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Article Information

Author: Thomas Russell
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Sakr punched

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Despite yesterday's decision, Justice Brereton's impact on contemporary attitudes to IP remuneration has been profound. If his aim was to jolt the profession out of complacency and to get liquidators and the courts thinking more critically about what "fair and reasonable" remuneration really entails, he has certainly achieved his goal…

Partner, Thomas Russell, discusses this decision further.

Background

Beginning with AAA Financial in September 2014, a sole judge of the NSW Supreme Court, Justice Paul Brereton, commenced a crusade against the hourly rate as a basis for fixing insolvency practitioner remuneration, lamenting that, despite the recognised shortcomings in time-based charging, "virtually every application for remuneration that the Court sees is made on that basis".

Observing that, "in smaller liquidations, liquidators cannot expect to be rewarded for their time at the same hourly rate as might be justifiable where more property is available, he fixed the liquidator's remuneration at 20% of realisations, a fraction of the original claim.

This decision – which came out of nowhere, from a judge who had previously not only approved hourly rates, but actually concocted his own rate scale – sent shock waves through the profession.

His Honour applied a similar approach in a series of consecutive decisions, repeatedly reaffirming that practitioners should be remunerated in proportion to the size of the job and the value of assets realised. Seemingly arbitrary formulas such as "2% of realisations" and "10% on the first $100,000 and 5% on the balance" were thrown around. The profession predictably (and not entirely unreasonably) responded as if the world was ending.

Yet, despite the perceived unfairness of these decisions, for commercial and pragmatic reasons nobody seemed prepared to mount any formal challenge to them, until…

One bleak winter morning – made even bleaker by a decision that slashed remuneration slashed a claim from $63,577 to $20,000 in a matter where creditors had been paid in full – a determined sole practitioner and his heroic lawyers made a stand and lodged an appeal on principle.

Yesterday, upholding that appeal, the Court of Appeal made clear that:

time spent at reasonable hourly rates provides a good starting point for consideration of a remuneration claim; and although proportionality is relevant, it is not the "be all and end all" of fairness and reasonableness, and appropriate regard must be had to the fundamental issue of whether or not the work done was reasonable.

Quotable quotes

In summarising the policy reasons behind its decision, the court said two things in particular which will strike a chord with practitioners.

First the court addressed work that, by its nature, will never lead to asset realisations, the example given being "work done by a liquidator in complying with his or her statutory obligations". It observed that there is "no reason" why liquidators should not be paid for such work:

…the mere fact that the work performed does not lead to augmentation of the funds available for distribution ***does not*** *mean the liquidator is not entitled to be remunerated for it… [It] is relevant to consider whether the work was necessary to be done. If it was, there is* ***no reason the liquidator should not be remunerated for it****.*

Second, the court addressed the situation where recovery action is attempted but is not successful, saying again that there is "no reason" why liquidators should not be paid for such attempts:

…there are commonly cases where work is undertaken in an unsuccessful attempt to recover assets whether at the request of creditors or otherwise. Provided it was reasonable to carry out the work and the amount charged for it was reasonable, there is no ***reason a liquidator should not recover remuneration for undertaking the work****. Indeed, as was pointed out in Hall v Poolman … there is a public interest in liquidators bringing recovery proceedings…*

The outcome: back to square one

Having concluded that Justice Brereton's approach had placed undue emphasis on proportionality, the Court of Appeal remitted the matter back to the Supreme Court for reconsideration, noting:

…it remains the responsibility of the Court to fix reasonable remuneration on the evidence before it, taking into account the matters referred to in s 473(10). That must include, in my opinion, considering the work done by the liquidator, whether it was reasonable to carry it out and the appropriateness of the amount charged for it.

Where does this leave us?

It is not clear what set Justice Brereton off on his crusade against the hourly rate. Perhaps, as Corporations List Judge, he had just had jack of seeing that, instead of applying any real rigor or scrutiny to their costs claims, liquidators were consistently approaching the court on the basis that they were entitled to nothing less than full payment for every second of time spent – and getting away with it due to lack of any robust opposition.

Whatever it was that precipitated his Honour's notorious AAA Financial decision in September 2014 and those that followed in the months to come, it cannot be denied that the decisions have had a profound impact on the remuneration landscape.

Although the Court of Appeal has now disagreed with the "proportionality-heavy" basis of the approach, other aspects of the approach, and the relevance of proportionality as one of many factors, were expressly endorsed.

In particular, the modified approach taken by Justice Black in Idylic Solutions (where proportionality is used as a means of testing the reasonableness of the time-based figure in order to consider whether it should be reduced) was praised.

Conclusion

Say what you might about the last few years of decisions and yesterday's result, it is clear that Justice Brereton has been single-handedly responsible for one of the most significant reforms in recent times of the way judges, lawyers and liquidators approach the issue of IP remuneration.

He might not be doing cartwheels of joy down Phillip Street after yesterday's result, but perhaps (please, for the love of God) he will be satisfied with the undeniable influence his decisions have had on the law and contemporary attitudes.