ claim for disbursements; and
   3. applied a 2.5% reduction to the Receivers’ claim for legal fees (but not for legal disbursements).
2. On 28 March 2014, the Receivers filed an application for review seeking to review the Registrar’s determination. On the application for review, the Receivers sought an order fixing the Receivers’ remuneration, costs and expenses for the Relevant Period at $4,303,813.79.
3. On the application for review before the primary judge, the Receivers’ submissions focused on the three aspects of the Registrar’s decision identified in [11] above, as well as the impact of a voluntary reduction of 10% in the remuneration of the Receivers and the professional costs of their solicitors.
4. It was common ground before the primary judge that the application for review was to proceed by way of a rehearing *de novo*: s 35A(5) and (6) of the *Federal Court of Australia Act 1976* (Cth) and *Mazukov v University of Tasmania* [2004] FCAFC 159 at [24]. Nevertheless, the Receivers directed their submissions to specific areas of complaint concerning the Registrar’s review and determination.
5. In terms of the applicable principles, her Honour described her approach to the Appointment Orders and the principles to be applied in the following terms at [13] to [15]:

13. A number of matters should be noted about those Appointment Orders: see [2] above. First, the Receivers are entitled to *reasonable* remuneration and *reasonable* costs and expenses. Second, that remuneration and those costs and expenses must be *properly incurred* in the performance of their duties and the exercise of their powers as receivers and managers. Third, the Receivers must make application to the Court and the amount they are entitled to receive is *fixed by the Court*. Fourth, the sum is to be calculated on the basis of the time *reasonably* spent by the receivers and managers, their partners and staff, at specified rates.

14. Certain other facts and matters inevitably follow. The Receivers must make a claim and they must provide sufficient information to enable the Court to properly assess their claim: *Re Korda; in the matter of Stockford Ltd* (2004) 140 FCR 424 at [37]. It was agreed that the onus is on the Receivers to justify the reasonableness and prudence of the tasks done: *Ide v Ide* [2004] NSWSC 751 at [42]. Next, to adapt the language in *Re Korda*, the Court is required to fix the Receivers’ *reasonable* remuneration and *reasonable* costs and expenses. That is the ultimate object: *Re Korda* at [38]. Why? Because that is what the Receivers are entitled to receive: see [13] above.

15. The reasonableness or otherwise of remuneration and costs and expenses incurred will depend on a number of different aspects. Each case will depend on its own facts. The Receivers submitted that there are three things that need to be demonstrated: (1) that it was necessary and appropriate for the work claimed to be done; (2) that the work was done at an appropriate level of seniority; and (3) that the work was done efficiently in the sense that a reasonable time was taken to do it. The Receivers accepted that this third limb must pick up the quality and complexity of the work done. I agree.

# Grounds of appeal

1. The appellants have raised numerous grounds of appeal. There are nine general grounds with numerous sub-elements.
2. The grounds of appeal and our principal conclusions can be conveniently summarised as follows:
   1. First, the appellants have challenged her Honour’s construction of the Appointment Orders addressing the basis upon which the Receivers’ remuneration was to be allowed and calculated. In particular, the appellants have challenged her Honour’s use of the concept of proportionality in justifying a 20% reduction of the remuneration claimed for the category of work described as “Investors / Distribution”. The appellants have contended that her Honour was not entitled to consider the concept of proportionality in fixing the remuneration. This is addressed in grounds 1(a), 2 and 4. In our opinion, this complaint concerning the construction of the Appointment Orders lacks substance.
   2. Second, even if her Honour was entitled to invoke the concept of proportionality, the appellants have contended that her Honour made various errors in making a 20% reduction in the remuneration claimed for that category of work. They contend that her Honour erred in how she applied the concept of proportionality. This is addressed in grounds 3 and 5. In our opinion, this complaint has some force.
   3. Third, the appellants have contended that her Honour erred in seeking to partly justify the 20% reduction based upon the delay that had occurred between the pooling judgment on 11 November 2010 and the filing of an application for directions for distribution on 4 October 2012. This is addressed in ground 1(c). In our opinion, this criticism also has some force.
   4. Fourth, the appellants have contended that her Honour inappropriately applied a discount by reference to the absence of evidence that the adjudication process adopted was the most efficient, which finding was contrary to the evidence. This is addressed in ground 1(d). In our opinion, this complaint has some force.
   5. Fifth, the appellants have contended that her Honour should have made specific findings as to what work she found was necessary and appropriate to have been done by the Receivers, including at an appropriate level of seniority and was done efficiently, and should have then fixed and allowed remuneration based upon such findings, rather than making a broad based reduction of the total amount claimed by the Receivers. This is addressed in ground 1(b) concerning the 20% reduction for work. In our opinion, this criticism lacks substance.
   6. Sixth, the appellants have contended that her Honour erred in applying the 20% reduction for work done in the “Investors / Distribution” category and the 5% reduction for other work based in part on the inefficiency of using senior analysts on administrative tasks. This is addressed in ground 6. We do not need to address this ground given that the primary judge’s decision is to be set aside in any event for the reasons set out in paragraphs (b) to (d) above and elaborated on later.
   7. Seventh, criticism was made by the appellants of her Honour’s approach in disallowing the remuneration claims for work undertaken in responding to subpoenas issued in other proceedings and for the work undertaken in co-operating with the Director of Public Prosecutions in relation to committal proceedings involving Mr Letten. This is dealt with in ground 7. We do not need to address this ground given that the primary judge’s decision is to be set aside in any event.
   8. Eighth, the appellants have contended that her Honour was in error in seeking to in part justify the 5% reduction or part thereof for work not done in the “Investors / Distribution” category based upon the repetition of narrations or insufficient detail in narrations. This is addressed in ground 8. Again, we do not need to address this ground given that the primary judge’s decision is to be set aside in any event.
   9. Ninth, the appellants have contended that her Honour failed to properly consider and give sufficient weight to the fact that the Receivers had voluntarily reduced their claim for remuneration by 10%. This is addressed in ground 9. In our opinion, this criticism has no substance. Strictly we do not need to address this ground, but we propose to say something about this given that the application for review is to be remitted for rehearing.
   10. Tenth, as we have said, the third appellant has challenged the costs order against it. Given that we propose to set aside her Honour’s decision for other reasons, the costs order as a consequence will be set aside in any event. Nothing further needs to be said on that aspect.
3. We propose to discuss grounds 1 to 5 and 9 in some detail. Given that grounds 1(c) and (d), 3 and 5 are to be upheld, that is sufficient to justify setting aside the primary judge’s orders and remitting the application for review for rehearing. We should say that on a rehearing, the judge hearing the matter will need to consider the application for review afresh on all issues.
4. Before proceeding further, we note that it was contended by the respondent that even if error had been established on the part of the primary judge, that nevertheless her Honour’s decision should stand. We will address that question later, but in general terms we do not accept that contention.

# ANALYSIS OF GROUNDS 1 TO 5 AND 9

1. Before discussing each of these grounds of appeal in some detail, there are two preliminary matters that should be addressed.
2. First, the application for review before her Honour was a rehearing *de novo* of the Registrar’s determination. Nevertheless, in a practical sense the proceeding before her Honour proceeded with the Registrar’s decision used as a starting point with the parties putting to her Honour their submissions for accepting or departing from that foundation. Her Honour acquiesced in that approach. Nevertheless, as a matter of form and substance, the proceeding before her Honour was a rehearing *de novo*. To the extent that her Honour used any part of the Registrar’s decision as the foundation for her reasons or decision and thereby adopted the same, that decision became her decision. Her Honour recognised as much. Whether on the remittal the judge dealing with the rehearing of the application for review takes the same approach is a matter for him or her.
3. Second, in dealing with the application for review and determining the Receivers’ remuneration, her Honour was undertaking an evaluative exercise rather than exercising a true discretion of the type dealt with in *House v The King* (1936) 55 CLR 499. ASIC contended the latter, but we disagree with that characterisation.
4. The exercise undertaken by her Honour was to construe and apply the terms of the Appointment Orders in fixing remuneration. By analogy, a similar process is undertaken under s 425(8) and like provisions. The Court is to fix the remuneration by applying and taking into account a broad range of evaluative factors, but ultimately fixing reasonable remuneration. We do not see this as an exercise of a discretion *per se*. It has been said that the term “discretion” is “apt to create a legal category of indeterminate reference” (*Dwyer v Calco Timbers Pty Ltd* (2008) 234 CLR 124 at [37]). But whatever the breadth of the reference, it is inapposite to use the language of “discretion” where a Court is applying a legal norm and in that application is identifying and evaluating various factors (see *Dwyer* at [40]). The context and setting is all important. We are not here dealing with the exercise of a trust power or an administrative power nor imposing a sentence. Rather, the relevant legal norm was created by the Appointment Orders and required to be applied by her Honour in accordance with the evidence before her. The relevant standard was reasonableness. It was not open ended (cf the standard “just and equitable” discussed in *Norbis v Norbis* (1986) 161 CLR 513 at 518 per Mason and Deane JJ). But it must be accepted that in some cases where a broad power is being exercised in accordance with very general factors, the boundary between a discretionary and non-discretionary judgment can become blurred. We have considered the discussion of this question in *Mobilio v Balliotis* [1998] 3 VR 833 at 836 to 841 per Brooking JA, although we note that his Honour’s views were not the subject of any consensus. In any event, a different issue and statutory regime was being considered to the issue that we are now addressing. If anything, we are inclined to adopt Ormiston JA’s approach (see at 853) to the effect that a decision of the type before us is not a true discretionary judgment, but in the present case the test for error on appeal may be *akin* to that applicable to the exercise of a judicial discretion. So, it may be set aside where obvious errors of fact or law have been made or the decision otherwise is plainly wrong (853 and 854). Similar observations were made by Phillips JA at 858 and 859. Another way to express the point is that where an evaluative judgment is involved upon which reasonable minds might differ and where there is no one correct conclusion, then clear error in the primary judge’s approach or findings must be established. It is not enough that an appeal court may have a preference for a different view to that taken by the primary judge (see *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424 at [25] per Allsop J (as he then was)).
5. But in the end, this question of characterisation may not matter. Given the nature of the errors that we have identified below and that have been established by grounds 1(c) and (d), 3 and 5, such errors would warrant the setting aside of the primary judge’s decision under either characterisation.
6. It is appropriate to address the relevant grounds of appeal (1 to 5 and 9) in the following sequence.

## (a) Grounds 1(a), 2 and 4 — Construction and the concept of proportionality

1. The appellants contended that each Appointment Order was to be construed such that “the remuneration should be calculated by reference to the time reasonably spent by the Receivers, their partners and staff and calculated at the rates specified in the Appointment Orders” (ground 1(a)). The appellants contended that this was the only basis that should have been used in fixing “reasonable remuneration”. As a corollary, the appellants contended that her Honour ought not to have considered the question of proportionality. In summary, the appellants’ central contention was that the reasonableness of the remuneration was to be determined *solely* by the reasonableness of the time spent and the application of the fixed rates to that time.
2. In our view, the appellants’ construction is too narrow.
3. First, the terms of the relevant Appointment Orders used the word “reasonable” in three places. It is apparent that the guiding theme was the fixing of *reasonable* remuneration. That was the purpose to be gleaned from the language of the Orders. Moreover, her Honour’s reasoning at the time she made the initial Appointment Order is consistent with that interpretation (see *Australian Securities and Investments Commission v Letten* [2010] FCA 140 at [43] to [47]). Further, it is to be recalled that s 425(8) (dealing with the remuneration of a receiver appointed under an instrument), s 449E(4) (dealing with the remuneration of an administrator), s 473(10) (dealing with the remuneration of a court-appointed liquidator) and s 504(2) (dealing with the remuneration of a liquidator under a voluntary winding up) all have *reasonableness* as the paramount principle in fixing remuneration. Her Honour’s Orders were no doubt made in and with an appreciation of that context. Further, the appellants did not point to any matter or submission made to her Honour at the time the Orders were made suggesting that any different position should apply to the fixing of the remuneration of the Receivers. If reasonableness is the guiding principle, then to suggest that the determination should be a narrow calculation based upon the reasonableness of time spent, with then an arithmetical calculation based upon the stipulated rates, is inapposite. The appellants accepted that a broader lens could be used, but not such as to extend to considering proportionality. But we consider that to exclude proportionality as a factor feeding into an assessment of reasonableness is not warranted. We will return to proportionality shortly.
4. Second, the appellants’ argument would seek to read into the terms of the Orders the word “only”, such that the remuneration should be calculated by reference only to the time reasonably spent and calculated at the specified rates. But the terms do not use the word “only” and nor in our view is the word to be implied. Time reasonably spent assessed at the stipulated rates is an important foundation, but it is not specified to be the *only* factor. The appellants emphasised the phrase “such sum …” in each of the Orders, but again that language does not necessarily imply that this was to be the only basis used.
5. Generally, the language of the Orders, and the context in which they were made, permit of proportionality being considered in order to assess the question of reasonable remuneration. Indeed, the question of proportionality is an anterior question to consider in order to determine whether time was reasonably spent. If the relevant work plan underpinning the actual time spent and the allocation of personnel at the requisite level of seniority was disproportionate to the nature, importance and complexity of the task and the benefit to be achieved from the task, then it might be said that the time spent on the task was not time *reasonably* spent.
6. The question of proportionality is a well recognised factor in considering the question of reasonableness. As the analogue of s 425(8) and like provisions expressly state, in having “regard to whether the remuneration is reasonable”, the Court can take into account, *inter alia*, the quality and complexity of the work and the value and nature of any property dealt with as well as the question of time reasonably spent. Generally, an amalgam of the factors in s 425(8)(d), (e), (g) and (h) have as their unifying theme the concept of proportionality.
7. The question of proportionality in terms of the work done as compared with the size of the property or activity the subject of the insolvency administration or the benefit or gain to be obtained from the work is an important consideration in determining overall reasonableness: see *In the matter of AAA Financial Intelligence Ltd (in liquidation)* [2014] NSWSC 1004 at [18] and [19] per Brereton J, *In the matter of AAA Financial Intelligence Ltd (in liquidation) (No 2)* [2014] NSWSC 1270 at [35], [36], [43] and [45] per Brereton J, *Mirror Group Newspapers plc v Maxwell* [1998] 1 BCLC 638 at 645, 651, 652 per Ferris J (also reported at [1998] BCC 324), *In the matter of On Q Group Ltd (in liquidation)* [2014] NSWSC 1428 at [20] per Brereton J, *Bank of Nova Scotia v Diemer* [2014] ONCA 851 at [33], [45], [55] and [56] per Pepall JA, *Re Roslea Path Ltd (in liquidation)* [2013] 1 NZLR 207 at [108], [115] and [121] per Heath and Venning JJ, *Brook v Reed* [2012] 1 WLR 419 at [51], [86] and [87] per Richards J, referring to the relevant 2004 UK Practice Statement [2004] BCC 912, *Re Korda; in the matter of Stockford Ltd* (2004) 140 FCR 424 at [47] per Finkelstein J, although we do not endorse his Honour’s obiter observations on the “lodestar” methodology as being the *required* approach as distinct from merely *one* practical way to proceed in a particular case.
8. Generally, in looking at proportionality, the value of the services rendered must be considered. We would endorse the observations of McLure JA in *Conlan as liquidator of Rowena Nominees Pty Ltd (in liquidation) v Adams* (2008) 65 ACSR 521 at [47] where her Honour observed:

As to the performance of a task reasonably embarked upon, the work done must be proportionate to the difficulty or importance of the task in the context in which it needs to be performed. This is what is encompassed in assessing the value of the services rendered. Using an example from the law, the time spent by an appropriately qualified and experienced practitioner in drafting a statement of claim should be proportionate to the amount in issue.

1. Finally, even if one was not to address proportionality as an express factor, nevertheless its absence may have forensic significance in determining reasonableness. Another way to look at proportionality can be to conclude from a lack of proportionality between the cost of the work done relative to the value of the services provided that there has been overcharging or excessive remuneration claimed (see *Thackray v Gunns Plantations Ltd* (2011) 85 ACSR 144 at [64] per Davies J).
2. For the above reasons we would reject ground 1(a). Her Honour properly construed the terms of the Appointment Orders and as part thereof took into account the question of proportionality.
3. Grounds of appeal 2 and 4 assert the following:

2. The learned judge erred in holding that in assessing the remuneration of the Receivers for the period 1 January 2012 to 31 March 2013 (“relevant period”) in the “Investors/Distribution” category, it was permissible to take into account the proportional relationship between the amounts actually distributed or available for distribution and the amount of the claim for work in that category (“specific proportionality criterion”).

4. The learned judge erred in holding that in assessing the whole or any category of the remuneration of the Receivers in the relevant period, it was permissible to take into account the proportional relationship between the amounts actually distributed or available for distribution and:

(a) the amount of the total claim for remuneration and expenses in the relevant period;

(b) the total of the remuneration and expenses previously allowed to the Receivers since their appointment,

(“general proportionality criterion”).

1. We would reject grounds 2 and 4 for the following reasons.
2. Her Honour was entitled, as part of considering the question of proportionality, to consider:
   1. the proportionality between the size, nature and value of the work in respect of the “Investors / Distribution” category in the Relevant Period (in the present case by reference to the proxy of the amounts actually distributed or available for distribution to Investors) and the claimed remuneration for such work in the Relevant Period;
   2. the proportionality between the size, nature and value of such work in the “Investors / Distribution” category *since* the Receivers’ appointment (but including the Relevant Period) and the claimed remuneration for such work over such a broader period;
   3. the proportionality between the size, nature and value of the non-“Investors / Distribution” category work and the claimed remuneration for such work, whether over the Relevant Period or a broader period (although such an analysis is not presently relevant);
   4. the proportional relationship between the size, nature and value of *all* work (Investors / Distribution and non-Investors / Distribution) and the claimed remuneration for such work, whether over the Relevant Period or a broader period (although such an analysis is not presently relevant).
3. But whatever the methodology, like must be compared with like. If proportionality is to be assessed in respect of the remuneration incurred for a category of work, the size, nature and value of *that* work is to be weighed against the remuneration claimed for *that* work.
4. We do not consider that her Honour was in error in taking into account such proportionality criteria as suggested above. Rather, as we will now explain, we have difficulty with her Honour’s application of such criteria and whether her Honour compared like with like.

## (b) Grounds 3 and 5 — The application of proportionality

1. Before dealing with her Honour’s specific reasons on proportionality, it is appropriate to consider more generally how her Honour dealt with the 20% reduction and its justification.
2. Her Honour addressed how the Registrar dealt with the 20% reduction by reference to 5 factors in the following terms at [18]:

The Registrar applied a 20% reduction on the amount claimed by the Receivers under the heading “Investors / Distribution”. The Registrar identified the reasons for that reduction as:

1. An excessive amount of time spent adjudicating investor claims;

2. Repetition of narrative entries and insufficient detail in some entries;

3. The question of proportionality;

4. The telephone hotline; and

5. Seniority of staff and nature of work undertaken.

1. Her Honour then addressed each of these elements in turn, although there was no identification as to how much of the 20% reduction was attributable to each component and why. Her Honour ultimately accepted that the 20% reduction was justified by reference to various elements without attributing any specific element to any specific quantum of the 20%. In our view, there are difficulties with how her Honour analysed some of these elements. In the present context we are dealing with the question of proportionality; we will address the other issues later.
2. On the question of proportionality, her Honour said the following at [27] to [29]:

27. Next, proportionality. The Registrar observed (at [29] of his reasons) that the claim for work in the “Investor / Distribution” category is large when compared with the distribution actually made or the amount available for distribution. This was and remains a relevant consideration in assessing remuneration. As the IAC submitted, the particular circumstances of the appointment and the nature of the assets are relevant to this issue.

28. So what is the position here? The Receivers have distributed $6.1 million to investors. There is a further $4.8 million which has been retained by them as a contingency for certain rejected investor claims, which may be distributed. That would bring the total sum of funds available for distribution after deduction of the Receivers’ remuneration, costs and expenses incurred but not paid as well as an allowance for estimated future expenses, to $10.9 million. The present claim, for over $4 million, appears large compared with these figures, all the more so given that the Receivers have already received about $14.2 million and there will be additional future claims by the Receivers.

29. The circumstances of this case are extraordinary. When Mr Letten was recently sentenced in the County Court for offences relating to these schemes, the sentencing judge described the schemes as an economic shamble or shemozzle, and the whole enterprise as having more structural defects than the Titanic: *Commonwealth Director of Public Prosecutions v Mark Ronald Letten* [2014] VCC 1285 at [9]. Those statements were not an exaggeration. Notwithstanding the difficulties faced by the Receivers, they were at the coal face, and it was beholden on them to seek to adopt measures that would ensure that the process was as streamlined and cost effective as possible. If that could not be achieved without further directions from the Court, the solution was to apply to the Court for those directions, as they did in relation to trustees’ rights of indemnity (application filed around 29 August 2011, judgment delivered 12 December 2011), and the methodology for adjudicating the claims and making distributions (application dated 4 October 2012, orders made 19 November 2012).

1. Grounds of appeal 3 and 5 assert the following:

3. If the learned judge was entitled to apply the specific proportionality criterion, her Honour:

(a) erred in its application by comparing the amount distributed or available for distribution with the amount of the total claim for remuneration and expenses in the relevant period ($4.3 million) rather than the actual claim for remuneration in the investors/distribution category in the relevant period ($2.4 million);

(b) erred in failing to give adequate reasons for her decision by specifying the result of the application of the criterion and the reasoning by which that result was arrived at.

5. If the learned judge was entitled to apply the general proportionality criterion, her Honour erred in its application by:

(a) failing to take into account and make allowance for:

(i) the fact known to the Court that the Receivers had been ordered by the Court to carry out and had carried out and reported to the Court upon the results of extensive investigations of the affairs of 21 unregistered managed investment schemes, the majority of which had no realisable assets, and 52 associated corporations;

(ii) evidence before the Court that the Receivers had realised assets totalling $92 million (including GST) all of which were encumbered to mortgagees;

(iii) evidence before the Court that of the total remuneration and expenses allowed to or claimed by the Receivers up to the end of the relevant period, $10.6 million, or approximately 59%, related to the interests of the mortgagees and had been paid out of the proceeds of asset realisations which would otherwise have been paid to those mortgagees;

(b) erred in failing to give adequate reasons for her decision by specifying the result of the application of the criterion and the reasoning by which that result was arrived at.

1. In our view, there are a number of difficulties with how her Honour approached the question of proportionality.
2. Generally, her Honour’s principal reasoning on the question of proportionality is dealt with at [28]. But her Honour appears not to have made like with like comparisons.
3. First, her Honour considered the value of the “Investors / Distribution” work in relation to the amount distributed of $6.1m and the amount to be distributed of $4.8m, totalling $10.9m. There is no difficulty with this. But in doing so, the comparator ought to have been the remuneration for work done in that category. Her Honour compared the amounts distributed or to be distributed with the “present claim, for over $4 million”. But the true comparator was the amount claimed for this category of work, being $2,369,274.50, alternatively that amount together with the previous remuneration claimed and allowed for that category of work.
4. Second, her Honour referred to the Receivers also having received about $14.2m. But that amount was in large part for remuneration done in relation to the secured creditors. It was not comparing like with like in looking at the proportionality for the remuneration claim in respect of the “Investors / Distribution” category. Now one could have looked at the total remuneration claim for work done in all categories as compared with the value of the work in all categories, but then the true comparator to the $14.2m would not just have been the $10.9m amount concerning distributions to investors, but would also need to have taken into account the value achieved or ascribed to the work undertaken concerning the secured creditors, which realised $92m.
5. For completeness, we should say that there is one submission of the appellants that we reject. It was said that in looking at the proportionality of the claim concerning the “Investors / Distribution” category, that the benefit of $10.9m should be assessed *only* against the $2.369m then claimed, without looking at the previous remuneration claimed for work in that category (this appears to have been $3.6m (T 24.45)). We would reject that contention. In our view, an appropriate proportionality analysis with respect to that category of work could properly consider either:
   1. the total value of that work with the total remuneration claimed for that work over the entire period; or
   2. the value of work performed of that type over the Relevant Period with the remuneration claimed for that work over the Relevant Period.
6. In that light, it would have been quite appropriate to compare the $10.9m “value” for the “Investors / Distribution” category with the total remuneration claimed for that work, not just limited to the work for that category claimed in the Relevant Period. Her Honour did not undertake that calculation; if she had, the relevant ratio of cost/benefit would have been in the order of 6 ($2.4m + $3.6m) to about 10 ($10.9m).
7. More generally, in considering the question of proportionality one also has to bear in mind two other points that may be overlooked. First, in performing some work, it may not be entirely clear *ex ante* what the precise benefit might be. A situation where work was being performed to preserve property of known value is quite different to the situation where work was being performed to achieve a return to creditors that was unclear. In the latter case, it might be inappropriate to use a hindsight analysis of known returns after the event to assess whether the work performed was proportional to the task; in such a situation one would look at the expected realistic return at the time the work was performed rather than actual outcomes. Second, some work may be sufficiently complex and labour intensive such as to justify a cost/benefit ratio of 6/10. After all, if the duty of the Receivers is to maximise returns and it is *necessary* to spend $0.60 to achieve $1.00, then proportionality is satisfied even if the ratio might be high.
8. In summary, we are not satisfied that the appropriate proportionality analysis was adopted in terms of comparing like with like. But we do accept that on one view of the correct analysis, a similar overall result may have been achieved to her Honour’s $4m to $10.9m comparison. Nevertheless, it seems to us that the question needs to be considered afresh, not only in applying the correct comparison but then separately justifying why that comparison warrants some or all of the relevant reduction, particularly in the face of the detailed evidence filed by the Receivers that was not the subject of cross-examination. It was not demonstrated and explained how any component part of the 20% reduction was justified by the proportionality criterion. Further, we do not consider that sufficient consideration was given to the fact that the Receivers’ program of work was largely a function of the directions and orders of the Court and the complexity of the matter.
9. For the above reasons we would generally uphold grounds 3 and 5.
10. It is also to be observed that her Honour’s reasoning on the proportionality question impacted on her consideration of the 5% reduction for other work, as her Honour explained at [38] to [40] of her reasons.
11. Given that there are difficulties with her Honour’s proportionality assessment, these difficulties also entail that the 5% reduction for other work is not maintainable on the foundation that her Honour used.

## (c) Ground 1(b) — Absence of findings

1. Ground 1(b) asserts:

1. The learned judge erred in finding or holding that the amount claimed by the Receivers for the adjudication of claims was “too high” and should be reduced by $475,852.90 in that in making the said finding:

…

(b) having identified that the matters which needed to be demonstrated by the Receivers as being: (1) that it was necessary and appropriate for the work claimed to be done; (2) that the work was done at an appropriate level of seniority; and (3) that the work was done efficiently in the sense that a reasonable time was taken to do it (including having regard to the quality and complexity of the work done), her Honour made no specific findings as to those matters;

1. We would reject this ground.
2. The appellants have contended that her Honour ought to have made specific positive findings about:
   1. the work necessary and appropriate to be done;
   2. the appropriate level of seniority; and
   3. the work that was done efficiently.
3. The onus was on the Receivers to justify the reasonableness and prudence of the tasks undertaken (see *Ide v Ide* [2004] NSWSC 751 at [42] per Young CJ in Equity, *Onefone Australia Pty Ltd v One.Tel Ltd* (2010) 80 ACSR 11 at [24] and [28] per Barrett J and *Venetian Nominees Pty Ltd v Conlan* (1998) 20 WAR 96 at 102 and 103 per Kennedy and Ipp JJ). If there was a lack of detail in the material provided by the Receivers, that would not have enabled her Honour to make such findings. In those circumstances, it was an appropriate approach to take the broader claim and appropriately discount, without making specific findings. But even assuming that there was sufficiently detailed material before her Honour, we do not agree that her Honour in any event needed to drill down and make detailed findings on such matters. Her Honour was entitled to take the practical course of looking at the matter more generally in assessing reasonableness and then applying, if thought necessary, any appropriate discounts. Where we differ with respect from her Honour is in the assessment and justification of the appropriate discounts, not in her overall approach to start with the Receivers’ claims and then to apply appropriate and justified discounts. It is neither sensible nor cost effective for the Court, on reviewing the remuneration claimed, to proceed by some line by line analysis using some building blocks or bottom up approach to build up an amount which the Court then determines to be reasonable remuneration based upon detailed findings concerning the matters set out in (a) to (c) of the preceding paragraph.
4. We would reject ground 1(b).

## (d) Ground 1(c) — Delay

1. Ground 1(c) asserts:

1. The learned judge erred in finding or holding that the amount claimed by the Receivers for the adjudication of claims was “too high” and should be reduced by $475,852.90 in that in making the said finding:

…

(c) the learned judge imposed an unspecified or indeterminate discount or penalty on the Receivers by reference to the learned judge’s opinion as to whether an excessive delay had elapsed between the pooling judgment on 11 November 2010 and the filing of an application for directions for distribution on 4 October 2012 …

1. At [26], her Honour dealt with the question of delay in the following terms:

Further, as the IAC submitted, in an earlier decision, the Court expressed concern about the length of time taken for the proof of claim process to commence, and observed that this “may later bear on how the remuneration and expenses of the Receivers should be dealt with”: *Australian Securities and Investments Commission v Letten (No 20)* [2012] FCA 1283 at [9]. Two years had elapsed between the date that pooling orders were made (11 November 2010) and the Receivers’ application for directions on distribution (filed on 4 October 2012). Mr Templeton’s evidence was that planning for the process of adjudicating investor claims commenced after the Court delivered judgment on the trustees’ right of indemnity on 12 December 2011: *Australian Securities and Investments Commission v Letten (No 17)* [2011] FCA 1420. Accordingly, almost the entire period between the commencement of planning for adjudication and the application for directions on distribution falls within the Relevant Period in the present application.

1. In our opinion, the primary judge’s reduction was not justified by the delay referred to.
2. First, the claim for remuneration was for the Relevant Period, which commenced in respect of the work claimed on 1 January 2012. There was no attempt made to link any delay to any additional work flowing from the delay that would not otherwise have needed to have been performed. For delay to justify a reduction, it had to be linked to increased or additional work that, absent delay, would not have been needed, or an increased level of inefficiency in the performance of the work that would not otherwise have been the case. In our view, her Honour did not elucidate any such link. It is not good enough to say, as the respondent has asserted in generality, that it is “well known that the effluxion of a long period of time results in an increase in costs”.
3. Second, the unchallenged evidence of the first appellant explained the delay (see for example his 44th affidavit sworn 14 June 2013, at [17] to [30] in Section B). The evidence demonstrated that the delay was not unreasonable. In any event, as we have said, any such delay was not explicitly linked to any inflated remuneration claim or any inefficiency in the work performed.
4. Third, her Honour took this delay question into account in partly justifying the 20% reduction, but without any direct linkage to support that reduction or to explain what part of the 20% reduction was referable to delay.
5. We would uphold ground 1(c).

## (e) Ground 1(d) — A discount for inefficiency

1. Ground 1(d) asserts:

1. The learned judge erred in finding or holding that the amount claimed by the Receivers for the adjudication of claims was “too high” and should be reduced by $475,852.90 in that in making the said finding:

…

(d) the learned trial judge applied an unspecified or indeterminate discount or penalty on the Receivers by reference to the absence of evidence as to any review of the adjudication process that was adopted to ensure that it was being done in the most efficient manner possible when:

(i) the adjudication process was carried out in accordance with the specific directions of the Court as to the manner in which the entitlements of investors should be calculated;

(ii) there was evidence of the steps taken by the Receivers to ensure the efficiency of the process;

(iii) in so far as the learned trial judge thereby found that the adjudication process was not carried out efficiently, in the sense that a reasonable time was taken to do it, such finding was against the evidence and the weight of the evidence;

(iv) the learned judge erred in failing to give adequate reasons for her decision by specifying the amount of the penalty or discount and the reasoning by which that amount was determined.

1. In our view there is some force in these grounds.
2. Her Honour at [25] said the following:

Using the figures most recently provided by Mr Templeton, it appears that on average about 1.6 hours was spent on each investment. Even accepting Mr Templeton’s assertion that hours recorded do not relate “solely to the adjudication process” and extended to include communications with investors (which are not specifically recorded or able to be identified in these entries), the amount claimed by the Receivers for this category of work is too high. The material filed does not indicate whether any review was undertaken of the process being adopted to ensure that it was being done in the most efficient manner or whether it required alteration in some respect or respects. In any task of this magnitude you would plan for and anticipate that changes would be required.

1. Her Honour seems to have taken the position that the adjudication plan ought to have been kept under review and made more efficient over time. It is said that the absence of such a review led to the claim being too high.
2. We have difficulties with this approach. The appellants led uncontested evidence as to the method implemented and the reasons for its implementation (see for example the 44th affidavit of the first appellant sworn on 14 June 2013 at [33] to [43], the 46th affidavit of the first appellant sworn on 28 March 2014 at [5] to [8], the 49th affidavit of the first appellant sworn on 27 June 2014 at [7] to [11], the 51st affidavit of the first appellant sworn on 4 August 2014 at [4] and [5] and Exhibit DJT-303).
3. On the face of this unchallenged evidence, in our view it was not open to say that the time spent was “too high”. Moreover, there was no evidence of any other more efficient process that would have reduced the time taken.
4. Further, it is not explained how this criticism, even if made good, justified some part or all of the 20% reduction.
5. In our view, ground 1(d) is made out.

## (f) Ground 9 — The Receivers’ 10% voluntary reduction

1. Although it is not strictly necessary to deal with this ground as we have determined to set aside her Honour’s orders for other reasons, given its relationship to the other grounds that we have discussed, it is appropriate to address it.
2. On the question of the significance of the 10% voluntary reduction made by the Receivers on the work charged on a time basis to the relevant files, her Honour at [55] to [57] observed the following:

55. The amount charged to a file number is not the “actual” claim. It reflects no more than the fact that people have allocated units of time to a particular matter. The Receivers appear to largely proceed from an assumption that they were entitled to every unit charged to the matter (reduced by their voluntary discount of 10%), without assessing whether the remuneration was reasonable and calculated on the basis of the time reasonably spent, and whether the costs and expenses were reasonable and properly incurred. That is wrong. A review of the work charged to a file is always necessary to identify, inter alia, work allocated to the wrong matter, work that took too long, work that should not be charged to a client and so on. The fact that this is a receivership does not alter that fact. Whether a review of that nature occurred in relation to these claims is unclear. Mr Templeton’s evidence was that “comprehensive” reviews of the fee summaries and schedules of work were undertaken, the appropriateness of time charged was considered on an ongoing basis and that write offs were made when reviewing the bills for the purpose of this application. The nature and extent of those reviews, and the nature, extent of, and reasons for, those write offs, remained unclear.

56. Time charging is an historic measure of value and has been described as unfair: *Re Korda* at [26] and the authorities cited. Its use has become common place and comes at a cost to the claimant – review, identification of the real claim and then justification of the amount claimed by the claimant. Each step is important: cf *Re Korda* at [17]. The Receivers’ solution appears to have been to apply a 10% discount across the board. The 10% reduction was said to have been provided “in recognition of the substantial nature of these receiverships, the significant hardship faced by investors and the significant amounts claimed by the Receivers”. Discounts are not discouraged but should be made on informed basis after review, identification of the real claim and then justification of the amount claimed by the claimant.

57. As the IAC submitted, it was appropriate to take the 10% reduction into account when assessing the reasonableness of the Receivers’ remuneration (see, by way of example, *Thackray v Gunns Plantations Ltd* (2011) 85 ACSR 144 at [207]) and the Registrar said he did so: at [17] of his reasons. The further discounts identified by the Registrar (and the subject of this rehearing) were applied to the discounted (or net) amount rather than the gross amount of fees claimed. There is no identifiable error in that approach.

1. If we may say so, we entirely agree with her Honour’s approach.
2. Ground 9 asserted that her Honour was in error. So it was asserted:

9. The learned judge erred in determining the remuneration of the Receivers:

(a) in finding contrary to the evidence before the Court that the Receivers had not reviewed their time charging records to identify the real claim;

(b) in failing to give any or any sufficient weight to the fact that the Receivers had voluntarily reduced their claim for remuneration in the relevant period by $367,693 from the amount that would have been payable at the rates fixed by the Court;

(c) in failing to determine the Receivers’ entitlement to remuneration by calculating that amount at the rates specified in the Appointment Orders rather than those rates reduced by the voluntary discount of 10% which the Receivers applied.

1. There is no substance to this complaint. First, her Honour did take into account the evidence concerning the review of the time sheets, but as her Honour found, the nature and extent of such reviews were unclear. Her Honour was quite entitled not to be satisfied that the 10% discount had proceeded from the *real* or *actual* claim as distinct from a notional arithmetic ambit claim. Second, her Honour gave the 10% discount the weighting that was appropriate in light of the absence of detailed evidence about the review process. Third, her Honour was quite entitled to commence her assessment of reasonableness using the starting point of the real claim, which had incorporated within it the 10% discount.

## (g) Grounds 6, 7, 8 and 10

1. Given that we propose to uphold grounds 1(c) and (d), 3 and 5, and to set aside her Honour’s decision accordingly, it is unnecessary to deal with these grounds.
2. It will be a matter for the judge dealing with the remittal to consider these matters afresh and not constrained by her Honour’s approach.

# CONCLUSION — SETTING ASIDE OF ORDERS

1. In our view, as we have upheld grounds 1(c) and (d), 3 and 5, it is appropriate to set aside her Honour’s orders.
2. The consequences of our findings are that errors have been made in the evaluative task undertaken by her Honour.
3. Moreover, we are unable to say that such errors had no causative significance to the making of her Honour’s determination. Her Honour’s approach to proportionality significantly underpinned both the 20% reduction and the 5% reduction. True it is that these reductions were also justified on other grounds. But we are unable to say that those reductions as so quantified would necessarily have been made and justified in any event on the other foundations relied upon. In any event, several of the other foundations relied upon to justify the reductions are problematic for other reasons. Moreover, we are not in a position for ourselves to apply a different set of quantitative reductions by in effect backing out the proportionality analysis, as her Honour elucidated it, and then applying the correct proportionality analysis. It is more appropriate for there to be a rehearing of the matter.
4. Accordingly, we will set aside her Honour’s orders and remit the hearing of the application for review to another judge to be considered afresh on all issues, but subject to our reasons.
5. On the question of costs, her Honour’s order against KPMG will be set aside. We consider that the costs of all parties to the present appeal and the hearing before her Honour should be treated as costs and expenses of the winding up of the Schemes and be paid out of the funds on hand held by the Receivers.

|  |
| --- |
| I certify that the preceding eighty-eight (88) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Besanko, Middleton and Beach. |

Associate:

Dated: 18 September 2015