IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2012-485-2591

UNDER	the Companies Act 1993
IN THE MATTER	of Ross Asset Management Limited (in liq) and related entities
RE	JOHN HOWARD ROSS FISK and MALCOLM GRANT HOLLIS as liquidators of Ross Asset Management Ltd (in liq) and related entities Applicants

Teleconference: On the papers

Counsel: M Colson KC and R Pinny for Liquidators

In attendance: N Thatcher

Minute: 12 September 2022

MINUTE OF ASSOCIATE JUDGE JOHNSTON

Background

[1] By memorandum dated 2 August 2022, supported by affidavit evidence from the liquidators of Ross Asset Management Ltd (in liquidation) (and related entities), the liquidators seek orders that will effectively bring this long running liquidation to an end.

[2] Three orders are sought:

(a) A procedural order regularising a change of liquidators. The liquidators originally appointed by the Court on 17 December 2012 were John Fisk

and David Bridgman. On 9 December 2020 Mr Bridgman retired and appointed Marcus McMillan as his successor. On 17 August 2021 Mr McMillan retired and appointed Malcolm Hollis as his successor. The liquidators are seeking an order pursuant to rr 4.51 of the High Court Rules 2016 formally confirming Mr Hollis' appointment.

(b) The Court's approval is sought for a final distribution of approximately $150,000 to investors and other creditors and investors (hereinafter "creditors"). The liquidators have proposed a formula for this, but need the Court's approval as it departs in at least one respect from the original determination relating to distribution.

(c) Finally, the liquidators seek approval of their costs for the entire period of the liquidation.

[3] Originally, I was concerned that the Court was being asked to consider these matters — most especially the approval of the liquidators' costs — on an ex parte basis. With that concern in mind I requested the Registrar to arrange a teleconference with counsel. A teleconference was arranged for 9.00 am on 7 September 2022. In the meantime, on 1 September 2022, the liquidators filed an updating affidavit sworn by Mr Fisk. Without going into any detail, this confirms that the liquidators have, via the processes they have used throughout the liquidation, informed interested parties of this application, given them access to details of the application and indicated to them that if they have any concerns they should obtain legal advice. I am of course aware that the investors are a sophisticated group who are well organised and, having lived with this liquidation for many years, have become familiar with the Court's processes. On the basis of Mr Fisk's affidavit, I am confident that all interested parties have been made aware of this application and had an opportunity to have their say. Mr Fisk explains that only seven creditors have communicated with the liquidators in relation to the application. He describes the nature of those communications. All that needs to be said is that none of those creditors have raised any substantive opposition, or indicated that they proposed to do so.

[4] In those circumstances, the Court is able, in my assessment, to treat this as an unopposed application.

Change of liquidators

[5] There is little that needs to be said about the change of liquidators.

[6] This liquidation commenced in late 2012, as already said, and it was inevitable that there would be changes. I can see no reason at all why the Court should not approve Mr Hollis' appointment and I do so.

Distribution

[7] That brings me to the basis for distribution of the last tranche of funds to creditors.

[8] In a judgment dated 8 August 2018 this Court determined the basis for the distribution or any available funds to creditors. This judgment followed a substantive hearing in which more than one proposal was advanced for this. The liquidators have of course applied the approved formula throughout in making earlier (and significantly larger) distributions. They do not propose any change to this except a practical one relating to recipients. The amount available for distribution is approximately $150,000. Although this is a substantial amount of money, there are some 600 potential recipients. As Mr Fisk says in his principal affidavit, a distribution to all creditors calculated in accordance with the original formula would become uneconomic in relation to those with smaller claims. Thus the liquidators have proposed that the distribution be limited to those creditors who would receive more than $100. This would halve the number of recipients. As I already said, there does not appear to be any opposition to this, and I would not expect there to be any because it appears to me to be entirely sensible. I therefore approve this slight variation to the distribution formula for the purposes of the final distribution.

[9] The liquidators seek one further order, namely that any payments that they are unable to make, because of an inability to locate the creditor, be paid to the

Inland Revenue Department under the Unclaimed Money Act 1971. I am not sure that a Court order is necessary for that.

[10] In any event, I make such an order as it is the sensible course.

Remuneration

[11] The most significant aspect of this application, by some margin, concerns the liquidator's costs. Their costs claim is for approximately $2.4 m. In addition the liquidators have incurred substantial costs in the course of the liquidation. For example their legal costs have been in the order of $3.8 m. On any view, those are substantial amounts. Mr Fisk in his affidavit recognises that. As one might expect he has provided a comprehensive description of the liquidation process, emphasising some of the major difficulties that the liquidators faced and the successful avenues they pursued to recover monies for creditors.

[12] No useful purpose would be served by describing the entire course of the liquidation in this minute. It is well documented in the liquidators' various reports over the years. However two aspects justify emphasis as they put the costs incurred by the liquidators (by which I mean both their costs and the legal and related costs) in proper perspective.

[13] The liquidators pursued a test case through this Court, the Court of Appeal and the Supreme Court in order to establish whether they, on behalf of the body of creditors had an entitlement to claw back funds form creditors (investors) who were paid out by RAM at the costs of the other creditors. This litigation was successful in determining the ground rules for recovery action. Then the liquidators set about determining what claims were available and pursued these over many years. It was this process that enabled them to change the landscape of the liquidation from one in which the creditors were likely to recover virtually nothing to one in which they have achieved a meaningful amount.

[14] As Mr Colson submitted, the leading authorities relating to the reasonableness upon which the liquidator's fees under the Companies Act 1993 is *Re Roslea Path Ltd (in liq)*[1] and *Madsen-Ries v Salus Safety Equipment Ltd*.[2]

[15] Mr Colson submitted that the key principles, insofar as they are relevant to this application are:

> 3.1 The principles applying to a retrospective application by liquidators for approval of remuneration are well established and are set out in the decision of the Full Court (Heath and Venning JJ) in *Re Roslea Path Limited (in liquidation)* (recently approved by the Court of Appeal in the decision of *Madsen-Ries v Salus Safety Equipment Limited.)* The key principles, relevant to this application, are as follows:
>
> (a) The onus is on the Liquidator to prove the reasonableness of his or her remuneration.
>
> (b) In fixing a Liquidators' remuneration, the Court is determining the fairness and reasonableness of what has been charged when measured against the work undertaken and the result achieved.
>
> (c) Fair and reasonable remuneration was reflected in the value of the services to the creditors and the company in liquidation; recognising that value is an elusive concept which goes beyond mathematical application of hourly rates to hours spent in administering the company's affairs.
>
> (d) Liquidators' remuneration had to be proportionate to the nature, complexity and extent of the work undertaken.
>
> (e) The factors used to assess costs rendered by a solicitor were equally applicable to assessing the remuneration for a liquidator's services. Those factors were:
>
> (i) the skill, specialised knowledge and responsibility required;
>
> (ii) the time and labour expended;
>
> (iii) the value or amount of any property or money involved;
>
> (iv) the importance of the matter to the client and the results achieved;
>
> (v) the complexity of the matter and the difficulty or novelty of the questions involved;
>
> (vi) the number and importance of the documents prepared or perused;
>
> (vii) the urgency and circumstances in which the business is transacted; and

---

1 *Re Roslea Path Ltd (in liq)* [2013] 1 NZLR 207.
2 *Madsen-Ries v Salus Safety Equipment Ltd* [2022] NZCA 101.

(viii) the reasonable costs of running a practice.

[Footnotes omitted]

[16] Mr Colson continued:

> 3.2 The Court in *Roslea Path* also observed that:
>
> (a) Where appointees are known by a Court to be independent and experienced, the Court is likely to have confidence in such people to abide by the ethical standards of any professional organisation to which they belong and to adhere to their obligations as officers of the High Court.
>
> (b) It is open to a liquidator to disclose, voluntarily, in the second and subsequent reports the amount of fees charged and the largest components of them together with the ability of any creditor or shareholder to challenge remuneration received under section 284(1)(e) of the Act. If such disclosure was made and no steps had been taken by a creditor or shareholder to challenge the remuneration by the time the retrospective application was made, this would impact the extent of the inquiry a Court would make into the remuneration.
>
> (c) On an application for approval, only the remuneration of the liquidator was subject to review, not the liquidator's expenses.
>
> [Footnotes omitted]

[17] That analysis appears to me to be an accurate description of the principles that can be derived from the cases.

[18] In his affidavit evidence in support Mr Fisk breaks the liquidators' costs down into the amounts claimed in respect of various entities within the RAM group, but in my view it is better to view the costs for the group as a whole.

[19] Mr Fisk is a very experienced liquidator. He describes this liquidation as both complex and time consuming. He identifies several factors that contribute to this including the incomplete and unreliable nature of the records, the extent and duration of Mr David Ross' fraudulent activities and the scale of the group's operations. He describes the scope of the engagement which the liquidators had had with investors and other creditors. He describes the scope of the litigation to which I have already referred and its complexity. Most particularly he emphasises the claw back litigation which apparently occupied something like half of the liquidators energies but which

ultimately led to the recovery of assets in the order of over $25 m. Finally he refers to the complexities associated with the application for directions as to distribution, the matter dealt with in my judgment of 8 August 2018 and the processes that followed that.

[20] As to rates of remuneration, these changed over the period of the liquidation but the maximum rates charged by the liquidators and other directors of their firm was $550 per hour and the rates for others engaged were correspondingly less. I am satisfied that the rates charged over the period of the liquidation were appropriate. I am also satisfied having regard to Mr Fisk's evidence that work was carried out at the correct level, that is to say that it was delegated to the appropriate staff members as necessary.

[21] In relation to these factors I note that Mr Fisk's evidence is that substantial discounts were applied at the point of invoicing and I accept that.

[22] Standing back from the matter I am satisfied that the costs, that is costs and disbursements are well within the appropriate range.

Conclusion

[23] For those reasons, I make the orders now sought in the terms set out in the first schedule to Mr Colson's memorandum of 2 August 2022.

Associate Judge Johnston

Solicitors:
Bell Gully, Wellington for Applicants