



IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO FSD 108 of 2022 (IKJ)

IN THE MATTER OF THE COMPANIES ACT (2022 REVISION)

AND IN THE MATTER OF GLOBAL CORD BLOOD CORPORATION (IN PROVISIONAL LIQUIDATION)

IN CHAMBERS

Appearances:

Mr Liam Faulkner and Ms Lisa Yun of Campbells LLP on behalf of the Joint Provisional Liquidators (“JPLs”)

Mr Christopher Young and Mr Alan Quigley of Forbes Hare on behalf of Blue Ocean Structure Investment Company Limited (the “Petitioner”)

Mr Stephen Leontsinis and Ms Kirsten Bailey of Collas Crill LLP on behalf of Oasis Investments II Master Fund (“Oasis”) & IsZo Capital LP (“IsZo”) (together, the “CC Shareholders”)

Before: The Hon. Justice Kawaley (in Chambers)

Heard: 9-10 October 2024

Ruling Delivered: 13 November 2024

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Contested fee application-approach to “core challenges” and “resource challenges”-governing legal principles

RULING

Background

1. John Royle and Margot MacInnis of Grant Thornton Specialist Services (Cayman) Limited (“GTSS”) and Chow Tsz Nga Georgia of Grant Thornton Recovery & Reorganisation Limited were appointed as Joint Provisional Liquidators of the Company (“JPLs”) by Order of this Court dated 22 September 2022. The Company had been listed on the New York Stock Exchange and its assets were on one view worth US\$1.5 billion. The business consisted of Hong Kong subsidiaries (“HK Subsidiaries”) and PRC subsidiaries (“PRC Subsidiaries”). A week after their appointment, the JPLs discovered that so-called “Bad Actors” had attempted to transfer these core assets out of the Company’s control. Recovering these assets became an overarching concern and litigation was quickly commenced, initially in Hong Kong (the “HK Proceedings”). In their First Report to the Court dated 20 October 2022, the JPLs stated:

“8.1.1 The expenses required to engage and co-ordinate such urgent activities in multiple jurisdictions are and will continue to be considerable in the initial phases of the JPLs’ appointment. However, the costs being incurred are minimal in proportion to the sums alleged to have been misappropriated and the assets to be safeguarded on an immediate and urgent basis which are in turn significant.”

2. The Company has been presumed to be solvent. The JPLs convened an Extraordinary General meeting for 16 April 2024 with a view to seeking approval of their fees for the first time. The Petitioner did not attend, and the meeting was inquorate.
3. It was against this background that an Amended Summons sealed on 17 May 2024 was filed by the JPLs seeking approval for fees and disbursements in the amount of US\$10,274,854 incurred during a one-year period from 22 September 2022 to 30 September 2023 (the “Fee Period”). The

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Summons was opposed by the Petitioner and the CC Shareholders (together, the “Controlling Shareholders”). The Controlling Shareholders’ combined stake in the Company is more than 70%.

4. The Court was, at a high level, invited to choose between two starkly different narratives about the merits of JPLs’ fee application (“Fee Application”):
 - (a) the JPLs essentially contended that the sums claimed were properly due and were entirely proportionate to the complexity and urgency of the main work done during the Fee Period and the value of the assets involved; and
 - (b) the Controlling Shareholders essentially contended that the amount claimed (in excess of US\$10 million for approximately one year’s work) was ‘eyewatering’, and the fact that the JPLs had deployed 83 staff members in all made it obvious that serious inefficiencies had occurred.
5. However, the application really turned on a detailed analysis of the merits of various specific challenges, which were set out in two reports and addressed both through evidence and written submissions. Having overrun the initial one-day hearing estimate by nearly half a day, I declined to hear full oral argument on the specific challenges to certain workstreams on the basis that the resources of the Court would be better deployed grappling with the minutiae, as it were, on the papers.
6. I am indebted to counsel for brightening the typically drab forensic landscape of fee applications with their occasionally colourful oral submissions.

Governing legal principles

7. There was no dispute about the governing legal principles. Mr Faulkner for the JPLs relied pivotally on two conceptual principles derived from Segal J’s decision in *Re Direct Lending Income Feeder Fund, Ltd (in Official Liquidation)*, FSD 108/2019, Judgment dated 3 February 2022 (unreported):

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- (a) what counsel, building on Segal J’s nomenclature, aptly termed a “Core Challenge” was a complaint that that a particular workstream was not reasonably necessary, applying a *Wednesbury*¹ unreasonableness standard (*Direct Lending* at paragraphs 44-45, *Re Herald Fund SPC* (in Official Liquidation), FSD 27/2013 (IKJ), Judgment dated 1 April 2021 (unreported) at paragraph 47);
- (b) what counsel, building on Segal J’s nomenclature, aptly termed a “Resource Challenge” is a complaint that relevant costs were not proportionate and did not deliver fair value, applying the standard of the reasonable prudent person (*Direct Lending* at paragraph 46).

8. Although the JPLs’ counsel accepted the onus was on the JPLs to prove they were entitled to their fees, Mr Young for the Petitioner emphasised that this meant that “*the court must resolve any doubt in favour of the estate*”: Proudman J in *Hunt-v-Yearwood-Grazette* [2009] BPIR 810 at paragraph 9 (cited in *Direct Lending* at paragraph 33). The Petitioner’s counsel referred the Court to the very instructive decision in *Re Sphynx*, FSD 16/2009, Judgment dated 13 November 2012 (unreported). Two passages he referred to I find instructive. In setting out his findings on the largest single contested workstream, Anthony Smellie CJ (as he then was) held:

(a) “63. *Complexity by itself is no excuse for inefficiency...*”; and

(b) “64. *My conclusion on this issue, purely I must note in the end as a matter of impression from my experience in the liquidation, while nonetheless having regard to the arguments and counter-arguments; is that some deduction is required, though not as large as that proposed by Moore Stephens.*”

9. Mr Leontsinis for the CC Shareholders referred to a passage in *Re Liberty Capital Limited et al* 2002 CILR 606 (Smellie CJ, Sanderson J and Henderson Ag. J) which helpfully identifies the overarching legal policy concern when dealing with remuneration applications. The Chief Justice opined as follows:

¹ *Associated Provincial Picture Houses-v-Wednesbury Corporation* [1948] 1 K.B. 223.

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“59. The court recognizes that insolvency practitioners are professionals and deserve to be adequately compensated for the important work they do. It is not the court’s intention to be miserly, if, indeed, such an expression could ever apply to the rates we have set. The paramount objective must be to safeguard the lawful interests of the creditors. We must be astute to recognize the inevitable tension that arises from the liquidator having to fulfil his duties to the creditors and the court, yet, at the same time having to secure his own interests by maximizing what he can earn from a retainer.” [Emphasis added]

10. Those observations made in the context of an insolvent liquidation apply with equal force to a solvent provisional liquidation. The JPLs’ skeleton accepted that *“where the Company is treated as solvent, the Company’s contributories can in principle challenge the amount of the liquidators’ remuneration”* (paragraph 10.1).

Application of governing principles to the present case

11. The most important practical considerations are (1) what weight should be attached to the report prepared by FTI Consulting (Cayman) Limited dated 5 September 2024 (“FTI Report”) and (2) how should the criticisms of the Fee Application be evaluated.

Approach to the FTI Report

12. In the most colourful submission of the hearing, Mr Faulkner suggested that if the Court were to significantly reduce fees based on such an insubstantial document, not only would the Court be bombarded by contested fee applications, stakeholders would be queuing up outside of FTI’s offices to obtain similar reports to launch similar challenges, and preparing reports for fee challenges would become FTI’s main line of business. There is a grain of truth in every joke.
13. The weight to be attached to the FTI Report is not comparable to the weight to be attached to the report deployed by the liquidation committee in the *Re Sphynx* case. In that case Moore Stephens were appointed as consultants to the Liquidation Committee, and a Mr Phillip Sykes swore an

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affidavit and attended to speak to the report if necessary. That report recommended a total discount of between 32-36%, and the Chief Justice reduced the fees by approximately half of that amount. Here, the FTI Report on its face had no author. Mr Young, appreciating the force of this criticism, responded that it was clear from correspondence that Mr David Griffin, a Senior Managing Director of FTI, stood behind the FTI Report.

14. The FTI Report begins with an “*Important Notice*” which explains that it is produced to the Controlling Shareholders in accordance with the terms of a letter of engagement dated 21 August 2024. It is based solely on information supplied by the JPLs listed in Appendix A, which includes the JPLs’ 1st to 6th Reports, the JPLs’ Fee Report dated 14 March 2024 (the “Fee Report”), their time entries and the Fee Application and supporting evidence.
15. The letter of engagement signed by Mr Griffin states that he will supervise the work done and confirms that no conflicts of interest exist. Section 2 (“Services to be provided by FTI”) states:

“The services to be performed will comprise undertaking review and analysis of the fees incurred during the Period, the preparation of a report (“Report”) and assisting with submission of the Controlling Shareholders’ evidence to the Court. The Report will contain FTI’s analysis and assessment of the JPLs’ fees.”

16. FTI on the face of the terms of their engagement agree to assist the parties retaining them with the presentation of their evidence to the Court and make no pretence about producing an independent report to the Court. The FTI Report is not a report signed by an insolvency practitioner who is willing to go on record with criticisms of fellow professionals and to posit the correct approach which they themselves have customarily followed and would have followed in comparable circumstances. This is a report issued by a corporate professional service provider with general oversight from an insolvency practitioner who was seemingly unwilling to leave his fingerprints on the forensic weapon in question. It carries less weight than the report relied upon by the liquidation committee in *Re Sphynx* which was explicitly authored by an insolvency practitioner who defended it on oath before the Court.

17. In the present case, I therefore treat the FTI Report as general factual evidence relevant to the evaluation of the merits of the JPLs' Fee Application in a manner which routinely occurs when stakeholders file evidence and advance submissions in opposition to officeholders' remuneration claims. The Report's conclusions nonetheless fall to be determined on their merits.

The approach to the application

18. In *Re Sphinx* (at paragraph 64), Smellie CJ indicated that he ultimately adopted an impressionistic approach based on his experience of the liquidation while considering the competing arguments, when dealing with the principal disputed item. In the course of the hearing, I canvassed with counsel whether I was entitled to adopt a similar approach based on my experience of fee approval applications generally. There were no vigorous rumblings of dissent. However, I made it clear in reserving judgment that it would be necessary for me to grapple with the specific issues which had been joined.
19. In addition, it is important to add that although this is the first Fee Application, I have some familiarity with the main focus of the provisional liquidation having had carriage of these proceedings from inception on 3 May 2022, appointed the JPLs on 22 September 2022 and dealt with both collateral and direct attacks on their appointment. On 31 March 2023, I dismissed an attempt by an entity linked with the former management to strike-out the Petition. On 8 September 2023, I gave reasons for setting aside two significant findings in my 29 July 2022 Judgment on the grounds that facts had been materially misstated by the Company acting by its former management.
20. Two extracts from the latter Judgment provide some insight into how contentious the provisional liquidation has been over the relevant Fee Period and the fact that their main focus was understandably on recovering the Company's most valuable assets. Firstly:

"1. ...Roughly a year ago, the Petitioner sought to list an ex parte on notice application as soon as possible to appoint the Joint Provisional Liquidators (the "JPLs") having discovered what appeared to be clear evidence that the Judgment I delivered on 29 July 2022 had been based in part on a forged bank statement relied upon by the Company. While the Court was seeking to fix a date which would suitably accommodate the Company's fair hearing rights,

it now appears that the listed Company’s management was, during this very window of time, disposing of the Company’s most valuable assets. This was purportedly done pursuant to undisclosed security arrangements entered into for the benefit its shareholders. At the time of the present hearing, the Litigation Steering Committee (the “LSC”), comprised of members of that same management, was reportedly opposing the JPLs’ attempts to recover these assets for the benefit of the Company.”

21. Secondly:

“In my Ex Tempore Judgment of 22 September 2022 appointing the JPLs, I expressed the provisional view that my 29 July 2022 Judgment was liable to be set aside on the grounds of fraud. Ignoring the adage “once bitten twice shy”, I resisted the Petitioner’s entreaties to urgently list its present application, a Summons dated 9 December 2022 seeking to set aside the 29 July 2022 Judgment (the “Set Aside Summons”). An improbable application was made by a company linked to the former majority shareholder, Mr Kam, to intervene and strike-out the Petition, by Summons dated 18 January 2023. I decided to hear that Summons first, for reasons I explained in my Judgment dated 31 March 2023 dismissing it...”

22. I will now turn to adjudicating the Core Challenge and the Resource Challenge respectively.

The Core Challenge

23. The Core Challenge was summarised in the Petitioner’s Skeleton Argument as follows:

“41. While the FTI Report does not contain any actual Core Challenge, the Petitioner does make a Core Challenge in respect of the decision by the JPLs to petition to the United States Bankruptcy Court Southern District of New York for recognition under Chapter 15 of the U.S. Bankruptcy Code (the “Chapter 15 Proceedings”) and the work done generally under the sub workstream ‘US Investigations’ under the workstream headed ‘Additional Cellenkos Transaction Activities and US Investigations’. Accordingly, while FTI suggest a 50% discount for this workstream, the Petitioner seeks to discount the costs incurred by the JPLs in respect of this workstream in their entirety.”

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24. The point has a distinctly unpromising start. The supposedly independent professional FTI Report does not support the contention that no reasonable liquidator would have commenced the Chapter 15 Proceedings, which were dismissed, at all. It is a factually and legally fragile complaint which was ruthlessly shattered by Mr Faulkner, who at times appeared to be defending his clients as if they were on trial for a capital offence.
25. The Fifth Affidavit of Joanne Verbiesen dated 10 September 2024 (“Verbiesen 5”) exhibited the FTI Report on behalf of the Controlling Shareholders. In paragraph 7, she acknowledges the factual lightness of the Report. Accordingly, given her *“involvement in this matter since its inception, I provide my commentary below in respect of the activities and issues identified in the FTI Report, as appropriate.”* Lawyers filing affidavits providing “commentary” on uncontroversial facts is “grist for the mill”. Making controversial factual assertions is a different matter. The boundaries between commentary and controversial factual assertion are often blurred. It is pivotally averred in Verbiesen 5 as follows:

“9. The Petitioner was never consulted on the JPLs’ plans to seek Chapter 15 recognition in the US. I do not know why the JPLs considered this a viable option, but the conclusion in the Memorandum of Decision and Order Denying Chapter 15 Petition (Case No. 22-11347 (DSJ)) dated 5 December 2022 that these proceedings do not “involve fixing or adjusting debts or creditors’ rights, and instead serve the current purpose of investigating suspected misconduct and locating and recovering corporate assets” must raise a real question as to why the JPLs were advised to pursue Chapter 15...”

26. An internal JPL team email dated 6 October 2022 (at 7.54 pm UK time) sets out *“Headlines from Call with Petitioner”*. The first bullet point under *“US”* reads: *“We explained the steps being taken to seek recognition in the US, that filing is imminent, and we would expect for the matter to be heard in 2-3 weeks.”* The final bullet point reads: *“Where additional assistance is required in the US, the Petitioner has offered the assistance of his counsel, Quinn Emanuel.”* Later that day, the JPLs’ then Cayman attorneys Mourant emailed Ms Verbiesen herself (at 3.23 pm Cayman time) seeking permission to use the Petitioner’s skeletons from the July and September hearings before

this Court as part of the Chapter 15 application. A colleague, seemingly also Cayman-based, responded affirmatively.

27. A 15 October 2022 GTSS “*Script for Call with Petitioner and his counsel*” records that Chapter 15 proceedings were commenced on 7 October 2022 and were due to be heard on 10 November 2022. Mr Faulkner also referred to the final bullet in that document which stated “\$8-\$12 million sought in funding”. Finally, a Memorandum from “GTSS” to “Blue Ocean” dated 11 November 2022 reported the following to the Petitioner about the progress and potential outcome of the Chapter 15 Proceedings which were now opposed:

“...The matter was heard on 10 November 2022 and the Judge reserved his decision. The Judge indicated that there were interesting and challenging points of law to consider and in particular whether JPLs of a solvent company qualify as a collective proceeding and meet the threshold for claiming Chapter 15 relief. We anticipate the Judge will take a number of weeks to deliver a judgment.”

28. The Memorandum then effectively explains why the US Proceedings were commenced by describing what steps would be taken if recognition was obtained, including pursuing 35 potential US deposition and *subpoena* targets which would assist the JPLs’ investigations into the impugned Cellenkos Transaction, which was a key plank of the Petition. Email correspondence the day before the hearing records Ms Verbiesen herself considering remote participation in the Chapter 15 hearing but accepting the JPLs’ advice that the Petitioner’s participation at the request of the JPLs might be exploited by the objectors as a basis for impugning the independence of the JPLs. That correspondence admittedly also suggests that Ms Verbiesen’s primary interest was any possible mention of the Petitioner’s own section 1782 application, rather than the Chapter 15 Proceeding itself.
29. Verbiesen 5 exhibits the 5 December 2022 49 page ‘*Memorandum of Decision and Order Denying Chapter 15 Petition for Recognition of a Foreign Proceeding*’. Judge David S. Jones found that although four out of seven requirements for recognition were in dispute, three criteria were disputed:

- (a) one disputed criterion was that the foreign proceeding should be a “collective” one. The Judge found that provisional liquidation proceedings commenced by a just and equitable winding-up petition was not a collective proceeding because the rights of creditors were not engaged. However, he noted that “the Court considered and was given cause for pause” by the JPLs’ reliance on the general principle that “*eligibility for Chapter 15 relief is to be ‘broadly construed’*”;
- (b) another disputed criterion was that the proceeding arose “under a law relating to insolvency or the adjustment of debt”. That requirement was met; and
- (c) the third and final disputed criterion was that the foreign proceeding should be “*for the purpose of reorganization or liquidation*”. This requirement was not met, and the Objectors were held to be correct in finding that all previous cases in which Cayman proceedings had been recognised “*in one way or the another, directly concerned creditor issues, entity debts, or a winding-up or liquidation of the company in question... the mere possibility that a liquidation could occur down the road is not sufficient...*”
30. The material before the Court demonstrated that, as Mr Faulkner put it, it was simply wrong to suggest that the Petitioner had not been consulted about the Chapter 15 Proceeding. He generously suggested that Ms Verbiesen might have forgotten about the emails she had been copied in on at the time, and a fair reading of those emails suggests that her involvement was peripheral. However, the complaint that no consultation occurred and that the reasons for the Chapter 15 Proceeding was incomprehensible absent access to the JPLs’ legal advice ought not to have been deposed to in terms which do not clearly demarcate the boundary between argumentative comment and factual assertion. The consultation complaint was pivotal to the Core Challenge, because it implied that had the Petitioner known, it would have uttered howls of outrage about such a wasteful proceeding being pursued.
31. The most reliable evidence is usually contemporaneous, and the present case is no exception. The relevant facts disclosed by the evidence may be summarised as follows:

- (a) the Company was a US listed company, so the benefits of Chapter 15 recognition are and would have been obvious to any reasonable stakeholder;
- (b) the Petitioner was extensively consulted and had access to its own US bankruptcy law advice at the time (from a firm well known in that field);
- (c) the Petitioner clearly supported the application and never formally complained at the time that it was a risky, let alone an irrational, avenue to pursue; and
- (d) the application was dismissed in terms which suggest that while it was perhaps something of an ‘envelope pushing’ one, it was not an application that competent legal advisors would have warned the JPLs not to pursue in the commercial context of the provisional liquidation at the relevant time.

32. The Core Challenge can only be decisively rejected.

The Resource Challenges

Overview of the Fee Report

33. The Fee Report opens by explaining that it aims “to provide the Company’s contributories, creditors and the Court with a detailed breakdown of the JPLs’ fees and expenses” for the Fee Period. It was deliberately delayed in order to save costs in circumstances where regular updates were provided to stakeholders through, *inter alia*, Court reports (paragraph 1.0.0). The three “most resource intensive workstreams” (55.4% and 65.1% respectively of JPLs’ and legal fees and expenses) are identified in paragraph 6.0.1 as being:

- (a) “*Control of HK Subsidiaries and associated litigation*”;
- (b) “*Investigative activities to identify and recover assets*”; and

(c) “Control of PRC Subsidiaries and associated litigation”.

34. Eight additional subsidiary workstreams are identified in paragraph 6.0.2. Each workstream is explained in a clear and straightforward manner adopting an approach which is similar to comparable fee reports in large liquidations.

35. The fee analysis by grade table sets out how much time and costs are attributable, per workstream, to various staff grades. This is invariably a strong indicator of rational human resource deployment. It reveals:

(a) 17% of all billed hours attributable to the JPL/partner grade;

(b) 4% attributable to Consultants;

(c) 21% attributable to Directors or Principals;

(d) 12% attributable to Associate Directors or Senior Managers;

(e) 20% attributable to Managers or Assistant Managers;

(f) 6% attributable to Seniors; and

(g) 20% attributable to Administrators.

36. Looking at the Grant Thornton staff grades, just over 40% of time billed is attributable to the top three grades, of which roughly half is attributable to the JPLs themselves. Approximately 46% is attributable to the three lower grades with almost half of that attributable to the lowest grade. On the face of it, having regard to my experience in many other cases, there is nothing remarkable about that approach, particularly in relation to a period of high-intensity high-level activity in the first year of a contentious provisional liquidation.

37. A less familiar table, but quite apposite for a multi-jurisdictional case, is the JPLs' fee analysis "by GT office". It seems self-evident that global firms such as Grant Thornton are only nominated as provisional liquidators and/or official liquidators in cases with a strong international dimension because of their multi-jurisdictional staff capacities. This table helpfully identifies what percentages of fees per workstream is attributable to each of seven offices:

(a) Cayman: 46%;

(b) Hong Kong: 29%;

(c) UK: 9%;

(d) BVI: 4%;

(e) US: 2%;

(f) PRC: 1%;

(g) Japan: 0%; and

(h) Other: 8%.

38. This is entirely unremarkable, on a superficial analysis, in relation to the provisional liquidation of a Caymanian company which was listed in the United States with its main assets held in the PRC through Hong Kong subsidiaries. 75% of fees were generated by GT offices in Cayman and Hong Kong, with a further 3% attributable to the US and PRC offices. Control and oversight of BVI and Cayman subsidiaries is one of the "Other" workstreams, explaining the 4% of expenses billed by the BVI office. The 9% attributable to the UK GT office is not explicable in the same way. However, absent any challenge, I would be inclined to assume that GT is a UK-founded firm likely to have a greater concentration of staff in the UK (principally London) than elsewhere. That the JPLs would look to that resource to fill skills or capacity gaps in Cayman and/or Hong Kong, again

drawing on my experience of other large international Cayman-based insolvencies, would be far-from eyebrow-raising.

39. The IPR Bands table was designed to show that all work was billed across the various offices within the Cayman IPR bands. Only the US GT maximum of \$840 appears on its face to be above Director or Principal maximum of \$815. A compressed “all offices” version of this table set out below the main table at section 20 of the Fee Report shows all offices’ maximum rate for that grade as \$785, within the upper IPR band of \$1,075.
40. Section 22 (Receipts and Payables) of the Fee Report sets out a balance sheet which initially seems somewhat odd on its face. It describes Assets and Realisations (including a Funding Loan) totalling \$8,119,459 and Costs of Realisations as \$6,732,395, with net ‘surplus’ (it seems to be implied) of \$1,387, 064. The JPLs fees are shown as a mere \$246,650, presumably reflecting what they have actually been paid (the bulk of the Funding Loan was applied to legal fees). However, on closer analysis this table seems to relate solely to cash realisations only. It deliberately omits the fees covered by the Fee Application the value of which effort the JPLs pivotally contend should be measured in relation to the value of non-cash assets recovered through the related JPL efforts.
41. The Fee Report also explains with sufficient clarity, for the benefit of the Company’s stakeholders and the Court, but not for the benefit of persons with adverse interests to the Company, the main asset recovery steps which were taken during the Fee Period.
42. Had the application been unopposed, I would most likely have granted it without any sense of anxiety. However, when stakeholders oppose a fee application, the Court should be slow to conclude, as Mr Faulkner suggested I should conclude, that the objections being raised can be ignored on the grounds that they are motivated by naked commercial self-interest. Save for the rare cases where commercial disputes are driven by personal *animus*, commercial litigants are always presumed to be acting in accordance with their commercial interests. There is no fault to be found in that. Commercial self-interest is usually a restraining influence in a legal system which penalises unmeritorious applications with adverse costs orders.

43. It must also be borne in mind that the JPLs may fairly be viewed as hybrid creatures straddling the private and commercial domains. Experience in this field teaches us that although this Court does not discount fees claimed by its office holders on an unprincipled basis, officeholders themselves appreciate that a certain give and take is required to in relation to remuneration applications because they and the stakeholders cannot function effectively without relatively cordial relations. This is illustrated by the fact that the JPLs had, with a view to avoiding a contested hearing, been willing to offer a 10% discount to the total amount claimed (which was net of a 4% discount in any event). In summary, when considering Resource Challenges, it is helpful to keep in mind the wise words of Anthony Smellie CJ (as he then was) in *Re Liberty Capital*, which apply with equal force to solvent and insolvent liquidations (cited in paragraph 9 above):

“...We must be astute to recognize the inevitable tension that arises from the liquidator having to fulfil his duties to the creditors and the court, yet, at the same time having to secure his own interests by maximizing what he can earn from a retainer.”

Overview of the FTI Report

44. The Introduction to the FTI Report indicates that the following issues will be addressed:

- (a) whether sufficient information was provided to justify the JPLs’ fees;
- (b) the exercise of the JPLs’ powers and whether any unnecessary tasks were undertaken;
- (c) the efficiency and proportionality of resource deployment; and
- (d) IPR compliance.

Sufficiency of information complaint

45. This topic is addressed in Section 2 of the FTI Report by reference to the United Kingdom Practice Statement (UKPS). It is concluded that:

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- (a) the overall team size (83) was described as “*a significant and unusual level of resources to deploy on a Cayman Islands provisional liquidation*”;
- (b) the deployment of 24 GTUK staff was inadequately explained;
- (c) the deployment of 10 BVI staff while Cayman and Hong Kong staff were also working on the same workstreams appeared inefficient;
- (d) why significant time was spent by all three appointees on the same tasks was unexplained;
- (e) the work done in the US was not sufficiently justified;
- (f) the value benefit in relation to the fees incurred on certain workstreams was not sufficiently explained; and
- (g) overlapping workstreams needed to be viewed together to properly evaluate them.

46. The Fifth Affidavit of John Royle dated 27 September 2024 (“Royle 5”) responds to Verbiesen 5 and the FTI Report. The sufficiency of information point is not dealt with as a freestanding matter in Royle 5 because no proposed discounts are attributed to this preliminary complaint. However, in dealing with the merits of the matters said to be inadequately explained, the JPLs have effectively responded to the insufficiency of information complaints made in the FTI Report. I find no basis for disallowing any of the fees claimed on the basis of insufficiency of information alone. The question is whether the explanations proffered in Royle 5 are adequate on their merits, not in raw content terms.

47. Nonetheless it is necessary to consider the FTI Report with care because, to a material extent, its conclusions are premised on an insufficiency of explanation by the JPLs. Section 2 of the Report concludes as follows:

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“In light of the above, it is difficult to quantify what level of remuneration would have been reasonable and appropriate without further information. However, in view of the need to quantify the fees which have not been fully justified by the information provided, we have suggested an appropriate discount on the fees incurred.”

48. Paragraph 36 of Royle 5 refers to an email dated 4 September 2024 from FTI’s Ms Plamondon which explains that the insufficient information complaint *“is taken into consideration in each of the efficiency discounts that we have proposed”*. In other words, the inefficiency discounts proposed are admittedly based on an incomplete understanding of how the JPLs have staffed the case.

The inefficiency complaint

49. Royle 5 Section D (*“The JPLs’ staffing of the file”*) (paragraphs 48-103) broadly responds to the generic complaint that there must have been inefficiencies because the way staff were deployed is not adequately explained. The following averments are pertinent:
- (a) the Petitioner itself sought the appointment of three JPLs based on the needs of the present case, even though two appointees is more typical (paragraph 49);
 - (b) the allocation of work across staff grades was *“appropriate”* based on *“the JPLs’ collective experience”* (paragraph 54);
 - (c) the allocation of work between the three JPLs was consistent with the number of staff they were supervising, Ms Chow primarily supervised 30.1% of staff while Ms MacInnis and Mr Royle supervised 69.9% (paragraph 65);
 - (d) the Fee Period required *“urgent steps...to protect the Company against sophisticated attempts to defraud it of high value assets valued at US\$1.3 billion”*. The global spread of staff enabled *“around the clock coverage when required”* (paragraph 70). Different teams were performing different tasks in different time zones without duplication;

- (e) there is no principled basis for discounting over US\$200,000 of time in relation to meetings which were necessary to prevent inefficiencies, and less needed as time moved on;
- (f) focusing on the total number of staff (83) is misleading. 38 staff members billed less than 30 hours during the period with a core team of 45 billing more than this;
- (g) 24 staff from GTUK were engaged from the forensics department: “*The GTUK team has a market leading forensics department*” (paragraph 82);
- (h) the GT BVI team of 10 comprised two forensics/investigative staff members and eight insolvency professionals assisting with control of the HK Subsidiaries;
- (i) four US office forensic staff were engaged because of the US connections of the Cellenkos Transaction; and
- (j) six staff with GT PRC and GT Japan were engaged primarily to deal with control of the PRC Subsidiaries.

50. This was a cogent response to the inefficiency complaints set out in the FTI Report based primarily on the less fulsome explanation previously provided by the JPLs. However, Mr Young insisted in oral argument that the large number of staff involved meant that some inefficiency inevitably must have occurred. The larger the number of staff members, the greater the likelihood of small inefficiencies being magnified. This was a very persuasive, practical argument advanced with suitable restraint by Mr Young as a fellow member of a related professional services tribe. The forces at play within a professional services firm are familiar ones and judicial notice can be taken of them by any commercial court.

51. Firstly, there is celebration when a large new retainer is taken on board, like a prize fish being brought ashore. Global firms typically deploy standing ‘armies’, not all of whom are continuously fully deployed (otherwise new retainers could never be effectively serviced). The bigger the matter, the greater the adrenaline rush; fighting fraud inevitably engenders a sense of righteousness, no

matter how level-headed the battle-hardened ‘officers’ may be. At the best of times middle and lower-ranking fee earners are unlikely to be rewarded for adopting monastically frugal billing practices. On the other hand, global firms have professional brands to burnish, and usually employ motivated staff eager to prove their worth by delivering real value to the engagements they work on. This consideration weighs against any inefficient case management impulses that might be at play. All of this was implicit in Smellie CJ’s above-quoted observations in *Liberty Capital* (see paragraphs 9, 43 above).

52. During the hearing, I acknowledged that there was some force to Mr Faulkner’s argument that the JPLs would not devote such manpower to a retainer like this, not knowing how they were going to be paid, unless they considered the work being done was truly necessary. But, as I also ruminated aloud, there is sometimes greater concentration on the particularities of billing when there is a reasonable expectation of being promptly paid. Even in the most carefully managed large liquidations, whenever liquidation fees cause stakeholders’ eyes to water, office holders frequently acknowledge that some discount is fairly required.
53. In the present case, without attributing the discount to any particular workstream (so far as I could discern), the JPLs offered a 10% discount to avoid a contested hearing. Mr Leontsinis astutely observed that settlement payment offers are rarely made at a level higher than what the offeror considers is reasonable. Accordingly, subject to considering the impact of the other more specific complaints, it appears to me that a discount of at least 10% for what might be described as ‘inherent inefficiencies’ is required.
54. The case for a discount of that sort of magnitude based on a global view of the Fee Application was accordingly easier to view as likely to achieve a rough and ready form of commercial justice than the purportedly more granular challenges to specific aspects of workstreams. An inherent weakness in the specific challenges to workstreams is that they are advanced on a materially uninformed basis. They are further undermined by the final bullet point in Section 1 of the FTI Report, which reads as follows:

“Our view is based on our experience dealing with Cayman Islands provisional and official liquidations appointments involving group structures with subsidiaries in Hong Kong,

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PRC and the BVI. Accordingly, the views and opinions expressed in this report are inherently subjective.” [Emphasis added]

55. Had an individual insolvency practitioner been retained to give independent expert evidence, one would have expected them to be easily able to extrapolate from their broad personal subjective experience objective opinions of what ought reasonably to occur in most cases. That no meaningful attempt to formulate objective views has seemingly been made (doubtless because of insufficient information) diminishes the overall weight than can be attached to the workstream challenges in the FTI Report. The standard response to these complaints set out in Royle 5 is that the proposed deductions are entirely arbitrary.

Control of Hong Kong Subsidiaries and Litigation workstream

56. Royle 5 acknowledges that this workstream is the largest single workstream to which some 27% of all fees are attributable. It has various sub-categories:

- (a) **Hong Kong Injunction Proceedings:** Mr Royle responds to six complaints in relation to staffing inefficiencies by explaining coherently why the presumed inefficiencies are in most cases arbitrary or unjustified. However, he accepts that 2.1 hours billed by a Senior Manager in relation to “General administration” (Complaint 5) is not adequately justified and should not be claimed. Mr Leontsinis rightly pointed out that paragraph 184 of Royle 5 does not respond to the high-level complaint that only one Cayman JPL and the Hong Kong JPL ought to have been involved at all. However, substantive inefficiency, carrying costs consequences, would only result from duplication and Mr Royle explicitly denies that any duplication occurred;
- (b) **Control of the HK Subsidiaries:** the complaint is of inefficiency based on their office holders working on (supposedly) the same issues and excessive involvement of the Cayman team on Hong Kong issues. Mr Royle responds convincingly to the four complaints;

- (c) **Investigative activities to identify and recover assets workstream:** Royle 5 responds convincingly to the complaints made about 5 sub-workstreams. Complaint 1 is that the need for “*general investigations*” is not adequately explained. Mr Royle provides the obvious answer about the purpose of the investigations and additionally avers that “*it is entirely appropriate for the JPLs not to provide details of the outcome of their investigations within their reports*” (paragraph 216). I agree. His explanations as to why five inefficiency complaints are in most cases not justified are straightforward, while the complaints themselves are necessarily uninformed ones. He agrees to discount the travel time costs of one BVI staff member travelling to London for a meeting, without conceding the costs were unjustified. As regards the Forensics sub-workstream, he again agrees to discount the travel costs of a BVI staff member travelling to London for a meeting. Other proposed discounts are fairly characterised as unprincipled and are adequately justified. An adequate response is made to complaints about the justification for the corporate intelligence sub-workstream. Where the FTI Report identifies duplicate entries and inadequately described items of work, Mr Royle agrees with the discounts proposed. Mr Royle adequately answers inefficiency complaints about the Review of Financial Records and Cordlife sub-workstreams. The necessity challenge to the General Investigations-Books and Records sub-workstream is also convincingly rebutted;
- (d) **Control of PRC Subsidiaries and associated litigation:** Mr Royle indicates this was the third largest main workstream. As in the case of each of the various workstreams, the way fees were incurred by staff category and office are set out in tabular form. Approximately 70% of fees were billed by the Hong Kong and PRC offices. Inefficiency complaints include a call for discounting by 50% any fees incurred by staff who billed less than US\$5000 on the workstream, a 50% discount on all Cayman time charged to PRC Proceedings and a complaint with no discernible costs consequences that work done by a Cayman staff member should have been done in Hong Kong. As regards a complaint that the PRC Proceedings would have required Mandarin language skills, he explains that one Cayman staff member does indeed have such language skills. The dish served up by FTI is liberally garnished with too many such complaints, which

Mr Royle (and indeed any other office holder) should not have to spend time responding to;

- (e) **Liquidity Considerations:** similar complaints are made in relation to this workstream, although a somewhat bespoke complaint is made about the fact that the JPLs' and one Hong Kong Partner's time accounts for 40.3%. Mr Royle avers: "*The issue of funding requires senior level involvement and is not something which can be heavily delegated to junior members of staff*" (paragraph 267). I am satisfied by this explanation and his response to various "*unprincipled*" efficiency discounts which are proposed;
- (f) **Cayman Court applications and filings:** this workstream generated fees 29.1% of which were attributable to the JPLs and 69.1% of which were attributable to GT Cayman. FTI identified six sub-workstreams and proposed discounts in relation to four of these. The complaints were essentially 'generic', for instance complaining about the involvement of non-Cayman office staff as being inherently inefficient and complaining that the time of low-billing staff should be written-off. I accept Mr Royle's evidence that this type of complaint, in effect, does not raise a case to be answered;
- (g) **Books and Records, Recovery and Review:** an overview of the generally helpful tables for this workstream in Royle 5 reveals that over 80% of fees were generated below partner level and just over 50% below Senior Manager level, and only 8.6% of time and 16.2% of fees at JPL level. Cayman is said to have generated 40% of the fees, Hong Kong 46.7% and UK 13.3%. When the FTI Report's complaints about two sub-workstreams are dealt with, it seems that BVI staff were involved as well. The summary of fees in Royle 5 are the same figures used in the FTI Report. I accept Mr Royle's evidence that there is no substance to the entirely abstract specific efficiency complaints.
- (h) **Service provider management and corporate governance:** this was another 'bottom-heavy' workstream with over 80% of fees and time falling below the Senior Manager level. Advancing abstract criticism of staff allocations detached from a nuanced analysis of the work involved is clearly an ambitious undertaking, particularly when in

big picture terms nothing appears to be amiss. Mr Royle does not respond directly, however, to the suggestion that the costs attributable to the Estate Treasury sub-workstream seem high relative to the amount of cash being recovered. But he points out that the “*monthly mean average for this workstream was US\$51,633.25*” (paragraph 323). This is an exceptional instance of a not altogether convincing response to a seemingly arguable high-level criticism on a ‘small ticket’ item (a discount of US\$41,550). However, taking into account the fact that no specific work billed is identified as irrelevant or unnecessary, I ultimately accept Royle 5’s averment that the “*JPLs are satisfied that the fees incurred were fair, reasonable and justified*” (paragraph 337);

- (i) **Regulatory compliance, statutory reporting and obligations:** the JPLs’ involvement was somewhat higher, understandably in this workstream. As regards Quarterly Reports, a generic discount is called for in respect of low-billing staff. This complaint is repeated in relation to the sub-workstream NYSE and US Regulation. Additional, somewhat nit-picking, complaints in relation to the latter sub-workstream are effectively negated by Royle 5;

- (j) **Stakeholder communication:** discounts are proposed on the hypothesis that (1) 75% of the fees charged by the lower billing of the two Cayman appointees were unreasonably incurred (communications with the Petitioner sub-workstream), (2) 75% of the fees charged by the lower billing Hong Kong partner and directors were unreasonably incurred (Communications with the Petitioner sub-workstream); and (3) 50% of the fees incurred staff charging less than US\$5000 (Investor Queries and Communications sub-workstream) were unreasonably incurred. I accept Mr Royle’s oft-repeated riposte that it is unprincipled to infer from the mere fact of low billings that it was inefficient to deploy staff to perform a limited role. However, the nub of the complaint made by the FTI Report on this issue was that the size of the team seems large for the task at hand. And Royle 5 does not directly respond to this context-specific point at all, perhaps assuming that the overarching ‘overly large team’ complaint has already been adequately dealt with. The standard averment that the fees were “*fair, reasonable and justified*” appears here to resemble something of a ritual incantation and

is not altogether convincing. I am nonetheless satisfied that the proposed discounts are not required, although this complaint lends some general support to the broader case that larger teams inevitably result in a greater risk of inefficiency;

- (k) **Control and oversight of BVI and Cayman Subsidiaries:** two similar discounts are proposed in relation to this workstream as are called for in relation to, *inter alia*, Stakeholder communication. Here FTI assert that “*a high-level review of the time entries...suggests duplication*” (Maxcess Petitions sub-workstream). The response in Royle 5 essentially denies that any specific instances of duplication have been identified. On balance I agree that any complaint about duplication must be made with greater specificity to require any formal response as it amounts to a complaint of unprofessional conduct. A second complaint is made about the two team sizes appearing “*disproportionate to the task at hand, leading to inefficiency*” (Cayman and BVI sub-workstream). This admittedly high-level and uninformed complaint is not directly answered in Royle 5, with the deponent merely averring that no duplication of effort has been identified. I am nonetheless satisfied that the proposed discounts are not required, although this complaint lends some general support to the broader case that larger teams inevitably result in a greater risk of inefficiency;
- (l) **Additional Cellenkos Transaction activities and US Investigations:** in relation to the first sub-workstream, the FTI Report refers to the fact that 28 staff members from five offices were involved and over 66.6% of time was billed at partner level, with another 21% at Associate Director/Senior Manager level. It is then stated: “*...it is unclear why these tasks were required to be performed by such a large senior team from so many offices*”. A discount of 50% of costs charged at the highest level is proposed. Royle 5 gives a fulsome and entirely convincing response to this complaint (at paragraphs 381-384). A similar discount of costs in relation to the US Investigations sub-workstream is proposed on the grounds that the estate does not appear to have received any benefit from the US proceedings which were commenced. Mr Royle fairly relies here upon his earlier response to the Chapter 15 Proceedings complaint.

Summary of findings on the Resource Challenges

57. The JPLs' evidence satisfies me that the discounts proposed in the FTI Report, or similar lesser discounts, are not required. All of the 'big-ticket' complaints were adequately responded to, with two 'small ticket' inefficiency complaints based on team size apparently overlooked. The FTI Report does, to a limited extent, support the broader proposition that in a large case with a large team, inherent inefficiency is a risk. However, that ultimately obvious point could have been advanced in a far more economical way. I am not satisfied that all of the amount claimed is properly due and the law requires any doubts to be resolved in favour of the estate.
58. The JPLs offered before the hearing to make unconditionally, in addition to the 4% discount reflected in the US\$9.3 million claimed, a further 3% discount. This amounted to a combined discount of roughly US\$1 million, according to Mr Faulkner. An open offer was made in return for not pursuing the contested hearing, as I understood it, a further 10%. In auction house style, Mr Young submitted in his closing oral submissions that a 25% discount would not be "outlandish". Mr Leontsinis, not to be outdone, proposed a discount somewhere between 27% and the 10% the JPLs themselves had offered. Mr Faulkner stoutly insisted that fees claimed were often awarded in full and urging the Court not to make arbitrary reductions. He cited my own decision in *World Properties Ltd (in Official Liquidation)*, FSD 49/2018 (IKJ), Judgment dated 3 October 2022 (unreported). That was a very different type of case where the application was not positively opposed. Certainly, there are examples of cases where contested fee applications have been approved in full: see e.g. *Perry and Perry-v-Lopag Trust Reg.*, FSD 205/2017 (NSJ), Judgment dated 27 January 2021 (unreported), where an attack on Mr Royle's receivership fee application was comprehensively rebuffed by Segal J. Segal J also apparently approved the joint official liquidators' fees in full in the main case upon which the JPLs' counsel relied, *Re Direct Lending Income Feeder Fund , Ltd (in Official Liquidation)*, FSD 108/2019 (NSJ), Judgment dated 3 February 2022 (unreported). That application concerned two fee periods, and a total sum a small fraction of what is in issue in the present case. He concluded (at paragraph 58) that "*a prudent man faced with similar circumstances would [have laid out] or [hazarded] his money in the way that the JOLs have done.*"
59. In reaching that conclusion, Segal J took the following matters into account:

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“57. I also note, when considering the amounts claimed by the JOLs, that they....wrote-off material amounts (11% and 14% of gross fees recorded for the Second Fee Period and the Third Fee Period respectively). This, of course, does not mean that the remaining remuneration for which the JOLs sought to be paid was reasonable, proportionate and value for money but it does support the point that the JOLs have undertaken a careful and proper process to review and establish the amount which can justifiably and fairly be charged.”

60. In the instant case, I feel entitled to take into account the fact that prior to filing the Fee Application, the JPLs wrote off 4% and in the course of the present application proceeding, have agreed to write off a further 3%. Having regard to the unusual scale of fees and size of team involved in the initial Fee Period in this case, I feel bound to take into account the risk that inherent inefficiencies occurred even though no specific items of billing have been shown to be unjustified. In these circumstances, the JPLs’ offer to reduce their claim by a further 10% can also properly (and pivotally) be taken into account as well. That was a conditional offer, but in my judgment it is a pertinent indication that such a discount would, to use Mr Young’s phrase, ‘not be outlandish’. I cannot countenance a discount any larger than that, particularly in a case where the JPLs have effectively worked on a wing and a prayer for over two years and there is no clear indication of when, and to what extent, they will actually recover any meaningful portion of, let alone all of, their fees. They have not simply worked in service of the stakeholders’ private commercial interests; liquidators who are willing to take appointments in relation to illiquid estates which have been victims of suspected fraud are discharging an important public function as well. The specific Resource Challenges are rejected, but the Fee Application is approved subject to a (further) discount of 10%.

Conclusion

61. On the first day of the hearing, I considered that Mr Royle’s prickly characterisation of the process he was embarking upon in Royle 5 (at paragraph 8), *“it takes longer to clean up the mud than it does to sling it”*) reflected undue hypersensitivity on his part. Having figuratively followed his footsteps, seeking to evaluate the merits of the mostly insubstantial complaints about the Fee

Report, I have ended up with a feeling that is best verbally expressed by the colloquialism “I feel your pain”.

62. This Fee Application, against a background of standing disputes and justified concerns about confidentiality, came before the Court in an unusual manner which in large part explains the unusual course it has taken. Overall, it was unhelpful in this case (and probably will be unhelpful in most cases) for the JPLs and the Court to be required to review a high-level critique of a Fee Report, albeit on the letterhead of a respected professional firm. This will most clearly be the case when the professional critique (1) does not remotely resemble independent expert evidence, and (2) does not even on its face contain the *imprimatur* of a specific insolvency practitioner.
63. The contested Fee Application is in summary determined as follows. The Core Challenge is rejected, and the Resource Challenges are allowed to the extent that the Fee Application is approved subject to a further discount of 10%. This is based in large part upon the open offer made to by the JPLs to avoid a contested hearing. I will hear counsel, if required, as to costs and the terms of the Order.



THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT