

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.

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VICTORIA DISTRICT REGISTRY
GENERAL DIVISION**

VID 562 of 2010

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

