

Cost caps for liquidators

February 2017

The Royal Court in Guernsey has, for the second time, made clear to insolvency practitioners (and those they instruct) that it will actively police its relatively recent practice direction aimed at cutting the costs of liquidations.

In its decision in the matter of DM Property Holdings (Guernsey) Limited, handed down on 10 January 2017, the Court refused to grant a liquidator the full amount of an increase requested to a cost capping order that the Court had previously made.

Background

On 23 March 2015 the Company was placed into compulsory liquidation. The Court ordered that the liquidator could charge costs on a time spent basis, however, it capped the fees at £15,000.

On 28 September 2015 the liquidator applied to increase the cap to circa £36,000. The Court considered that this increase in the cap was reasonable given that additional proceedings were necessary and those proceedings could not have been foreseen at the time that the original cap was imposed.

In or about June 2016 the liquidator prepared his report for consideration before the Commissioner and confirmed in the report that the fee cap had been exceeded. The Commissioner was unable to re-visit the fee capping order. Accordingly the liquidator had to apply to the Court pursuant to Practice Direction 3 of 2015 (**the Practice Direction**) for a second revision of the fee cap.

Findings of the Court

The Court was minded to award an increase to the fee cap given that there were certain aspects of the liquidation that were not within the liquidator's knowledge at the time that the first increase to the fee cap was granted by the Court. However, the liquidator was unable to recover the full amount sought.

The Court considered that:

1. The modification of the fee cap applied for by the liquidator in 2015 was made when the liquidator had detailed knowledge of the liquidation and what was necessary to complete the liquidation. Therefore, the liquidator should have applied for fees and costs that he was able to foresee at that time.
2. Any fee cap imposed by the Court is intended to introduce a level of financial discipline on the part of the liquidator.
3. The best practice for liquidators will be to revert to the Court for directions pursuant to section 426 of the Companies (Guernsey) Law 2008, or the Practice Direction, as early as possible when it becomes apparent that a previous estimate is no longer accurate. A late application raises the question as to why it has been left until late in the day to draw it to the Court's attention.

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Key Points for Consideration:

- The Practice Direction has teeth. Ignore it at your (unrecoverable) cost.
- Liquidators should apply to the Court to increase any fee cap when it first becomes apparent that the cap will be exceeded. In particular, do not wait until the closure of the liquidation to seek retrospective approval.
- A liquidator may seek to have the fee cap increased after the fees have been incurred, however they will be relying on the Court's indulgence.
- The Court will penalise the liquidator where additional expenditure should have been foreseen. Prepare initial estimates, and any subsequent revisions, carefully and with sufficient flexibility to encompass a broad range of potential tasks and costs.

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