FEDERAL COURT OF AUSTRALIA

Kelly, in the matter of Halifax Investment Services Pty Ltd (in liquidation) (No 8)

[2020] FCA 533

File number:	NSD 2191 of 2018
Judge:	**GLEESON J**
Date of judgment:	23 April 2020
Catchwords:	**INSOLVENCY –** application by liquidator for judicial advice under s 63(1) of the *Trustee Act 1925* (NSW) or directions under s 90-15 of Div 90 of Sch 2 (*Insolvency Practice Schedule (Corporations*) to the *Corporations Act 2001* (Cth) –whether liquidators are justified in refraining from realising investments until the determination of all substantive issues in the proceedings – not appropriate to give judicial advice under s 63(1) of *Trustee Act 1925* (NSW) where competing claims to trust funds – whether appropriate to give direction– where issue on which direction sought a decision about the proper or reasonable administration of trust property the subject of competing claims which could give rise to the prospect of claims against the liquidators – application for direction granted
Legislation:	*Corporations Act 2001* (Cth) ss 479 and 511, Pt 7.8 Div 2, Sch 2, *Insolvency Practice Schedule (Corporations)* s 90-15 *Federal Court Rules 2011* Pt 30 *Trustee Act 1925* (NSW) s 63
Cases cited:	*Ample Source International Limited v Bonython Metals Group Pty Limited (in liquidation), in the matter of Bonython Metals Group Pty Limited (in liquidation) (No 8)* [2018] FCA 1614 *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth* [2019] HCA 20 *City of Swan v Lehman Bros Australia Ltd* [2009] FCA 784 *In re MF Global Australia Ltd (in liquidation)* [2012] NSWSC 994; (2012) 267 FLR 27 *In the matter of Ian James Purchas as Liquidator of Astarra Asset Management Pty Ltd (in liquidation)* [2011] NSWSC 91 *In the matter of MF Global Australia Limited (in liquidation)* [2012] NSWSC 1524

	Kelly, in the matter of Halifax Investment Services Pty Ltd (in liquidation) (No 7) [2020] FCA 248 *Kerr, in the matter of Octaviar Limited (in liquidation)* [2019] FCA 1614; (2019) 139 ACSR 192 *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of The Macedonian Orthodox Diocese of Australia and New Zealand* [2008] HCA 42; (2008) 237 CLR 66 *Marley v Mutual Security Merchant Bank & Trust Co Ltd* [1991] 3 All ER 198 *Re Corporations Law; v Addstone Pty Ltd (in liquidation) & Ors* [1997] FCA 1043; (1997) 25 ACSR 357 *Re KSK Holdings (Australia) Pty Ltd (in liquidation)* [2019] NSWSC 1463 *Re One.Tel Ltd and Ors* [2014] NSWSC 457; (2014) 99 ACSR 247 *S & D International & Anor v MIG Property Services & Ors* [2010] VSC 336; (2010) 79 ACSR 373
Date of hearing:	3 April 2020
Registry:	New South Wales
Division:	General Division
National Practice Area:	Commercial and Corporations
Sub-area:	Corporations and Corporate Insolvency
Category:	Catchwords
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ORDERS

NSD 2191 of 2018

IN THE MATTER OF HALIFAX INVESTMENT SERVICES PTY LTD (IN LIQUIDATION) (ACN 096 980 522)

BETWEEN:	**MORGAN JOHN KELLY AND PHILIP ALEXANDER QUINLAN AS JOINT AND SEVERAL LIQUIDATORS OF HALIFAX INVESTMENT SERVICES PTY LTD (IN LIQUIDATION) (ACN 096 980 522)** First and Second Plaintiffs
	HALIFAX INVESTMENT SERVICES PTY LIMITED (IN LIQUIDATION) (ACN 096 980 522) Third Plaintiff
AND:	**CHOO BOON LOO** First Defendant
	ELYSIUM BUSINESS SYSTEMS PTY LTD (ACN 110 669 282) Second Defendant
	JASON PAUL HINGSTON (and another named in the Schedule) Third Defendant

JUDGE:	**GLEESON J**
DATE OF ORDER:	**23 APRIL 2020**

THE COURT DIRECTS THAT:

1. Pursuant to s 90-15 of the *Insolvency Practice Schedule (Corporations),* Schedule 2 to the *Corporations Act 2001* (Cth), the first and second plaintiffs are justified in refraining from:

   (a) realising any and all extant investments until the determination of all substantive issues in this proceeding and in *In the matter of Halifax New Zealand Limited* (In Liquidation) CIV-019-404029149; and

   (b) applying to the Court for directions to the effect that realisation of all extant investments should proceed as soon as practicable, in advance of the final hearing of the proceeding.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

GLEESON J:

1 This judgment concerns the question whether the first and second plaintiffs (**liquidators**) should "close out" extant investments held on behalf of investors in advance of the determination of several substantive issues affecting the distribution of funds or investments comprising a "deficient mixed fund" held by the third plaintiff (**Halifax AU**) and Halifax New Zealand Limited (in liquidation) (**Halifax NZ**).

2 The substantive issues include whether the investments of some investors are traceable and what is a fair method of distributing the funds held by the liquidators. A difficult question concerns the most appropriate date for calculating the value of clients' investments for the purposes of distribution of any pooled fund. The value of the investments vary not only over time, but also as a proportion of the total pool of investor funds.

3 A hearing has been fixed for the determination of the substantive issues in December 2020, concurrently with similar proceedings in the High Court of New Zealand (**HCNZ proceeding**) brought by the liquidators of Halifax NZ.

4 The liquidators seek judicial advice and or a direction that they are justified in refraining from:

(1) realising any and all extant investments until the determination of all substantive issues by this Court and the HCNZ; and

(2) applying to the Courts expeditiously for directions to the effect that realisation of all extent investments should proceed as soon as practicable.

5 The application is made in the context of the liquidators' decision to refrain from causing the Halifax entities to realise any extant investments until the Courts give the substantive directions sought in these proceedings, subject to being given judicial advice or directions from the Court that they are justified in adopting that course.

6 On 19 February 2020, both Courts ordered the joinder of four representative defendants to act as contradictors for the purposes of determining the substantive issues in the proceeding. As recorded in the orders, those representative defendants were joined to represent the following classes of investor:

(1) Choo Boon Loo (**Mr Loo**): all clients of Halifax AU and all clients of Halifax NZ whose proportionate entitlement to or share of funds from the "Deficient Mixed Fund" (as that phrase is defined in para 189 of the affidavit of Morgan John Kelly sworn 26 June 2019 in this proceeding) will be higher after the realisation of all extant investments than it was on the date administrators were appointed to Halifax AU and Halifax NZ.

(2) Elysium Business Systems Pty Ltd (**Elysium**): all clients of Halifax AU and all clients of Halifax NZ whose proportionate entitlement to or share of funds from the "Deficient Mixed Fund" will be lower after the realisation of all extant investments than it was on the date administrators were appointed to Halifax AU and Halifax NZ.

(3) Jason Paul Hingston: all clients of Halifax AU and Halifax NZ that transferred shares into the Trader Workstation (also known as Halifax AU's IB Platform or Halifax NZ's IB Platform) from another stockbroker and have not traded in those shares.

(4) Atlas Asset Management Pty Ltd as trustee for the Atlas Asset Management Trust (**Atlas**): all clients of Halifax AU and Halifax NZ whose investments are not traceable and who wish to contend that all clients should share in any deficiency regardless of whether investments are traceable or not.

7 A fifth proposed defendant, Mr Wang, sought joinder to represent client investors whose investment was made before there was a deficient mixed fund and whose investments are arguably traceable on that basis. It subsequently emerged that Mr Wang did not fall within the proposed class that he had been appointed to represent. Accordingly, by order made on 3 April 2020, Fiona McMullin was joined as the fifth defendant to represent clients of Halifax AU and Halifax NZ whose invested before 1 January 2016 in order to propound the argument that investments made before there was a deficient mixed fund are traceable.

8 By order 9 made on 19 February 2020 and order 3 made on 20 April 2020, the Court has ordered that the representative defendants be indemnified in respect of their legal expenses reasonably incurred in so acting, such expenses to be paid out of the accounts described in Annexure A to the Plaintiffs' Interlocutory Process filed 31 July 2019, as agreed by the liquidators or taxed.

9 None of the defendants expressed opposition or otherwise criticised the liquidators' decision. Mr Loo and Mr Hingston supported the liquidators' decision.

10 Thus, although the evidence (referred to below) shows that there are investors who contend that the liquidator close out extant investments without delay, no argument was made against the relief sought by the liquidators.

CONTEXT IN WHICH ADVICE OR DIRECTION IS SOUGHT

11 The total value of client equity positions, being the quantum of funds owing to clients relating to cash and investments that clients have held with Halifax AU and Halifax NZ, varies constantly.

12 The position for Halifax AU and Halifax NZ combined as at close of business (US time) on the following dates (calculated on an equity basis and without taking into account the original deficiency and subsequent payments of administrator and liquidator remuneration and expenses) is as follows:

Date	**Total Client Equity Balances**
22 November 2018	AUD211,601,823
14 February 2020	AUD274,148,871
17 March 2020	AUD244,423,482

13 The recent decrease in the total client equity balance coincides with the spread of COVID-19. However, senior counsel for the liquidators, Mr Leopold SC, explained that the combined fund's performance does not simply track the share market because the relevant investments include derivatives and investments affected by currency exchange rates.

14 Since their appointment, the liquidators have permitted investors to close out open positions, or to sell or realise investments in financial products, but have not entered into any new transactions or trades on behalf of investors.

15 That is, the liquidators have allowed clients to convert their investments to cash (for non-derivative products) or to crystallise the liability between Halifax AU and the client (for derivative products), although the date for valuing claims has not yet between determined.

16 Since the appointment dates (23 November 2018 for Halifax AU and 27 November 2018 for Halifax NZ), a total of 18,235 positions have been closed by investors, still leaving 22,645 open positions.

17 The evidence did not reveal the quantum of the open positions or the number of investors holding the open positions. However, it is reasonable to infer that the investors holding the

22,645 open positions have made a deliberate choice not to realise their investments, and consider it to be in their individual interests not to do so.

18 As investors have been repeatedly notified of their ability to close out extant investments, including by reports to creditors, FAQs posted to the Halifax AU and Halifax NZ websites, and investor notices, it is reasonable to assume that the vast majority of investors will realise their investment if they wish to do so and, not having done so, they do not want the liquidators to realise their investment for them.

19 On the other hand, it is certainly possible that there is a significant group of investors, who most likely have already closed their own positions, consider that the liquidator should realise the extant investments of others in their own interests and or the interests of the investors as a whole.

20 Whether the liquidators realise extant investments or not, they face the risk of criticism by investors who may argue that their conduct involved either a breach of contract or a breach of trust. However, the position of the investors who have not closed out may be more readily articulated. In essence, by closing out extant investments, the liquidators would be acting against the wishes of investors who have chosen to keep their positions open.

21 On the other hand, it is difficult to determine who, if anyone, stands to gain or lose by closing out extant investments at one time or another. Ultimately, this will depend upon the value of the investments at the time of closing out, the additional costs incurred by not closing out and the manner in which the funds are distributed.

22 The question upon which the liquidators seek advice or a direction is, in effect, whether they are justified in refraining from acting against the wishes of the investors who hold open positions, having regard to the fact that some investors consider that they should act to close out extant positions.

Investor submissions on closing out

23 In November 2019, the liquidators sent out a notice to investors which, among other things, asked investors to put forward their views in relation to the closing out of extant positions.

24 A total of 68 responses were received. Eight investors stated that they wanted investor positions to be closed out. In his affidavit affirmed on 25 March 2020, Mr Kelly summarised the key points advanced by these investors as follows:

(1) as a result of the "commingling effect", investors can generally not be dealt with on an individual basis;

(2) the costs of keeping the trading platforms operational are too high and are eroding investor funds;

(3) the liquidators costs will increase the longer this matter goes on;

(4) while the positions are open, they are at risk to the changing market;

(5) finalisation of accounts allows accurate distribution decisions;

(6) investors would like to "get on with their lives"; and

(7) some investors are reliant on their investment for their retirement.

25 Mr Kelly expressed the following views concerning these points:

(1) the first point is contested by those defendants who will argue that their investments are traceable, for example, Mr Hingston. Accordingly, the liquidators cannot presently proceed on the basis that no investor can be dealt with individually;

(2) even if all extant investments were realised, there would be continuing costs associated with the investment platforms;

(3) this is true but, given the other issues to be determined before a distribution, Mr Kelly does not agree that the liquidation will run substantially longer if extant investments are not realised in advance of the hearing;

(4) the risk of exposure to the market cuts both ways. Mr Kelly noted that, even with recent large downturns in the stock market, the total value of all investments is still well in excess of the figure as at the appointment of the liquidators;

(5) Mr Kelly does not accept that an early realisation of all extant positions will promote "accurate distribution positions"; and

(6) the last two points seem to assume that an early realisation of all extant positions will lead to an earlier distribution to investors.

26 I accept each of Mr Kelly's observations.

27 It is an unfortunate reality that the finalisation of the liquidation would appear to require the Court's determination of several issues including, most importantly, the manner in which the funds held by Halifax AU should be distributed.

28 The costs of the liquidation are an undesirable and unfortunate consequence of the complex circumstances of Halifax AU and Halifax NZ. As a general proposition, the longer the liquidation takes, the more costly it is likely to be.

29 However, without more, none of the points set out above provides a persuasive reason why the liquidators should take steps to close out extant positions prior to the determination of the substantive issues, where such steps would be contrary to the apparent wishes of the investors who hold those positions.

30 As to the question of cost, Mr Kelly estimated that the saving on trading costs, if all extant investments were to be closed out or otherwise realised, would be about $1.4 million in the year following such closing out. Mr Kelly's estimate was based on the following figures:

	Weekly operating costs (pre close out) $	**Weekly operating costs (after close out) $**
Platform costs	28,008.00	5,887.75
Employment	10,903.00	8,000.00
Occupancy	1,524.00	1,524.00
Other	1,028.00	1,028.00
Contingency:	3,507.00	2,000.00
Total	**44,970.00**	**18,439.75**

31 While that is a significant amount, the evidence does not reveal how such a saving might compare with the costs arising out of unwanted realisations of assets, which might include reinvestment costs, tax liabilities and costs associated with currency conversion.

32 To date, there has been no suggestion that the additional costs of maintaining the investment platforms should be borne only by those parties who maintain extant positions but it is possible that such a submission might be made in due course. However, at present, there is no evidence to suggest that the costs of maintaining the investment platforms are outweighed by the benefits.

33 There is also no evidence to suggest that an earlier closing out of extant positions would save costs on the liquidation. I accept the informed opinion of Mr Kelly to the contrary on this point.

Other investor correspondence

34 Mr Kelly's evidence included written communications from investors on the question of whether or not extant investments should be realised (in addition to the responses to the notice to investors referred to above). Mr Kelly summarised the correspondence as follows:

> The position of Investors is not consistent. Some Investors have asserted that the Liquidators are conducting themselves improperly by refraining from closing all extant investments. Some Investors have asserted that the Liquidators would be causing Investors financial harm (or potential financial harm) if they do close extant investments. Some of the communications received by the Liquidators and their staff on this issue have threatened legal proceedings against the Liquidators in the event that they do not close out extant investments.

35 I have reviewed the correspondence at pp 443 to 491 of exhibit "MJK-5" to Mr Kelly's 25 March 2020 affidavit. That correspondence commences with an argument by one investor against closing out, before moving into a debate about the preferable distribution of funds. One email states first that the liquidators should be seeking to close out all positions as soon as possible, but then that the author does "not wish to have positions closed if it then takes another year to sort out percentages and costs for distribution". Overall, the correspondence shows a vigorous debate about the pros and cons of closing out, most often in the context of debate about issues of distribution and concern about the costs of the ongoing liquidation. However, I did not identify any significant argument that is not covered by the points set out at [25] above.

36 In particular, the correspondence includes the following:

(1) In an email sent on 5 December 2019:

> … if we can suggest that they close it out now, and cap the profits and costs of the liquidation then at least we are ahead in terms of gains in the market? I certainly understand that there will be opposing views to this, but we have to come to a compromise otherwise again it is only the liquidators that win …

(2) In an email sent on 10 December 2019:

> … 1. We are not convinced Ferrier Hodgson/KPMG have our best interests at heart. Less so, now that KPMG have taken over. A lot of us were not comfortable with that change, and have concerns that we may be just a money earner for KPMG?
>
> …
>
> You have said that it is not your intent to ask the court for a particular action. Some of us feel that you should be making a request to the court <u>for</u> a particular action, on top of your suggested "4 Investor Groups" debate. That being primarily, to ask to close all positions ASAP, work out the investor returns to

> each of us and to simultaneously pay out the investor funds back to investors …

(3) In an email sent on 23 January 2020:

> …Some common sense needs to prevail here. We just want out money back. **Halifax is now in a position to return our money.** KPMG just wants this to continue as long as possible so they can keep charging fat fees and adding to their bottom line. It is just plain WRONG. I am thinking of starting a class action against KPMG to be honest. You can return all our money and still have some leftover.

(4) In an email sent on 19 March 2020:

> …You have spent 2 years charging fees when any sound reasoning would have been to close out everybody and get the maximum because you could never get any more. I think you have failed. I think you are prolonging the windup and IF I ever get the chance to prove it I will try my best to wind you up….

Previous application

37 On 18 February 2020, without notice, the liquidators sought a direction and or judicial advice to the effect that they would be justified in refraining, up to and including 3 April 2020, from closing out all extant investments of investors in Halifax AU.

38 The liquidators sought similar relief in relation to Halifax NZ in the Halifax NZ proceeding.

39 In each case, the liquidators' application was refused: *Halifax (No 7)* [2020] FCA 248 and Minute/Direction No (8) dated 21 February 2020 in the Halifax NZ proceeding.

40 In summary, I declined to grant the relief sought for the following reasons:

(1) I was not satisfied that there was any particular legal issue raised for consideration or any attack on the propriety or reasonableness of the liquidators' refraining from closing out prior to 3 April 2020;

(2) I was not satisfied that the Court had sufficient information, particularly concerning the liquidators' duties and powers in connection with closing out of investors' positions; and

(3) the Court could not decide whether it was advantageous to the liquidation or to the multiplicity of affected trusts to refrain from closing out investors' positions prior to 3 April 2020 on the limited material available.

LEGAL PRINCIPLES

Judicial advice under s 63(1) *Trustee Act 1925* (NSW) (Trustee Act)

41 By s 63(1) of the Trustee Act, a trustee may apply to the Court for an opinion advice or direction on any question respecting the management or administration of the trust property, or respecting the interpretation of the trust instrument.

42 As the liquidators observed, the power to give judicial advice is extremely wide. The sole jurisdictional bar to s 63 relief is "the existence of a question respecting the management or administration of the trust property or a question respecting the interpretation of the trust instrument": *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of The Macedonian Orthodox Diocese of Australia and New Zealand* [2008] HCA 42; (2008) 237 CLR 66 (***Macedonian Orthodox Church***) at [58].

43 The function of judicial advice is to give personal protection to the trustee: *Macedonian Orthodox Church* at [64]. By s 63(2), if the trustee acts in accordance with the opinion advice or direction, the trustee is deemed, so far as regards the trustee's own responsibility, to have discharged the trustee's duty as trustee in the subject matter of the application, provided that the trustee has not been guilty of any fraud or wilful concealment or misrepresentation in obtaining the opinion advice or direction.

44 As explained in *Marley v Mutual Security Merchant Bank & Trust Co Ltd* [1991] 3 All ER 198 (***Marley***) at 201:

> A trustee who is in genuine doubt about the propriety of any contemplated course of action in the exercise of his fiduciary duties and discretions is always entitled to seek proper professional advice and, if so advised, to protect his position by seeking the guidance of the court.

45 The purposes of judicial advice also include the protection of the interests of the trust: *Macedonian Orthodox Church* at [72]. Thus, in *Marley* at 201, cited with approval by the plurality in *Macedonian Orthodox Church* at [104], the Privy Council said:

> [I]n exercising its jurisdiction to give directions on a trustee's application the court is essentially engaged solely in determining what ought to be done in the best interests of the trust estate and not in determining the rights of adversarial parties.

46 Although this proceeding has been constituted with defendants, the application for judicial advice invokes a procedure for private advice to trustees as explained in *Macedonian Orthodox Church* at [64]. Thus, although the Court sought to hear any objection from the defendants

concerning the liquidators' decision (and has considered the written evidence of objections from investors), it was not obliged to give objections particular weight: *Marley* at 201.

47 In *In the matter of MF Global Australia Limited (in liquidation)* [2012] NSWSC 1524 at [14], Black J was satisfied that the Court had jurisdiction to provide judicial advice in connection with a settlement of proceedings pursuant to which the liquidators would receive recoveries that would be trust property under the statutory trust in Pt 7.8 Div 2 of the *Corporations Act 2001* (Cth) (***Corporations Act***).

48 The liquidators contended in oral submissions that the extant investments similarly ought to be treated as trust property under the statutory trust in Pt 7.8 Div 2.

49 In *In re MF Global Australia Ltd (in liquidation)* [2012] NSWSC 994; (2012) 267 FLR 27 Black J considered an application for advice or directions in connection with whether certain bank accounts should be pooled with client segregated accounts. Although he did not question the Court's jurisdiction under s 63 of the Trustee Act, at [9] his Honour preferred to proceed under s 479(3) and s 511 of the Corporations Act where the liquidators' application reflected "at least a potential dispute between different claimants to the relevant client segregated accounts" noting the general rule that an "opinion or advice will not be given under s 63 of the *Trustee Act* where a question concerns the respective rights of beneficiaries or their identity: J D Heydon and M J Leeming, *Jacobs' Law of Trusts in Australia*, 7th ed, LexisNexis Butterworths, 2006 at [2134]; *Re Purchas (as liquidator of Astarra Asset Management Pty Ltd (in liq))* [2011] NSWSC 91 at [40]."

Direction under s 90-15 Insolvency Practice Schedule (Corporations)

50 In *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth* [2019] HCA 20; Gordon J noted at [166]:

> [T]he statutory framework for a liquidator to apply for directions has changed. Prior to its repeal and the enactment of the *Insolvency Practice Schedule* [being Schedule 2 to the Corporations Act], s 479(3) of the Corporations Act allowed a liquidator to apply to the court for directions in relation to a matter arising under a winding up. Section 90-15(1) of the Insolvency Practice Schedule now provides a source of power for the court to provide directions to liquidators, and relevantly provides that the court may make 'such orders as it thinks fit' in relation to the 'external administration' of a company.

51 In using the language "such orders as it thinks fit", s 90-15(1) plainly confers a very broad power on the Court.

52 In *Ample Source International Limited v Bonython Metals Group Pty Limited (in liquidation), in the matter of Bonython Metals Group Pty Limited (in liquidation) (No 8)* [2018] FCA 1614 at [88]-[92], I set out the following matters concerning s 90-15:

> [88] By s 90–20(1)(d) of the *Insolvency Practice Schedule* and the definition of "officer" in s 9 of the Act, a liquidator is a person who may apply for an order under s 90–15.
>
> [89] The Court's supervisory powers under s 90–15 of the *Insolvency Practice Schedule* are arguably as broad, or broader than, its powers under the previous provision, being the former s 479(3) of the Act.
>
> [90] Section 479(3) allowed a court-appointed liquidator to apply to the Court for directions in relation to a matter arising under a winding up. The function of a liquidator's application for directions under s 479(3) was to give the liquidator advice as to the proper course of action for him or her to take in the liquidation: *Re MF Global Australia Ltd (in liq)* [2012] NSWSC 994; (2012) 267 FLR 27 at [7].
>
> [91] In *Re Ansett Australia Ltd and Korda* [2002] FCA 90; (2002) 115 FCR 409, Goldberg J explained at [44]:
>
> > When liquidators and administrators seek directions from the Court in relation to any decision they have made, or propose to make, or in relation to any conduct they have undertaken, or propose to undertake, they are not seeking to determine rights and liabilities arising out of particular transactions, but are rather seeking protection against claims that they have acted unreasonably or inappropriately or in breach of their duty in making the decision or undertaking the conduct. They can obtain that protection if they make full and fair disclosure of all relevant facts and circumstances to the Court. In *Re G B Nathan & Co Pty Ltd* (1991) 24 NSWLR 674 , McLelland J said at 679–680:
> >
> > > The historical antecedents of s 479(3) …, the terms of that subsection and the provisions of s 479 as a whole combine to lead to the conclusion that the only proper subject of a liquidator's application for directions is the manner in which the liquidator should act in carrying out his functions as such, and that the only binding effect of, or arising from, a direction given in pursuance of such an application (other than rendering the liquidator liable to appropriate sanctions if a direction in mandatory or prohibitory form is disobeyed) is that the liquidator, if he has made full and fair disclosure to the court of the material facts, will be protected from liability for any alleged breach of duty as liquidator to a creditor or contributory or to the company in respect of anything done by him in accordance with the direction.
> >
> > > …
> >
> > > Modern Australian authority confirms the view that s 479(3) 'does not enable the court to make binding orders in the nature of judgments' and that the function of a liquidator's application for directions 'is to give him advice as to his proper course of action in the liquidation; it is not to determine the rights and liabilities arising from the company's transactions before the liquidation': [cases cited omitted].
>
> [92] At [65], Goldberg J concluded:

> [T]he prevailing principle adopted by the courts, when asked by liquidators and administrators to give directions, is to refrain from doing so where the direction sought relates to the making and implementation of a business or commercial decision, either committed specifically to the liquidator or administrator or well within his or her discretion, in circumstances where there is no particular legal issue raised for consideration or attack on the propriety or reasonableness of the decision in respect of which the directions are sought. There must be something more than the making of a business or commercial decision before a court will give directions in relation to, or approving of, the decision. It may be a legal issue of substance or procedure, it may be an issue of power, propriety or reasonableness, but some issue of this nature is required to be raised**.** It is insufficient to attract an order giving directions that the liquidator or administrator has a feeling of apprehension or unease about the business decision made and wants reassurance. There must be some issue which arises in relation to the decision. A court should not give its imprimatur to a business decision simply to alleviate a liquidator's or administrator's unease. There must be an issue calling for the exercise of legal judgment.

53 In *S & D International & Anor v MIG Property Services & Ors* [2010] VSC 336; (2010) 79 ACSR 373, Warren CJ approved the liquidator's compromise of legal proceedings involving competing claims over a property held on trust, exercising the power then conferred by s 511 of the Corporations Act. At [17], her Honour described the case as one that "dealt with the risk attendant upon a conscientious liquidator in an acrimonious liquidation environment" and considered that s 511 orders may have utility to protect liquidators "where such protection would be just and beneficial to advancing the liquidation process as a whole".

54 At [18], her Honour referred to the following observation of Mansfield J in *Re Corporations Law; v Addstone Pty Ltd (in liquidation) & Ors* [1997] FCA 1043; (1997) 25 ACSR 357 at 363:

> While the court may be reluctant to give directions when purely commercial considerations are relevant to the liquidator's decision, even in relation to the conduct of litigation, there will be circumstances where it is or may be appropriate to do so. One of those circumstances may be where the liquidator's proposed decision is the subject of criticism by a particular creditor or creditors as being unreasonable or mala fides.

55 At [23], Warren CJ concluded that the liquidator had made a reasonable commercial decision in good faith when entering into the relevant settlement deed, on the facts before her Honour. At [24], her Honour considered that something more was needed to justify an order pursuant to s 511. Her Honour concluded that the history of the dispute gave rise to a well-founded fear in the liquidator that he may be the subject of claims, and that fear may preclude the settlement money being received to the detriment of creditors. Her Honour considered that the circumstances were unusual enough to warrant the grant of the protection sought.

56 In *Re One.Tel Ltd and Ors* [2014] NSWSC 457; (2014) 99 ACSR 247 at [35], Brereton J noted the need for caution in making a direction, saying:

> But the fact that a direction under s 511 — unlike an approval under s 477(2A) or (2B) — exonerates the liquidator from personal liability, means that a closer examination of the liquidator's decision is required than under s 477. In short, the court should not make a direction the effect of which is to exonerate the liquidator from personal liability in respect of a commercial judgment that the liquidator is concerned may prove contentious, unless satisfied that the liquidator's decision is, in all the circumstances, a proper one.

57 In that case, the relevant direction concerned entry into a deed of settlement which, Brereton J concluded (at [49]), was a decision involving both the exercise of legal judgment and commercial judgment.

58 In *Re KSK Holdings (Australia) Pty Ltd (in liquidation)* [2019] NSWSC 1463 at [18], Rees J explained:

> The Court may give directions where it will be "of advantage in the liquidation": *Dean-Wilcox v Soluble Solution Hydroponics Pty Limited* (1997) 42 NSWLR 209 at 212; (1997) 24 ACSR 79 at 81. The Court will not generally give a direction where the matter relates to the making or implementation of a business or commercial decision or when no legal issue is raised, or where there is no attack on the propriety or reasonableness of the liquidator's decision, but it may do so where there is the prospect of such an attack: In the matter of *Steel Distribution Pty Limited (in liquidation) (receivers and managers appointed)* [2013] NSWSC 669 at [20] per Black J; *In the matter of Dungowan Manly Pty Limited (in liq)* [2018] NSWSC 1083 at [17].

59 A direction may be given that a trustee would be justified in refraining from doing something: *Kerr, in the matter of Octaviar Limited (in liquidation)* [2019] FCA 1614; (2019) 139 ACSR 192 (liquidator justified in not advancing a claim pending the resolution of a separate proceeding). In that case, Farrell J concluded (at [70]) that the course of refraining from instigating proceedings without judicial advice placed the liquidator at risk of future allegations of breach of duty where the company apparently had good prospects in relation to the claim, and that this was a matter supporting the decision to make the direction.

LIQUIDATORS' REASONS FOR REFRAINING FROM CLOSING OUT

60 In his 25 March 2020 affidavit, Mr Kelly gives the following reasons for the liquidators decision to refrain from realising all extant investments until the determination by the Courts, following the final hearing, of the substantive issues in the liquidation:

> 71. *First*, if all extant investments were realised in advance of all other issues in the Interlocutory Application being determined, this would preclude the Plaintiffs and Halifax AU from making an *in specie* distribution of any

investments and this would have a number of consequences that many Investors may regard as adverse.

72. The possibility of making an *in specie* distribution to Investors was raised by a number of Investors who responded to the Investor Notice. Some of those Investors put forward proposal whereby, even if a particular investment was not traceable, Investors could receive an *in specie* distribution of particular investments on the basis that, in effect, they would pay cash to fund any excess in the value of the assets transferred by in specie distribution when compared with the entitlement of that Investor as determined by the Courts.

73. If Investors received an *in specie* distribution, this may also mean that Investors do not incur a capital gains tax liability, at least in the short term, in respect of the assets so transferred. On the other hand, if extant investments are realised now, this may well crystallise a capital gains tax liability on the part of many Investors.

74. Further, if an *in specie* distribution occurred in respect of some or all investments, this would reduce the percentage of the portfolio of investments held by Halifax AU that would need to be realised. This could significantly reduce the time and cost involved in realising the portfolio and therefore maximise the value of the portfolio.

75. *Secondly*, a related argument against closing out all extant investments now is that some Investors contend that they hold an investment that is traceable and that they should therefore not share in the deficiency resulting from the use by Halifax AU of Investor funds for operating expenses …and resulting from the application of Investor funds for the costs and expenses of the liquidation and the litigation. If all extant investments were realised now before the Court had made a determination in respect of whether those investments were traceable, that would preclude those Investors from obtaining an *in specie* distribution of those investments which were traceable.

76. *Thirdly*, the Plaintiffs have sought directions and/or judicial advice as to whether "pooling" orders of the kind made in the external administration of BBY Limited (receivers and managers appointed) (in liquidation) and other similar cases should be made in the external administration of Halifax AU. My understanding is that Justice Brereton in *Re BBY (No. 2)* (2018) 363 ALR 492 at [38]-[40] described "*pooling*" as a "*pragmatic remedy*" whereby, with multiple accounts, the Court treats each Client as "*having a rateably equal interest*" in the combined funds, "*when the funds have become so intertwined that each Client's entitlement to one account may reasonably be regarded as identical to its entitlement to the other(s), and this will be so when it is reasonable to regard each as having a rateably equal interest in the mixed fund*." My understanding is that Justice Brereton pointed out at [42] that in the *Sonray* litigation (*Georges v Seaborn International (Trustee), in the matter of Sonray Capital Markets Pty Ltd (in liq)* (2012) 288 ALR 240) Justice Gordon directed that "*the liquidators pool various assets, including the Client segregated accounts, into a single Client fund for the purpose of distribution*" – "*in circumstances where it was not possible to work out precisely who is entitled to what moneys in particular segregated accounts, all the Court could do was to permit the moneys in the segregated accounts to be pooled with a view to their proportionate distribution*". If the Court ultimately gave directions or judicial advice that "pooling'' should not occur, it seems to me

that realising all extant investments in advance of the final hearing would frustrate that outcome.

77. *Fourthly*, the vast majority (being about 86%) of the 57 Investors who expressed a view for or against closing out in response to the Investor Notice expressed the view that they did not want extant investments to be closed out. Only 8 Investors were in favour of closing out. I have taken this significant opposition into account in making my decision. A related point is that… although all Investors were told that they could close out their investments when they wanted to, 18,235 investments have been closed, but a significant number of investments (22,645) continue to remain open.

78. *Fifthly*, …, even if a process were to be undertaken of realising all extant investments in advance of the hearing, it may be that that process would not be completed much before the hearing, if it were completed at all. …, that is in the context of discussions between my counsel and the Courts to the effect that there may be a possibility of a final hearing towards the end of this calendar year.

79. *Sixthly*, …I have carefully considered and taken account of all of the factors, …, put forward by those Investors who stated that they wish all Investor positions to be closed out. In relation to those matters I have formed these views:

    (a) Point (a) (that no individual Investor any longer has any right or entitlement to the commingled fund) fails to have regard to the position advanced by a number of Investors who say that their investments are traceable; and fails to have regard to the key issue, which is being agitated between two represented groups, as to whether the date of calculation of the entitlements of individual Investors should be the Appointment Dates or the date when any individual Investor's investments are in fact realised;

    (b) Point (b) (which emphasises the costs of keeping the trading platforms operational) does not take account of the fact, to which I referred in paragraph 19 above, that, even if all extant investments were realised, there would be continuing costs associated with the investment platforms;

    (c) As to point (c), even assuming that extant investments are only realised as a result of a direction given at the final hearing, there will be much in any event to be done by the Liquidators after the final hearing, in relation to the distribution of the funds and other liquidation tasks, including possible recovery actions against third parties. I therefore do not agree with the implication that the liquidation will run for a substantially longer period if extant investments are not realised in advance of the hearing;

    (d) As to point (d), whilst it is true, as the recent large downturn in the stockmarket demonstrates, that open positions are exposed to fluctuations in the markets, this cuts both ways. Even with the recent large downturn in the stockmarket, the total value of all investments is, … still well in excess of the figure as at the Appointment Dates;

(e) As to point (e), I do not see how an early realisation of all extant positions "allows accurate distribution decisions" any more than would otherwise be the case;

(f) Point (g), in my view, wrongly assumes that realising extant investments now will result in a distribution soon afterwards to Investors. Before that can occur, as I understand it, a number of substantive issues need to be resolved by the Courts at the final hearing.

80. *Seventhly*, the points advanced by those who opposed closing out, …, seem to me to be more persuasive than the points advanced by those who supported closing out, essentially for the reasons I have already given above.

LIQUIDATORS' SUBMISSIONS

61 The liquidators' principal submission was that matters raised by investors in response to the investor notice issued in November 2019 have made it clear to the liquidators that it is not practicable to divorce the question whether closing out should occur immediately from other substantive questions that need to be determined at the final hearing. In addition, the large majority (over 85% of those who provided a clear indication either way) of those who responded to the investor notice on the issue of whether closing out should occur immediately opposed it; and the principled reasons provided by those who opposed immediate closing out appeared to Mr Kelly to be more persuasive than those provided by the few who supported immediate closing out.

Judicial advice

62 The liquidators submitted that the issue raised by them is "quintessentially a question involving the management or administration of the trust property". The extant investments made on behalf of investors through Halifax AU and Halifax NZ as their brokers are choses in action. The prospective proceeds of the realisation of those choses in action will, upon realisation, form part of a deficient, commingled trust fund held on behalf of the investors by the trustees (relevantly for this proceeding, Halifax AU). Whether that trust property should all be realised immediately is very much a question of the management or administration of the trust property, which falls within the heart of the jurisdiction of the Courts to provide judicial advice to the trustees.

63 Further, the liquidators submitted that, whether they should pursue the course of refraining from closing out until the final determination of all substantive issues by the Courts is contentious because there are investors who support and investors who oppose immediate closing out. As such, the liquidators argue, Halifax AU, as a trustee, is entitled to look to the

Court for judicial advice which will give it protection against any action by those who support immediate closing out (not limited to those who flagged, in response to the investor notice, that that was their position).

64 In particular, the liquidators contended that some of the correspondence referred to above indicates that there is a real prospect of an attack on the liquidators in respect of their decision to refrain from closing out pending determination of the substantive issues. Such investors may allege that refraining from closing out extant positions has caused them financial loss.

65 The liquidators also contended that there is a real issue about whether their conduct may involve a breach of duty to some investors. In particular, one category of the Australian Client Service Agreements provides that, if Halifax AU exercises its power to terminate the agreement, it has an obligation to close out positions. The relevant provision states that, upon termination of the agreement, unless otherwise agreed in writing, Halifax AU "will … close out all of the Client's future contracts and close out, abandon or exercise any options not yet exercised". Mr Kelly expressed concern that clients who are in favour of immediate closing out may allege that the liquidators are in breach of duty by failing to exercise a discretion to terminate the client service agreements pursuant to which extant investments are held.

66 The liquidators argued that, if they proceed in accordance with the decision Mr Kelly has made to refrain from closing out, then some investors may argue that, having regard to all of the surrounding circumstances (including the recent enormous volatility in the global financial markets), the power to terminate was one which the liquidators came under a duty to exercise in order to enliven the consequential obligation to close out all extant positions.

67 The liquidators also argued that, by refraining from closing out the liquidators may come under attack from some investors who may say that they are in breach of duty by failing to take advantage of the saving of some $1.4 million a year in the costs of operating the trading platforms, that being the approximate saving which would result from an early closing out, as set out above.

Direction

68 The liquidators contended that they are entitled to a direction in addition to judicial advice.

69 The liquidators submitted that the power to give directions to liquidators is a very broad one. There is nothing about the decision that the liquidators have made which is in the nature of a

business or commercial decision. Rather, it is a decision (subject to obtaining judicial advice or directions), in the face of those who suggest that the liquidators should be acting otherwise, that there should be no realisation of all extant investments until the determination by the Courts of all substantive questions. That may be characterised as a decision concerning the efficient case management of the resolution of a number of competing issues. In addition, because of the contractual power to terminate at least some of the client services agreements, which power, if exercised, would require the consequential realisation of some (but not all) of the extant investments, it may also be characterised as a decision raising a question concerning the non-exercise by Halifax AU of a discretionary power. Thus, the liquidators submitted, the question the subject of the present application is correctly characterised as "an issue of power, propriety or reasonableness" of the proposed course of action.

CONSIDERATION

70 The question whether to refrain from closing out extant positions until determination of the substantive issues in this proceeding (and the concurrent proceeding in the High Court of New Zealand) is a vexed one because plainly there are investors who consider that it is against their interests and, perhaps, against the interests of investors as a whole.

71 However, to do otherwise would involve action contrary to the inferred wishes of investors whose positions remain open. It would also defeat the claims of investors who seek an *in specie* distribution to the extent that the investments affected by such claims are closed out.

72 The liquidator submitted that the realisation of extant investments would frustrate any eventual decision that the funds should not be pooled. Certainly, it would be undesirable to deal with the proceeds of realised investments in a manner which adds to the complexity of analysing whether there are investments or accounts which should not be pooled.

73 The liquidators are in an invidious position. There is no reason to think that they are acting other than properly in bringing this application. In particular, there is no evidence that the liquidators are seeking to prolong the liquidation for their own benefit at the expense of investors, contrary to what is suggested by the correspondence referred to above.

74 The proposed course of action is not a business or commercial decision. Rather, it is a decision about the proper or reasonable administration of trust property the subject of competing claims which inevitably give rise to the prospect of claims against the liquidators on behalf of investors who might conclude that they have been disadvantaged.

75 Given the large number of investors and their different circumstances, it is likely that there is a range of opinions held by investors about the circumstances in which all extant investments should be closed out.

76 Although this Court (and the HCNZ) reserved dates for hearing of the substantive issues in the second half of September 2020, the liquidators and the defendants have now proposed a hearing in early December. I have no reason to believe that any party is seeking to delay the resolution of the matter. Further, where the Courts are currently required to conduct proceedings using remote access technology, by reason of the current COVID-19 pandemic, there has been significant disruption to the Court lists as matters that cannot feasibly be conducted in this way have been vacated. In those circumstances, and in the absence of any evidence to the contrary, there is no good reason for the liquidators to agitate for an earlier hearing of the question whether all extant positions should be closed out in advance of determination of the substantive issues in the proceeding.

77 In any event, generally speaking, it is preferable for there to be a single final hearing of all substantive issues in a proceeding. Part 30.1 of the *Federal Court Rules 2011* provides for hearing separate questions. However, the starting point is that in the ordinary course all issues of fact and law should be determined at the one time and a party seeking to depart from the ordinary course needs to point to some benefit to be gained from that departure. In *City of Swan* [2009] FCA 784 at [27], Rares J identified the following relevant principles:

> (1) As a general rule the starting point is that all issues of fact and law should be determined at the one time.
>
> (2) A party seeking the determination of separate questions must satisfy the Court that it is "just and convenient" for the order to be made. The order must be made on concrete facts, either established or agreed, for the purpose of quelling a controversy between the parties so as to produce a conclusive or final judicial decision on the issue, which is of a real, not hypothetical, importance to the determination of the controversy.
>
> (3) There are special problems where the separate issue involves a mixed question of fact and law, although it may still be able to be decided as a separate issue. However, care must be taken in precisely formulating the question and specifying the facts upon which it is to be decided.
>
> (4) The Court must have all relevant matters before it as a precondition of it being asked to exercise its discretion if the separate question involves the grant or refusal of declaratory relief.
>
> (5) It may still be appropriate to determine a separate question even if it will not resolve all the issues, provided that there is a strong prospect that the parties will agree upon the result when the core of the dispute has been decided or if

the decision will obviate unnecessary and expensive hearings of other questions.

(6) Generally speaking an issue will not be appropriate for separate determination if it is simply one of two or more alternative ways in which an applicant or plaintiff frames its case and its determination would leave other significant issues unresolved.

(7) It is relevant to consider whether:

- the separate questions will contribute to the saving of time and cost by substantially narrowing the issues for trial or even lead to the disposal of the proceedings;
- they will contribute to the settlement of the proceedings;
- they will give rise to significant contested factual issues both at the time of the hearing of the preliminary question and at the time of the trial;
- there will be any significant overlap between the evidence adduced on the hearing of the separate question and a trial;
- the questions will prolong, rather than shorten, the proceedings.

78 In this case, the evidence does not indicate any persuasive reason for a determination of questions concerning the closing out of extant positions in advance of the substantive issues in the proceeding.

Judicial advice

79 Assuming that the liquidators are correct in their contention that the extant investments are impressed with a statutory trust, their application is plainly made in the context of a dispute between investors as to the proper administration of the extant investments and their respective rights to keep open or to have closed out the investments. In those circumstances, I am not persuaded that this is an appropriate case for judicial advice under s 63.

Direction under s 90-15

80 However, I am satisfied that this an appropriate case for a direction of the kind sought by the liquidator having regard to the matters set out at [70] to [77] above. In particular, on the available evidence the following matters justify the making of such a direction:

(1) The liquidators are not able to make a decision about when to close out extant investments that will meet the wishes of all investors and they cannot confidently predict that any particular approach to closing out positions will be in the interests of all investors.

(2) The orderly and efficient determination of the issues in the proceeding requires the determination of potential entitlements to *in specie* distribution of investments prior to closing out of all extant positions.

(3) The liquidators' proposal to refrain from closing out is consistent with the apparent wishes of a substantial number of investors, who currently hold over 22,000 open positions.

(4) Although the liquidators' proposal is contrary to the wishes of some investors, they are very much in the minority. Moreover, the evidence does not reveal any clear benefit to an early closure of positions held by or on behalf of an investor who does not seek to close out. Even accepting that the additional costs of maintaining the investment platforms are significant, it is not possible to say that those costs will not be recouped or exceeded by increases in the value of the extant investments. Thus, it is no obvious that any investor will ultimately be disadvantaged if the liquidators act in accordance with their proposal.

CONCLUSION

81 I will make a direction under s 90-15 to the effect sought by the liquidators.

I certify that the preceding eighty-one (81) numbered paragraph is a true copy of the Reasons for Judgment herein of the Honourable Justice Gleeson.

Associate: 

Dated: 23 April 2020

SCHEDULE OF PARTIES

NSD 2191 of 2018

Defendants

Fourth Defendant:	ATLAS ASSET MANAGEMENT PTY LTD (ACN 607 442 679)