

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

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

**CIV-2010-404-170
[2020] NZHC 1371**

UNDER the Companies Act 1993

IN THE MATTER OF the liquidation of GREEN SECURITIES
LIMITED (IN LIQUIDATION)

BETWEEN COMMISSIONER OF INLAND
REVENUE
Plaintiff

AND GREEN SECURITIES LIMITED
(IN LIQUIDATION)
Defendant

On the papers: 18 June 2020

Copy for Henry David Levin, Liquidator

Judgment: 18 June 2020

**JUDGMENT OF ASSOCIATE JUDGE R M BELL
Application to fix liquidators' remuneration**

*This judgment was delivered by me on 18 June 2020 at 11:00am
pursuant to Rule 11.5 of the High Court Rules*

.....
Registrar/Deputy Registrar

Copy for:
Henry David Levin, Deloitte, Auckland
Inland Revenue Department

[1] The liquidators seek approval of their remuneration for this liquidation at \$159,044 plus GST and expenses. They applied on 8 July 2019. As the amount sought is large for the liquidation of a small business, I asked for further information, which they provided. I have, however, taken longer than I ought to decide their remuneration. Applications to determine remuneration are made towards the end of the liquidation. Delay prevents the final report being sent to the Registrar of Companies and the company being removed from the register. Accordingly, the delay must have caused inconvenience. I apologise for that.

[2] When the liquidation order was made on 5 May 2010, the Court approved the liquidators' proposed rates of remuneration:

| | |
|---------------------------|------------------------------------|
| Directors/ liquidators | \$395-\$475 (plus GST) per hour |
| Associates | \$325-\$395 (plus GST) per hour |
| Managers | \$255-\$315 (plus GST) per hour |
| Senior analysts | \$215-\$260 (plus GST) per hour |
| Business analysts | \$165-\$215 (plus GST) per hour |
| Administration staff | \$95-\$125 (plus GST) per hour |

The liquidators have provided this breakdown of their fees:

| Particulars of team | Average hourly rate charged | Hours claimed | Fees claimed |
|--------------------------------|--|----------------------|----------------------------|
| Liquidators | \$461.90 | 87.5 hrs | \$40,415.87 |
| Associates | \$355.00 | 0.2 hr | \$71.00 |
| Managers | \$305.53 | 96.2 hrs | \$29,391.60 |
| Senior analyst | \$235.51 | 79.60 hrs | \$18,746.73 |
| Business analyst | \$201.65 | 330.40 hrs | \$66,626.62 |
| Administration staff | \$101.25 | 116.30 hrs | <u>\$11,775.52</u> |
| Total | \$235.18 | 710.20 hrs | <u>\$167,027.34</u> |

The rates charged are within those approved in the liquidation order. The liquidators estimate a further 14 hours' work to complete the liquidation but they hold only \$159,044 in hand. If the total time on the liquidation is taken as 724.20 hours and the remuneration is capped at \$159,044, the average hourly charge-out rate will be \$219.61.

[3] Realisations in the liquidation came to \$321,135. The main receipts were \$260,724 paid by receivers, \$95,751 on a distribution from the bankruptcy of the director of the company, \$10,000 from a pre-liquidation bank account, and interest. The liquidators incurred legal fees of \$56,123 (including GST). Other expenses are unremarkable. The Commissioner of Inland Revenue is the major creditor not only for preferential taxes but for other unpaid taxes. Her claim as preferential creditor is for \$114,072. Non-preferential unsecured creditors came to \$470,606, giving total creditors of \$593,678. The Commissioner has been paid her costs on the liquidation application in full and has received 81.08 cents in the dollar for her preferential claim. If the liquidators' remuneration claim is upheld in full, there will be no funds for unsecured creditors.

[4] In a letter of 19 July 2019, the Inland Revenue advised that the Commissioner has no objection to the remuneration sought. That is a standard position taken by the Commissioner, when she has sought the appointment of the liquidators on her liquidation applications. If the Commissioner were the only one to benefit from an adjustment to the remuneration, the Commissioner's consent would make it unnecessary to enquire further. In this case, however, it seemed possible that other creditors might benefit from any adjustment to the remuneration. Further enquiry was required.

[5] The liquidators' memorandum outlines the circumstances of the liquidation and the work undertaken. A draft of the liquidators' final report, copies of earlier liquidators' reports and a printout of the liquidators' time records were provided. I have read the decision in a proceeding by the liquidators against the company's director.¹ I have not asked the liquidators to provide further information.

¹ *Madsen-Ries v Just* [2013] NZHC 2254.

[6] The liquidators' expenses and remuneration are payable out of the assets of the company.² As the company was put into liquidation by court order and the liquidators claim at rates higher than those allowed under ss 276 and 277 of the Companies Act, they need a court order approving their remuneration. They are entitled to remuneration but must show that it is reasonable.

[7] The leading case, *Re Roslea Path Ltd (in liq)*,³ deals extensively with the principles and practice on applications to fix liquidators' remuneration. It is not necessary to address every point in the decision. The Court held that in fixing a liquidator's remuneration, it is determining the fairness and reasonableness of what has been charged when measured against the work undertaken and the result achieved. Fair and reasonable remuneration is the value of the services to the creditors and shareholders. Value is an elusive concept which goes beyond mathematical application of hourly rates to hours spent in administering the company's affairs. The principles applied on reviewing lawyers' costs are analogous.

[8] The court referred with approval to an Australian decision, *Conlan v Adams*⁴ that suggested non-exhaustively categories where time had not been used reasonably:

- (a) work beyond the power of the liquidator;
- (b) work done negligently;
- (c) unnecessary work (covering decisions to carry out the work and over-servicing);
- (d) work by people with inappropriate seniority; and
- (e) work at inappropriate rates.

[9] The judgment encouraged liquidators to disclose relevant information as to remuneration to creditors during the liquidation. It held that liquidators' costs associated with applications to fix remuneration are to be treated as costs in the liquidation unless the court orders otherwise. Statements in the judgment as to a

² Companies Act 1993, s 278.

³ *Re Roslea Path Ltd (in liq)* [2013] 1 NZLR 207 (HC).

⁴ *Conlan v Adams* [2008] WASCA 61, (2008) 65 ACSR 521.

proportional approach have statutory support. Section 253 of the Companies Act, which sets out the principal duty of a liquidator, is subject to the requirement to carry out the duties “in a reasonable and efficient manner”.

[10] The Court quoted a dictum in *Re Medforce Healthcare Services Ltd (No.1)*, that the court reviews only remuneration, not expenses of a liquidator.⁵ There is, however, a qualification. If liquidators take a course of action which is not required in 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 allowing their expenses for the same matter. The legal basis is that regardless 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, liquidators may be paid only “the fees and expenses *properly incurred*”.

[11] Green Securities Ltd operated a Rodney Wayne hair salon at Botany Town Centre, Auckland. The company’s director, Mr Just, was a director of two other companies with Rodney Wayne salons: one at Manukau shopping centre (operated by Presidential Homes New Zealand Ltd) and the other in Nelson. The liquidators say that the largest contributors to the company’s insolvency were a high level of debts, advances to a loss-making associate of \$200,650 and advances to the director of \$264,296. The company was still trading at the date of liquidation. The liquidators decided to keep the business operating with a view to sale as a going concern. That was overtaken by a secured creditor putting the company into receivership. The receivers kept the business operating and sold it for \$680,000. That provided a surplus of \$206,724 for unsecured creditors. The liquidators say that as well as dealing with the receivers, they also had to deal with others claiming security over company assets (for example, under retention of title clauses). That required additional work to that normally undertaken at the start of the liquidation. Their time records show that during this phase they engaged a lawyer for advice on some of the legal issues under the receivership.

⁵ *Re Roslea Path* at [45]; *Re Medforce Healthcare Services Ltd (No.1)* [2001] 3 NZLR 145 (CA) at [18].

[12] As well as dealing with the receivership, which resulted in a realisation for unsecured creditors, the liquidators looked at other avenues of recovery. In May 2011 they asked Mr Just to repay \$264,296 in drawings from the company. Mr Just denied liability and claimed that the records on which the liquidators relied were inaccurate. They considered that Mr Just was worth pursuing as he controlled an Auckland residential property. However, instead of suing for repayment of the funds taken from the company, the liquidators sued Mr Just for breaches of director's duties.

[13] At the same time, they also sued Mr Just for breaches of director's duties owed to Presidential Homes New Zealand Ltd, also in liquidation. In August 2013 the liquidators recovered judgment against Mr Just for \$187,500 for Green Securities Ltd and \$164,000 for Presidential Homes New Zealand Ltd.⁶ Mr Just defended the proceeding in person. The liquidators established without too much difficulty that Mr Just breached these duties under the Companies Act: s 135 (reckless trading), s 136 (not to agree to the company incurring obligations without reasonable grounds to believe the company can perform) and s 137 (duty of care). Mr Just would not enter into any settlement arrangements with the liquidators. In response to their bankruptcy proceeding Mr Just made a formal proposal to his creditors. That failed. The liquidators' vote at the creditors' meeting defeated the proposal. Mr Just was adjudicated bankrupt in October 2014. As liquidators of Green Securities Ltd, they claimed \$482,032 in the bankruptcy. That was made up of the judgment plus interest and costs, and \$264,295 for advances paid to Mr Just. His Auckland residential property was owned by a company of which he was the shareholder. The Official Assignee had the company put into liquidation and appointed himself liquidator in January 2016. The property was fire-damaged. The Official Assignee collected the insurance and sold the property in its damaged state, realising \$286,000. That resulted in a dividend of \$95,751.00 to the liquidators as unsecured creditors in Mr Just's bankruptcy. Although the liquidators do not say so, I assume that there was also a distribution to them as liquidators of Presidential Homes New Zealand Ltd, also creditors in Mr Just's bankruptcy.

⁶ *Madsen-Ries v Just* [2013] NZHC 2254.

[14] The liquidators' time sheets show that there was intensive work in 2010-2011 at the start of the liquidation and again in 2013-2014 when the proceedings against Mr Just. That can be seen in their charges for each year.

| | |
|------|-------------|
| 2010 | \$47,146.14 |
| 2011 | \$16,266.90 |
| 2012 | \$7,006.50 |
| 2013 | \$42,018.00 |
| 2014 | \$23,242.00 |
| 2015 | \$5,569.40 |
| 2016 | \$10,351.00 |
| 2017 | \$9,421.00 |
| 2018 | \$3,601.00 |
| 2019 | \$2,251.00 |

[15] The liquidators have categorised tasks in the liquidation. The total amounts charged for each category are:

| Task | Charge |
|---------------------------------------|---------------|
| Enforcement | \$50,556.50 |
| Investigation | \$26,638.00 |
| Cash management | \$26,333.00 |
| Statutory obligations | \$17,480.00 |
| Secured creditors | \$17,088.00 |
| Review of affairs/records | \$8,495.00 |
| Creditor issues | \$6,920.50 |
| Trading business/ ceasing to trade | \$2,388.50 |
| Asset realisation | \$2,180.50 |
| Asset maintenance/ protection | \$1,324.50 |

| | |
|-------------------------------|----------|
| Creditors meetings/ report | \$299.00 |
| Staff | \$165.00 |
| Leases/landlords | \$117.50 |

These categories are not watertight. For example, some of the work could be equally be put under enforcement or investigation. Notwithstanding that, the categories give a good idea of the extent of work on different aspects of the liquidation.

[16] The liquidators' reports to creditors show these legal fees (excluding GST):

| | | |
|-----|------------------------------------|---------------------------|
| (a) | From 5 May 2010 to 5 November 2010 | \$3,113.00 |
| (b) | From 5 May 2012 to 5 November 2012 | \$4,406.00 |
| (c) | From 5 November 2012 to 5 May 2013 | \$20,089.00 |
| (d) | From 5 May 2013 to 5 November 2013 | \$5,801.00 |
| (e) | From 5 November 2013 to 5 May 2014 | \$7,274.00 |
| (f) | From 5 May 2014 to 5 November 2014 | \$7,189.00 |
| | | <u>\$47,872.00</u> |

The fees for the first period relate to work on the receivership. The rest, \$44,759.00, went on the proceedings against Mr Just.

[17] These matters can be noted:

- (a) The realisation of assets involved mainly two tasks: obtaining the surplus following the receivership, and pursuing Mr Just and collecting under his bankruptcy;
- (b) Dealing with claims and making distributions do not seem to have led to more than the usual amounts of work and did not throw up any difficulties;

- (c) The liquidation ran for a long time, nine years to practical completion, although it was not large or complicated;
- (d) The time spent on the liquidation, over 700 hours, is high;
- (e) The fees are high for such a liquidation; and
- (f) The average hourly charge-out rate is low in comparison with claims by other liquidators carrying out similar liquidations with similar fee structures. An average between \$250 and \$300 per hour is more common.

[18] At May 2012 the liquidators had been paid by the receivers but had not started the proceeding against Mr Just. That provides a convenient point from which to assess their conduct of the liquidation. They held \$139,302 after paying their fees and all expenses. If they had completed the liquidation then, they would have paid the Commissioner her preferential claim in full and had a surplus, about \$25,000, for non-preferential unsecured creditors. Instead they sued Mr Just but in doing so spent more than they recovered and had less for creditors than at May 2012.

[19] By itself that does not mean that the liquidators should not have sued Mr Just. That would be a hindsight judgment. The liquidators did not know in May 2012 that the claim would lose them money. Their decision to sue can be defended. Mr Just was known to have control of a significant asset, his home. There was good reason to believe that the liquidators could obtain judgment against him. In many cases where liquidators claim against directors for overdrawn accounts or breaches of duty, directors will negotiate a settlement rather than fight to the end. They may not have appreciated that Mr Just would be less amenable.

[20] Even so, aspects of the litigation raise questions. The liquidators combined their claim against Mr Just as director of Presidential Homes Ltd in the Green Securities Ltd proceeding. Ordinarily that should be efficient with costs shared between the two claims. That does not appear to be the case here. The costs of suing Mr Just are high, even for a claim against him only as director of Green Securities Ltd.

[21] The liquidators sued for breaches of director's duties instead of for the overdrawn funds. Normally it is easier to prove a claim for overdrawn funds.⁷ Often summary judgment may be sought for such a debt claim. It is not clear that there were any difficulties with such a claim in this case. Moreover, the liquidators made their case more complex than it needed to be. They sued for breaches of three separate duties under the Companies Act, when they needed to sue for only one. Any of them would have done. The piling on of causes of action is a heavy-handed, "throw the book at him" approach. It is also inefficient in increasing work by the liquidators and their lawyers, as well as the defence and the court, without any commensurate benefit. Spending time and money on two more causes of action was excessive and unnecessary. The legal fees incurred in obtaining judgment against Mr Just come to \$30,296 (plus GST). With a slimmer case, the fees would be less. \$5,000 (plus GST) would be saved.

[22] The liquidators' enforcement charges included time spent on the claim against Mr Just, including collating and analysing information, instructing lawyers, preparing evidence and attending court. Again their charges would be lower if they had run a leaner claim.

[23] But aside from the Just litigation, the liquidators' claim is still very high. Part of the explanation is time. The longer a liquidation takes, the more time is spent on administrative tasks, such as keeping accounts and reporting to creditors. Although these are required, they are not productive. So, one of the disadvantages of a settlement with a director that requires payments over time is that the liquidation cannot be completed until all payments have been received and costs are run up in the meantime. That can be seen in this case in the time it took to receive the final dividend from Mr Just's bankruptcy.

[24] While allowing for that time element, the liquidators' claims are still higher than I see in other cases where a liquidation has not been completed while payments are still collected. There is a pointer in the claims for cash management (\$26,333) and statutory obligations (\$17,480). These are the third and fourth highest of the

⁷ See for example *EBR Holdings Ltd (in liq) v van Duyn* [2017] NZHC 1698.

liquidators' categories. They should not be. The liquidation did not require extensive accounting work. The main statutory obligations are dealing with tax matters, including the GST aspects of the liquidation, the initial report to creditors (there was no meeting with creditors) and reporting to creditors every six months. The reports to creditors were routine and followed a standard format, giving an update since the last report. In November 2018 preparing the report required 9/10 of an hour. Similar time was spent on other reports. The work required under these categories cannot justify the amounts claimed.

[25] Under these categories in their time records, many of the liquidators' claims are for steps such as "open mail", "put file in Lundia", "coding", "clear in-tray and distribute mail", "PoD" (proof of debt), "file paperwork in codafiles", "return file to Lundia", "approve invoice for payment", all in six-minute units. These charges are for routine clerical work. This explains the many hours claimed but at a low average hourly rate.

[26] I do not accept that it is reasonable for the liquidators to charge separately for these steps. These matters are generally absorbed as part of the costs of running an insolvency practice and are covered by the rates approved for liquidators, associates, analysts and the like. Most businesses do not charge out that way. As an example, a construction contractor working on a "charge-out" basis will charge for materials and labour but will typically not charge for clerical work as part of the services provided under the contract. Instead, they are absorbed within the charge-out costs. Similarly other insolvency practitioners do not include these matters as separate charges in their remuneration claims. Such charges do not add value for creditors.

[27] A large number worked on the liquidation.⁸ Some of that is not surprising in view of the time the liquidation took. There will be personnel changes over that time. And tasks were properly delegated. Some of those who started were still involved at

⁸ These names appear on the time records: David Levin, Vivien Madsen-Ries, Jason Weir, Guarev Hemani, Amy Sexton, Ryna Ali, Sarah Barnes, Helem Dem Yanenko, Kamma Jagdale, Julie Cook, Katerina Sutherland, Melissa Pritchard, Rachel Betti, Erwin Hessing, Lisa Webb, Annalise Irawan, Robert Campbell, Colin Owens, Rachelle Betti, Marichu Gacuan-Pacquin, Grace Xie, Liz Smith, Rebecca Hildyard, Sagida Mohammed, Sylvia Xu, Aparva Joshi, Olwyn Funnell, Hamish Ellis-Jack, Charlie Graham, Sarah Collins, Eugene Souslov, Sayuree Ram, Mitchell Skienars, Lily Choun and Eileen McLeod.

the end. All the same, there were inefficiencies. The liquidators have charged for time spent for one person passing the matter on to another. There was increased reporting within the team – one person explaining to another what has happened, seeking advice and giving instructions. There would be greater efficiencies with a smaller team. A liquidation of this size did not require so many people working on it.

[28] That work in the first two years on the initial investigation and dealing with the receivership can be justified. The liquidators planned to keep trading and to sell the business. That is more challenging and requires more care than dealing with a company that has stopped trading. The receivership required the liquidators to protect the interests of unsecured creditors, including scrutinising claims by secured creditors. I am less convinced that work on other matters and work after May 2012 was carried out as efficiently as was possible. The result was charges that are higher than reasonable.

[29] It is not possible to go through each item in the 63 pages of time records and allow, adjust or reject each to reach a new total. That also would be inefficient. In *Re Roslea Path Ltd*, the court said:⁹

...we consider that the exercise of a judicial discretion to fix an amount on a global basis is preferable to the liquidator being required to provide more detailed information which is likely to increase the cost to creditors and the delay in distribution of remaining funds.

And:¹⁰

Rather, we consider that Associate Judges should inquire into the reasonableness of fees on the basis of the principles outlined in *Medforce 1* and other cases, but have the ability to fix a global sum as remuneration (as a matter of judgment), if the liquidator had supplied too little information to enable a clear view to be formed on whether what was claimed was or was not “reasonable”.

I have to acknowledge that there has been delay anyway.

[30] In my judgment the liquidators’ reasonable remuneration is \$120,000 (exclusive of GST and expenses). That sum takes away padding and inefficiencies in

⁹ *Re Roslea Path Ltd* at [141].

¹⁰ At [142].

their claim but leaves them with an amount that is still relatively high for such a liquidation. It also recognises that fairly intense work was required at the start and that the claim against Mr Just was more protracted than the liquidators would normally expect.

[31] In summary, I fix the liquidators' remuneration at **\$120,000** (exclusive of GST). That is also to cover all steps to complete the liquidation. The legal expenses claimed by the liquidators are reduced by \$5,000 (plus GST).

.....
Associate Judge R M Bell