

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

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

**CIV-2012-404-7253  
[2020] NZHC 1368**

UNDER the Companies Act 1993

IN THE MATTER OF the liquidation of SALUS SAFETY  
EQUIPMENT LIMITED (in liq)

BETWEEN COMMISSIONER OF INLAND  
REVENUE  
Plaintiff

AND SALUS SAFETY EQUIPMENT LIMITED  
(IN LIQUIDATION)  
Defendant

On the papers: 17 June 2020

Copy for: H D Levin, Deloitte

Judgment: 17 June 2020

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**JUDGMENT OF ASSOCIATE JUDGE R M BELL  
Approval of liquidators' remuneration**

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*This judgment was delivered by me on 17 June 2020 at 3:30pm  
pursuant to Rule 11.5 of the High Court Rules*

.....  
*Registrar/Deputy Registrar*

**Copy for:**  
H D Levin, Deloitte, Auckland  
Inland Revenue Department

[1] The liquidators seek approval of their remuneration for this liquidation at \$91,600 plus GST and expenses. They applied in July 2018. As the amount sought is large for the liquidation of a small business with few assets, I asked for further information which the liquidators provided. I have, however, taken far too long to decide their remuneration. Liquidators' applications to approve their remuneration are made before liquidators send out their final report and ask to have the company removed from the register. My delay in giving this decision has held that up. I apologise for the inconvenience that must have caused.

[2] When the court ordered the company into liquidation on 13 February 2013, it had proved these hourly rates of remuneration for the liquidators:

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

[3] The liquidators provided this breakdown of their fees:

Personnel	Average hourly rate charged (Exclusive of GST)	Hours claimed	Fees claimed
Liquidators	\$475.00	33.9 hrs	\$16,102.50
Associates	\$395.00	.6 hrs	\$237.00
Managers	\$315.00	73.3 hrs	\$23,089.50
Senior analyst	\$218.20	2.5 hrs	\$545.50
Business analyst	\$191.91	248.0 hrs	\$47,593.04
Administration staff	\$100.23	64.1 hrs	<u>\$6,431.02</u>
<b>Total</b>	\$222.53	422.40 hrs	<b><u>\$93,998.56</u></b> (ex GST)

[4] Twenty-four people in the liquidators' practice worked on the liquidation. The rates charged are within those approved in the liquidation order. The liquidators' estimate a further 14 hours to complete the liquidation but they hold only \$91,148.00 in hand. If the total time on the liquidation is taken as 436.40 hours and the remuneration is capped at \$91,148, the average hourly charge-out rate will be \$208.86 (excluding GST).

[5] Realisations in the liquidation came to \$232,911. The main receipts were \$215,007 paid by the directors of the company, \$8,945 for receivables and \$6,484 for sale of assets. The expenses incurred by the liquidators are unremarkable. The Commissioner of Inland Revenue is by far the major creditor. She is a preferential creditor for the costs of the liquidation application (\$3,834) and for preferential taxes (\$93,376). She is also owed over \$93,951 for non-preferential taxes. There were only four other unsecured creditors, of which the highest was \$8,300. The Commissioner has been paid her preferential claims in full. Unsecured creditors have been paid 38.6 cents in the dollar.

[6] In a letter of 30 July 2018, 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 liquidators' appointment in her liquidation applications. If the Commissioner were the only one to benefit from any adjustment to the remuneration, the Commissioner's consent would not make it necessary to enquire further. In this case, however, other creditors would benefit from any adjustment to the remuneration. Further enquiry was required.

[7] The liquidators' memorandum outlines the circumstances of the liquidation and the work undertaken. At my request, the liquidators answered my queries, and provided information and the liquidation files.

[8] The liquidators' expenses and remuneration are payable out of the assets of the company.<sup>1</sup> 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.

[9] The leading case, *Re Roslea Path Ltd (in liq)*,<sup>2</sup> 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.

[10] The court referred with approval to an Australian decision, *Conlan v Adams*<sup>3</sup> 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.

[11] The judgment in *Roslea Path Ltd (in liq)* encouraged liquidators to disclose relevant information as to remuneration to creditors during the liquidation. It held that

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<sup>1</sup> Companies Act 1993, s 278.

<sup>2</sup> *Re Roslea Path Ltd (in liq)* [2013] 1 NZLR 207 (HC).

<sup>3</sup> *Conlan v Adams* [2008] WASCA 61, (2008) 65 ACSR 521.

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 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".

[12] The liquidators' time records show that the total time spent on the liquidation for the following years was as follows:

2013	170.7 hours
2014	29.9 hours
2015	60.4 hours
2016	52.7 hours
2017	66.7 hours
2018	<u>42.0 hours</u>
<b>Total:</b>	<b><u>422.4 hours</u></b>

The liquidators' time records show that while there was some activity in January and February 2014, relatively little was done the rest of that year: only 7.9 hours were billed. The liquidators accept that the file was overlooked.

[13] The liquidators' time records categorise tasks. The times taken for the main categories are:

<b>Task</b>	<b>Hours</b>
Cash management	103.4 hours
Statutory obligations	77.5 hours
Review of affairs/records	61.2 hours
Investigations	51.1 hours
Creditor issues	42.2 hours
Debtors	22.9 hours
Enforcement	21.6 hours
Asset realisation	17.2 hours

Initial investigations/first 7 days	12.5 hours
Secured creditors	3.7 hours
Leases/landlords	1.9 hours

These categories are not watertight, but they give a good general idea of the extent of work on different aspects of the liquidation.

[14] Salus Safety Equipment Ltd carried on business as a contractor providing height safety protection services. The company had stopped trading in December 2012. The last financial statements appear to have been in the year ending 31 March 2010. On liquidation, it had a vehicle, plant and equipment, leased premises and some debtors. Some creditors claimed security over some items of plant and equipment. The company's directors complied with the liquidators' request for information and documents.

[15] The liquidators' steps at the start of the liquidation in taking charge of the company's assets and records, identifying securities registered under the Personal Properties Securities Act, freezing bank accounts, identifying the landlord, disclaiming the lease and other onerous contracts, are all routine and unremarkable.

[16] In March 2015, the liquidators wrote to the directors, holding them liable for breaches of duty under the Companies Act 1993. The claim was for \$215,007, the sum of the creditors' claims in the liquidation. The directors responded promptly, accepting liability and offering to pay \$50,000 immediately and the balance by instalments at \$1,000 per week. The liquidators accepted the offer and prepared an acknowledgment of debt, which the directors signed. The directors paid according to the terms of the deed of acknowledgment of debt. I could see no documents on the liquidators' files recording any defaults by the directors or any follow-up action by the liquidators on non-payment. The liquidators made interim distributions to creditors as the directors paid. The claim against the directors was accordingly successful. The directors were entirely co-operative. They did not contest liability but made a sensible settlement proposal. The liquidators made a major recovery without the costs of legal proceedings and without incurring any legal expenses.

[17] Before the liquidators made demand on the directors, they established the amounts of the claims in the liquidation. The Commissioner made an amended claim after the liquidators had settled with the directors. Some extra work was required to deal with that. The other claims did not present any difficulties.

[18] These matters can be noted:

- (a) much of the work was routine for the liquidation of a small contracting company;
- (b) apart from resolving the Commissioner's claim, dealing with creditors and their claims did not throw up any significant issues and should not have led to unusual amounts of work;
- (c) the liquidators did not incur any unusual expenses;
- (d) the major recovery in the liquidation, the successful collection from the directors under the settlement, went much more smoothly than is often seen in such cases;
- (e) the liquidation ran for five years, although it was not large or complicated;
- (f) the time recorded, over 400 hours, is high for such a liquidation;
- (g) the fees are high for such a liquidation;
- (h) 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 \$200 and \$300 per hour (exclusive of GST) is more common;
- (i) the affairs of Salus Safety Equipment Ltd were not complicated; and

- (j) the liquidation ran smoothly, especially given the co-operation of the directors.

In these circumstances, the liquidators' remuneration claim is out of kilter with what I see in comparable cases.

[19] The liquidators rely on their itemised attendances in their time records to justify their proposed fees of \$91,148. I do not, however, accept that that provided fair value to the creditors. The liquidators have recorded large amounts of time on routine tasks. That can be seen in the claim for 103.4 hours on cash management and 77.5 hours on statutory obligations. Under those categories, the liquidators have charged in 6 minute units for routine clerical work. 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 and analysts. These charges appear to be padding. The liquidators say that it was necessary to monitor payments by the directors. But that explanation does not account for the many hours allocated to "cash management". Similarly, it is hard to see the justification for the 77 hours claimed for statutory obligations. By and large liquidators' statutory obligations involve advertising the liquidation, dealing with tax aspects of the liquidation such as GST, the initial report to creditors (there was no meeting of creditors), and reporting to creditors every six months. The reports to creditors are routine and follow a standard format, giving updates since the last report.

[20] If this liquidation had been given to a smaller insolvency practice, I am satisfied that the liquidation could have been completed in shorter time. Time would not have been lost during 2014. The same results would be achieved with less time on the job. The average hourly rate would be higher but the overall fees would be lower. That would give more value to creditors. I assess that a more efficient insolvency practice would have completed this liquidation with the same results but with fees of \$30,000. I do not consider that these liquidators' claims for more than that count as value to the creditors.

[21] Accordingly, I fix the liquidators' remuneration at \$30,000 (exclusive of GST). The liquidators may also recover the expenses they have claimed. This remuneration is to cover their costs of completing the liquidation.

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**Associate Judge R M Bell**