Neutral Citation Number: [2024] EWHC 422 (Ch)

Claim No: CR-2022-LDS-000414

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN LEEDS
INSOLVENCY AND COMPANIES LIST (ChD)

IN THE MATTER OF THE GOOD BOX CO LABS LIMITED
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Leeds Combined Court Centre,
The Courthouse, 1 Oxford Row, Leeds, LS1 3BG.

Date: 05/03/2024

Before:

HH JUDGE KLEIN SITTING AS A HIGH COURT JUDGE

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Between:

(1) JEREMY CHARLES FROST **(2) STEPHEN PATRICK JENS WADSTED** **(as the former administrators of The Good Box Co Labs Ltd)**	**Applicants**
- and -	
(1) THE GOOD BOX CO LABS LIMITED **(2) JOANNE ELIZABETH MILNER** **(3) DAVID JULIAN BUCHLER** **(as the joint plan administrators of the Restructuring Plan relating to the First Respondent)** **(4) NGI SYSTEMS & SOLUTIONS LIMITED** **(inter alia as the representative of the former members of the former creditors' committee in the former administration of the First Respondent)**	**Respondents**

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Eleanor Temple (instructed by **Prosperity Law LLP**) for the **Applicants**
Tibor Barna, an authorised representative, for the **First Respondent**
Nicholas Leah (instructed by **The Wilkes Partnership LLP**) for the **Fourth Respondent**

Hearing date: 20 February 2024

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
HH JUDGE KLEIN

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 a.m. on 5 March 2024.

HH Judge Klein:

1. This is my decision following the hearing of a preliminary issue, ordered by HH Judge Saffman on 13 October 2023, in an application by the Applicants, which they made on 18 August 2023, for "an order pursuant to IR rr.18.24 & 18.28 increasing the amount of the Applicants' remuneration as the Joint Administrators" of The Good Box Co Labs Ltd ("the company") ("the application"). The preliminary issue was expressed by the Judge to be "whether the Applicants are entitled to apply for a determination of their fees". Since a hearing before me on 14 December 2023, that preliminary issue has been referred to as "the Standing Issue". At the same hearing, as an order I made then recites, the parties then represented (the Applicants and the company) did not dispute that the Standing Issue (and so the preliminary issue ordered) requires the resolution only of the following question: whether the Applicants have standing to make an application under rules 18.24 and 18.28 of the Insolvency (England and Wales) Rules 2016 ("IR2016") even though, at the time they made the application in August 2023 and since then, they were not, and have not been, office-holders in relation to the company ("the Standing Issue Question"). For reasons that do not matter now, the determination of the Standing Issue had to be adjourned to the hearing to which this judgment relates ("the hearing"), and I gave directions, including in relation to the joinder of the Second, Third and Fourth Respondents to the application. At the hearing, all the represented parties (the Second and Third Respondents having elected not to participate) proceeded on the basis that the Standing Issue Question was the question which needs to be answered to determine the preliminary issue. This judgment sets out my answer to that question.

Background

2. The company was placed in administration on 28 June 2022 and the Applicants were appointed administers. On 16 January 2023, HH Judge Davis-White KC sanctioned a restructuring plan in respect of the company under section 901F(1) of the Companies Act 2006. By the Judge's order the Applicants' appointment as administrators ceased to have effect, in the circumstances which have happened, on 26 January 2023.

3. The administration appears to have been contentious, as apparently was the settling of the restructuring plan and as the application has been.

4. Although it is disputed by the company and the Fourth Respondent ("NGI"), which had proposed the restructuring plan, the Applicants contend, and the application has proceeded on the basis, that the company's creditors fixed the Applicants' remuneration on 30 December 2022 by a decision procedure by which the following resolution was approved:

> "That the Joint Administrators' fees be charged by reference to the time properly spent by them and their staff in dealing with the matters relating the to the Administration, such time to be charged at the hourly charge out rate of the grade of staff undertaking work at the time the work is undertaken. Fees on account of these costs to be approved at £235,000 plus VAT" ("the resolution").

5. There was a dispute about the Applicants' remuneration as administrators at the time the restructuring plan was being proposed (as can be discerned from the recitals to Judge Davis-White's order to which I am about to refer). In any event, clause 8.3 of the restructuring plan ("clause 8.3") has provided as follows:

> "Any unpaid fees or expenses of the Administrators approved by the Administration Creditors Committee as at the Restructuring Plan Effective Date will be paid by the company within 14 days of the Restructuring Plan Effective Date. Any other fees or expenses claimed by the Administrators will be subject to the Adjudication Process and in the absence of agreement with the Plan Administrators the Administrators shall be at liberty to apply to Court for approval in accordance with [IR2016]."

6. The restructuring plan also contains a complex claims adjudication process in clause 10.2 ("the adjudication process"), which, amongst other matters, contains short limitation periods for debt claims covered by the adjudication process to be brought against the company.

7. There was clearly an issue at the hearing before Judge Davis-White about the inter-relation of clause 8.3 with the adjudication process, because the Judge's order recites:

> "AND UPON the Court noting that neither clause 8.3 nor clause 10 of the Restructuring Plan interferes with any valid decision made before the Restructuring Plan Effective Date (as defined in the Restructuring Plan) fixing the basis of the Joint Administrators' remuneration in accordance with the Insolvency (England and Wales) Rules 2016, but that it is initially a matter for adjudication by the Plan Administrators in accordance with clause 10 whether any such valid decision has been made
>
> AND UPON the Court taking the view that, whilst clause 10.2 of the Restructuring Plan is not expressed to be subject to the rights of the Joint Administrators set out in clause 8.3 of the Restructuring Plan, that is clearly the intended effect of clauses 10.2 and 8.3 of the Restructuring Plan
>
> AND UPON [NGI] and the company (acting by the Joint Administrators) consenting to an amendment of the Restructuring Plan such that clause 10.2 shall begin with the rider: "Subject always to the rights of the Administrators set out in clause 8.3 of this Restructuring Plan" so as to reflect the intended effect of clauses 10.2 and 8.3
>
> AND UPON the Court taking the view that such amendment will cause no prejudice to stakeholders of the Company, as the amendment merely reflects the clear intended effect of clauses 10.2 and 8.3 of the Restructuring Plan".

The final version of the restructuring plan does contain the additional words, in clause 10.2, which were recited as being consented to.

8. The Applicants made a claim for payment of remuneration, under the adjudication process, to the Second and Third Respondents ("the plan administrators") on 6 February 2023, in the sum of £229,751.38. Of that claim, about £209,000 represents a claim for fees incurred additional to the £235,000 payment on account which was approved by the resolution. The plan administrators have not admitted the claim for the additional £209,000 and, so, the Applicants made the application.

IR2016 Part 18, Chapter 4 - Remuneration and Expenses in Administration, Winding Up and Bankruptcy

9. I have found it helpful to keep in mind rules 18.24 and 18.28 of IR2016 and other rules which may bear on the interpretation of those rules and which are contained in the same chapter of the rules, as follows:

> "18.15 - Application of Chapter
>
> (1) This Chapter applies to the remuneration of -
>
> (a) an administrator;
>
> (a) a liquidator; and
>
> (b) a trustee in bankruptcy.
>
> (2) This Chapter does not apply to the remuneration of a provisional liquidator or an interim receiver.
>
> 18.16 - Remuneration: principles
>
> (1) An administrator, liquidator or trustee in bankruptcy is entitled to receive remuneration for services as office-holder.
>
> (2) The basis of remuneration must be fixed -
>
> (a) as a percentage of the value of -
>
> (i) the property with which the administrator has to deal, or
>
> (ii) the assets which are realised, distributed or both realised and distributed by the liquidator or trustee;
>
> (b) by reference to the time properly given by the office-holder and the office-holder's staff in attending to matters arising in the administration, winding up or bankruptcy; or
>
> (c) as a set amount.
>
> (3) The basis of remuneration may be one or a combination of the bases set out in paragraph (2) and different bases or

percentages may be fixed in respect of different things done by the office-holder…

(8) The matters to be determined in fixing the basis of remuneration are -

(a) which of the bases set out in paragraph (2) is or are to be fixed and (where appropriate) in what combination;

(b) the percentage or percentages (if any) to be fixed under paragraphs (2)(a) and (3);

(c) the amount (if any) to be set under paragraph (2)(c)…

18.23 - Remuneration: application to the court to fix the basis

(1) If the basis of the administrator's remuneration or the liquidator's remuneration in a voluntary winding up is not fixed under rules 18.18 to 18.20 (as applicable) then the administrator or liquidator must apply to the court for it to be fixed.

(2) Before making such an application the liquidator or administrator must attempt to fix the basis in accordance with rules 18.18 to 18.20.

(3) An application under this rule may not be made more than 18 months after the date of the administrator's or liquidator's appointment…

18.24 - Remuneration: administrator, liquidator or trustee seeking increase etc.

An office-holder who considers the rate or amount of remuneration fixed to be insufficient or the basis fixed to be inappropriate may -

(a) request the creditors to increase the rate or amount or change the basis in accordance with rules 18.25 to 18.27;

(b) apply to the court for an order increasing the rate or amount or changing the basis in accordance with rule 18.28…

18.28 - Remuneration: recourse by administrator, liquidator or trustee to the court

(1) This rule applies to an application by an office-holder to the court in accordance with rule 18.24 for an increase in the rate or amount of remuneration or change in the basis.

(2) An administrator may make such an application where the basis of the administrator's remuneration has been fixed -

…(b) by decision of the creditors (by decision procedure);…

(6) The office-holder must deliver a notice of the application at least 14 days before the hearing as follows -

(a) in an administration, a creditors' voluntary winding up, a winding up by the court or a bankruptcy -

(i) to the members of the committee, or

(ii) if there is no committee to such one or more of the creditors as the court may direct;…

(7) The committee, the creditors or the contributories (as the case may be) may nominate one or more of their number to appear or be represented and to be heard on the application…

18.31 - Remuneration: new administrator, liquidator or trustee

(1) This rule applies where a new administrator, liquidator or trustee is appointed in place of another.

(2) Any decision, determination, resolution or court order in effect under the preceding provisions of this Chapter immediately before the former office-holder ceased to hold office (including any application of scale fees under rule 18.22) continues to apply in relation to the remuneration of the new office-holder until a further decision, determination, resolution or court order is made in accordance with those provisions.

18.32 - Remuneration: apportionment of set fees

(1) This rule applies where the basis of the office-holder's remuneration is a set amount under rule 18.16(2)(c) and the office-holder ceases (for whatever reason) to hold office before the time has elapsed or the work has been completed in respect of which the amount was set.

(2) A request or application may be made to determine what portion of the amount should be paid to the former office-holder or the former office-holder's personal representative in respect of the time which has actually elapsed or the work which has actually been done.

(3) The request or application may be made by -

(a) the former office-holder or the former office-holder's personal representative within the period of 28 days beginning with the date upon which the former office-holder ceased to hold office; or

(b) the office-holder for the time being in office, if the former office-holder or the former office-holder's personal representative has not applied by the end of that period…

(6) The person making the request or application must deliver a copy of it to the office-holder for the time being or to the former office-holder or the former office-holder's personal representative, as the case may be ("the recipient")…

18.34 - Remuneration and expenses: application to court by a creditor or member on grounds that remuneration or expenses are excessive

(1) This rule applies to an application in an administration, a winding-up or a bankruptcy made by a person mentioned in paragraph (2) on the grounds that -

(a) the remuneration charged by the office-holder is in all the circumstances excessive;

(b) the basis fixed for the office-holder's remuneration under rules 18.16, 18.18, 18.19, 18.20 and 18.21 (as applicable) is inappropriate; or

(c) the expenses incurred by the office-holder are in all the circumstances excessive.

(2) The following may make such an application for one or more of the orders set out in rule 18.36 or 18.37 as applicable -

(a) a secured creditor,

(b) an unsecured creditor with either -

(i) the concurrence of at least 10% in value of the unsecured creditors (including that creditor), or

(ii) the permission of the court,…

(3) The application by a creditor or member must be made no later than eight weeks after receipt by the applicant of the progress report under rule 18.3, or final report or account under rule 18.14 which first reports the charging of the remuneration or the incurring of the expenses in question ("the relevant report")…

18.36 - Applications under rules 18.34 and 18.35 where the court has given permission for the application

(1) This rule applies to applications made with permission under rules 18.34 and 18.35…

> (3) The applicant must, at least 14 days before the hearing, deliver to the office-holder a notice stating the venue and accompanied by a copy of the application and of any evidence on which the applicant intends to rely…
>
> 18.37 - Applications under rule 18.34 where the court's permission is not required for the application
>
> (1) On receipt of an application under rule 18.34 for which the court's permission is not required, the court may, if it is satisfied that no sufficient cause is shown for the application, dismiss it without giving notice to any party other than the applicant.
>
> (2) Unless the application is dismissed, the court must fix a venue for it to be heard.
>
> (3) The applicant must, at least 14 days before any hearing, deliver to the office-holder a notice stating the venue with a copy of the application and of any evidence on which the applicant intends to rely…"

Matters for determination - introduction

10. As the Standing Issue Question highlights, the principal dispute between the parties who participated in the hearing which they wish to have resolved is whether the Applicants have standing to make an application under rule 18.28(1) of IR2016 ("a rule 18.28 application") even though, at the time the application was made and since then, the Applicants were, and have not been, in office as office-holders (as administrators) in relation to the company. Throughout this time, they have been the company's former administrators.

11. A further dispute between those parties arose at the hearing, on which they made submissions and which they did not suggest does not fall within the preliminary issue (or the Standing Issue Question in particular), which, logically, needs to be resolved first. I need to explain how that further dispute has arisen in a little detail.

12. At the December 2023 hearing, in the light of the resolution, it was not clear to me that the Applicants were actually contending that the rate or amount of remuneration fixed by the resolution was insufficient or that the basis thereby fixed was inappropriate (to paraphrase rule 18.24 of IR2016). Perhaps recognising a potential inconsistency between the resolution, which, on the face of it, fixed the Applicants' remuneration "by reference to the time properly given by [them and their] staff in attending to matters arising in the administration" (see rule 18.16(2)(b) of IR2016) and the ambit of rule 18.28 of IR2016, Miss Temple (who represented the Applicants then as she has done since), contended, on instructions, that, in fact, the Applicants' remuneration had been fixed by the resolution in a set amount (under r.18.16(2)(c) of IR2016). Mr Barna, the company's representative (who has represented the company at all material times in the application) also contended that the Applicants' remuneration was fixed in a set amount. As a result, my December 2023 order recited as follows:

> "AND UPON the Applicants and the First Respondent agreeing, for the purposes of the Application, that, on 30 December 2022, the creditors in the former administration of the First Respondent resolved that (i) the Applicants were entitled to be remunerated in the set amount of £235,000, but (ii) that the Applicants retained, or did not relinquish, any right they had to request the creditors to increase the amount of such remuneration"

13. Also, because of an argument advanced then by Miss Temple, and pursued since by her, although without much vigour, which I was not sure I properly understood, I directed the Applicants to file points of claim.

14. The points of claim are not clear. Although paragraph 2 suggests that the Applicants maintained that their remuneration was fixed in a set amount under r.18.16(2)(c) of IR2016, in paragraph 19, they plead:

> "The basis of remuneration was fixed by the creditors' committee on a time cost basis in December 2022…"

Further, as Miss Temple expressly confirmed to me at the hearing, on instructions, in a departure from the agreement recited in my December 2023 order, it is now the Applicants' case that their remuneration was fixed by the resolution on the basis set out in rule 18.16(2)(b) of IR2016 (which I will refer to as "the time-cost basis"), although she then suggested that the approval, by the passing of the resolution, of "fees on account of these costs…at £235,000 plus VAT", that is, effectively a payment on account approval (as I understood her to accept), was an approval of a fixed amount of remuneration.

15. In the result, the following further question needs to be determined: on the basis that the Applicants now contend that their remuneration was fixed by the resolution on the time-cost basis, can they make a rule 18.28 application?

16. The company and NGI argue that they cannot because they are not seeking an increase in the rate of their remuneration (as Miss Temple accepted), nor are they seeking to change the basis of their remuneration (as Miss Temple also accepted). Nor, argue the company and NGI, are they seeking to increase the amount of their remuneration.

Representation

17. I have already indicated that Eleanor Temple of counsel has represented the Applicants throughout the application. As I have also indicated, Tibor Barna, a company representative has represented the company, effectively throughout the application, first with the permission of HH Judge Kelly, and then, at the hearing, with my permission. Nicholas Leah of counsel represented NGI for part of the December 2023 hearing and represented NGI at the hearing. I am grateful to them all for their assistance.

On the basis that the Applicants contend that their remuneration was fixed on the time-cost basis, can they make a rule 18.28 application?

18. The parties made only limited submissions on this question. In particular, they did not make any submissions at all on the proper construction of those parts of rules 18.24 and 18.28 of IR2016 which are engaged by this question. The limited nature of their submissions on the proper construction of IR2016 generally is a subject to which I will return.

19. As an aside, it is entirely understandable that the Applicants now contend that the resolution fixed their remuneration on the time-cost basis. The first part of the first sentence of the resolution is substantively the same as rule 18.16(2)(b) of IR2016. The second part of that sentence merely sets out the rate at which their time costs are to be calculated.

20. I turn then to the question.

21. I have already noted that the Applicants are not seeking an increase in the rate of their remuneration. Nor are they seeking a change to the basis of their remuneration.

22. As I have also already noted, because of the outcome of the adjudication process, the Applicants have so far not reached agreement with the plan administrators about an increase in what they should actually be paid, which I understand is because of the limitation to £235,000 of the payment on account approved by the resolution. The Applicants are trying to establish, by means of the application, that they should actually be paid more. However, does that mean that they consider the amount of remuneration fixed by the resolution insufficient, so engaging rule 18.24 of IR2016? To effectively put the same question another way: are they seeking an increase in the amount of remuneration fixed by the resolution, so engaging rule 18.28 of IR2016?

23. In my view, the answer to the questions in issue is: no.

24. Looking at rules 18.24 and 18.28 of IR2016 in the context of the whole of the chapter in question of IR2016, they aim provide a mechanism to office-holders (i) to obtain an increase in the percentage(s) of the value of the relevant assets to which it has been initially determined the office-holders are entitled (see rule 18.16(2)(a) of IR 2016), or (ii) to obtain an increase in the set amount which it has been initially determined they will be paid (see rule 18.16(2)(c) of IR 2016). The rules aim too to provide a mechanism to office-holders to obtain a change in the basis (or bases) of remuneration set out in rule 18.16(2) of IR2016 to which it has initially been determined the office-holders are entitled. The rules may even aim also to provide a mechanism for office-holders to obtain an increase in their charge out rates when their remuneration has initially been fixed on the time-cost basis.

25. The Applicants do not want any of these changes to their remuneration. In particular, they are not seeking an increase in any set amount which it has been initially determined they will be paid, because it is not now their case that the resolution fixed their remuneration in accordance with rule 18.16(2)(c) of IR2016. In any event, they have never suggested that they should be remunerated in an amount more than that calculated by reference to the agreed charge out rates for the time properly spent on the administration as provided for in the resolution. In short, they are in fact not seeking an increase in the amount of remuneration fixed by the resolution.

26. The payment on account approval was not the fixing, by the resolution, of the amount to which the Applicants were entitled for remuneration. The payment on account approval was no more than an authorisation, by the company's creditors, for the immediate withdrawal, by the Applicants, from the company's funds of up to £235,000 on account of the Applicants' remuneration to which they were more generally entitled because of the approval of the resolution.

27. Miss Temple helpfully explained to me at the hearing a number of matters relating to office-holders' remuneration which reinforce the conclusions I have already reached.

28. She explained that, even if creditors put a limit on the amount which an administrator can draw on account of their remuneration when that remuneration has been fixed on the time-costs basis, the administrator's charge over assets provided for by paragraph 99 of Schedule B1 to the Insolvency Act 1986 ("Schedule B1") (which covers their remuneration) extends to the whole of the administrator's remuneration to which they are properly entitled on the time-costs basis and not just the authorised payment on account.

29. She also explained that, had the administration in this case continued and not been brought to an end by the approval of the restructuring plan, the Applicants would have (prima facie at least) been entitled to all their fees referable to the time properly spent on the administration at the appropriate charge out rate. She explained that, if there had been a remuneration dispute, it would most likely not have been brought to court by the Applicants but, rather, by the dissatisfied creditors under rule 18.34 of IR2016.

30. I understood the underlying point in both scenarios to be that, in the cases being considered, remuneration has not been fixed in the amount of the sum approved as a payment on account.

31. Miss Temple did also say that, in this case, the Applicants would not have sought to draw any remuneration in excess of £235,000 without the further approval of the creditors as a matter of professional conduct. She also said that the rule in *ex parte James* may have precluded the Applicants from drawing remuneration in excess of £235,000 without further creditor approval. I do not need to decide that point and am prepared to accept that that may be so. However, that the Applicants may not have drawn remuneration in excess of £235,000 without further creditor approval or that, as officers of the court, the Applicants perhaps ought not to have done so, does not affect the determination about whether the Applicants are seeking an increase in the amount of their remuneration initially fixed by the approval of the resolution.

32. Acknowledging again, as I have already done, the limited extent of the parties' submissions on this question, I have concluded that, as the Applicants are not seeking an increase in the rate or amount of their remuneration fixed by the approval of the resolution and as they are not seeking a change in the basis of their remuneration, what they are seeking does not fall within the ambit of a rule 18.28 application. To put the same point another way, as they do not, in fact, consider that the rate or amount of remuneration fixed by the resolution is insufficient or that the basis so fixed is inappropriate, they do not have standing, under rule 18.24 of the IR2016, to make a rule 18.28 application.

33. That is not to say that there may not be an alternative route, by way of an insolvency application, for the Applicants to obtain a determination about whether they should be paid more. The Applicants may also have (or may also have had) a mechanism under the adjudication process for bringing their claim to court by way of a general civil claim. However, as I have said, on the limited submissions made by the parties I do not think a rule 18.28 application has been the right way for the Applicants to have proceeded.

Can a former officer-holder make a rule 18.28 application?

34. I do not have to answer this question because of the conclusions I have already reached. However, because the parties made submissions on the issue raised by the question, and because the parties have indicated that they may seek permission to appeal my decision, I will give my answer. I do so with a degree of hesitation. On this question, as on the former question, the parties' submissions were limited. They did not make any submissions about the history of the making of IR2016, particularly against the background of the former rules, the Insolvency Rules 1986 ("IR1986"). Nor, save in relation to rule 1.2 of IR2016, did they make any submissions about how Part 18, Chapter 4 of IR2016 ("Chapter 4") should be read in the context of the rest of IR2016. Nor did anyone, other than Mr Barna, make any submissions on the construction of IR2016 as a statutory instrument, and Mr Barna made only high-level submissions on that matter.

35. In summary, Mr Barna and Mr Leah submitted as follows:

    i) rules 18.24 and 18.28 of IR2016 must be given their ordinary meaning. Those rules refer to office-holders, not to former office-holders, which is consistent with only insolvency practitioners in office having standing to make a rule 18.28 application;

    ii) this conclusion is reinforced because rule 18.28(6) of IR2016 requires an applicant to deliver notice of their application to the members of the creditors' committee and, once an administration is ended, there is no existing creditors' committee. There are only former members of a former committee;

    iii) this conclusion is further reinforced by rule 1.2 of IR2016, which provides:

> ""office-holder" means a person who under the Act or these Rules holds an office in relation to insolvency proceedings and includes a nominee".

    (I understand their point to be that, because rule 1.2 of IR2016 refers, in the present tense, to a person holding office, IR2016 defines office-holders as insolvency practitioners being in a particular office for the time being);

    iv) this conclusion is also reinforced because Chapter 4 contains other rules which do expressly refer to former office-holders and distinguish them from office-holders currently in office; in particular, rules 18.31 and 18.32 of IR2016.

36. Mr Barna also submitted that, if a rule 18.28 application was not limited to current office-holders, a company might have hanging over it the risk of a stale rule 18.28

application long after it has been rescued. He distinguished a rule 18.28 application from an application for the initial fixing of an office-holder's remuneration under rule 18.23 of IR2016, which must be made within 18 months after the office-holder's appointment. He argued that, if an application under rule 18.23 of IR2016 ("a rule 18.23 application") can be made by a former administrator (whose term of office will initially have been for 12 months under paragraph 76 of Schedule B1), that only a current office-holder can make a rule 18.28 application is reinforced.

37. Mr Barna also argued that clause 12 of the restructuring plan, which imposes a stay on proceedings, precludes the Applicants from making the application. Whether or not clause 12 of the restructuring plan has that effect is a complicated point of documentary construction, because clause 8.3 expressly permits the Applicants to make IR2016 applications. Just as Judge Davis-White concluded that it was intended that the adjudication process would be subject to clause 8.3, I tend to think that clause 12 was intended to be subject to clause 8.3. However, I do not decide the point, because I do not need to do so. Whether the application ought to be stayed because of the terms of the restructuring plan is not a matter which would have to be decided at this stage. If the application had proceeded, but for the conclusions I have already reached, the point raised by Mr Barna would, in practice, be more appropriately decided at the next hearing, it not being a point which obviously falls within the ambit of the Standing Issue Question.

38. Miss Temple submitted as follows:

i) Chapter 4 has to be read in context. The aim of the chapter is to provide a mechanism for office-holders to be remunerated and the chapter is not concerned with whether or not a former office-holder, no longer being in office, has, or has lost, standing to have their remuneration determined;

ii) consistent with that, Chapter 4 contains provisions which refer to office-holders even when those provisions are intended to, or may, apply to former office-holders; in particular, rules 18.23, 18.34, 18.36 and 18.37 of IR2016;

iii) to give effect to the equivalent aim of IR1986, specialist insolvency judges have consistently permitted former administrators to apply for their remuneration to be initially fixed. In this regard, Miss Temple prayed in aid *Re Super Aguri F1 Ltd* [2011] BCC 452 (a decision of Registrar Jaques) and *Re Brilliant Independent Media Specialists Ltd (in liquidation)* [2015] BCC 113 (a decision of then Registrar Jones);

iv) more generally, courts have taken a purposive approach to questions of standing, not literally interpreting the relevant statutory provisions, but rather enquiring into who has a direct interest in the matter in issue. In this regard, Miss Temple prayed in aid *Re Lehman Brothers Europe Ltd (in administration) (No. 2)* [2021] 2 All ER (Comm) 559 (a decision of Hildyard J) and *Brake v. The Chedington Court Estate Ltd* [2023] 1 WLR 3035 (a decision of the Supreme Court);

v) taking all these matters into account, it is clear that the Applicants do have standing to make the application even though, throughout the application's life, they have not been in office as the company's administrators.

39. As I have already said, Miss Temple made an alternative case, which was apparently based on the first two recitals of Judge Davis-White's order which I have quoted (but, in fact, was more properly based on clause 8.3). In the end, it has turned out that that alternative case takes the Applicants nowhere. Miss Temple summarised the case as follows: If IR2016 permit the application to be made, the restructuring plan does not remove that right, and the Applicants can make the application. If IR2016 do not permit the application to be made, the restructuring plan aside, the restructuring plan does not give the applicants a right to make the application, so that the Applicants cannot make the application. The alternative case, such as it is, is clearly a circular one and entirely stands or falls with the main dispute between the parties about who generally has standing to make a rule 18.28 application.

40. As it also happens, although the point was not explored at the hearing and nothing turns on this, the recitals to Judge Davis-White's order suggest that, at the sanction hearing before him, the remuneration dispute related whether or not the resolution was effective at all to initially fix the Applicants' remuneration, which is not the position any of the parties took before me. If there was a dispute about the effectiveness of the resolution, that may explain the reference, in clause 8.3, to a decision of the creditors' committee (rather than to a decision of the creditors) and that may suggest that, in making reference, in clause 8.3, to the Applicants' right to make an IR2016 application, the drafters of the clause had a rule 18.23 application in the forefront of their minds, rather than a rule 18.28 application.

41. Having considered the parties' submissions, I have concluded that former administrators can make a rule 18.28 application. I now explain why.

42. The language of rules 18.24 and 18.28 is important of course and I accept that the ordinary meaning of "an office-holder" and of "an administrator" is of an insolvency practitioner who is currently in office.

43. I do not get much help from the requirement, in rule 18.28(6) of IR2016, that an applicant must give notice of the application to the creditors' committee, because the rule provides alternatively that, if there is no committee, notice must be given to such of a company's creditors as the court directs. I accept that that alternative requirement is likely to have been directed to the case where there is no existing creditors' committee in a continuing administration, but it is not so limited.

44. Nor do I get much help from rule 1.2 of IR2016. It is not clear to me that that definition is intended to prescribe when an applicant has standing to make a rule 18.28 application. The definition may be intended to be no more than a shorthand for an administrator, a liquidator, a trustee in bankruptcy or other relevant insolvency practitioner, in which case, "administrators" can be substituted for "office-holders" in this case in rules 18.24 and 18.28 of IR2016. If the definition is intended to be no more than a shorthand (which is supported by the use of "office-holder" in rule 18.16(1) of IR2016), its only effect is to substitute one word (administrator) for another (office-holder), without helping to establish whether an insolvency practitioner formerly in office has standing to make a rule 18.28 application.

45. I do not get any help from rules 18.31 or 18.32 of IR2016, because, read contextually, they refer, and need to refer, to former office-holders in order to distinguish those insolvency practitioners from insolvency practitioners currently in office who are also

referred to in those rules. Those rules would otherwise have made no sense. In fact, those rules may provide some slight support for the Applicants' case because they do not simply refer to "the office-holder" when referring to an insolvency practitioner who is currently in office. Rather, rule 18.31 refers to "the new administrator" and "the new office-holder" and rule 18.32 refers to "the office-holder for the time being in office".

46. It is not enough simply to ascribe their ordinary meaning to "an office-holder" and "an administrator". Rules 18.24 and 18.28 of IR2016 need to be set in context.

47. I agree with Miss Temple that the purpose of Chapter 4 is to make provision for office-holders' remuneration. That is clear from the opening provision (rule 18.15) and from rule 18.16(1).

48. Rules 18.24 and 18.28 also form part of a chapter in which other rules do not use references to "office-holders", and similar, prescriptively to refer to insolvency practitioners who are currently in office. To the contrary, other rules include within such references former office-holders.

49. Rule 18.34 permits a dissatisfied creditor or member to challenge an office-holder's remuneration. The applicant may, for example, make an application under this rule ("a rule 18.34 application"), in the case of a member's voluntary liquidation, within 8 weeks after the applicant's receipt of the liquidator's final account, but, by then, the liquidator is likely to have vacated office. By section 94(3) of the Insolvency Act 1986, the liquidator must send their final account to the registrar of companies within 14 days of the account being made up, and, on doing so, they vacate office (see section 171(6) of the Insolvency Act 1986). The position is even starker when the procedural rules applicable to a rule 18.34 application are considered. Rules 18.36 and 18.37 of IR2016 set a time which is likely to be even later after the liquidator has left office for the applicant to notify the (former) office-holder of the hearing. Yet none of those rules refer to former office-holders. All the relevant references are to office-holders.

50. Rule 18.23 of IR2016 is likely to be a further instance when Chapter 4 refers to an office-holder (in this case, an administrator) when it is intended that former office-holders are included in the rule. Rule 18.23(3) of IR2016 suggests that insolvency practitioners may be able apply to the court to initially fix their remuneration even when they have ceased to be in office as administrators, because the rule permits rule 18.23 applications to be made within 18 months of an administrator's appointment and, by default, an administrator's appointment is for 12 months. It is likely, in fact, that the rule does, on its proper construction, permit former administrators to make a rule 18.23 application. As Miss Temple pointed out, in both *Super Aguri* and *Brilliant*, Registrars permitted former administrators to make applications for their remuneration to be initially fixed under rule 2.106 of IR1986 which was in similar, but admittedly not the same, language as rule 18.23.

51. *Brilliant*, in particular, is consistent with, and provides some support for, my conclusion (even noting paragraph 42.6 of the judgment). The application, in that case, was pursued under rule 2.106(6) of IR1986 which was then in the following terms:

> "If not fixed as above, the basis of the administrator's remuneration shall, on his application, be fixed by the court…; but such an application…in any event may not be made more than 18 months after the date of the administrator's appointment."

The applicants in that case were appointed on 1 December 2011 and ceased to be in office when the company was put into liquidation on 12 August 2012. It is clear, from the basis of part of the application, that the applicants made their application after they had ceased to be in office as administrators. (One of the issues the Registrar had to determine was whether the applicants could be remunerated for work done after they ceased to be in office). Yet the experienced Registrar was not troubled that the application was made not by an administrator but by former administrators, which is notable because the Registrar clearly had in mind, in determining whether the applicants could be remunerated for the work done after they ceased to be in office, that they were former administrators. The Registrar said, at paragraph 42 of his judgment:

> "In my judgment:
>
> 42.1 Rule 2.106 applies to remuneration for the services of the administrator "as such". On the face of this wording and taking account of the wording of paragraph (1) as a whole, this is to be construed as referring to services carried out whilst appointed under Schedule B1 to manage the company's affairs, business and property. It should not include services provided after those duties ceased to the company in liquidation.
>
> 42.2 That construction is consistent with the general thrust of the wording of the rule as a whole which is aimed at matters arising during and concerning the term of appointment. It is consistent with the underlying intention that matters of remuneration should be decided by the creditors' committee where possible. That will only occur during the term of appointment of the administrator.
>
> 42.3 It is consistent with the statutory scheme that provides for the "former administrator's" remuneration and other expenses to be charged upon the assets passed to (in this case) the liquidator (see paragraph 99(3) of Schedule B1). There is no suggestion within paragraph 99 of Schedule B1 that the charge will include remuneration and other expenses incurred after cessation of the appointment.
>
> 42.4 The submission of Mr Robins [that the applicants could be remunerated for work done after they ceased to be in office] must depend upon paragraph 111 of Schedule B1 applying. It provides:

> ""administrator" has the meaning given by paragraph 1 and, where the context requires, includes a reference to a former administrator."

Paragraph 1(1) of Schedule B1 provides:

> "(1) For the purposes of this Act "administrator" of a company means a person appointed under this Schedule to manage the company's affairs, business and property."

42.5 The Rules do not define terms concerning the administrators already defined in the Act and plainly paragraph 111 may apply. However, the simple answer to the submission of Mr Robins is that the context of rule 2.106 (as opposed to the context of his submission) does not require the meaning of administrator to include a former administrator.

42.6 In addition, an extension of rule 2.106 to events after the cessation of office is sufficiently significantly to require and therefore expect express wording to that effect. That is particularly so both because the rule on its face is limited to the period of appointment and because there is no express provision for this possibility within the statutory charge provisions. It may also be noted from paragraph 99(3) of Schedule B1 that Parliament is not slow to refer expressly to "former" when that is considered appropriate.

42.7 There is also the point that it is reasonable to conclude that Parliament would have provided express wording if it had been intended to alter the expected position that a liquidator will decide whether to retain and therefore remunerate former administrators for their services and in doing so continue to control the assets available for distribution to creditors."

It is clear, if from nothing else then from the Registrar's approach to the application and from paragraphs 42.1-42.3 of his judgment, that what the Registrar meant when he said that "the context of rule 2.106…does not require the meaning of administrator to include a former administrator", was that, when rule 2.106(1) said that "the administrator is entitled to receive remuneration for his services **as such**" (emphasis added), paragraph 111 of Schedule B1 did not have the effect of creating an entitlement for an insolvency practitioner who was formerly an administrator to be remunerated for work done after they ceased to be in office.

52. Apart from Miss Temple's brief submission on paragraph 42.5 of *Brilliant* once I had drawn that sub-paragraph to the parties' attention, no-one made any submissions about paragraph 42 of the decision. It may be that the Registrar was not concerned about the standing of the applicants in that case when they made their application, even though they were not in office, because he may have concluded that paragraph 111 of Schedule B1 had the effect of giving former administrators standing to make an application under rule 2.106 of IR1986. By analogy, former administrators would then have standing to make a rule 18.23 application, although that rule only refers to

an "administrator" making such an application (as the former rule effectively did). If all that is right, it would provide a complete answer to the question I am considering, because rule 18.28(2) of IR2016 refers, in terms, to when an "administrator" can make a rule 18.28 application. (Because no-one made submissions on paragraph 42 of *Brilliant* (save as I have indicated), and because no party relied on paragraph 111 of Schedule B1, I have not taken into account, in reaching my decision, what I have said in this paragraph).

53. Save to note that Hildyard J, also a judge with substantial insolvency expertise, focused on whether the applicants in that case had "sufficient interest" in their application, I have not found *Lehman* to be of great assistance. The former administrators in that case applied for their discharge from liability under paragraph 98 of Schedule B1. One of the questions Hildyard J had to decide was whether, because they were no longer in office when they made their application, they had standing to do so. The Judge said, at [22] - [23]:

> "As to the second question, and whether the fact that LBEL has been in liquidation for some time affects the power of the court in this regard or its exercise, Mr Riddiford submitted that, although there is no case law expressly confirming that a former administrator has standing to apply once the company has moved into liquidation, it must be the position that he or she does have such standing. Mr Riddiford emphasised the following points (which I take almost verbatim from his written submissions):
>
> (1) First, no restriction is expressed in paragraph 98 of Schedule B1 to the Act such as to prevent a former administrator from making an application under paragraph 98(2)(c).
>
> (2) Secondly, paragraph 98(2)(c) is, on the contrary, conspicuously non-prescriptive as regards the question of the standing required to make an application, stating simply that the discharge takes effect "in any case, at a time specified by the court". This is in contrast to other provisions of Schedule B1 where the question of standing is provided for in detail. See, for example, the detailed standing provisions set out in paragraph 91(1) of Schedule B1 to the Act. Accordingly, the better view is that: (i) any person with a sufficient interest in the matter of an administrator's discharge (or of a former administrator's discharge) has standing to make such an application; and (ii) the administrator (or former administrator) in question plainly qualifies as a person with a sufficient interest in the matter.
>
> (3) Thirdly, other provisions of paragraph 98 contemplate that the question of the timing of an administrator's discharge may, in certain cases, arise for determination only once the administrator is no longer in office. In particular, para 98(3A) provides as follows (emphasis added): "In a case where the

> administrator is removed from office, a decision of the creditors for the purposes of sub-paragraph (2)(b), or of the preferential creditors for the purposes of sub-paragraph (2)(ba), must be made by a qualifying decision procedure." Where the relevant creditors fail to make the decision contemplated by paragraph 98(3A) – whether through inadvertence or otherwise – the former administrator would presumably be able to avail himself of paragraph 98(2)(c) and apply to the Court for an order fixing the date of his discharge (this at a time when, necessarily, he had already become a former administrator). The express words of paragraph 98(2)(c) support this view – noting that the words "in any case", as used in paragraph 98(2)(c), must include at the very least all cases expressly contemplated by paragraph 98 itself (which includes the case of the administrator who is "removed from office" (paragraph 98(3A)).
>
> (4) Finally, it is also right to note that the date on which the Court typically orders that an administrator's discharge will take effect under paragraph 98(2)(c) of Schedule B1 is a date after the termination of the administration. In these circumstances it would be surprising if paragraph 98(2)(c) of Schedule B1 included an implied restriction to the effect that an application could only be made prior to the administration's termination.
>
> [23] I accept these submissions. In my judgment, there is no expressed limitation to the power of the court, provided its jurisdiction is invoked by a person with standing; the Former Administrators are plainly such persons; and the exercise of the power is appropriate and expedient."

It seems to me that the Judge was very much focused on the particular wording of paragraph 98 of Schedule B1 which does not identify in terms, unlike rules 18.24 and 18.28 of IR2016, who may make an application under that paragraph.

54. *Brake* has been of greater assistance. That case concerned the proper construction of section 303(1) of the Insolvency Act 1986, which provides:

> "If a bankrupt or any of his creditors or any other person is dissatisfied by any act, omission or decision of a trustee of the bankrupt's estate, he may apply to the court; and on such an application the court may confirm, reverse or modify any act or decision of the trustee, may give him directions or may make such other order as it thinks fit."

Lord Richards (with whom the other Justices agreed) said, at [99]:

> "The principles underlying the standing of applicants under section 303(1), and section 168(5), of the Insolvency Act 1986 can be summarised as follows. Creditors have standing where their application concerns their interests as creditors, because

> the bankrupt's estate or the assets of the company in liquidation are administered under the terms of the statutory trust for their benefit as creditors. Likewise, where there is or there is likely to be a surplus, the bankrupt or contributories are also persons for whose benefit the estate or assets are being administered and they have standing in respect of their interests in the surplus. Beyond that, there is a limited class of cases where creditors, the bankrupt, contributories or others will have standing, but only in respect of matters directly affecting their rights or interests and arising from powers conferred on trustees or liquidators which are peculiar to the statutory bankruptcy or liquidation regime. *Engel v. Peri* and *In re Hans Place Ltd* provide good examples of cases within this category."

55. Two points emerge from *Brake*; first, that the court does adopt a purposive interpretation of insolvency legislation when determining whether an applicant has standing to make an application and, secondly, that, when determining whether an applicant has standing to make an application, the court's focus is likely to be on whether the outcome of the application in question will directly affect the applicant's rights or interests in connection with powers conferred by the statutory insolvency regime.

56. I agree with Miss Temple that, whether or not the Applicants are directly affected by the outcome of the application (which was disputed by Mr Barna, on the facts, which is a dispute I cannot determine), former administrators can be directly affected by the outcome of a rule 18.28 application which is an application relating to an office-holder's statutory power to charge remuneration for their services. In short, *Brake* supports a purposive (rather than ordinary meaning) interpretation of rules 18.24 and 18.28 of IR2016 and can also support an interpretation of those rules which permits former administrators to have standing to make a rule 18.28 application.

57. An earlier decision of then Registrar Jones, *Re Future Route Ltd (in liquidation)* [2017] EWHC 3677 (Ch), which the parties did not refer me to, is to similar effect as *Brake*. In that case, the Registrar was being asked fix the remuneration of liquidators. The Registrar said, at [24]:

> "Mr Brockman referred me to the case of Engel v Perry *(sic)*. There, Ferris J, in the context of bankruptcy, accepted that the court had jurisdiction, either expressly under an equivalent to section 112, or under the court's inherent jurisdiction, to fix remuneration even where there was a regime for doing so outside of the court's involvement. It is clear from that decision that the court can fill in gaps that are left by the Rules in circumstances in which the Rules may well not have expressly envisaged the circumstances that exist. That could be considered a good description of this case."

Because the parties did not refer me to this case, and because the Supreme Court in *Brake* analysed the decision in *Engel* differently, I have not relied on *Future* in reaching my decision. However, it is interesting to note that that is another decision

where the court's focus was on the nature of the applicants' interest in the outcome of their application.

58. It is true, as Mr Barna pointed out, that, whereas a rule 18.23 application is time-limited to a period of 18 months from an administrator's appointment, a rule 18.28 application is not time-limited. However, I think that the risk of a stale application is likely to be only a theoretical risk and so not persuasive on the question of whether or not former office-holders can make a rule 18.28 application. As paragraph 21.2(9) of the Insolvency Proceedings Practice Direction 2020 makes clear, the judge determining a remuneration application will take into account the timing of the application in question:

> "The court will take into account whether any application should have been made earlier and if so the reasons for any delay."

Disposal

59. Although I have concluded that former administrators do have standing to make a rule 18.28 application when they are no longer in office, for the reasons I have given I have concluded that the Applicants do not consider "the…amount of remuneration fixed to be insufficient". Nor, I have concluded, are they actually asking for "an increase in the…amount of remuneration", their remuneration having been fixed, on their case, on the time-cost basis. In the circumstances of this case, the Standing Issue Question must be answered in the negative and, in the context of the application, so must the preliminary issue as defined by Judge Saffman. The application must therefore be dismissed.

Postscript

60. I circulated a draft judgment on a confidential basis to Miss Temple, Mr Barna and Mr Leah. Together with their combined list of typographical corrections and obvious errors, I received a note from Miss Temple.

61. Miss Temple asked me in her note, first, to delay the handing down of the judgment to permit the parties to make further submissions on the question of whether, on the basis that the Applicants contend that their remuneration was fixed on the time-cost basis, they can make a rule 18.28 application. In other words, Miss Temple wanted a further opportunity to persuade me that I am wrong to have decided that the Applicants do not have standing to make a rule 18.28 application for the reasons I have given. She pointed out in her note that the question in issue arose at the hearing and that the parties' representatives only made limited submissions.

62. The question in issue did not arise for the first time at the hearing. It had been discussed at the December 2023 hearing (see paragraph 12 above). It only arose again at the hearing because the points of claim were not clear, because the Applicants had previously agreed that their remuneration was fixed in a set amount (as recorded in my December 2023 order) and because it was only at the hearing that it was confirmed that the Applicants' case is that their remuneration was fixed on the time-cost basis.

63. I accept, indeed I have already recorded, that the parties only made limited submissions on the question in issue. That was the parties' choice. No party was limited in the time allocated to their submissions. No party asked for an adjournment or for a further opportunity to make submissions. The parties were able to make whatever submissions they wanted. The company and NGI have not supported a delay to the handing down of the judgment. Nor have they supported the Applicants' proposal that further submissions should now be made.

64. In the light of the foregoing, it has not been appropriate to delay the handing down of the judgment.

65. Miss Temple asked me in her note, secondly, as follows:

> "…whether the court might consider giving fuller reasons for rejecting the submissions made in relation to the decision in [*Brilliant*] (see paragraphs 2, 3, 25-28.3 and 34) in which the Registrar fixed the remuneration of former administrators under applications made under rule 2.106 IR1986 (which was in similar language to rule 18.23) and rule 2.108 (which was in similar language to rule 18.24), even though the creditors had already fixed the administrators' basis of remuneration by reference to a time costs basis (as here)."

66. As I pointed out to Miss Temple at the hearing, although the application in *Brilliant* was brought under rules 2.106(6) and 2.108 of IR1986, it was, as I have already recorded, only pursued at the hearing before the Registrar under rule 2.106(6) of IR1986, as the Registrar pointed out in paragraph 1 of his judgment. As I also pointed out to Miss Temple at the hearing, *Brilliant* appears to have proceeded (on all sides, and without objection) on the basis that, although the applicants in that case ceased to be in office on 12 August 2012, their remuneration was not fixed (by the creditors' committee) beyond 17 February 2012. Rule 2.106 of IR1986 provided, as I have already set out in part:

> "…(3C) It is for the creditors' committee (if there is one) to determine -
>
> (a) which of the bases [of remuneration] are to be fixed and (where appropriate) in what combination, and
>
> (b) the percentage or percentages (if any) to be fixed [where remuneration is fixed on the basis that the administrator will receive as remuneration a percentage of the value of the property with which he has to deal] and the amount (if any) to be set [where the administrator is to be remunerated in a set amount]…
>
> (5) If there is no creditors' committee, or the committee does not make the requisite determination…the administrator's remuneration may be fixed…by a resolution of a meeting of creditors…

> (6) **If not fixed as above**, the basis of the administrator's remuneration shall, on his application, be fixed by the court…; but such an application may not be made by the administrator unless the administrator has first **sought** fixing of the basis in accordance with paragraph…(5)…, and in any event may not be made more than 18 months after the date of the administrator's appointment" (emphasis added).

It is clear from rule 2.106 of IR1986 that, if the remuneration of the applicants in that case had been fixed, by the creditors' committee, for the whole of the period they were in office, the court would not have had jurisdiction under the rule to fix their remuneration. It is also clear from the rule that, if the remuneration of the applicants in that case had been fixed, by the creditors, for the whole of the period of their office-holding which was not covered by any prior decision of the creditors' committee, the court would not have had jurisdiction under the rule to fix their remuneration. Not only are there suggestions in the judgment (see, for example, paragraph 1) that the parties proceeded on the basis that the applicants' remuneration had not been fixed at all beyond 17 February 2012, but, had any party argued that the court might not have jurisdiction to fix the applicants' remuneration under rule 2.106(6) of IR1986, because their remuneration had already been fixed, by the creditors' committee or the creditors, for the whole of the period they were in office, the Registrar would have dealt with the point in his judgment (cf. paragraph 3 of the judgment). He did not. All the indications are, therefore, that everyone proceeded on the basis that the remuneration of the applicants was not fixed beyond 17 February 2012.

67. I did consider *Brilliant* before reaching my decision on the question in issue, but I did not find it helpful for the following reasons in particular:

i) the Applicants have made a rule 18.28 application, not a rule 18.23 application. A rule 18.23 application, not a rule 18.28 application, is the equivalent, under IR2016, of an application under rule 2.106(6) of IR1986 (that is, the application which was pursued in *Brilliant*). In short, I have had to determine a preliminary issue in a different application;

ii) unlike apparently in *Brilliant*, the Applicants have not contended that their remuneration was not fixed for any period of time. To the contrary, it has been their case that their remuneration was fixed, for the whole of the period they were in office, on the time-cost basis.