

8 February 2011

TO CREDITORS

Dear Sir/Madam

**Sonray Capital Markets Pty Ltd (In Liquidation) (“the Company”)
ACN 104 482 993**

We refer to previous correspondence and now provide a further update as follows:

1 Public examinations of PwC partners

The public examinations of the PwC partners who completed two solvency and two compliance framework reviews of the Company were conducted during December 2010.

The examinations revealed that the scope of these reviews were limited and did not include the Client Segregated Account. Consequently, we are considering our position and reserving our rights in relation to the PwC partners, both of whom have indicated that they do not intend to participate in the mediation.

2 Mediation

As advised at the second meeting of creditors, we believe that a mediated outcome with the parties that contributed to the deficiency of the Client Segregated Accounts is to likely produce the best outcome for investors both in terms of return and timelines.

To that end, Saxo Bank (“Saxo”) has agreed to provide the liquidators with a limited recourse loan of \$500,000, which:

- will be used to fund the mediation and activities incidental to the mediation thereby negating the use of funds from the Client Segregated Account; and
- is repayable only from proceeds of any settlement which Saxo agrees to pay or out of any judgement sum a court orders Saxo to pay.

Accordingly, a Mediation Agreement and Mediation Funding Agreement were drafted, both of which required Court approval (and in relation to which, the relevant Court documents were placed on our website as they were prepared).

The Court did not approve the Mediation Agreement in the First Orders on the basis that the Court was not satisfied with the drafting of the confidentiality clause.

Consequently the clause has been amended so that the liquidators’ rights to use confidential information arising from the mediation is not impeded in any way, and a revised draft of the Mediation Agreement was provided to the Court.

MELBOURNE

Level 29 600 Bourke Street
Melbourne VIC 3000 Australia
PO Box 290 Collins Street West
Melbourne VIC 8007
phone +61 3 9600 4922
fax +61 3 9642 5887
email fhmelb@fh.com.au
www.ferrierhodgson.com
DX 125 Melbourne

ADELAIDE
BRISBANE
PERTH
SYDNEY
JAKARTA
KUALA LUMPUR
SINGAPORE
TOKYO

Affiliated through
Zolfo Cooper
UNITED STATES
UNITED KINGDOM
CARIBBEAN
AND
KLC KENNIC LUI & CO
HONG KONG
CHINA



On 31 January 2011 the Court ordered that the liquidators are authorised to enter into the Mediation Agreement and the Mediation Funding Agreement, both of which have now been executed by the liquidators and Saxo.

We expect to receive the \$500,000 funding in the week commencing 7 February 2011, and we anticipate that the mediation process will:

- Commence during February 2011. At this stage, Saxo is the only confirmed participant however we hope that HLB Mann Judd through its insurer, Russell Johnson and Scott Murray will also participate. As previously noted, PwC have declined to attend.
- Take several months to complete. It is extremely difficult to estimate when and if an outcome can be reached not least because of the various court applications that will be required as the mediation progresses.

3 Remuneration

Although at the second meeting of creditors on 27 October 2010 creditors approved my remuneration for the period 22 June to 30 September 2010 in relation to activities regarding the Client Segregated Account, it was necessary for the Court to approve my remuneration claim from the Client Segregated Account.

Court orders in that regard were made on 8 December 2010 (“the First Orders”).

The First Orders approve the use of Client Segregated Account funds for my remuneration and set out the procedure for the assessment of my remuneration and the content which the affidavit filed in support of the application must contain.

The amount of my remuneration application is \$1,014,353.00 (plus GST). This is \$26,170.50 (plus GST) lower than the amount approved by creditors at the second meeting of creditors because, following a review initiated by us of each individual time entry to comply with the First Orders, it has been necessary to transfer some entries to the general activities time code because the work performed does not have sufficient nexus with Client Segregated Account Activities.

In accordance with the First Orders we enclose the following documents:

- Form 16 “Notice of intention to apply for remuneration” pursuant to the Federal Court (Corporations) Rules 2000 (Cth)
- A copy of the affidavit which will be filed in support of our application for remuneration (please note the annexures to the affidavit have been put on our website (www.fh.com.au) – due to their size it was not appropriate to email them)
- A copy of the orders dated 8 December 2010



4 Future court applications

As previously advised, it will be necessary to seek court directions on several matters to allow the liquidation to progress. These matters include but are not limited to:

- The rights of investors who were exclusively using the trading platform maintained by Interactive Brokers LLC and whether these investors are individually beneficially entitled to financial products held by Interactive Brokers LLC.
- Whether the financial instruments may be claimed by individual investors or are the subject of a constructive trust and, if the latter, whether they ought to be separated into distinct pools on trust for separate classes of beneficiaries or treated as a single pool on trust with one class of beneficiary.
- The ability of parties to exercise certain powers, such as a power to liquidate financial instruments so that proceeds may be paid into the Client Segregated Account.
- How to determine the value of the assets held by third party providers and whether positions held may be closed and liquidated.
- Questions that arise during the mediation.
- Approval of any negotiated outcome.

Now that the Mediation Agreement and Mediation Funding Agreement have been approved, we intend on making these applications as soon as practical and further correspondence regarding these applications will follow in due course.

Updates will continue to be provided as required. In the interim should you have any queries, please email us at sonray@fh.com.au or phone Courtney Davies of this office on (03) 9604 5620.

Yours faithfully

Sonray Capital Markets Pty Ltd

A blue ink signature of George Georges, appearing as a stylized 'G' followed by a flourish.

George Georges
Liquidator

A blue ink signature of John Lindholm, appearing as a stylized 'JL' followed by a flourish.

John Lindholm
Liquidator

Encl.

Form 16 Notice of intention to apply for remuneration
(rules 9.1, 9.2, 9.3, 9.4, 9.5)

IN THE MATTER OF SONRAY CAPITAL MARKETS PTY LTD (IN LIQUIDATION)

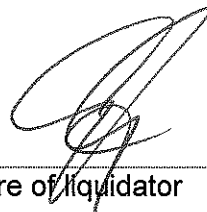
ABN or ACN: 104 482 993

TO: The Creditor as addressed

TAKE NOTICE that, not less than 21 days after this notice is served on you, I, George Georges of Ferrier Hodgson, Level 29, 600 Bourke Street, Melbourne, Victoria liquidator and former administrator of the above company, intend to apply to the Court to determine our remuneration for the period 22 June 2010 to 30 September 2010.

If you object to my application, you must, within 21 days after being served with this notice, serve on me a notice of objection stating the grounds of objection to the remuneration claimed.

Date: 8 February 2011



Signature of liquidator

Affidavit

**IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
DIVISION: CORPORATIONS**

No. VID 562 of 2010

IN THE MATTER OF: SONRAY CAPITAL MARKETS PTY LTD
(IN LIQUIDATION) ACN 104 482 993

**RE AN APPLICATION BY GEORGE GEORGES & JOHN ROSS LINDHOLM
IN THEIR CAPACITIES AS JOINT AND SEVERAL LIQUIDATORS OF
SONRAY CAPITAL MARKETS PTY LTD (IN LIQUIDATION) ACN 104 482 993**

Plaintiffs

I, George Georges of Level 29, 600 Bourke Street, Melbourne in the State of Victoria,
chartered accountant and registered liquidator, say on oath:

- 1 I am a chartered accountant, a registered liquidator and a partner of the firm Ferrier Hodgson. I make this affidavit from my own knowledge except where otherwise indicated. Where I make this affidavit from facts outside my personal knowledge, I am informed by the source stated and truly believe those facts to be true.
- 2 In this affidavit I refer to and rely on my affidavits sworn on 15 July 2010 (**My First Affidavit**), 28 October 2010 (**My Second Affidavit**) and 26 November 2010 (**My Third Affidavit**) and adopt the terms and definitions referred to therein.
- 3 Exhibited to me at the time of swearing this affidavit is a folder of documents marked "GG-4". References to GG-4 followed by a reference to a tab number are references to that exhibit and the tab number within the relevant exhibit folder where the document is to be found.
- 4 On 30 November 2010 the Court made orders in this proceeding *Georges (Liquidator), in the matter of Sonray Markets Pty Ltd (in liq)* [2010] FCA 1371 (**Orders**). The Orders set out the procedure for the assessment of the plaintiffs'

Filed on behalf of: The plaintiffs
Prepared by:
Norton Rose Australia
RACV Tower, 485 Bourke Street
MELBOURNE VIC 3000

Solicitor's Code: 370
DX: 445 Melbourne
Tel: (03) 8686 6000
Fax: (03) 8686 6505
Ref: 2698457
Attention: Allan Kawalsky



proper remuneration and the content which the affidavit in support should contain. This application is filed pursuant to the Orders.

- 5 I swear this affidavit in support of my application for an order for the approval of the Remuneration, as that term is defined in the Orders, for the period commencing from 22 June 2010 until 30 September 2010 (**Relevant Period**) in the amount of **\$1,014,353.00 plus GST**.

Appointments

- 6 On 22 June 2010 Mr John Ross Lindholm (**Mr Lindholm**) and I were appointed as joint and several administrators of Sonray Capital Markets Pty Ltd (in liquidation)(ACN 104 482 993) (**Sonray**).
- 7 On 27 October 2010 the creditors of Sonray resolved under section 439 of the *Corporations Act 2001* (Cth) (**Act**) that Sonray be wound up. At that time Mr Lindholm and I became the liquidators of Sonray. In this affidavit where I refer to "we" or "us" it is a reference to Mr Lindholm and me. During the Relevant Period we were Voluntary Administrators only and did not undertake any work as Liquidators.

Background

- 8 Sonray was incorporated and registered with the Australian Securities and Investment Commission on 1 May 2003. Set out at GG-1 Tab 1 is a copy of a historical search conducted on 15 July 2010 of Sonray in the register maintained by the Australian Securities and Investments Commission.
- 9 On 19 October 2010 I prepared a report to Creditors pursuant to section 439A(4)(a) of the *Corporations Act 2001* (**s 439A Report**). The s 439A Report is at exhibit GG-2 Tab 12 of My Second Affidavit and it was sent out to creditors on 19 October 2010. For convenience it is also to be found at **GG-4 Tab 1**. I refer to and rely on the information about Sonray's affairs and financial circumstances which I have set out in pages 7 to 44 of the s 439A Report in support of this application for approval of an order for payment of our remuneration, as sought in this application.
- 10 At pages 8 through to 22 of the minutes of the second meeting of creditors which is exhibited at GG-4 Tab 2, I have summarised in a general way some of the work which we did in the Relevant Period and the results of those investigations.



- 11 Although not strictly applicable to the instant interlocutory process, having regard to some of the factors under section 473(10) of the Act to which the court may consider when determining whether remuneration is reasonable I say:
- (a) the work performed by the Administrators during the Relevant Period was reasonably necessary to:
 - (i) keep the investors informed;
 - (ii) preserve the assets related to the Segregated Accounts (as the term is defined in the Orders);
 - (iii) form an opinion in relation to the affairs of Sonray and make a meaningful recommendation to investors;
 - (iv) determine what, if any, additional assets were available for investors and / or creditors of Sonray;
 - (v) determine what was the size of the deficiency in the Segregated Accounts; and
 - (vi) determine if there would be any recoveries available to contribute to the pool of funds in the Segregated Accounts.
 - (b) the work likely to be performed by the Administrators was reasonably necessary to ensure that the return to investors and / or creditors of Sonray is maximised by continuing to do all of the above. Specifically, we are actively pursuing a mediated outcome, which we believe, if successful, will result in the best outcome for investors in terms of quantum and timing of recovery over other options;
 - (c) the period to which the work was or is likely to be performed by the Liquidators - while it is difficult to give an accurate estimate, given the complexity of the liquidation, it is likely that the liquidation will continue until at least the end of 2011;
 - (d) the quality of the work performed or likely to be performed by the Liquidators - Ferrier Hodgson are Australia's and the Asia-Pacific's largest independent corporate restructuring practice with 47 partners and over 440 staff throughout Australia and Asia. The work performed by us was allocated to staff at the appropriate level and experience having regard to the nature and complexity of the work;



- (e) the complexity of the work performed or is likely to be performed:
 - (i) Sonray operated a financial services business which had a disorganised internal structure and outsourced a number of key functions;
 - (ii) our investigations have revealed that the management of Sonray mishandled funds in the company's Segregated Account; and
 - (iii) Sonray entered into a number of different agreements with investors and third party providers requiring consideration of a number of different rights and obligations and the necessity to obtain legal advice.

- (f) the number, attributes and behaviour of the creditors:
 - (i) 25 Priority Unsecured Creditors with total outstanding entitlements of \$205,572.63;
 - (ii) 32 Ordinary Unsecured Creditors totalling \$442,457;
 - (iii) 4,596 Investors, with an estimated total loss of circa \$47.6 million;
 - (iv) the Liquidators have made every effort to keep the investors informed so as to reduce the large quantity of correspondence from investors;
 - (v) a large number of investors have wanted to know what the appointment means for them personally and the status of their individual account and we have had to deal with that correspondence; and
 - (vi) a number of the investors have their superannuation funds and life savings invested with Sonray.

Remuneration Report

12 On 19 October 2010 I prepared a remuneration report to Creditors pursuant to my obligations under Section 449E of the Act which I sent out to Creditors that day (**Remuneration Report**) together with the s 439A Report . The Remuneration Report is at GG-2 tab 2 of My Second Affidavit and also is to be found at Annexure 1 of GG-4 Tab 1.



- 13 The Second Meeting of Creditors was held at 2:30pm at the Melbourne Exhibition and Convention Centre, room 219, 1 Convention Centre Place, South Wharf with audio visual conferencing available at locations in Sydney and Brisbane.
- 14 I was the chairman of the meeting and recorded that the following resolutions, amongst others, were passed:
- (a) Sonray be wound up;
 - (b) that the Administrator's remuneration in respect of general administration tasks, as set out in Annexure 1 of the s 439A Report ("**Creditors' Report**"), for the period 22 June 2010 to 30 September 2010 in the amount of \$554,139.50 plus GST be approved and that the Administrators be authorised to draw those fees when funds come to hand;
 - (c) that the Administrators' estimated remuneration in respect of general administrative tasks, as set out in Annexure 1 of the Creditors' Report, for the period 1 October to the end of the administration in an amount not exceeding \$75,000.00 plus GST, be approved and that the Administrators be authorized to draw those fees when funds come to hand;
 - (d) that the Administrators' remuneration in respect of tasks related to dealing with the Segregated Accounts, as set out in Annexure 1 of the Creditors' Report, for the period 22 June to 30 September 2010 in the amount of \$1,040,523.50 plus GST, be approved and that the Administrators be authorised to draw those fees when funds come to hand;
 - (e) that the Administrators' estimated remuneration in respect of tasks related to dealing with the Segregated Accounts, as set out in Annexure 1 of the Creditors' Report, for the period 1 October 2010 to the end of the administration in an amount not exceeding \$80,000 plus GST, be approved and that the Administrators be authorised to draw those fees when funds come to hand.
- 15 Before the resolutions referred to at paragraphs 14(d) and 14(e) were passed I informed the creditors present at the meeting that that resolutions were not binding and that in order to have that remuneration paid out of the Segregated Accounts I would first have to obtain orders from a court. I put the resolutions to creditors knowing that they were not binding because I thought it important to obtain an indication from the creditors present at the meeting that they approved of the remuneration I was seeking to be paid out of the Segregated Accounts. At pages



58 and 59 of the minutes of the second meeting of creditors it is recorded that these resolutions were passed unanimously.

- 16 A copy of the minutes of the second meeting of creditors is at **GG-4 Tab 2**.

Method of Recording of Time on Work Performed

- 17 The method of recording the time spent by Mr Lindholm and me and the staff of Ferrier Hodgson assisting us in the work related to the activities described under the definition of Remuneration in the Order (**Segregated Accounts Activities**) is that I and every member of my staff, maintain a paper timesheet and computerised time sheet on a daily basis. Time spent on various matters is recorded on that paper timesheet and computerised time sheet on the basis of six minute units. These primary records are available for inspection should they be required.
- 18 In accordance with Ferrier Hodgson's procedures the computer is able to extract information for a particular matter that includes records of the time spent and the activity of each of my partners (including me) and staff in relation to those matters.
- 19 On or shortly after the commencement of the voluntary administration of Sonray, I gave instructions to my staff that prior to recording a time entry they would need to distinguish between the work they undertake that is referable to the Segregated Accounts and the work that is referable to the general voluntary administration of Sonray and make the time entry under the relevant category of work.
- 20 Set out at **GG-4 Tab 3** is a true copy of the work in progress time entries for the Relevant Period in relation to the Segregated Accounts Activities.
- 21 The time entries relating to the Segregated Accounts Activities were collated and are summarised in parts 1 and 2 under Schedule A3 of the Remuneration Report:
- (a) Part 1 of Schedule A3 is a schedule divided up into 3 columns and breaks the tasks related to the Segregated Accounts undertaken by the administrators into distinct categories in accordance with the recommendations for the preparations of remuneration reports on in the IPA code of Professional Practice for Insolvency Professionals. Next to each general task category is a more detailed description of the types of activities that are included in that category;
 - (b) Part 2 of Schedule A3 is a schedule which summarises the calculation of the Remuneration according to the member of staff who performed the



work, level, rate and the sub-category of work which was performed in relation to Segregated Accounts Activities in the Relevant period.

- 22 If any activity that was performed by me or my staff was referable to the general voluntary administration activities of Sonray then such activity and the associated time entry was recorded under a separate file number. Time entries referable to general voluntary administration matters conducted in the Relevant Period, were collated and summarised in schedule A2 of the Remuneration Report. The remuneration incurred in relation to those activities is not relevant to this application.
- 23 To comply with the Orders a review has been conducted of each individual time entry (approximately 1,782) relating to the Segregated Accounts Activities for the Relevant Period. Consequently, it has been necessary to transfer some entries to the general activities time code because the work performed does not have sufficient nexus with Segregated Accounts Activities.
- 24 Set out at **GG-4 Tab 4** is a revised copy of Schedule A3 which takes into consideration the transfer of time (**Revised Schedule A3**). The Revised Schedule A3 amounts to \$1,014,353.00 (plus GST), which is \$26,170.50 (plus GST) lower than the amount approved by creditors at the second meeting of creditors as described in paragraphs 14(d) and 15 herein.
- 25 The settling of the time sheet entries, and the preparation of Revised Schedule A3 was conducted under my supervision. I believe all calculations and the division of the recording of time between Segregated Accounts Activities and activities referable to the voluntary administration of Sonray in the Revised Schedule A3 are accurate and reasonable.
- 26 As a result of Sonray's misuse of funds in the Segregated Accounts it was necessary to consider in some detail whether a particular task that was performed related to work performed in relation to the Segregated Accounts or work that was conducted in relation to the voluntary administration of Sonray.
- 27 At **GG-4 Tab 5** is a schedule which my staff have prepared to provide further information behind reasoning we used to allocate time entries to either the file code described as "the Administration Account" or the file code described as "the Segregated Account".
- 28 To the best of my knowledge the Revised Schedule A3 accurately and completely records the time spent by each staff member, and myself, engaged in relation to the



work performed during our appointment as Voluntary Administrators in the Relevant Period.

29 In my opinion:

- (a) the length of time spent by my partners, staff and me was reasonably necessary for the work that was carried out;
- (b) all the work was conducted by a professional who had the requisite qualifications to perform that work; and
- (c) all the work was conducted in a timely and accurate manner.

Segregated Accounts- Receipts and Payments

30 A brief summary of the steps taken to get in and preserve funds, which form part of the Segregated Accounts in relation to each third party provider is as follows:

- (a) Saxo - Saxo has served Sonray with notices of termination of all relevant agreements between it and Sonray and has also notified Sonray that it is entitled to instruct its custodian to proceed with the sale of stock lodged as margin cover for the total amount owed to Sonray. I am informed by Saxo that as at 25 June 2010 the total unrealized value of positions and money held by Saxo was \$19,467,172.90. Saxo has asserted that, as at 25 June 2010, the sum of \$8,546,502.19 is payable to Sonray as a consequence of the early termination of the ISDA Master Agreement between Sonray and Saxo dated 23 December 2003. In consultation with the Administrators, Saxo has agreed to preserve the status quo by continuing to hold the stock and those funds;
- (b) Interactive Brokers – We have been in regular correspondence with Interactive Brokers about the manner in which money and financial instruments held by Interactive Brokers is to be treated. It is estimated that approximately \$9,400,000 in cash and financial positions is held by Interactive Brokers;
- (c) MF Global Australia Limited - The full amount held by MF Global, following the close out of financial instruments, (being \$3,165,468.79) was transferred into the Client Segregated Accounts on 26 August 2010;
- (d) Macquarie Equities Limited (**Macquarie**) – Macquarie has closed out of exchange traded option positions and transferred \$3,346,480.74 into



Sonray's Macquarie Cash Management Account. The Liquidators are signatories to that account;

- (e) Forex Capital Markets LLC – On 26 August 2010 \$484,982.48 was transferred to Sonray's Client Segregated Accounts held at the Australia and New Zealand Banking Group Ltd (**ANZ**);
 - (f) D2MX Pty Ltd (**D2MX**) – the amount, if any, held by D2MX on behalf of Sonray is being investigated and enquiries with D2MX are continuing. The amount which may be held by D2MX is estimated to be \$5,000.
- 31 At paragraph 41(a) of my First Affidavit I deposed that as at 22 June 2010 the balance of the Client Segregated Accounts and the Macquarie Cash Management Account, comprising accounts held by Sonray investors at ANZ, HSBC and Macquarie, was \$6,509,729.80.
- 32 At paragraph 40 of My Second Affidavit I deposed that as at 13 September 2010 the cash balance of those accounts had increased to \$10,414,807.
- 33 At paragraph 42 of My Second Affidavit I deposed that as at 13 September 2010 the total of all cash and the estimated realisable value of holdings in possession of third party providers was approximately \$28,391,505.
- 34 A summary of the receipts and payments of the Segregated Accounts as at 30 November 2010 is at **GG-4 Tab 6**.

Description of the Segregated Accounts Activities

- 35 We have undertaken a number of activities to ensure that the assets, financial instruments and money held by third party service providers on behalf of Sonray and/or its clients have been preserved. In some cases, where authorised to do so, third party service providers have taken steps to transfer funds to accounts under our control. In relation to each third party provider it has been necessary to collate and review the numerous documents which establish the contractual framework between Sonray and that third party provider and to investigate Sonray's books and records and interview Sonray staff in order to verify the history of the transactions with that third party provider.
- 36 During the Relevant Period the Segregated Accounts activities included, as described in the s 439A Report, the following investigations:




- (a) investigations into allegations that a rogue trader at Sonray conducted unauthorised trading in a number of client accounts;
- (b) investigations into the deficiency in the Segregated Accounts. Prior to the appointment of administrators to Sonray a reconciliation was undertaken by the employees of Sonray to ascertain the value of assets (cash and equities) and had determined the total of all investor positions (the liability Sonray had in relation to the funds contributed by all investors). This reconciliation revealed a significant deficiency in the Segregated Accounts maintained by Sonray. As at 19 October 2010 the deficiency in the Segregated Accounts was approximately \$46 million (see 6.7.3 of the s 439A Report). These investigations included:
 - (i) consideration of funds withdrawn from the Segregated Accounts for the payment of commissions. Our investigation found that a number of these payments from the Segregated Accounts were unfunded (see 6.7.3.1 of the s 439A Report);
 - (ii) the detailed investigation into Sonray's transaction records to identify unfunded transactions – transactions on the Segregated Accounts for which there was no corresponding cash movement into bank accounts making up the Segregated Accounts (see 6.7.3.2 of the s 439A Report);
 - (iii) investigation of unfunded withdrawals from the Segregated Accounts paid to Sonray that were processed through various client accounts (see 6.7.3.3. of the s 439A Report).
- (c) investigation into the alleged misuse of money from the Segregated Accounts to:
 - (i) fund Russell Johnson and Scott Murray's personal living expenses;
 - (ii) repay personal debts owed by Mr Johnson;
 - (iii) inject working capital into Sonray to allow it to continue to trade;
 - (iv) enable Scott Murray to lend money to his father's business, Swann Group.

(see 6.7.5 of the s 439A Report).



37 As described in Schedule A3 of the Remuneration Report and in the Revised Schedule A3, the Segregated Accounts Activities undertaken during the Relevant Period also included:

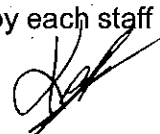

- (a) notifying and meeting with ASIC in relation to its investigation into the affairs of Sonray;
- (b) suspending all trading under the non-agency model trading platforms which would cause the opening of new positions;
- (c) communicating and dealing with employees, creditors, over 4000 investors, landlords, and third party providers, and instructing my solicitors to respond to correspondence from investor's legal representatives about their entitlements;
- (d) reviewing Sonray's books and records and accounting systems,;
- (e) reviewing the information technology environment of the Sonray Group and forensically imaged all computer records, laptops and Blackberries which captured 7.5 million documents;
- (f) meeting with management of Sonray to discuss the factors which led to the appointment of Administrators, the cause of which was principally the misuse of funds in the Segregated Accounts;
- (g) interviewing director, senior staff, and a number of former employees of interest about the circumstances that led to the deficiency in the Segregated Accounts;
- (h) dealing with media enquiries;
- (i) investigating the nature, and size of the deficiency in the Segregated Accounts;
- (j) meeting with legal representatives from Saxo Bank A/S;
- (k) writing to Sonray's auditors and other advisors seeking copies of their files and terms of their retainer;
- (l) writing to Sonray's insurer seeking copies of the terms of all relevant insurance policies and have begun considering their terms and preparing notifications;



- (m) instructing my solicitors to collect and review the major agreements with all third party providers in relation to the ability of Sonray and its third party providers to terminate those agreement and liquidate open positions held by Sonray on a consolidated basis on behalf of its clients;
- (n) writing to and speaking with all third party providers;
- (o) obtaining legal advice about the characterisation of investors as beneficiaries of a trust, including seeking the advice of Senior Counsel;
- (p) dealing with investors and their lawyers in respect of various claims including in respect of injunction proceedings brought in the New South Wales Supreme Court and instructing my solicitors in relation to same;
- (q) instructing my solicitors, and reviewing, analyzing and preparing the material for public examinations pursuant to Section 596B of the Corporations Act 2001 of Scott Murray , which was part-heard on 23 September 2010, and Russell Johnson, which was part heard on 28 and 29 September 2010.

Basis for Fees

- 38 The hourly rates charged by partners and employees of Ferrier Hodgson which apply to the voluntary administration of Sonray are at schedule A1 of the Remuneration Report.
- 39 The Revised Schedule A3 shown at GG-4 Tab 4 is a spreadsheet prepared from extracts of the computer records referred to above in relation to the work undertaken by me and my staff (**Spreadsheet**). The Spreadsheet shows the time recorded by individuals in hours and the corresponding charge in accordance with each operator's hourly charge out rate.
- 40 The Spreadsheet shows that the remuneration in relation to the activities identified in Schedule A3 is \$1,014,353.00 plus GST. We have also incurred disbursements of \$1,352.73.
- 41 I believe that the firm rates are reasonable, based on the:
- (i) the experience of each staff member;
 - (ii) the work actually performed in relation to the appointment to
 - (iii) the complexity of the work performed by each staff member;

- (iv) the responsibility of each staff member in relation to the work performed by them;
- (v) the costs incurred by my firm in performing the work in relation to my appointment;
- (vi) the risks undertaken by my respective firms in allowing Mr Lindholm and I to accept the appointment and conducting the work in relation to my appointment; and
- (vii) the rates charged by comparable firms within Victoria.

42 I am of the opinion that the work performed to date in relation to the Segregated Accounts has been reasonably necessary.

43 I believe that all work performed by my partners, staff and me, was performed in an efficient and timely manner.

Other matters

44 The Liquidators are currently preparing a further Remuneration Report in relation to Remuneration incurred after 30 September 2010.

Conclusion

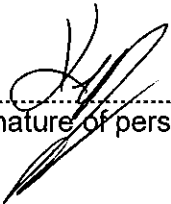
45 I respectfully request this Honourable Court to approve the claims of Mr Lindholm and me for remuneration out of the Segregated Accounts incurred for the Relevant Period.

SWORN by George Georges at Melbourne)
 in Victoria on 3 February 2011)
)
)



.....
 Signature of George Georges

Before me:



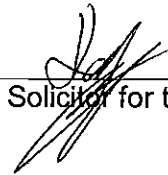
.....
 Signature of person taking affidavit

KEN TONG YEE
 RACV Tower 485 Bourke Street
 Melbourne Victoria 3000
 An Australian Legal Practitioner
 within the meaning of the
 Legal Profession Act 2004

CERTIFICATE OF COMPLIANCE

I, **KEN TONG YEE**, certify to the Court that the affidavit of George Georges sworn on **3** February 2011 filed on behalf of the plaintiffs complies with Order 14, rule 2 of the Federal Court Rules.

Date: **3** February 2011



Solicitor for the plaintiffs

KEN TONG YEE
RACV Tower 485 Bourke Street
Melbourne Victoria 3000
An Australian Legal Practitioner
within the meaning of the
Legal Profession Act 2004

Filed on behalf of: The plaintiffs
Prepared by:
Norton Rose Australia
RACV Tower, 485 Bourke Street
MELBOURNE VIC 3000

Solicitor's Code: 370
DX: 445 Melbourne
Tel: (03) 8686 6000
Fax: (03) 8686 6505
Ref: 2698457
Attention: Allan Kawalsky

**IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
DIVISION: CORPORATIONS**

No. VID 562 of 2010

**IN THE MATTER OF: SONRAY CAPITAL MARKETS PTY LTD
(IN LIQUIDATION) ACN 104 482 993**

**RE AN APPLICATION BY GEORGE GEORGES & JOHN ROSS LINDHOLM
IN THEIR CAPACITIES AS JOINT AND SEVERAL LIQUIDATORS OF
SONRAY CAPITAL MARKETS PTY LTD (IN LIQUIDATION) ACN 104 482 993**

Plaintiffs

**TABS 1 – 6 of Exhibit GG-4 to the
Affidavit of George Georges sworn 3 February 2011**

Prepared by:
Norton Rose Australia
RACV Tower, 485 Bourke Street
MELBOURNE VIC 3000
Ref: SJP:2698457

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
DIVISION: CORPORATIONS

No. VID 562 of 2010

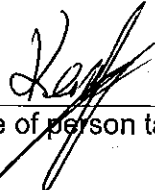
IN THE MATTER OF: SONRAY CAPITAL MARKETS PTY LTD
(IN LIQUIDATION) ACN 104 482 993

RE AN APPLICATION BY GEORGE GEORGES & JOHN ROSS LINDHOLM
IN THEIR CAPACITIES AS JOINT AND SEVERAL LIQUIDATORS OF SONRAY
CAPITAL MARKETS PTY LTD (IN LIQUIDATION) (ACN 104 482 993)
Plaintiffs

EXHIBIT GG-4

This is the exhibit marked "GG-4" produced and shown to **GEORGE GEORGES** at the time of swearing/~~affirming~~ his affidavit on 3 February 2011.

Before me:



Signature of person taking affidavit

KEN TONG YEE
RACV Tower, 485 Bourke Street
Melbourne Victoria 3000
An Australian Legal Practitioner
within the meaning of the
Legal Profession Act 2004

Filed on behalf of: The plaintiffs
Prepared by:
Norton Rose Australia
RACV Tower, 485 Bourke Street
MELBOURNE VIC 3000

Solicitor's Code: 370
DX: 445 Melbourne
Tel: (03) 8686 6000
Fax: (03) 8686 6505
Ref: 2698457
Attention: Allan Kawalsky

FEDERAL COURT OF AUSTRALIA

Georges (Liquidator), in the matter of Sonray Capital Markets Pty Ltd (in liq)

[2010] FCA 1371

Citation: Georges (Liquidator), in the matter of Sonray Capital Markets Pty Ltd (in liq) [2010] FCA 1371

Parties: **GEORGE GEORGES & JOHN ROSS LINDHOLM IN THEIR CAPACITIES AS JOINT AND SEVERAL LIQUIDATORS OF SONRAY CAPITAL MARKETS PTY LTD (IN LIQUIDATION)**

File number: VID 562 of 2010

Judge: **FINKELSTEIN J**

Date of judgment: 8 December 2010

Catchwords: **CORPORATIONS** – insolvency – company trustee of trust funds – whether liquidator can be paid costs and remuneration out of trust money – proposed mediation – whether a mediation agreement restricting use of information obtained ought be approved

Legislation: *Corporations Act 2001* (Cth), s 981B
Evidence Act 1995 (Cth), s 131(1)

Cases cited: *789TEN v Westpac Banking Corp* [2004] NSWSC 594
Berkeley Applegate (Investment Consultants) Ltd (in liq), Re; Harris v Conway [1989] Ch 32
Sutherland Re Application of (2004) 50 ACSR 297
Trio Capital Ltd (Admin App) v ACT Super Management Pty Ltd (2010) 79 ACSR 425

Date of hearing: 30 November 2010

Place: Melbourne

Division: GENERAL DIVISION

Category: Catchwords

Number of paragraphs: 26

Counsel for the Plaintiffs: I D Martindale SC
H N G Austin

Solicitor for the Plaintiffs: Norton Rose Australia

Counsel for the Roland Mark
Ward: P Crutchfield SC
D Gration

Solicitor for Roland Mark
Ward: Slater & Gordon Limited

Counsel for Efax Pty Ltd: N Cotman SC
D T Forbes

Solicitor for Efax Pty Ltd: Hall & Wilcox

**IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION**

VID 562 of 2010

**IN THE MATTER OF SONRAY CAPITAL MARKETS PTY LTD (IN LIQUIDATION)
ACN 104 482 993**

**GEORGE GEORGES & JOHN ROSS LINDHOLM IN THEIR
CAPACITIES AS JOINT AND SEVERAL LIQUIDATORS OF
SONRAY CAPITAL MARKETS PTY LTD (IN
LIQUIDATION)
Plaintiffs**

**JUDGE: FINKELSTEIN J
DATE OF ORDER: 8 DECEMBER 2010
WHERE MADE: MELBOURNE**

The Court makes the following orders without prejudice to any affected party's rights to dispute the existence and/or extent of any right of the Plaintiffs to receive any Remuneration and/or Expenses from any Segregated Account (each term being hereinafter defined), and without prejudice to any interested party's right to dispute the character of or title to property referred to herein.

UPON THE PLAINTIFFS BY THEIR COUNSEL UNDERTAKING that if it should hereafter be adjudged by the Court that the amount of any Remuneration and/or Expenses that they have been paid from any Segregated Account in accordance with paragraph 1 of these Orders (Interim Amount) exceeds the amount of the Remuneration and/or Expenses that should be borne by that Segregated Account (Proper Amount) then, subject to paragraph 3(b) of this Order, they will as directed by the Court in making such adjudication repay to the Segregated Account in question the amount by which the Interim Amount has exceeded the Proper Amount, together with interest thereon at such rate as the Court shall in making the adjudication determine.

THE COURT ORDERS AND DIRECTS THAT:

1. Subject to paragraph 3 below, in the event that the assets of Sonray Capital Markets Pty Ltd (In Liquidation) (ACN 104 482 993) (Sonray) are insufficient to pay the Remuneration fixed by a Registrar following a referral to a Registrar in accordance with paragraph 4(a) and Expenses, the Plaintiffs be paid Remuneration and Expenses

from the money held in the Segregated Accounts as at the date of their appointment as voluntary administrators on 22 June 2010 as follows:

- (a) to the extent that the Remuneration and/or Expenses are attributable to a particular Segregated Account, from that Segregated Account;
 - (b) to the extent that the Remuneration and/or Expenses are attributable to more than one Segregated Account, from each relevant Segregated Account on a pro-rata basis according to the assets of the relevant Segregated Account; and
 - (c) to the extent that the Remuneration and/or Expenses are not attributable to a particular Segregated Account, that they be payable on a pro-rata basis according to the assets of all of the Segregated Accounts.
2. Direct pursuant to s 511 of the *Corporations Act 2001* (Cth) (the Act) that, if the assets of Sonray are insufficient to pay the Remuneration and Expenses, the Plaintiffs would be justified, and would otherwise be acting reasonably, in causing the Remuneration and Expenses under paragraph 1 to be paid from the Segregated Accounts in the manner set out in paragraph 1 above.
3. The Court notes that:
- (a) any question as to whether in any case the Interim Amount exceeds the Proper Amount in respect of any Segregated Account shall only be determined by a Judge of the Court, and any application to a Registrar for the purposes of paragraph 4 below shall not, unless a Judge otherwise orders, be delayed or affected by the pendency of any application to have such a question determined;
 - (b) no application made to determine whether the Interim Amount exceeds the Proper Amount shall be brought more than 90 days after the final assessment by a Registrar of the Plaintiffs' Remuneration and/or Expenses pursuant to paragraph 4 below;
 - (c) the Plaintiffs have liberty to apply in respect of the following questions on reasonable notice to all other affected persons, including any representative party appointed by the Court pursuant to paragraph 5 below:
 - (i) to the extent that the Plaintiffs may seek that any Remuneration and Expenses which are not paid from the money held in the Segregated

Accounts as at the date of their appointment as voluntary administrators on 22 June 2010 and are not otherwise met out of the assets of Sonray, the question of whether the Plaintiffs are entitled to be paid those Remuneration and Expenses from money deposited into the Segregated Accounts after 22 June 2010 or any other funds or property;

(ii) to the extent that any remuneration and expenses are not attributable to the Segregated Accounts, and are not otherwise met out of the assets of Sonray:

(A) the question of the manner and source of the payment of such Remuneration and Expenses; and

(B) the question whether the costs and expenses of tasks undertaken by the Plaintiffs other than those identified in the definitions of Remuneration and Expenses set out below are costs and expenses that may be recoverable from the Segregated Accounts or any other funds or property.

4. Direct, for the purposes of paragraph 1 above, that:

(a) the matter be referred to a Registrar for assessment of the Plaintiffs' proper remuneration;

(b) the Plaintiffs file an Interlocutory Process seeking an order for the amount of any remuneration sought by the Plaintiffs;

(c) subject to these orders, a Registrar assess any application for remuneration lodged by the Plaintiffs as though it were an application by an Official Liquidator for approval of his or her remuneration;

(d) at least 21 days before filing the Interlocutory Process seeking the order, the Plaintiffs must serve on:

(i) any person who has notified them of an interest in, or an intention to claim against, the Segregated Accounts; and

(ii) any representative party appointed by the Court pursuant to paragraph 5 below;

The following documents:

- (A) a notice in accordance with Form 16 of the Federal Court (Corporations) Rules 2000 (Cth) amended as necessary;
 - (B) a copy of any affidavit upon which the Plaintiffs intend to rely, such affidavit containing at least the information that would be required by s 473(12) of the Act if that section applied; and
 - (C) a copy of the Orders made on this application;
- (e) a document may be served on any person by sending the document by email to that person's email address;
- (f) within 21 days after the last service of the documents mentioned in sub-paragraph (d), any interested person so served may give to the Plaintiffs a notice of objection to the remuneration claimed, stating the grounds of objection;
- (g) if the Plaintiffs do not receive a notice of objection within the period mentioned in sub-paragraph (f):
- (i) the Plaintiffs may file an affidavit, made after the end of that period, in support of the interlocutory process seeking an order stating:
 - (A) the date, or dates, when the notice, affidavit and orders required to be served under sub-paragraph (d) were served; and
 - (B) the Plaintiffs have not received any notice of objection to the remuneration claimed within the period mentioned in sub-paragraph (e);
 - (ii) the Plaintiffs may endorse the interlocutory process with a request that the application be dealt with in the absence of the public and without any attendance by the Plaintiffs; and
 - (iii) the application may be so dealt with; and
- (h) if the Plaintiffs receive a notice of objection within the period mentioned in sub-paragraph (f), the Plaintiffs must serve on each affected person so served who has given a notice of objection a copy of:

- (i) The Interlocutory Process seeking the order on each affected person so served who has given a notice of objection; and
 - (ii) any affidavit in support of the Interlocutory Process seeking the order, which must:
 - (A) state the nature of the work carried out by the Plaintiffs;
 - (B) state the amount of remuneration claimed;
 - (C) include a summary of the receipts taken and payments made in respect of the Segregated Accounts by the Plaintiffs for the period for which remuneration is claimed; and
 - (D) state particulars of any objection of which the Plaintiffs have received notice.
5. Pursuant to r 2.13(5) of the Federal Court (Corporations) Rules 2000 (Cth), Roland Ward be appointed to represent himself and all clients of Sonray claiming an entitlement to financial instruments and/or money held by Interactive Brokers LLC.
6. Roland Ward be indemnified out of the Segregated Accounts for his expenses reasonably incurred in so acting.
7. Direct that any affected person has liberty to apply to vary the orders obtained on this application within 14 days of the date on which they are made on 3 days written notice to the Plaintiffs.
8. Direct that the Plaintiffs have liberty to apply generally.

Definitions

In this Order, the following words have the following meanings:

Expenses means expenses incurred in the administration and liquidation of Sonray relating to the Segregated Accounts, including:

- (a) the ascertainment of the nature and value of the position of the assets and liabilities relevant to the Segregated Accounts;

- (b) the investigation of the financial relationship between Sonray and the Segregated Accounts;
- (c) the identification of the creditors who may claim in respect of the Segregated Accounts and any matters necessary to determine appropriate action to be taken in relation to the Segregated Accounts on behalf of Sonray including action to preserve and protect the Segregated Accounts;
- (d) identifying or attempting to identify the source of money held in the Segregated Accounts;
- (e) recovering or attempting to recover funds or other assets the proceeds of which should have been held in the Segregated Accounts on or before 22 June 2010;
- (f) protecting or attempting to protect funds or other assets the proceeds of which should have been held in the Segregated Accounts on or before 22 June 2010;
- (g) distributing funds held in the Segregated Accounts to the persons beneficially entitled to them;
- (h) identifying claims which may be brought to benefit the Segregated Accounts or reduce other claims against it, being in either case claims relating to funds or other assets which should have been held in the Segregated Accounts on or before 22 June 2010;
- (i) reviewing and dealing with claims by any person to any entitlements in respect of the Segregated Accounts;
- (j) instructing lawyers to:
 - (i) advise in relation to any of the matters referred to above; and
 - (ii) commence this application.
- (k) the Plaintiffs' costs in respect of the procedure referred to in paragraph 5 of this order;
- (l) the Plaintiffs' costs and expenses of this application on an indemnity basis.

Remuneration means such remuneration of the Liquidators as the Court will approve in respect of their administration and liquidation of Sonray relating to the Segregated Accounts including:

- (a) the ascertainment of the nature and value of the position of the assets and liabilities relevant to the Segregated Accounts;
- (b) the investigation of the financial relationship between Sonray and the Segregated Accounts;
- (c) the identification of the creditors who may claim in respect of the Segregated Accounts and any matters necessary to determine appropriate action to be taken in relation to the Segregated Accounts on behalf of Sonray including action to preserve and protect the Segregated Accounts;
- (d) identifying or attempting to identify the source of money held in the Segregated Accounts;
- (e) recovering or attempting to recover funds or other assets the proceeds of which should have been held in the Segregated Accounts on or before 22 June 2010;
- (f) realising or attempting to realise funds or other assets the proceeds of which should have been held in the Segregated Accounts on or before 22 June 2010;
- (g) protecting or attempting to protect funds or other assets the proceeds of which should have been held in the Segregated Accounts on or before 22 June 2010;
- (h) distributing funds held in the Segregated Accounts to the persons beneficially entitled to them;
- (i) identifying claims which may be brought which may directly or indirectly benefit the Segregated Accounts or reduce other claims against it, being in either case claims relating to funds or other assets which should have been held in the Segregated Accounts on or before 22 June 2010;
- (j) reviewing and dealing with claims by any person to any entitlements in respect of the Segregated Accounts; and
- (k) instructing lawyers to:
 - (i) advise in relation to any of the matters referred to above; and
 - (ii) commence this application.

Segregated Accounts means:

- (a) Australia and New Zealand Banking Group account numbers 013006-1087-85428, 120824CAD00001, 120824USD00001, 120824NZD00001, 120824JPY00001, 120824GBP00001, 120824EUR00001, 120824CHF00001;
- (b) Hong Kong Shanghai Banking Corporation account numbers 001-225333-002, 001-225333-003, 001-225333-901, 001-225333-160, 001-225333-904, 001-225333-900, 001-225333-902, 001-225333-903, 001-225333-159; and
- (c) Macquarie Cash Management Account number 961006129.

Segregated Account means:

Each individually numbered account within the Segregated Accounts.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.
The text of entered orders can be located using Federal Law Search on the Court's website.

**IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION**

VID 562 of 2010

**IN THE MATTER OF SONRAY CAPITAL MARKETS PTY LTD (IN LIQUIDATION)
ACN 104 482 993**

**GEORGE GEORGES & JOHN ROSS LINDHOLM IN THEIR
CAPACITIES AS JOINT AND SEVERAL LIQUIDATORS OF
SONRAY CAPITAL MARKETS PTY LTD (IN
LIQUIDATION)
Plaintiffs**

**JUDGE: FINKELSTEIN J
DATE: 8 DECEMBER 2010
PLACE: MELBOURNE**

REASONS FOR JUDGMENT

1 This is an application by the liquidators (1) to have their costs and expenses paid out of trust money and (2) for approval to enter into a mediation funding deed and a mediation agreement. On the costs question the case raises several important points, but as not all necessary parties are before the Court their resolution must be deferred. In the meantime interim orders for the liquidators' costs will be made. There is no reason, however, to defer dealing with the mediation agreements and they will be approved, subject to one change I will mention in a moment.

2 The liquidators, Messrs Georges and Lindholm, were initially the administrators, but became the liquidators, of Sonray Capital Markets Pty Ltd, when the company's creditors resolved that it should be wound up. Sonray held an Australian Financial Services Licence which authorised it to provide financial product advice on a range of financial products, deal in financial products, make a market for derivatives and operate custodial or depository services.

3 Sonray earned fees and commissions from providing financial product advice to its clients (it had over 6,000 clients) and by providing access to trading platforms which enabled clients to trade in financial products on both an "over the counter" basis and on various exchanges around the world. The business was conducted under two models: (a) an agency

model where Sonray brokers placed orders on behalf of clients with third party providers, which did not involve any client funds passing through accounts controlled by Sonray; and (b) a non-agency model where Sonray clients would deposit their funds into “segregated accounts” maintained by Sonray with two banks where their funds were pooled with other client funds.

4 The *Corporations Act 2001* (Cth) contains provisions that regulate the manner in which a financial services licensee must deal with clients’ money. Section 981B requires clients’ money to be paid into an account which satisfies certain requirements. It is not necessary to describe those requirements. It is sufficient to note that client money is held on trust for the clients.

5 At the present time, the liquidators hold over \$10.4 million in trust and there is another approximately \$28.3 million which is held by third parties that may also be trust money when it is received. Nonetheless, as a result of the significant mishandling of clients’ funds by Sonray officers, there is a deficiency in funds of around \$46.7 million.

6 The liquidators have incurred, and will continue to incur, significant costs referable to the preservation and administration of the trust fund. They seek to have those costs paid out of trust money. *Re Berkeley Applegate (Investment Consultants) Ltd (in liq); Harris v Conway* [1989] Ch 32 deals with such a case. The company’s business had been to act as an agent in investing funds in mortgaged properties. Its assets on the commencement of winding up consisted of money of its own, money held on behalf of individual investors in clients’ bank accounts and legal charges of property held on behalf of investors who had supplied the moneys advanced to the chargors. The company’s free assets were not sufficient to pay the liquidator’s expenses and fees. The court declared that the liquidator could fund the costs of undertaking work (which was fairly widely interpreted) for the benefit of the beneficiaries using trust assets.

7 The *Berkeley Applegate* principle has been applied in Australia: see for example *Re Application of Sutherland* (2004) 50 ACSR 297 and *Trio Capital Ltd (Admin App) v ACT Super Management Pty Ltd* (2010) 79 ACSR 425.

8 The way in which the *Berkeley Applegate* principle may be applied in this liquidation is likely to be controversial. First, a trustee owes a duty to beneficiaries to take reasonable steps to realise any claims which he/she holds in trust. Ordinarily the trustee would be entitled to be indemnified for the costs of such litigation. If, as here, the trustee has committed a breach of trust so that he/she/it is personally liable to restore the trust estate, the trustee will not be entitled to be indemnified by the trust estate for his/her/its costs until the loss is made good.

9 This suggests that the liquidators should look to Sonray's free assets to meet the costs of administering the trust. According to Mr Georges' affidavit Sonray has or may soon have free assets worth around \$2 million, out of which at least some of those costs could be paid. Whether the free assets must be spent first is one of the issues that must be investigated at a hearing at which all interested parties are represented.

10 Another issue arises because it is unclear whether clients' funds are held in a single trust fund or in several trusts. One of the beneficiaries, Mr Ward, says there are at least 18 separate trust funds held by Sonray. It is necessary to determine whether there is more than one trust because a liquidator is not entitled to charge beneficiaries of one trust with costs and expenses incurred in relation to other trusts.

11 Yet another problem is whether all clients want the liquidators to spend their (ie the clients') money pursuing potential claims. It is not beyond possibility that some clients would prefer to take what they can get now and not risk spending more of their money chasing what may be complex claims. Put more colloquially, for some clients a bird in the hand is worth more than two in the bush. This is plainly a matter which the liquidators will need to keep under consideration.

12 The liquidators seek orders that to the extent Sonray's assets are insufficient to meet the liquidators' costs, they should be assessed by a registrar and, to the extent they are attributable to a particular account, be taken from that account, to the extent that they are attributable to more than one account, they be taken from those accounts on a pro rata basis according to the assets of the relevant account and to the extent they are not attributable to any particular account, they are to be payable on a pro rata basis according to the assets of all the accounts. These orders cannot be made until the several issues I have mentioned, and

perhaps others, have been resolved. Nonetheless, as an interim solution (ie a solution pending resolution of the issues which will affect the costs claim) I indicated I would make the orders sought provided the liquidators undertook to repay such amount as may hereafter be determined they were not entitled to receive. The liquidators are content to proceed on that basis.

13 The interim orders will make clear the precise work for which the liquidators are to be paid. The liquidators will not be permitted to recover any general liquidation expenses from the trust money.

14 This brings me to the mediation agreements. Mr Martindale SC, who appeared for the liquidators, explained the background of the agreements in the following way. The liquidators have identified a number of potential claims against third parties including Saxo Bank A/S, Interactive Brokers LLP, HLB Mann Judd and their insurers, PricewaterhouseCoopers, Russell Johnson, Scott Murray, significant clients and possibly others. They have discussed those claims with Saxo and its solicitors. Either the liquidators or Saxo's solicitors (it is unclear which person) raised the possibility of an early mediation involving Saxo and the other third parties.

15 The liquidators are in no position to consider a settlement of potential claims. To this point they have conducted only preliminary investigations regarding the merits of potential claims against third parties. Further investigations are required.

16 Saxo understands this and has offered to provide the liquidators with a limited recourse loan in the sum of \$500,000 for the purposes of enabling the liquidators to conduct further investigations and then to prepare for the mediation.

17 The liquidators take the view that entering into the mediation funding agreement and thereby getting their hands on \$500,000 is in the best interests of Sonray's creditors (including, of course, its former clients) as access to the funds will enable them to complete their investigations and participate in the proposed mediation to explore a settlement which may maximise the return to creditors.

18 I have indicated that the two agreements will be approved with one change. But I should make it plain that I have misgivings about the appropriateness of what is occurring here. It is, however, an issue that can appropriately be dealt with at the point, if it ever comes to the point, of approving any compromise which may be reached as a result of the mediation process. Nevertheless, it would, I think, be helpful for me to explain the basis of my concerns.

19 In my experience it is, to say the least, highly unusual for A to fund B's investigation into A's conduct so that B is in a position where it can compromise any claim it may have against A. Saxo may be motivated to fund an investigation into itself by one of a number of different considerations. For example, it may realise that it has committed a compensable wrong and it may wish to make good the losses it has caused with a minimum of publicity and at a minimum cost. If that is its motivation it is a highly laudable one. Another possibility is that Saxo believes the liquidators will not be able to conduct a thorough investigation of potential claims with the \$500,000 that has been put on the table and, as a consequence, at an early mediation Saxo will be able to achieve a more satisfactory compromise than would otherwise be the case. A third possibility, which is really an aspect of the second, is that Saxo hopes to reach a compromise before action and thus avoid the obligation of formally articulating a defence to any claim and also avoiding what would be quite onerous discovery obligations.

20 My concerns are not merely idle. Mediation, and particularly early mediation, has several well understood deficiencies. One of those deficiencies is the imbalance of information. A settlement based on asymmetric information will likely result in justice not being done.

21 For these reasons the liquidators will need to be very careful to avoid a settlement with Saxo (or any third party) in circumstances where they do not have sufficient information with which to make a prudent decision about the appropriateness of the compromise. They are, after all, embarking upon a process of settling claims which are held on trust for beneficiaries. In the unusual circumstances of this case, if there be any settlement achieved which, necessarily, will be subject to court approval, that approval may not be forthcoming if the settlement is not supported by a significant majority of the beneficiaries. At the approval application the liquidators may, in any event, be required to tender the advice of counsel on

the merits of the proposed settlement. But, as I have said, these are matters that are best dealt with if it becomes necessary to do so.

22 The last matter to mention is the change I think ought to be made to the mediation agreement. Mediations attract what is usually referred to as “without prejudice” privilege. This privilege prevents a party to a mediation tendering into evidence in subsequent proceedings any communications in relation to the mediation or any documents prepared for the purposes of the mediation. In some jurisdictions the rules have been legislated: see eg *Evidence Act 1995* (Cth), s 131(1).

23 By its very nature the privilege is very limited. Parties are, however, entitled by agreement to broaden its scope: *789TEN v Westpac Banking Corp* [2004] NSWSC 594. That is what Saxo seeks to do. In its current form the mediation agreement requires Sonray and its lawyers to undertake not to make any use of any information obtained during the mediation process. This could constitute a significant restraint on Sonray and its lawyers’ freedom to act. It is not beyond possibility that, dependent upon what happens at the mediation, Saxo might seek to restrain Sonray from commencing litigation against it or to restrain Sonray’s current lawyers from continuing to act on Sonray’s behalf in any action. That possibility arises if it were to be impossible for Sonray or its lawyers to keep separate pre-mediation knowledge of the facts that support potential claims and knowledge obtained during the mediation.

24 No rational person with equal bargaining power would agree to a provision which could have that effect. I think that the liquidators should not agree to it either. Thus I will approve the mediation agreements, but only on the condition that the non-use clause is removed or substantially rewritten.

25 It will be necessary for the liquidators to provide me with a further draft of the mediation agreement. If it is in order I will grant the requisite approval in chambers. In the meantime I will make orders dealing with the costs in accordance with the minutes now proposed by the liquidators.

26

The liquidators' costs to date of this application will be in the liquidation.

I certify that the preceding twenty-six (26) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Finkelstein.

Associate: 

Dated: 8 December 2010

