

SUPREME COURT OF QUEENSLAND

CITATION: *Re Health Reimagined Ltd (in liq)* [2020] QSC 220

PARTIES: **TODD WILLIAM KELLY**
(applicant)
v
HEALTH REIMAGINED LTD ACN 158 150 513 (in liquidation)
(respondent)

FILE NO/S: SC No 233 of 2020

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Cairns

DELIVERED EX TEMPORE ON: 13 May 2020

DELIVERED AT: Cairns

HEARING DATE: 13 May 2020

JUDGE: Henry J

ORDER:

- 1. The applicant liquidator would be justified in distributing the whole of the surplus funds in the winding up of Health Reimagined Ltd ACN 158 150 513 (in liquidation) to Arafmi Ltd (ACN 626 426 668).**
- 2. The requirements of regulation 5.6.71 of the *Corporations Regulations* be dispensed with.**
- 3. The applicant's non-compliance with rules 9.2(2) and 9.2(3) of the *Corporations Proceedings Rules* be excused.**
- 4. That the liquidators remuneration (excluding outlays) for the period 5 August 2019 to 3 April 2020 be determined in the sum of \$10,428.74 (excluding GST).**
- 5. That those outlays of the applicant that may have a profit element, be approved in the sum of \$349.00 (excluding GST) for the period to 3 April 2020.**
- 6. That the liquidators remuneration (excluding outlays) for the period 4 April 2020 to finalisation of the liquidation be approved in a sum not exceeding \$6,750.00 (excluding GST).**

7. That those outlays of the applicant that may have a profit element, be approved in a sum not exceeding \$350.00 (excluding GST) for the period 4 April 2020 to finalisation of the liquidation.

CATCHWORDS: CORPORATIONS – WINDING UP – CONDUCT AND INCIDENTS OF WINDING UP – APPLICATIONS TO COURT FOR DIRECTIONS OR ADVICE – where the liquidator has satisfied all proved claims and controls a surplus fund – where the liquidator seeks orders that it would be justified in distributing the surplus to another company, Arafmi Ltd, with similar objects to Health Reimagined Ltd – where Health Reimagined Ltd’s constitution precludes a distribution to members and requires distribution to another fund, authority or institution with similar objects – where the applicant liquidator also seeks orders fixing his remuneration – whether leave of the court is required before distributing a surplus – whether the liquidator would be justified in distributing the surplus to another company

Corporations Act 2001 (Cth), s 488, s 501, sch 2 s 90-15, sch 2 s 60-10, sch 2 s 60-12

Corporations Regulations 2001 (Cth), reg 5.6.71

Uniform Civil Procedure Rules 1999 (Qld), sch 1A r 7.9

Cadman v Aborigines and Islanders Alcohol Relief Service Ltd [2018] QSC 72, followed

Weston (Liquidator), in the matter of Leetong Proprietary Limited (in liq) [2020] FCA 372, followed

Yanoee Proprietary Limited (in liq) [2006] NSWSC 705; (2006) 24 ACLC 1087, followed

COUNSEL: T McGrath (*sol*) for the applicant

SOLICITORS: Miller Harris Lawyers for the applicant

HIS HONOUR: The applicant liquidator was appointed in the voluntary winding up of Health Reimagined Ltd on 29 March 2019. Since then, the liquidator has satisfied all proved creditors’ claims and is in the happy position of controlling surplus funds. He now seeks orders under the *Corporations Act 2001* pertaining to the distribution of the surplus and the fixing of his remuneration.

The requirement in s 488 of the Act for the court’s leave to distribute a surplus only applies to winding up in insolvency or by the court. For voluntary winding ups, the manner of distribution of a surplus can be determined without reference to the court per s 501 which provides it must, unless the company’s constitution otherwise provides, be distributed among the members according to their rights and interests in the company.

However, the application of s 501 in a particular case may still be attended by such factual uncertainty that it is prudent for the liquidator to seek the court's guidance before distributing a surplus. This the liquidator may do, as the present liquidator does, by s 90-15 of the Act's sch 2, the *Insolvency Practice Schedule (Corporations)*.
 5 That provision confers broad power upon the court to make such orders as it thinks fit in relation to the external administration of a company.

The relevant orders initially sought were an order that the applicant liquidator would be justified in distributing the whole of the surplus funds in the winding up to Arafmi Limited or in the alternative an order giving the court's leave so to do. As I have just explained of the apparent construction of ss 488 and 501, leave in the present case is not required. I am fortified in that conclusion by the similar conclusions reached, for example, in *Yanoe Proprietary Limited (in liq)* [2006] NSWSC 705, [9] and *Weston (Liquidator), in the matter of Leetong Proprietary Limited (in liq)* [2020] FCA 372,
 10 [73].
 15

Moving then to the application of s 501, one component of the uncertainty attending this case is that, of the four potential creditors identified, only one lodged a proof of debt. It has been paid its claim and statutory interest. Another potential creditor confirmed a debt was not presently owed. Despite repeated invitations, the remaining potential creditors (see exhibit TWK to the liquidator's affidavit), which are substantial corporations, have not submitted proofs of debt in the administration.
 20

The liquidator has met the requirements of rule 7.9 of sch 1A of the *Uniform Civil Procedure Rules 1999* pertaining to his affidavit and the advertising of notice of his application, as if his application were an application for leave to distribute a surplus. No potential creditor or indeed anyone appears to resist the application. The evidence clearly shows a surplus remains. I am satisfied the liquidator can do no more and is entitled to proceed to distribute the surplus on the basis the company's liabilities have been met. After satisfying the cost of the liquidation, that surplus will be in the order of about \$89,000.
 25
 30

Returning to the other topic of uncertainty in applying s 501, being satisfied that the company's liabilities have been met the next issue is whether the company's constitution provides for distribution other than among members proportionately to their rights and interests. It does. In the present situation, the constitution's clause 6.2(a) precludes a distribution to members. Clause 6.2 continues:
 35

“(b) property referred to in rule 6.2(a) must be given to another fund, authority or institution:

- 40 (i) with objects similar to the objects of the Company;
 and
 (ii) with a prohibition on distribution of its income and property among its Members to an extent at least as great as is imposed on the Company under this
 45 Constitution.

- (c) the fund, authority or institution to receive property under rule 6.2(b) must be decided by ordinary resolution of the Board at or before the time of winding up or dissolution.”

5 On 25 March 2019, the directors resolved, pursuant to clause 6.2(c) to distribute any
surplus to what was described in the resolution as “Arafmi Queensland”. I agree
with the liquidator’s understanding that this was a reference to Arafmi Limited. I am
fortified in that conclusion by the fact that its benevolent objects are similar to those
of Health Reimagined Limited and it has a commensurate prohibition on the
10 distribution of income to members. In the circumstances, I conclude the liquidator
would be justified in distributing the whole of the surplus to Arafmi Limited. The
proposed draft order reflects that.

I record for completeness that compliance with reg 5.6.71 of the *Corporations
15 Regulations 2001* should be dispensed with. As I concluded in *Cadman v Aborigines
and Islanders Alcohol Relief Service Ltd* [2018] QSC 72, [15], the requirement of an
annexure to the orders of a form 551 schedule is not apt to cases in which the surplus
distribution is not to members.

20 Turning finally to determination of remuneration, there has been no recent cause to
convene a meeting of members and it is thus convenient that the court, as the body
alternatively empowered pursuant to s 60-10(2) of the *Insolvency Practice Schedule*,
determine remuneration. The unmet notice requirements of *Uniform Civil Procedure
Rules*, sch 1A, rule 9.2 need not be complied with in the circumstances of this case;
25 although they have been met to an extent in any event. The content of the
liquidator’s remuneration and work in progress reports is unremarkable. Having
regard to the matters listed in s 60-12 of the *Insolvency Practice Schedule* and the
professional opinion on the topic before me, I am satisfied the remuneration in the
proposed draft order is reasonable.

30 I order as per the proposed draft order signed by me and placed with the papers.