

**IN THE HIGH COURT OF NEW ZEALAND
NEW PLYMOUTH REGISTRY**

**CIV-2017-443-000032
[2017] NZHC 1383**

UNDER Part 19 of the High Court Rules and section 284(1)(a) of the Companies Act 1993

IN THE MATTER of an application under section 284(1)(a) of the Companies Act 1993 for directions in relation to the liquidation of Total Debt Solutions (2009) Limited (in liquidation)

BETWEEN MALCOLM GRANT HOLLIS AND WENDY ANN SOMERVILLE Applicants

AND TOTAL DEBT SOLUTIONS (2009) LIMITED (IN LIQUIDATION) Respondent

Hearing: 21 June 2017 (Determined on the papers)

Counsel: M K Crimp for Applicants

Judgment: 22 June 2017

JUDGMENT OF ASSOCIATE JUDGE MATTHEWS

[1] The applicants are the liquidators of the defendant company, Total Debt Solutions (2009) Limited (in liquidation) (TDS), appointed by special resolution of shareholders on 23 December 2015.

[2] TDS traded as a debt collection company. At the time of its liquidation it held three bank accounts, one of which is described as a Bank of New Zealand 25 account in which there was a credit balance at the date of liquidation. On liquidation the BNZ offset a debit balance in another account leaving a credit of \$7,546 in the 25 account.

[3] The 25 account was an account into which debtors made payments of debts owed to other companies on whose behalf TDS was recovering those debts. The 25 account was not set up, formally, as a trust account but in all the circumstances it seems clear (and the liquidators accept) that it was operated by TDS as a trust account, because no transactions in relation to the affairs of TDS passed through this account.

[4] After liquidation, payments from debtors continued to be received. When the liquidators closed the two accounts they were left with a credit balance which they regard as trust monies held on account of companies for which TDS was acting as debt collector.

[5] The liquidators seek a direction that they may have recourse to all monies received by TDS to meet their fees and expenses incurred in the liquidation. They ask that service of the application be dispensed with.

[6] The evidence of Ms Somerville, one of the liquidators, establishes that the record-keeping of TDS was extremely poor. The liquidators have found themselves unable to establish the full extent of TDS's current customer base, whether any debtors still owe money to TDS, or whether any other sums remain payable to TDS by its customers. Significantly, the liquidators have not been able to locate a reconciliation or other record of sums received by TDC in relation to individual customer names. Records by way of reports to customers about their debts that have been located do not appear to be accurate and cannot be relied on. As a result of all these deficiencies the liquidators are unable to determine which customers may be entitled to the balance held in the 25 account. Thirty-one customers have filed claims totalling \$191,075 in respect of the sum of \$25,156 held in the 25 account.

[7] The liquidators say that their only way to determine which customers are beneficially entitled to share in the funds in the 25 account would be for a retrospective tracing exercise to be undertaken, tracing payments through the bank statements in an attempt to reconcile and reconstruct exactly what has occurred. The liquidators say this would be a time consuming exercise and given the poor records, it may prove impossible, in any event. Their view is that the cost of undertaking this

exercise is likely to exceed the funds actually held, particularly given the significant inquiries that would be required from third parties. Thus the liquidators say that from a practical perspective, given that the company does not have any funds apart from the trust asset from which any fees can be paid to carry out a reconstruction, the only practical course is not to take any further steps, to apply the funds in the 25 account to professional fees incurred to date, and to close the liquidation. Fees incurred to date exceed \$44,000, so even if this course is approved the liquidators stand to have to write off a great deal of the costs which have been incurred in this liquidation.

Discussion

[8] The application is brought under s 284 of the Companies Act 1993. Subsection 1(a) enables a court to give any directions to liquidators in relation to any matter arising in connection with the liquidation.

[9] This application has not been served on any party. In the circumstances of this case, which are outlined to the extent relevant in the balance of this judgment, I am satisfied that service should be dispensed with and I so direct. The records of TDS are in such a poor state that it is not clear who may be affected by the order sought, or to what extent.

[10] It is clear that the cost of undertaking a reconciliation which would be required if entitlement to the funds in the 25 account were to be established, would be significant and I accept the liquidators' evidence that there may not be a successful result, even if the exercise could be attempted and costs incurred at a level which would leave some funds available for distribution. In these circumstances I do not see any material benefit to claimants against the trust fund in a more detailed analysis of entitlement being undertaken. Even if the exercise were undertaken free of charge, claimants would receive an average of under 10 cents in the dollar, each. It would be entirely unrealistic to proceed this way. There are sound reasons to think that any recovery by creditors would be at a low level, if indeed any recovery were made at all.

[11] It is also established that if this exercise were to be undertaken, the liquidators would have no prospect of receiving any sum on account of fees incurred to date. In effect the liquidators ask that the monies held in the 25 account be applied to their fees as though they were not trust funds, but monies recovered in the course of the liquidation. As noted by McGechan J in *Re Newsmakers International Ltd (in liq)*:¹

[W]hen a liquidator is forced to carry out work in relation to assets held on trust, for the benefit of the beneficiaries concerned, the Court has an inherent jurisdiction to allow reasonable costs against those assets. There is an underlying and obvious equity. He who saves trust assets for the benefit of beneficiaries, properly can ask those beneficiaries to meet his proper expenses. It has been made clear that the jurisdiction does not extend to general expenses of the winding up: the activity concerned must relate to trust assets in a direct fashion.

[12] To similar effect are the decisions in *Re Berkley Applegate (Investment Consultants) Limited*,² and *Re Secureland Mortgage Investments Ltd*.³

[13] It follows from these decisions that if the liquidators went ahead and undertook the analysis of the trust fund they would be entitled to be paid their fees from that fund in full, or to the extent that the fund was sufficient. Equally it is clear that the liquidators cannot claim their general fees in relation to conducting the liquidation from the funds held on trust.

[14] If the entire sum held in the 25 account is applied towards the liquidators' costs and disbursements, they will be paid only a little over half of the total fees which have been expended in this liquidation. Although I do not have an exact empirical calculation before me, given the nature of the activities of TDS I am satisfied that at least half, and probably a much greater percentage of the liquidators' fees will have been incurred in relation to recovering the trust monies and dealing with claims in respect of them. I reach this conclusion because the entire business of TDS was an operation which involved the use of the trust account, that business was plainly active at the time TDS went into liquidation, and the principal tasks of the liquidators will have related to this aspect of TDS's affairs. Without a detailed

¹ *Re Newsmakers International Ltd (in liq)* HC Napier M153/86, 24 February 1994 at 6.

² *Re Berkley Applegate (Investment Consultants) Limited* [1988] 3 All ER 71.

³ *Re Secureland Mortgage Investments Ltd* (1988) 4 NZCLC 64,266.

analysis of the attendances in respect of which the liquidators have incurred fees I cannot assess the matter any more accurately. I am satisfied, however, that fees incurred in relation to the trust funds will in all probability well exceed the sum now held in the trust fund.

[15] In this circumstance, and applying the principles to which I have referred, I am satisfied that an order should be made as sought by the liquidators.

Outcome

[16] I direct that the applicant liquidators may have recourse to all funds received by the defendant company into its bank accounts to meet their expenses and remuneration as liquidators of the company, including legal fees incurred by them in that capacity for advice in relation to the monies in the 25 account.

[17] There will be no order for costs.

J G Matthews
Associate Judge

Solicitors:
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