IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2017-404-108
[2017] NZHC 2019

UNDER	Section 250 of the Companies Act 1993
IN THE MATTER OF	RAYLAND INVESTMENT LIMITED (in liq)
BETWEEN	LARRY FANN AND YANYAN GUOFAN Applicants
AND	MARK HECTOR NORRIE AS LIQUIDATOR OF RAYMOND INVESTMENT LIMITED Respondent

Hearing: 2 June 2017

Appearances: G Round for the Applicant
J Nolen for the Respondent

Judgment: 23 August 2017

JUDGMENT OF ASSOCIATE JUDGE R M BELL

This judgment was delivered by me on ***23 August 2017*** *at* ***2:00pm***
pursuant to Rule 11.5 of the High Court Rules

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Registrar/Deputy Registrar

Solicitors:
Law & Associates (Gareth Round), Auckland, for the Applicants
K3 Legal Ltd (James Nolen), Auckland, for the Respondent

[1] On 10 March 2017, Rayland Investment Ltd was ordered into liquidation on the insolvency ground.[1] Mr Norrie was appointed liquidator. The amount owing to the creditor, Mr Patel, was $68,560.64. The applicants, the director and shareholders of Rayland Investment Ltd, applied on 5 April 2017 for the liquidation to be terminated under s 250 of the Companies Act 1993. At the hearing the only matter in issue was the amount of Mr Norrie's remuneration. Following the hearing, a question as to GST returns has come up.

[2] The circumstances of the application are not unusual. Rayland Investments Ltd carried on business as a residential property developer, but there is no evidence that it traded actively immediately before it was ordered into liquidation. The liquidation order was regularly obtained. Rayland Investment Ltd did not oppose the application and did not appear. Mr Patel had obtained judgment against the company in the District Court. While the company did file a defence, it did not appear at the hearing. Mr Patel's lawyers served a statutory demand for the judgment sum both on the registered office of the company and on the director at his home. The liquidation application was served only on the registered office of the company. The people who occupied the premises for the registered office had no connection with Rayland Investments Ltd. Although the director, Mr Fann, knew of the statutory demand, he did not find out about the liquidation proceeding until after the order was made. He now wants to take the company out of liquidation and for that he is prepared to pay the company's external creditors and Mr Norrie's reasonable remuneration. The applicants are the only shareholders. They are also creditors for shareholders' advances. So long as arrangements are made to pay external creditors and to secure the liquidator's remuneration, this is an appropriate case to terminate the liquidation. All relevant interests under *Re Bell Block Lumber Ltd (in liq)* will be addressed: creditors, the liquidator and shareholders.[2] The applicants, as shareholders, clearly consent to the termination of the liquidation.

[3] The court approved these rates of remuneration for Mr Norrie:

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1 Companies Act 1993, s 241(4)(d).
2 *Re Bell Block Lumber Ltd (in liq)* (1992) 5 PRNZ 642 (HC).

[a] liquidator – $400 per hour

[b] insolvency accountants – $180-$250 per hour

[c] secretarial and clerical assistance – $60-$120 per hour

Those rates are exclusive of GST. It was a condition of the order that Mr Norrie apply for approval of his overall remuneration at the end of the liquidation.

[4] The only creditors who have claimed in the liquidation are:

Mr Patel – preferential claim for costs in liquidation	$4,248.69
Mr Patel – District Court judgment	$68,560.64
Accountant	$1,725.00
Shareholders	$339,520.00
Total:	**$414,054.33**

I am satisfied on the evidence that there are no other external creditors. Mr Fann's affidavit addresses this aspect. Mr Norrie was at one stage concerned that there were others, but did not contest this part of the application.

[5] At the start of the liquidation, Mr Patel paid Mr Norrie $2,000.00 for initial expenses. That expense incurred by Mr Norrie in the liquidation is to be treated distinctly from the creditors' claims.

[6] The shareholders have paid $85,000.00 into their solicitor's trust account to cover the payments to external creditors and the liquidator, but Mr Norrie says that is not enough. At 8 May 2017 he calculated the total amount to settle as follows:

External creditors	$76,534.33
Liquidation costs (including disbursements and GST)	$39,128.69
Legal costs (including disbursements and GST)	$10,221.92
Finishing-off costs	$3,538.50
Total:	**$129,423.44**

[7] The amount for external creditors includes $2,000 for Mr Patel's payment to Mr Norrie. The $39,128.69 for remuneration is derived from $31,027.27 excluding GST but including expenses. Since then, the amount claimed for remuneration and

expenses (excluding GST) has increased to $33,710.94. Mr Norrie has broken down his work as follows:

Pre-liquidation:	6.7 hours	$2,124.00
Liquidation tasks:	68.0 hours	$16,178.00
Accounting:	3.9 hours	$858.00
Creditors' claims	1.8 hours	$396.00
Correspondence	5.3 hours	$1,647.00
Settlement matters	30.2 hours	$8,633.00.
Section 250 application	11.1 hours	$3,142.00
Total:	**127.0 hours**	**$32,978.00**

[8] Mr Norrie charged his work out at $350.00 per hour and an insolvency accountant at $220.00 per hour. Those are within the rates approved by the court on the liquidation order. The average hourly rate is $259.66. His billings report shows each step taken with a brief narration, the time taken and the rate charged.

The conduct of the liquidation

[9] Mr Norrie has charged for work he carried out even before he was appointed liquidator. Any insolvency practitioner invited to become a liquidator of a company needs to carry out preliminary work: if only to make sure that they are not disqualified from acting as liquidator.[3] That will typically mean making searches of the companies register and the personal property securities register as well as internal checks. A consent under s 282 of the Companies Act needs to be prepared. There is no reason why liquidators should not be able to recover the costs of that preliminary work if they are in fact appointed liquidator. It is a necessary part of their work. In this case, Mr Norrie went further. His consent took the form of an affidavit (which requires more work). Consents under s 282 do not need to be sworn. He carried out property searches. He prepared notices under s 261 of the Companies Act as well as a questionnaire.[4] He came to court to see whether he was appointed liquidator. Those steps go beyond the normal preliminary work by liquidators.

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3 See the Companies Act, s 280.

4 Under s 261 a liquidator may give notice in writing to a director, shareholder or other person to

[10] On the day the liquidation order was made, Mr Norrie and an assistant went to the registered office of Rayland Investments Ltd. It was appropriate for him to take an assistant. She spoke Chinese, he did not. The director and shareholders are Chinese. The address turned out to be wrong, but they found Mr Fann nearby. They interviewed him and uplifted some records. They served a notice under s 261 of the Companies Act on him. In the following weeks the liquidator and his assistant attended to tasks normally undertaken in an insolvent liquidation. The liquidation was advertised. Records were obtained from the company's accountant. Mr Norrie made his first report. Property searches were undertaken. He issued a number of notices under s 261 of the Companies Act. His assistant began an analysis of records to establish whether there were any voidable transactions, as the shareholders had taken payments in substantial reduction of their accounts.

[11] At an early stage Mr Fann indicated his interest in taking the company out of liquidation and paying the creditors. That led to Mr Norrie preparing a deed, called a "Deed of Conditional Settlement and Indemnity". The parties are Rayland Investment Ltd, Mr Norrie and Mr Fann. Altogether, three versions were prepared. No deed was ever signed. The deed was an alternative to the liquidation being terminated. Mr Fann took legal advice. Negotiations between Mr Fann's lawyers, the liquidator and later the liquidator's lawyers did not result in any resolution. Mr Norrie must have appreciated at an early stage that Mr Fann was interested in an agreed arrangement under which external creditors would be paid.

[12] On 5 April 2017 the lawyers announced that the present application to terminate the liquidation would be made. The bulk of Mr Norrie's charges are for the period between the court order of 10 March and 5 April 2017. Mr Fann expected that the liquidator's costs would be about $10,000.

Principles on approving liquidators' remuneration

[13] In cases where the court has appointed the liquidator, the liquidator's remuneration is limited to amounts fixed under s 277 or prescribed rates, unless the

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hand over such books, records or documents as the liquidator requires.

court orders otherwise.[5] As Mr Norrie is seeking approval of higher remuneration, he has the burden of justifying the remuneration he seeks.[6]

[14] In *Re Roslea Path Ltd* a Full Court generally affirmed the principles in *Re Medforce Healthcare Services Ltd (in liq)*:[7]

> **[45]** In *Medforce 1*, the Full Court prefaced its discussion on specific issues raised by the following general comments, all of which we endorse, in the context of Court appointed liquidators:
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> > [18] It seems clear that s 284(1)(e) applies to an application pursuant to s 276(2) so that put at its simplest, the duty of the Court on an application to fix a liquidator's remuneration must be to fix a figure which is "reasonable in the circumstances", This follows too from the provisions of subs (1) of s 276 which entitle a liquidator to charge "reasonable remuneration".
> >
> > [19] An allied question is as to what is included in the expression "remuneration". It seems clear that it is only the remuneration of the liquidator which is subject to review, not his expenses. The distinction between the two is apparent from s 278 which provides that "the *expenses* and remuneration of the liquidator are payable out of the assets of the company" (emphasis added).
> >
> > [20] It is also important to note that subs (2) limits the remuneration of liquidators to that fixed under the regulations "Unless the Court otherwise orders".
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> **[46]** Liquidators are paid out of assets of the company that have been realised for distribution to creditors. This creates a "common fund" in which all participants have an interest. The participants include all creditors and (to the extent a surplus may result) shareholders of the company. An analogy is a trust fund out of which a trustee is entitled to remuneration. In "common fund" cases, involving legal practitioners who seek remuneration, an inquiry is undertaken both into work carried out and whether it was reasonably necessary, having regard to the nature and value of the issues at stake. That principle was applied by Mahon J, in relation to legal aid remuneration paid out of public moneys, in *Re Chapman, Feenstra, Cartwright & Gendall* [1977] 2 NZLR 196 (SC). While there is no express reference to that principle in the Full Court's decision in *Medforce 1*, Mahon J's judgment was referred to with approval in *Medforce 2*, at 161.

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5 Companies Act 1993, s 276(2).

6 *Re Roslea Path Ltd* [2013] 1 NZLR 207 (HC) at [143].

7 *Re Roslea Path Ltd*, above n 5. See also [113], [122] and adjustments to *Medforce* at [187]; *Re Medforce Healthcare Services Ltd (in liq)* [2001] 3 NZLR 145(HC).

> **[47]** In dealing with retrospective applications to approve fees charged by a liquidator, *Medforce 1* approved the following statements of principle taken from *Mirror Group Newspapers plc v Maxwell (No 2)* [1998] 1 BCLC 638 and *Re Peregrine Investments Holdings Ltd* [1998] 2 HKLRD 670:
>
> (a) Court appointed liquidators are fiduciaries. As with any fiduciary it is necessary for remuneration to be justified.
>
> (b) The appropriate test is to determine whether a particular cost would have been incurred; would the time spent have been undertaken by a reasonably prudent person faced with the same situation?
>
> (c) While time is a relevant factor in fixing remuneration, the value of the services rendered is more important than the cost of rendering them.

[15] I add a qualification to the statement in *Medforce* that the court may only review the remuneration, but not the expenses of a liquidator. That is directed at the court's power to review the reasonableness of liquidators' remuneration. If liquidators take a course of action which is not required for the liquidation, the court may disallow both their expenses and their remuneration for that course of action. It would be absurd to refuse their remuneration while still allowing their expenses for the same matter. The legal basis is that regardless of the court's power of review of remuneration under ss 276 and 284, liquidators have no right to claim for expenses not required for a liquidation. Under Schedule 7(1) of the Companies Act 1993 liquidators may be paid only "the fees and expenses *properly incurred*". In this case, for the reasons given at [26]-[38] below, I have found that Mr Norrie did carry out unnecessary matters and I have disallowed both remuneration and expenses for them.

[16] *Re Roslea Path Ltd* approvingly cited the judgment of McLure JA in *Conlan v Adams*:[8]

> **[80]** Citing from Ferris J's judgment in *Mirror Group* (at 336–337) her Honour identified (at [39]) three propositions, in the context of time-costing procedures:
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> (a) Time spent represents a measure not of the value of the service rendered but of the cost of rendering it.
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> (b) Remuneration should be fixed so as to reward value, not so as to indemnity [sic] against cost.

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[8] Above n 5,citing *Conlan v Adams* [WASCA] 61, (2008) 65 ACSR 521.

(c) Time spent is only one of a number of relevant factors in assessing the value of work undertaken.

[81] Approving Finkelstein J's review of authorities in *Korda*, McLure JA quoted the following passage from his judgment in that case:

> [47] It seems to me that the proper approach is first to establish what … is called the "lodestar" amount. This amount is reached by the number of hours reasonably spent by the insolvency practitioner multiplied by a reasonable hourly rate … This step will require the tribunal to decide whether the work performed was necessary to the [liquidation], whether it was performed within a reasonable time and whether the rate is reasonable having regard to what the practitioner, and other practitioners, usually charge their clients. The "lodestar" amount should then be adjusted (up or down) to reflect other factors including the quality of the work performed, the complexity in the administration over and above the normal complexity of such work, the novelty and difficulty of the issues that confronted the [liquidator] as well as the ultimate result obtained by him.

[82] McLure JA considered that it would be helpful, for practical purposes, to identify categories of conduct that would not represent time reasonably expended at a reasonable rate. She said:

> [44] … They include, without intending to be exhaustive:
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> (a) work that is beyond the power of the liquidator;
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> (b) conduct that is negligent (whether that be in undertaking, or in the performance, of the work);
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> (c) unnecessary work;
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> (d) work undertaken by persons of inappropriate seniority (having regard to level of training and experience); and
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> (e) work undertaken at inappropriate hourly rates.
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> McLure JA accepted that the expression "unnecessary work" in (c) above was "unhelpfully vague". The Judge accepted that the first two categories of conduct (ultra vires or negligent) could also be classified as "unnecessary work" but emphasised that (c) was intended to be wider, relating "to both decisions to embark on a course of action and the work undertaken in performance thereof and is captured by the concept of "over-servicing": at [45].

[17] The Full Court's description of the court's function is also helpful:[9]

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9 *Re Roslea Path Ltd*, n 22.

(b) The nature of the Court's function

[102] In fixing a liquidator's remuneration, the Court is making a determination of the fairness and the reasonableness of what has been charged when measured against the work undertaken and the result achieved. Fair and reasonable remuneration reflects the value of the services rendered to the creditors of the company and, if a surplus were achieved, its shareholders. "Value" is an elusive concept which goes beyond mathematical application of hourly rates to hours spent by individuals involved in administering the company's affairs.

[103] In analogous decisions dealing with challenges to costs rendered by solicitors, the Court has taken into account a variety of factors that may, in some cases, result in fair remuneration being assessed at an amount higher than that computed on a strict application of hourly rates multiplied by hours spent. For example, in *Gallagher v Dobson*, at 615, Barker ACJ referred to the factors for assessing costs, then set out in the *New Zealand Law Society's Costing and Conveyancing Practice Manual*, at 4:

(a) the skill, specialised knowledge, and responsibility required

(b) the time and labour expended

(c) the value or amount of any property or money involved

(d) the importance of the matter to the client and the results achieved

(e) the complexity of the matter and the difficulty or novelty of the questions involved

(f) the number, and importance of the documents prepared or perused

(g) the urgency and circumstances in which the business is transacted

(h) the reasonable costs of running a practice.

[104] Those principles are equally applicable to remuneration for liquidators' services.

[105] We consider that, in assessing "value", on a retrospective application or a review, similar factors ought to apply. While *Medforce 1* held that the appropriate test was to determine whether the time spent would have been undertaken by a reasonably prudent person faced with the same situation (at [32(b)]), we read that observation as referring to an inquiry that goes to determination of the reasonableness of the remuneration claimed. If it were more than that, the need for liquidators to fulfil statutory duties would be given too little weight: see *Simion v Brown*, at 25 and [70(a)] above.

> **[106]** In determining a liquidator's remuneration, the Court must be mindful that, in many cases, the number and value of individual creditors will not be sufficient to provide an incentive for a particular creditor to apply to the Court to review the fees charged by the liquidator. The lack of an appropriate incentive to challenge what might be unreasonable fees requires the Court to act in a more protective manner than might, otherwise, be desirable: cf the comments of the Law Commission on this topic, in its 1989 report, at [36] above. ...
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> **[108]** The need for a "proportionate" approach is inherent in the authorities and literature... Not only must remuneration be proportionate to the nature, complexity and extent of work undertaken, but the information required by the Court to justify it should be proportionate to the amount sought, as well as those other factors...

[18] The judgment encouraged liquidators to disclose relevant information as to remuneration to creditors and shareholders during the liquidation.[10] The Full Court also noted that the liquidators' costs associated with applications to fix remuneration are to be treated as costs of the liquidation, unless the court orders otherwise.[11]

[19] The statements in the judgment as to a proportionate approach have statutory support. Section 253 of the Companies Act, which sets out the principal duty of a liquidator, is subject to the requirement "in a reasonable and efficient manner".

[20] Applications to terminate a liquidation bring special considerations. At the outset of an insolvent liquidation the liquidator is mainly concerned to act in the interests of creditors. In the typical case under s 250 the shareholders or directors take steps to take the company out of liquidation by arranging to satisfy the creditors. Once the interests of creditors are secured, the focus of the liquidator's efforts should shift to the interests of shareholders and directors – those promoting the termination. It may no longer be necessary or efficient for a liquidator to carry on with normal liquidation tasks, once it becomes clear that the company will be taken out of liquidation. It is a matter of judgment when to switch attention from one group's interest to another's.

[21] In my experience, applications under s 250 of the Companies Act show varying reactions by liquidators. Some liquidators actively co-operate with the directors in

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10 At [146]-[152] and [177].
11 At [240].

arranging a prompt termination of the liquidation.[12] In some cases liquidators put the liquidation on hold while they give the directors and shareholders the opportunity to raise finance to pay out all the creditors. At the other extreme are liquidators who treat the directors and shareholders with hostility, assume the worst of them and take a "play to the whistle" approach, even when there is an application pending under s 250.[13] These cases can generate disagreement as to liquidators' remuneration.

[22] An order under s 250 of the Companies Act is required to bring a liquidation to an end, even in cases where the order was made by mistake or the company was throughout, or the company did not oppose the application because of some oversight. At the same time, it must also be common experience for liquidators to be presented with fobbing-off and stalling excuses when dealing with directors and shareholders who resent the company having been put into liquidation. Assertions that an application will be made under s 250 may not always be carried into effect. Insolvency practitioners are entitled to take a sceptical view of such announcements.

[23] A liquidator has statutory functions to perform including advertising, dealing with requests to call creditors' meetings, making a first report. A liquidator must, of course, attend to those matters, even if an application is pending under s 250. Beyond that, it is a matter of judgment in each case as to how seriously to take an expression of intention to apply under s 250.

Assessing the remuneration

[24] Mr Grant Reynolds, an experienced insolvency practitioner, has reviewed Mr Norrie's costing records and evidence as to the conduct of the liquidation. His comments are general only. He has not inspected Mr Norrie's files. In his general opinion, some of the steps taken by Mr Norrie were not necessary and the amount of time spent was not commensurate with the outcome. He makes these points:

[a] Mr Patel's claim has been over-stated by $2,000 because of the extra payment made on liquidation.

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12 An example is *Re Asian International Group Ltd (in liq)* HC Auckland CIV-2015-404-2779; referred to in *Jollands v Wilson* [2016] NZHC 308 at [27].

13 *Jollands v Wilson,* above n 11.

[b] Although he has frequently been appointed by court order, he has never found it necessary to attend court to confirm his appointment.

[c] Unless he was alerted that there was a risk that assets may be hidden or moved, it is unnecessary to take immediate steps to secure assets. Instead, a better approach is to discuss matters with the company's directors, accountant and other professional advisers. A phone call may have been more efficient in this case. It would not be possible to find out if assets had been stripped without first obtaining the financial records.

[d] It was unnecessary to use notices under s 261 of the Companies Act at the outset. His approach is to discuss with the directors the assets and liabilities of the company and cross-reference those with the financial records. In his experience, it is rare for company directors to be able to provide all the books and records on the day of liquidation. Sometimes it takes time to obtain them all. He would only use a s 261 notice at a later date.

[e] The proposed deed of settlement was unnecessary. A simple agreement to pay creditors and liquidators' costs and disbursements would have achieved the same result. He would have made sure that the creditors had been properly identified and the funds were available. Once that was done, a simple agreement covering payment of creditors and liquidator's fees would have been enough.

[f] He is puzzled by the in-depth analysis of company bank records to identify voidable transactions and to analyse solvency, when the applicants were making plans to pay the company creditors.

[g] He does not accept the claim for work done before liquidation.

[h] He considers the general costs of $16,178 plus GST for more than 46 hours of time as excessive. Not all of the steps were required. He suggests 25 hours –that is, $8,750.00.

[i] Similarly, the claim of $8,633 plus GST for settlement negotiations is also excessive.

[j] He notes that the liquidator has billed for more than 100 hours which equates to 20 hours of work a week for five weeks. He suggests a better course would have been for the liquidator to take a holding position once Mr Fann indicated that an application for termination would be made.

[k] Given that the claims in the liquidation are $76,000, the liquidator's costs of over $40,000 (including expenses) are disproportionate.

[l] In his experience with termination applications, the applicant makes appropriate arrangements to pay all creditors and agreement is reached on how the termination will be handled, with consent on and disbursements. He has not been involved in contested questions of remuneration on termination applications.

[m] He suggests the remuneration should be no more than $15,000 plus GST.

[25] Mr Norrie's general response is that he has been vindicated by the result. Until the company was in liquidation, Mr Fann had ignored the company's liability to Mr Patel. As a result of effective steps he took as liquidator, Mr Patel and the other creditor are to be paid. Mr Norrie shows no sympathy for Mr Fann in ignoring Mr Patel.

[26] In my view there are aspects which make Mr Norrie's claimed remuneration excessive.

[27] Not all his attendances before the liquidation order were necessary.

[28] Between 13 March and 22 March Mr Norrie knew that Mr Fann was looking to resolve matters by paying the external creditors and was willing to pay Mr Norrie's reasonable remuneration. Mr Norrie's response was ham-fisted. The deed of settlement of 17 March 2017 is one-sided. It provides for Mr Fann to pay $100,000 and to give a range of waivers and warranties on the basis that the liquidation will continue as a

solvent liquidation. It was hedged with all manner of conditions to favour the liquidator. As an example, if Mr Fann did not pay the $100,000 under the agreement (time being of the essence), he was to pay interest at 29 per cent per annum compounding monthly.[14] The deed does not address the liquidator's remuneration. Mr Norrie undertook not to contact any bank or obtain financial records until the time for creditors to lodge claims had expired, not to interview the second applicant or Mr Fann's wife, but he would say in his final report that the liquidation was solvent. These were conditional on performance by Mr Fann. These matters aside, it is not clear what if anything Mr Norris was meant to do under the deed. The deed was a clumsy way to try to resolve matters. It is not surprising that it did not get anywhere.

[29] At the same time, Mr Norrie took an overbearing approach. He threatened to uplift Mr Fann's car, alleging that it was property of the company[15] (he later acknowledged that was not the case).[16] He directed the company's accountant not to have anything to do with Mr Fann[17] (although it would be expected that a director required to hand over company documents would contact the accountants for accounting materials).[18] He gave ultimatums requiring the deed to be signed within one day or else he would continue with the liquidation.[19] He repeatedly alleged that Mr Fann had not complied with his s 261 notice and used that to threaten him with continuation of the liquidation and reporting to the Integrity and Enforcement Unit of the Registrar of Companies.[20] He said that he would oppose any application under s 250 because it was bound to fail (although, in the event, he did not oppose).[21] When the applicant's lawyers advised that they held funds in their trust account to pay creditors, he demanded that they pay it to him, even though they were not company funds.[22]

[30] It is clear from the correspondence that Mr Fann and his lawyers were genuinely trying to resolve matters, but they could not make good headway, because they were

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14 Clause 6.3.
15 Letter of 22 March 2017, paragraph 13.
16 Email of 22 March 2017 at 4.11 pm.
17 Letter of 24 March 2017.
18 That is consistent with a director's ongoing responsibilities under s 248(1)(b) while the company is in liquidation.
19 Letter of 22 March 2017, paragraph 12, email of 4 April 2017 at 6.14 pm.
20 Letter of 4 April 2017.
21 Emails of 24 March 2017 at 1.14 pm and 6.42 pm, letter of 3 April 2017.
22 Email of 5 April 2017 at 8.52 am.

dealing with a liquidator who showed little interest in resolving matters simply by an agreed order under s 250 of the Companies Act. That approach was inefficient. It should not be at the applicants' expense.

[31] While this was going on, Mr Norrie had extensive enquiries made to check for voidable transactions. His investigations showed that within the last year or so before liquidation, there had been substantial reductions in the shareholders' current account. Mr Reynolds' point is sound. Those enquiries were unnecessary, when Mr Fann's approach should have told Mr Norrie that Mr Fann was prepared to rectify any preference by paying the other creditors in full. This was work that Mr Norrie could sensibly put on hold to await the outcome of negotiations with Mr Fann.

[32] Mr Norrie was very free with his use of s 261 notices.

[33] I do not accept that it was necessary for Mr Norrie to use a lawyer during this phase. As an experienced liquidator, he should be able to deal with proposals to terminate a liquidation without obtaining legal advice. In my experience most liquidators are able to do so. I do not allow his claim for legal fees.

[34] Setting the remuneration requires allowing so much as is reasonable under the principles in *Re Roslea Path Ltd* by reducing the amounts claimed to what a liquidator would charge if Mr Fann's attempts to resolve matters had been treated in a more accommodating way and there were less misdirected work. There is no issue with the rates claimed. For some steps I have applied a blended rate because the work will be divided between Mr Norrie and his accountant. I fix Mr Norrie's remuneration:

Pre-liquidation	2 hours	$700.00
Liquidation tasks	30 hours at $260 per hour	$7,800.00
Accounting	3.9 hours at $220 per hour	$858.00
Creditors' claims	1.8 hours at $220 per hour	$396.00
Correspondence	5.3 hours at $350 per hour	$1,855.00
Settlement matters	6 hours at $350 per hour	$2,900.00
Section 250 application	3 hours at $350 per hour	$1,050.00
	Total (exclusive of GST)	**$15,559.00**

[35] In addition I allow his provision for finishing off work – $3,538.50 (including GST and expenses). That does not allow for GST returns which are dealt with separately below.

[36] The disbursements claimed are approved. There was no objection to them.

Legal fees

[37] Mr Norrie's lawyers have charged him $8,840.00 plus GST and disbursements – a total of $10,221.92 – for work during the liquidation including on this application. There are attendances between 15 March 2017 and 4 April 2017 relating to the settlement deed, for which $4,190 plus GST is charged. As explained in [31] above, I do not allow that as it is work which a liquidator reasonably could carry out himself. Legal work on the deed of settlement was not required because that was a misdirected way of resolving matters. Further the work arose from Mr Norrie's inefficiency in his hard-nosed approach in dealing with Mr Fann.

[38] The later attendances relate to this proceeding. In a routine court-ordered liquidation, the liquidators will apply for approval of their remuneration and the costs of that application are seen as a normal part of their work as liquidators. This case, however, goes beyond that. Mr Norrie sought approval of remuneration beyond what was reasonable. In demanding payment in full of all the remuneration he claimed, he was no longer acting in the interests of creditors but defending his own personal interests. The applicants have to carry their own costs of the application – that is a normal incident of a s 250 application. There is no reason why they should also pay Mr Norrie's. He should pay his own legal costs, just as they have to pay theirs. This is an appropriate case to order a departure from the standard approach that the liquidator's costs on approving his remuneration come out of the company assets.

The GST issue

[39] After the hearing, the parties filed further memoranda relating to a GST question. The Commissioner of Inland Revenue issued a default assessment for goods and services tax for the two month period ending 31 March 2017 for $77,072.92

including $4,526.92 for penalties and interest. Most of the two month taxable period is before the company was ordered into liquidation. Mr Norrie says that the default assessment is a claimable debt in the liquidation unless the company proves otherwise by declaring and filing a return for the taxable period. He says that he is responsible for filing the return. With co-operation from the applicants, he anticipates that the time required is from two to three hours at $220 per hour plus GST. He says that a May return needs to be filed as well. He notes that the Commissioner has not made any claim in the liquidation to date.

[40] The applicants say that they will arrange to file the GST return themselves.

[41] A liquidator is responsible for filing GST returns for taxable periods ending while the company is in liquidation. Under s 58 of the Goods and Services Tax Act 1985, when a company is registered for GST, the liquidator becomes a "specified agent". The liquidator is treated as a registered person carrying on the taxable activity of the company. That lasts during the "agency period". Section 58 says:

> **58 Personal representative, liquidator, receiver, etc**
>
> (1) In this section and sections 46 and 55 —
>
> **agency period** means the period beginning on the date on which a person becomes entitled to act as a specified agent carrying on a taxable activity in relation to an incapacitated person and ending on the earlier of—
>
> (a) the date on which some person other than the incapacitated person or the specified agent is registered in respect of the taxable activity; or
>
> (b) the date on which there is no longer a person acting as specified agent in relation to the incapacitated person
>
> **incapacitated person** means a registered person who dies, or goes into liquidation or receivership, or becomes bankrupt or incapacitated;
>
> **specified agent** means a person carrying on any taxable activity in a capacity as personal representative, liquidator, or receiver of an incapacitated person, or otherwise as agent for or on behalf of or in the stead of an incapacitated person.

(1A) Despite sections 5(2) and 60, a person who becomes a specified agent is treated as being a registered person carrying on the taxable activity of the incapacitated person during the agency period, and the incapacitated person is not treated as carrying on the taxable activity during the period.

(1B) If a person becomes a specified agent and has been appointed to carry on part of the incapacitated person's taxable activity only, subsection (1A) applies only to the part of the taxable activity the person has been appointed to carry on.

(1C) Subject to section 46(7), a specified agent may deduct an amount under section 20(3) relating to supplies made before the agency period if the incapacitated person is entitled to, and has not previously deducted, the amount.

(1D) A specified agent is not personally liable for any liabilities incurred under this Act by the incapacitated person on or before the date the agency period starts.

(2) Where a mortgagee is in possession of any land or other property previously mortgaged by the mortgagor, being a registered person, the Commissioner may, from the date on which the mortgagee took possession of that land or other property, until such time as the mortgagee ceases to be in possession of that land or other property, deem the mortgagee, in any case where and to the extent that the mortgagee carries on any taxable activity of the mortgagor, to be a registered person.

(3) Any person who becomes a specified agent, or who as a mortgagee in possession carries on any taxable activity of the mortgagor, shall, within 21 days of becoming a specified agent or commencing that taxable activity of the mortgagor, notify the Commissioner of that fact and of the date of the death or of the liquidation or receivership or bankruptcy or mortgagee taking possession of any land or other property previously mortgaged by the mortgagor, or of the nature of the incapacity and the date on which it began.

[42] In *Stiassny v Commissioner of Inland Revenue*, the Supreme Court said this about the section:[23]

> [18] The effect of s 58 is that where someone is acting as an agent, including as a receiver, of an incapacitated person, and is carrying on the principal activity of the incapacitated person, that agent is to be treated as personally carrying on the principal activity whilst entitled to act as agent and until ceasing to act as such or until a third party becomes registered in respect of the taxable activity. During the agency period the incapacitated person is not to be treated as carrying on the taxable activity. Those who act in circumstances which make them specified agents under s 58 can be anticipated under ordinary agency principles to be entitled to have recourse to

[23] *Stiassny v Commissioner of Inland Revenue* [2012] NZSC 106, [2013] 1 NZLR 453.

> the assets of their principal by way of indemnity and to an equitable lien arising as a matter of law to afford them a security…

[43] The agency period under s 58 continues. It will not come to an end until an order is made under s 250 terminating the liquidation.

[44] The liquidator, not the applicants, is accordingly responsible for filing GST returns in the liquidation. He should file returns for all taxable periods ending during the liquidation up until the terminating order under s 250.

[45] He may recover for the costs of filing the GST return at $220 per hour plus GST for however many hours are required. The applicants will appreciate the benefits in co-operating with the liquidator by providing all the information required to file the return for the taxable periods before the company went into liquidation.

Outcome

[46] Mr Norrie's remuneration for steps taken up to the hearing is fixed at **$15,559.00** exclusive of GST. The disbursements claimed are approved but not the legal fees. He may also recover $3,538.50 (including GST and expenses) for finishing off work. In addition he may recover for the costs of filing the GST returns at $220 per hour plus GST. From his remuneration he is to repay Mr Patel the $2,000 advanced at the start of the liquidation.

[47] Because there is still work to do it is not possible to fix the total remuneration yet, but these directions are enough to show what is required. Once the total amount has been calculated and the applicants' lawyers advise that they have funds in their trust account to clear all the external creditors and to pay Mr Norrie's remuneration, the parties should ask for this to be relisted in the next miscellaneous liquidation list to make an order terminating the liquidation. If the parties can agree, a joint memorandum may be filed with proposed consent orders to be made on the papers.

[48] Each side is to pay their own costs of the proceeding.

…….

Associate Judge R M Bell