

**THE HIGH COURT
BANKRUPTCY**

[Bankruptcy No. 4391]

**IN THE MATTER OF THE BANKRUPTCY ACT 1988 AS AMENDED AND IN THE MATTER OF
M.O'L. (A DISCHARGED BANKRUPT)**

JUDGMENT of Humphreys J. delivered on Wednesday the 28th day of April, 2021

1. On 7th December, 2020, a number of applications were made in the bankruptcy list *ex parte* on behalf of the Official Assignee seeking the approval of payments in respect of fees incurred in the administration of the relevant bankruptcy estates. Having considered the matter I adjourned those applications and requested the Official Assignee to review the format and procedures for such applications and revert to the court, which he now very helpfully has done.
2. The present application is the first of the reformatted applications for approval of fees. Having heard the application on 12th April, 2021, I indicated that I would give a formal ruling clarifying the appropriate approach.

The need for approval of costs by the court

3. Section 61(3)(h) of the Bankruptcy Act 1988 gives the Official Assignee power "to agree a sum for costs where the Court so directs or where he considers that the amount which would be allowed on taxation would not exceed €12,000".
4. It has emerged that there had been a practice whereby payments of costs had been approved by the Official Assignee where the solicitors' invoice on any given occasion was under the sum of €12,000, even if the cumulative total of costs in any one case exceeded that sum. That is not a correct interpretation of the section. To allow the €12,000 limit to be circumvented by the expedient of issuing multiple bills of costs, each for less than that sum, but the total exceeding it, essentially nullifies the statutory intention that over a certain limit there would have to be reference to the court.
5. Going forward, the Official Assignee will be required to submit bills of costs to the court for approval in any case where the payment of additional costs would take the cumulative total for that case over the statutory threshold of €12,000, or where that threshold has already been exceeded. It will also be appropriate, where the Official Assignee is making any such application in an existing case, to seek the court's approval for historic costs already paid out without the necessary approval having been obtained at the time.
6. All that being said, I do not immediately see the necessity for compelling the Official Assignee to engage in a comprehensive exercise to review all historical files for that purpose. I think the needs of justice will be adequately met by limiting the necessity to seek approval of historic payments to cases where the Official Assignee is seeking a further payment to be made in respect of costs in the case concerned. For completeness I suppose I should say that that does not preclude applications by third parties objecting to such historic payments-out, where their interests can be said to have been adversely affected in some inappropriate way, but hopefully that is more a point of theory than one that will trouble the court much in practice.

The need for a *legitimus contradictor*

7. Stating the obvious, but payment out of the bankrupt's estate in favour of a solicitor engaged by the Official Assignee has the potential to adversely affect creditors if it reduces the amount that would otherwise be recovered by those creditors or any of them. That is not in any way to take from the inevitability that legal advice is necessary or from the fact that solicitors engaged by the Official Assignee are entitled to be paid an appropriate rate for their services. But because of the potential for impact on third parties, in the form of a final determination of the issue rather than an interlocutory ruling reversible or remediable later, the consequence is that an application for payment of costs out of the bankrupt's estate is not properly an *ex parte* application. As noted by Whelan J. (Ryan P. and Hogan J. concurring) in *MouldPro International Limited (In Liquidation)* [2018] IECA 88 (Unreported, Court of Appeal, 16th March, 2018), the appropriate *legitimus contradictor* in a comparable context is normally "a creditor who stands in a position likely to be directly affected by the determination with regard to remuneration. This reinforces all the more the desirability in the public interest of ensuring that the *legitimus contradictor* is, in general, the largest or a significant unsecured creditor."
8. On that analysis, it is necessary for the Official Assignee to endeavour to identify the appropriate *legitimus contradictor*, which will normally be the petitioning creditor or the largest unsecured creditor. Their consent to the application should be sought, and if a letter of consent is furnished, the application can be made on foot of an *ex parte* docket. If that is not the case, however, the application should be made by notice of motion served on such *legitimus contradictor*. There may be unusual cases where there may need to be an alternative approach as to identifying who is the appropriate *legitimus contradictor*, but the foregoing should be the general approach and any deviation from that should be subject to seeking the court's directions as appropriate.

Format of the application

9. When the initial applications for approval of costs were made, they reflected the previous practice of a certain lack of formality in the paperwork, with details of proposed legal fees produced, but not explained on affidavit.
10. The present application is made on foot of an *ex parte* docket dated 10th March, 2021 grounded on an affidavit of Michael Ian Larkin sworn on 10th March, 2021. The affidavit sets out the background, exhibits the invoices, outlines details of the work provided, provides an update as to the state of the proceedings, notes that the fees were reviewed and calculated at an agreed rate, states that the rate is very competitive and compares favourably with rates for corporate insolvency applications, and finally notes the position of the petitioning creditor. A supplemental affidavit of Michael Ian Larkin filed on 7th April, 2021 exhibits a letter of consent from that creditor. In general, this additional level of formality, including the grounding of the application on an affidavit, provides a necessary transparency and, should it ever be necessary to call on it, accountability, as to the process. Such an approach is required to satisfy the court and any other interested party that the correct procedures have been adopted and accordingly should be used going forward.

Order

11. In the light of the foregoing, I propose to grant the relief sought at para. 1 of the *ex parte* docket, that being an order pursuant to s. 61(3)(h) of the Bankruptcy Act 1988 approving the costs of €32,656.50 arising in the bankruptcy estate of *M.O'L.*

12. I should perhaps state here for completeness that for similar reasons I also propose to approve the amounts of costs requested in the other cases listed on 12th April, 2021 namely *G.L., J. McC., J.T.* and *B.W.*