



Neutral Citation Number: [2019] EWHC 2018 (Ch)

Case No: HC-2017-002679

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
IN THE MATTER OF TOTAL DEBT RELIEF LIMITED (IN LIQUIDATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Rolls Building
Fetter Lane
London EC4A 1NL

Date: 1 August 2019

Before :

HIS HONOUR JUDGE MONTY QC
sitting as a High Court Judge

Between :

STEPHEN JOHN HUNT

**(as Liquidator of Total Debt Relief Limited
(in Liquidation))**

Applicant

- and -

THE FINANCIAL CONDUCT AUTHORITY

**Interested
Party**

Mr Daniel Lewis (instructed by Moon Beaver Solicitors) for the **Applicant**
The Interested Party did not appear and was not represented

Hearing date: 18 July 2019

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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His Honour Judge Monty QC

HHJ Monty QC:

1. On 11 September 2018, on the application of the Financial Conduct Authority (“the FCA”), the Applicant was appointed provisional liquidator of Total Debt Relief Limited (“the Company”).
2. The Company was a debt management firm whose business was to advise individuals on how to resolve their financial problems. One of the methods was a debt management plan between the Company and the client, with the client making a monthly payment to the Company and the Company in turn paying an amount to the client’s creditors, with the balance being placed into a pool of payments so that a full and final settlement could be negotiated. The discovery that the pool money had been misappropriated and transferred from the jurisdiction into the accounts of two connected companies in the USA led to the FCA’s application.
3. On 12 September 2018, the Applicant obtained a freezing order against the Company’s directors and the recipients of the monies. The freezing order was continued on 26 September 2018.
4. On 31 October 2018, the Company was wound up and on 7 November 2018 the Applicant was appointed liquidator.
5. The Applicant seeks an order (a) approving a Distribution Plan, having recovered some but not all of the clients’ funds, so that he can make an interim distribution of those recovered funds, and (b) approving the remuneration, costs and expenses in respect of the work undertaken in effecting that recovery.
6. The Applicant was represented by Mr Daniel Lewis of counsel, to whom I am grateful for his detailed submissions. The FCA was not represented but has written to the court stating that it neither consented to nor opposed the application and that in the circumstances it would not attend the hearing.
7. The FCA’s Client Asset Rules (CASS) which apply here, as the Company is a debt management firm, are those in CASS Chapter 11 (“Debt management client money chapter”). The appointment of the Applicant was a “failure of a CASS debt management firm”, and thus a “primary pooling event” under CASS 11.13.3 R (1). The effect is that all client money is pooled together to form a notional pool, and the firm must calculate the amount that it should be holding on behalf of each individual client: CASS 11.13.4 R (2). The firm “must distribute client money comprising the notional pool so that each client receives a sum that is rateable to their entitlement to the notional pool calculated in CASS 11.13.4 R (2).
8. A CASS debt management firm receives and holds client money as trustee: CASS 11.6.1. That Rule sets out the terms of that trust:
 - (1) For the purposes and on the terms of the debt management client money rules and the debt management client money distribution rules;
 - (2) Subject to (3), for the clients for whom that money is held, according to their respective interests in it;
 - (3) On failure of the CASS debt management firm, for the payment of the costs properly attributable to the distribution of the client money in accordance with (2); and

- (4) After all valid claims and costs under (2) and (3) have been met, for the CASS debt management firm itself.
9. The Guidance at CASS 11.6.2 G states:
- “The consequence of this rule is there is a fiduciary relationship between a CASS debt management firm and its client, under which client money is in the legal ownership of the firm but remains in the beneficial ownership of the client. In the event of failure of the CASS debt management firm, costs relating to the distribution of client money may have to be borne by the trust.”
10. The court has an inherent jurisdiction to give directions to trustees to distribute trust property on particular bases when the court is satisfied it is just and expedient to do so: *MF Global UK Ltd (in special administration) (No 3)* [2013] 1 WLR 3874 per David Richards J at [26]. This extends to distribution notwithstanding the existence of claims or potential claims of third parties [30]. This was also the approach followed in *Worldspreads Limited (in special administration)* [2015] EWHC 1719 (Ch), and in my judgment, it is the approach I should take here.
11. In *MF Global*, all the claimants known to the special administrators had been notified of the application to the court, which has not happened in the present case. However, the amount involved is smaller, and as the Applicant has explained in his evidence before the court, the creditors (and there were 468 clients of the Company) have been notified in general terms of what is being sought, and the Distribution Plan provides for further notification to be given. Further, as indicated, the FCA has taken a neutral stance in relation to the application. I respectfully adopt what was said by Birss J in *Worldspreads* at [25] and accept Mr Lewis’s submission that it was not necessary for formal notification to have been given to all of the creditors.
12. On 26 September 2018, Birss J made an order in the following terms:
- “The Applicant shall:
- a. be entitled to be paid out of the Recovered Funds (as defined below) the remuneration, costs and expenses incurred for the purpose of enabling a distribution to be made to the Company’s customers and the costs of making such a distribution, in accordance with CASS 11.6.1 R(2) subject to the Court’s approval as to the amount of remuneration, costs and expenses in accordance with sub-paragraph 1(b) below;
 - b. present his accounts and claims for remuneration, costs and expenses to the Court for review and approval when applying for approval of his plan for distribution to the Company’s customers; and
 - c. be entitled to be reimbursed from the Recovered Funds up to a limit of £10,000 for the court fees and other administrative expenses that have been and will be incurred in recovering and administering the Recovered Funds.
- “Recovered Funds” means the monies recovered by the Applicant as provisional liquidator (and liquidator, if applicable) representing either the Company’s money or money held on trust for the Company’s clients.”
13. As Mr Lewis submits, the proposed Distribution Plan has the following features (and the following is taken from Mr Lewis’s skeleton argument):
- (1) The client funds which should have been held by the Company on trust for its clients are to be pooled;

- (2) The Applicant will set a date by which clients are required to notify him of their claims ('the Bar Date');
 - (3) After the Bar Date, the Applicant will have the power to notify and pay an interim distribution and to pay the Court approved costs and expenses;
 - (4) There is an appeal procedure where the Applicant has rejected a Client Trust Monies Claim in whole or in part and the client is dissatisfied with the decision, and providing for the Applicant's decision to become binding where such an application is not brought within 28 days of the decision;
 - (5) The Applicant may make a further proposed distribution if there are additional recoveries in respect of the trust funds;
 - (6) The Distribution Plan preserves the clients' right to prove in the liquidation (which will apply where the recovered Pooled Funds have been insufficient to meet a client's claim in full).
14. I accept Mr Lewis's submission that the proposed Distribution Plan provides a fair method for ascertaining clients' claims and achieving a rateable distribution according to each client's entitlement, and that it complies with CASS 11.13, which requires that (1) the client trust money is placed in a notional pool, (2) the amount held on behalf of each individual client at the pooling date is calculated; and (3) each client receives a sum that is rateable to their entitlement to the notional pool.
15. I also note that the proposed Distribution Plan is similar to those adopted in *Worldspreads* and *MF Global*.
16. The proposed Distribution Plan is therefore approved. It appears as Annex A to this judgment and to the Order which I have made.
17. I turn now to the question of the remuneration, costs and expenses. The Order of Birss J of 26 September 2018 (see paragraph 12 above) means that the entitlement to such an order has been decided. The issue today is whether to approve the amounts sought, or whether approval should be given in some other amount.
18. I have taken into account the following.
19. First, the judgment of the Court of Appeal in *Brook v Reed – Practice Note* [2012] 1 WLR 419. In that case, which set out the principles to be applied by the court when fixing or approving the remuneration of a trustee in bankruptcy, and which reviewed a number of cases as well as the Insolvency Rules and the *Practice Statement: The Fixing and Approval of the Remuneration of Appointees* [2004] BCC 912, it was held as follows:
- (1) The aim is to reward the value of the services rendered by the office holder. This does not necessarily equate to time spent. Remuneration rewards value, not to indemnify against cost. Time spent is only one of the relevant factors. All the circumstances must be taken into account.
 - (2) Sufficiently full information is needed to enable the court to take a clear view of what has been done or will be done and of the value protected for the creditors.
 - (3) The principles set out in the *Practice Statement* should be followed, and these are set out at [35] of the judgment.

- (4) The real task is to balance these principles in their application to the facts and circumstances of the case: see also *Simion v Brown* [2007] BPIR 412 at [27].
20. Secondly, the Practice Direction – Insolvency Proceedings Part 6, which is in terms similar to those of the *Practice Statement*, and sets out the following guiding principles:
- 21.2. The guiding principles which follow are intended to assist in achieving the objective:
- (1) “Justification”. It is for the office-holder who seeks to be remunerated at a particular level and / or in a particular manner to justify their claim. They are responsible for preparing and providing full particulars of the basis for, and the nature of, their claim for remuneration.
 - (2) “The benefit of the doubt”. The corollary of the “justification” principle is that if after having regard to the evidence and guiding principles there remains any doubt as to the appropriateness, fairness or reasonableness of the remuneration sought or to be fixed (whether arising from a lack of particularity as to the basis for and the nature of the office-holder’s claim to remuneration or otherwise), such element of doubt should be resolved by the Court against the office-holder.
 - (3) “Professional integrity”. The Court should (where this is the case) give weight to the fact that the office-holder is a member of a regulated profession and as such is subject to rules and guidance as to professional conduct and the fact that (where this is the case) the office-holder is an officer of the Court.
 - (4) “The value of the service rendered”. The remuneration of an office-holder should reflect the value of the service rendered by the office-holder, not simply reimburse the office-holder in respect of time expended and cost incurred.
 - (5) “Fair and reasonable”. The amount and basis of the office-holder’s remuneration should represent fair and reasonable remuneration for the work properly undertaken or to be undertaken.
 - (6) “Proportionality of information”. In considering the nature and extent of the information which should be provided by an office-holder in respect of a remuneration application to the Court, the office-holder and any other parties to the application shall have regard to what is proportionate by reference to the amount of remuneration to be fixed, the nature, complexity and extent of the work to be completed (where the application relates to future remuneration) or that has been completed by the office-holder and the value and nature of the assets and liabilities with which the office-holder will have to deal or has had to deal.
 - (7) “Proportionality of remuneration”. The amount and basis of remuneration to be fixed by the Court should be proportionate to the nature, complexity and extent of the work to be completed (where the application relates to future remuneration) or that has been completed by the office-holder and the value and nature of the assets and/or potential assets and the liabilities and/or potential liabilities with which the office-holder will have to deal or has had to deal, the nature and degree of the responsibility to which the office-holder has been subject in any given case, the nature and extent of the risk (if any) assumed by

the office-holder and the efficiency (in respect of both time and cost) with which the office-holder has completed the work undertaken.

(8) “Professional guidance”. In respect of an application for the fixing and approval of the amount and/or basis of the remuneration, the office-holder may have regard to the relevant and current statements of practice promulgated by any relevant regulatory and professional bodies in relation to the fixing of the remuneration of an office-holder. In considering a remuneration application, the Court may also have regard to such statements of practice and the extent of compliance with such statements of practice by the office-holder.

(9) “Timing of application”. The Court will take into account whether any application should have been made earlier and if so the reasons for any delay.

21. In the present case, the costs are claimed in respect of four phases of work, and in respect of the remuneration or costs of the Applicant as provisional liquidator/liquidator, the Applicant’s English solicitors, Counsel and US lawyers.
22. The witness statements of the Applicant set out in great detail the work which has been done, and the hours spent on each of the phases.
23. I am satisfied on the Applicant’s evidence as to the following matters:
 - (1) The hourly rate is appropriate. I accept the Applicant’s evidence that his rates are a commercial rate, comparable with firms of similar size and location, and reflect the experience of his firm and his team.
 - (2) There has been no duplication of effort on the part of the members of the Applicant’s team.
 - (3) The work done was necessary and appropriate.
 - (4) This was and remains a complex case in which the Applicant had to act quickly.
 - (5) There has been considerable success in recovering funds, and there is more work to do.
24. I also take into account:
 - (1) The urgency of the work required from the outset. The Applicant was appointed without any prior knowledge of the Company of its affairs, and had to investigate and take action quickly.
 - (2) The complexity of the issues. The Applicant had to identify where the money had gone, and any onward payments, in respect of 468 clients. The Applicant had to apply for and obtain a freezing order. Proceedings had to be commenced in New York and lawyers in the UK and in the US had to be retained. The proceedings in New York were protracted and led to contempt proceedings because the directors of the Company were less than forthcoming. A significant degree of partner and senior management input was required.
 - (3) The amount of work done. This included (a) attempts to recover the outstanding books and records of the Company, (b) a review of the available records to reconcile client claims with the information in the records, (c) liaising with clients and setting up a process for reconciling claims with records, (d) undertaking Chapter 15 proceedings in New York

to secure the Company's books and records and to secure client funds which had been transferred out of this jurisdiction to New York, (e) interviewing officers of the Company and other relevant individuals, (f) analysing the material in support of proposed claims, and (g) arranging for the clearing and disposal of office fixtures and fittings, and (h) obtaining a freezing order. The full extent of the work done is set out in the Applicant's witness evidence.

- (4) The need to pursue other proceedings, in particular the Chapter 15 proceedings and tracing claims. Again, this is dealt with in the Applicant's witness evidence. The lawyers in New York have been working on a deferred payment basis.
25. Further, I accept Mr Lewis's submission that the costs now are a snapshot of the position as it presently is, and that this is in effect the low water mark in terms of recovery versus cost. There is, as the Applicant says, an intention to pursue other claims very shortly.
26. I also accept that it was proper for the Applicant to enter into Conditional Fee Agreements with the UK solicitors, and with counsel. Both CFAs refer to a 65% uplift, which in my view is reasonable. I do not need to decide whether under those CFAs "success" has been achieved for the purposes of the uplift being payable.
27. For all of these reasons, and taking into account the matters I have set out at paragraphs 19 and 20 above, the remuneration, costs and expenses are approved as set out in Annex B to this judgment and to my order.

(End of judgment)

ANNEX A

APPROVED DISTRIBUTION PLAN

1. Mr Stephen Hunt (“**the Liquidator**”), the liquidator of Total Debt Relief Limited (in liquidation) (“**the Company**”) shall act in accordance with this Distribution Plan solely as agent of the Company in its capacity as trustee of the funds held on trust at the time of his appointment as provisional liquidator (“**the Pooled Funds**”), and nothing in this order or in determining Client Trust Monies Claims (as defined below) or in distributing the Pooled Funds in accordance with this Distribution Plan shall result in the Liquidator assuming personal liability as trustee.
2. The Liquidator is subject to the CASS rules at 11.13 and responsible for the distribution of Pooled Funds to clients of the Company (“**the Clients**” or where referred to individually “**the Client**”)
 - 2.1. The pooling event occurred at 14.55 hours on 11th September 2018.
 - 2.2. Any claim by the Clients against Pooled Funds is referred to below as “**Client Trust Monies Claims**”.
 - 2.3. Until such time as otherwise declared not to be funds held on trust, all sums up to the value of the funds that should have been held on trust for the Clients are to be considered Pooled Funds, whether or not they were held within the bank accounts of the Company at 14.55 hours on 11 September 2018. Any such funds held other than in the bank accounts operated by the Company under the CASS rules are only Pooled Funds if they can be traced back to the bank accounts operated by the Company that were subject to the CASS rules.
3. The liquidator be at liberty to:-
 - 3.1. Set a date by which any un-notified Client Trust Monies Claims must be notified to him (“**the Bar Date**”);
 - 3.2. Correspond by email on at least one more occasion with Clients who have not submitted a Client Trust Monies Claim to notify them individually of the Bar Date.
4. After the Bar Date the Liquidator be at liberty to:-
 - 4.1. Make provision from the Pooled Funds recovered at the close of business on the Bar Date for the remuneration, costs and expenses properly to be paid from that trust (“**the Approved Costs**”) pursuant to para. 1(a) of the order of Mr Justice Birss dated 26 September 2018 and paras. 1 and 2 of the order of His Honour Judge Monty QC dated 18 July 2019 (“**the July Order**”). Such provision to be subject to para. 3 of the July Order by which the Liquidator has liberty to make a further application in the event of further recoveries of Pooled Funds.
 - 4.2. Calculate an interim distribution on a *pari passu* basis where there remains a shortfall in the recovered funds and after allowing for the Approved Costs.
 - 4.3. Notify clients of the proposed distribution.
 - 4.4. Notify the FCA of the proposed distribution.
 - 4.5. Pay an interim distribution but maintain a provision for those clients who do not agree with the amount notified.

- 4.6. Take any necessary steps to seek to agree disputed Client Trust Monies Claims and pay those clients when all reasonable steps have been taken to verify their claims as follows:
 - 4.6.1. To deliver a copy of the July Order and this Distribution Plan to any Client and highlight paras. 4.6.2 to 4.6.4 below when the Liquidator notifies any client that a Client Trust Monies Claim has been rejected in whole or part.
 - 4.6.2. Any Client who is dissatisfied with the decision reached by the Liquidator on their claim and the proposed distribution has liberty to apply to the court within 28 days of the date of the decision of the Liquidator for the decision to be reversed or varied.
 - 4.6.3. Any Client whose Client Trust Monies Claim is rejected in whole and notified of that fact and who fails to file an application to the court within 28 days of the decision by the Liquidator shall no longer be entitled to any distribution of Pooled Funds.
 - 4.6.4. Any Client whose Client Trust Monies Claim is rejected in part and fails to file an application to the court within 28 days of the decision by the Liquidator in respect of that rejected part of the Client Trust Monies Claim shall no longer be entitled to any distribution of Pooled Funds in respect of that rejected part.
5. If the Liquidator succeeds in making additional recoveries from directly traceable dissipations from the Company of Pooled Funds to the ascertained total sum of Pooled Funds that ought to have been held within the client bank accounts operated by the company and subject to CASS rules at 14.55 hours on 11 September 2018, the Liquidator be at liberty to:-
 - 5.1. Make a further provision for the remuneration, costs and expenses incurred in recovery of those funds and to make an application to the court for such payment towards the remuneration, costs and expenses as the court determines.
 - 5.2. Declare a further proposed distribution from the Pooled Funds.
 - 5.3. Notify the FCA of the proposed further and final distribution.
 - 5.4. Pay a final distribution *pari passu* of Pooled Funds no earlier than 28 days after the declaration is notified to clients.
6. Nothing in this order shall prejudice any right of a client to prove for a proper claim in the liquidation as an unsecured creditor.

ANNEX B

APPROVED REMUNERATION, COSTS AND EXPENSES

Phase	Liquidator	Moon Beever (English solicitors)	Daniel Lewis (Counsel)	Mayerson & Hartheimer PLLC (US lawyers)
<u>Provisional liquidation</u> 7 September 2018 to 16 November 2018	£130,390.67	£102,699.50 £66,735.18 (Uplift)	£22,893.75 (inc Uplift)	US\$70,559.52
<u>Liquidation</u> 7 November 2018 to 11 April 2019	£216,510.29	£157,383.75 £102,229.44 (Uplift)	-	US\$57,611.90
<u>Liquidation</u> 12 April 2019 to 16 July 2019	£76,192.82	£70,365.00 £45,737.25 (Uplift)	£9,750 (inc Uplift)	US\$129,660.86
<u>Implementation of Distribution Plan (estimate)</u>	£50,115.00	-	-	-
<u>TOTALS</u>	<u>£473,208.78</u>	<u>£330,448.25</u> <u>£214,701.87</u> <u>(Uplift)</u>	<u>£32,643.75</u> (inc Uplift)	<u>US\$257,832.28</u>

(All figures are ex-VAT).