Article Information

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Is a lawyer immune from a legal suit? The doctrine of 'Advocate's Immunity'

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In *Sakr*, consistently with his Honour's previous remuneration decisions:

- hourly rates were disapproved as a basis for remuneration;
- a percentage or commission basis was suggested as preferable;
- proportionality was mentioned as a touchstone; and
- the court suggested starting points such as "2.5% of realisations and 3% on distributions", or "10% on the first $100,000 of realisations, and 5% thereafter".

The liquidator has already lodged an appeal against the decision. During the course of the appeal, the Court of Appeal is also likely to consider three earlier decisions given in the lead-up to *Sakr* (and relied upon in the decision): *AAA Financial, Hellion and Gramarkerr* (details below).

Background

As the Corporations List Judge, Justice Brereton has first pick of all corporations cases in the New South Wales Supreme Court.

In 2014, he took an interest in liquidators' remuneration. During a five-week period spanning September and October, citing a perceived need for "proportionality" in charging, he delivered four controversial decisions attacking time-based charging and instead endorsing **commission-based remuneration**. In each case, this approach resulted in the liquidator's claim for remuneration being slashed.

The decisions *(AAA Financial, Hellion, Gramarkerr and On Q Group* – details below) sent shockwaves through the profession. The ensuing months mainly involved liquidators rubbing their heads and trying to work out what just happened. Over a year passed without a further decision on the subject until, in February 2016, his Honour was propelled back into the headlines with *Independent Contractor Services* (details below).

ICS reflected the same theory underpinning the earlier decisions – hourly rates result in "disproportionate expenditure of time", whereas commission-based remuneration "incentivises the creation of value".

His Honour also addressed the question of *outsourcing*, finding that if a liquidator outsources realisations work to third parties (for instance debt collectors and lawyers), the liquidator's own commission should be reduced, because someone else has done all the heavy lifting.

The phrase "Indicatively, I would be inclined to allow 2% on realisations" echoed ominously through the halls…

The Sakr Nominees decision

Something else happened on 23 February – a liquidator woke up about $43,000 worse off as a result of his Honour's decision the previous day in Sakr. Creditors had been paid in full, yet the liquidator's $63,577 fee claim had been slashed to $20,000.

The decision was delivered on 22 February, but written reasons were not published at the time. Written reasons were finally published last Friday, and may now be viewed online. As noted above, the decision appears to turn on considerations of proportionality, and makes reference to starting-point calculations such as "2.5% on realisations and 3% on distributions", and "10% on the first $100,000 of realisations, and 5% thereafter".

The liquidator has filed an appeal against the decision. Because the decisions in *AAA Financial, Hellion, and Gramarkerr* were all relied upon, those decisions will also fall to be scrutinised by the Court of Appeal.

It is to be hoped that the Court of Appeal will ameliorate Justice Brereton's hard line approach on time-based charging – but the possibility of further support for the approach cannot be ruled out.

Watch this space for further developments!