IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY
I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE
COMMERCIAL PANEL **CIV-2019-404-2049**

UNDER	section 284 of the Companies Act 1993, section 66 of the Trustee Act 1956 and Part 19 of the High Court Rules 2016
IN THE MATTER OF	**HALIFAX NEW ZEALAND LIMITED (IN LIQUIDATION)**
BETWEEN	**MORGAN JOHN KELLY and PHILIP ALEXANDER QUINLAN** (in their capacity as liquidators) **First Applicants** **HALIFAX NEW ZEALAND LIMITED (IN LIQUIDATION)** **Second Applicants** **MORGAN JOHN KELLY and PHILIP ALEXANDER QUINLAN** (in their capacity as trustees) **Third Applicants**

(continued on next page)

AFFIDAVIT OF MORGAN JOHN KELLY
DATED 25 MARCH 2020

Next event date: 3 April 2020 (joint case management hearing)
Judicial officer: Venning J
Case officer: Corrina MacDonald

Russell McVeagh

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AND

CHOO BOON LEE

First Respondent

ELYSIUM BUSINESS SYSTEMS PTY LTD

Second Respondent

JASON PAUL HINGSTON

Third Respondent

ATLAS ASSET MANAGEMENT PTY LTD (as trustee for the Atlas Asset Management Trust)

Fourth Respondent

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 25/03/2020 3:18:24 PM AEDT and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged:	Affidavit - Form 59 - Rule 29.02(1)
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File Title:	IN THE MATTER OF HALIFAX INVESTMENT SERVICES PTY LTD (ADMINISTRATORS APPOINTED) ACN 096 980 522
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Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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Form 59
Rule 29.02(1)

Affidavit

No. NSD 2191 of 2018

Federal Court of Australia

District Registry: New South Wales

Division: General

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

MORGAN JOHN KELLY AND PHILIP ALEXANDER QUINLAN IN THEIR CAPACITY AS JOINT AND SEVERAL LIQUIDATORS OF HALIFAX INVESTMENT SERVICES PTY LTD (IN LIQUIDATION) ACN 096 980 522 AND OTHERS NAMED IN THE SCHEDULE

Plaintiffs

Affidavit of:	**Morgan John Kelly**
Address:	Level 38, Tower Three, International Towers Sydney, 300 Barangaroo Avenue, Sydney NSW 2000
Occupation:	Registered Liquidator
Date:	25 March 2020

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Filed on behalf of **Morgan John Kelly and Philip Alexander Quinlan in their capacity as joint and several liquidators of Halifax Investment Services Pty Ltd (in liquidation) ACN 096 980 522, Plaintiffs**
Prepared by **Jason Opperman and Katherine Smith**
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I, Morgan John Kelly, of Level 38, Tower Three, International Towers Sydney, 300 Barangaroo Avenue, Sydney NSW 2000, registered liquidator, affirm:

1. I am a joint and several liquidator of Halifax Investment Services Pty Ltd (In Liquidation) (**Halifax AU**) and of Halifax New Zealand Limited (**Halifax NZ**), a subsidiary of Halifax AU, together with Philip Alexander Quinlan (the **Liquidators**).

2. Further, in New Zealand the Liquidators are trustees of a trust, pursuant to an appointment, under Regulation 246(2) of the *Financial Markets Conduct Regulations 2014* (NZ), by the Financial Markets Authority, in respect of money that had, by the time of the appointment (on 27 November 2018) of the Liquidators as Administrators of Halifax NZ, been received

by Halifax NZ from Clients in connection with certain financial products that were derivatives.

3. I refer to my affidavits affirmed in the Australian proceedings on 26 June 2019 (**First Australian Affidavit**) and 26 July 2019.

4. I also refer to my affidavit affirmed in the New Zealand proceedings on 24 September 2019 (**First NZ Affidavit**).

5. I affirm this affidavit, in identical form in each of the Australian proceedings and the New Zealand proceedings, in support of the Plaintiffs' application:

   (a) to the Federal Court of Australia for judicial advice and/or directions pursuant to section 90-15 of the *Insolvency Practice Schedule (Corporations)* (being Schedule 2 to the *Corporations Act 2001* (Cth)) and/or section 63 of the *Trustee Act 1925* (NSW);

   (b) to the High Court of New Zealand for directions pursuant to section 284 of the *Companies Act 1993* (NZ) and/or section 66 of the *Trustee Act 1956* (NZ),

   that the Plaintiffs would be justified in refraining from closing out all extant investments until the final determination of the matters referred to in paragraphs 4 to 6 and 9 to 11 of the Interlocutory Application filed on 3 July 2019 in the Australian proceedings and the final determination of the matters referred to in paragraphs 1(b)(i)-(v) and (xi)-(xiii) of the Originating Application for Directions filed on 25 September 2019 in the New Zealand proceedings (**Interlocutory Applications**).

6. The reference to "*closing out*" throughout this affidavit is intended to extend to closing out open positions in derivatives as well as to selling or realising all assets or financial products in which there are extant investments. It is also intended to cover the closing of hedged positions which will occur automatically in the case of those investments which are hedged.

7. Nothing contained in this affidavit is intended to waive any legal professional privilege. Any waiver that is made is confined to this application, and to the information contained therein, the documents referred to therein, and the exhibits or annexures thereto.

8. Shown to me at the time of swearing this affidavit in both proceedings is a folder of documents which in both proceedings is marked "**MJK-5**" (**Exhibit**). References in this affidavit to page numbers in the Exhibit are to the corresponding pages of the Exhibit unless indicated otherwise.

Value of investments held by Halifax AU

9. Prior to our appointment as administrators of Halifax AU on 23 November 2018 (**Australian Appointment Date**) and as administrators of Halifax NZ on 27 November 2018 (**New Zealand Appointment Date**) (collectively **Appointment Dates**), Halifax AU and Halifax NZ were both online brokers in respect of a range of financial products in which their Clients invested. In respect of certain derivative products they also entered into contracts with their Clients as counterparties/principals.

10. Mr Sutherland, who is a director within my team at KPMG and has worked on this matter since its commencement, and I have expressed the view in our June 2019 affidavits that the funds held by Halifax AU and Halifax NZ are in large part commingled, as between those entities and as between investment platforms. I am still of that view.

11. Since the Australian Appointment Date, the total value of Client equity positions, being the quantum of funds owing to Clients at a particular point in time relating to cash and investments Clients have held with Halifax AU and Halifax NZ, has varied. The position for Halifax AU and Halifax NZ combined, as at close of business (US time) each of 22 November 2018, 14 February 2020 and 17 March 2020, is set out below. These are indicative only as no formal adjudication process has as yet been undertaken. Further, they are calculated on an equity basis and do not take into account the original deficiency and subsequent payments of Administrator and Liquidator remuneration and expenses.

Date	Total Client Equity balances
22 November 2018	AU$211,601,823
14 February 2020	AU$274,148,871
17 March 2020	AU$244,423,482

12. The recent decrease in the value of these assets has coincided with the spread of COVID-19.

Trading platforms

13. As at the Australian Appointment Date, Halifax AU conducted its business by way of the following trading platforms:

    (a) Trader Workstation (provided by Interactive Brokers LLC (**IB**)) (**IB Platform**) (Halifax AU's IB Platform being known as **Interactive Broker AU**) (**IB Australia**). Halifax AU also facilitated Clients trading on Halifax NZ's IB Platform (**IB NZ**);

(b) MetaTrader 4 (**MT4**); and

(c) MetaTrader 5 (**MT5**).

14. As at the New Zealand Appointment Date, Halifax NZ conducted its business by way of the IB NZ Platform. Halifax NZ also facilitated Clients trading on Halifax AU's MT4 and MT5 platforms.

15. In addition to the trading platforms referred to in the preceding two paragraphs, prior to the Appointment Dates Halifax AU and Halifax NZ had also conducted their businesses by way of certain other trading platforms. Those other platforms were no longer used by the Halifax entities by the Appointment Dates.

Costs of keeping the trading platforms open

16. After the Australian Appointment Date, Halifax AU has kept open the IB Australia Platform and the MT4 and MT5 platforms; and after the New Zealand Appointment Date Halifax NZ has kept open the IB NZ Platform. However, all platforms have been switched to "close only" mode. That is, Investors are able to close positions which were open at the Appointment Dates, but are not able to open new positions. Where open positions are closed, the cash realised from any such closure continues to be quarantined within accounts maintained by either Halifax AU, Halifax NZ or third parties such as IB.

17. All of those platforms are administered in Australia by Halifax AU. I understand that, prior to the Appointment Dates, Halifax AU apportioned to Halifax NZ (by deducting it from broking commissions otherwise payable to Halifax NZ) a share of the cost of administering the platforms and of the treasury function carried out by Halifax AU in respect of the operation of the platforms.

18. Currently, on a weekly basis, the costs incurred in relation to the maintenance of the trading platforms is approximately $44,970, which is comprised of the following costs:

(a) platform costs in the amount of $28,008.00;

(b) costs of employing staff to maintain the trading platforms in the amount of approximately $10,903.00;

(c) costs of leasing office space for Halifax AU in the amount of $1,524.00;

(d) other costs in the amount of $1,028.00; and

(e) contingency costs in the amount of $3,057.

19. In the event that all extant investments were realised, costs incurred in relation to the maintenance of the trading platforms would be reduced. The Liquidators are likely to continue to require access to the trading platforms at least until all extant investments are realised and all data necessary to calculate Investor entitlements has been extracted from the platforms. As a result, even if the Plaintiffs were to proceed to close out or otherwise realise all extant investments now, this will not result in an elimination of all costs associated with operating the trading platforms.

20. I estimate 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. I estimate the cost savings of closing out as follows:

	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**

Halifax AU's power to terminate and realise extant investments

21. Each Client who traded on the Halifax trading platforms entered into a Client Service Agreement (**CSA**) with Halifax AU or Halifax NZ. The CSAs set out the terms upon which Halifax AU and Halifax NZ would facilitate investment by the Client in financial products or on which (in the case of derivative products) Halifax AU and Halifax NZ would contract as principal with the Client.

22. I am aware of the following CSAs entered into by Halifax AU with Clients (**Australian CSAs**):

(a) CSA dated 14 October 2008. Exhibited at pages 23 to 42 of the Exhibit is a copy of this CSA;

(b) CSA dated 14 March 2012. Exhibited at pages 43 to 62 of the Exhibit is a copy of this CSA;

(c) CSA dated 16 August 2012. Exhibited at pages 63 to 84 of the Exhibit is a copy of this CSA;

(d) CSA dated 2 October 2013. Exhibited at pages 85 to 106 of the Exhibit is a copy of this CSA;

(e) CSA dated 20 October 2014. Exhibited at pages 107 to 141 of the Exhibit is a copy of this CSA;

(f) CSA dated 1 July 2015. Exhibited at pages 142 to 177 of the Exhibit is a copy of this CSA;

(g) CSA dated 29 July 2016. Exhibited at pages 178 to 211 of the Exhibit is a copy of this CSA;

(h) CSA dated 20 October 2016. Exhibited at pages 212 to 255 of the Exhibit is a copy of this CSA; and

(i) CSA dated 3 September 2018. Exhibited at pages 256 to 298 of the Exhibit is a copy of this CSA.

23. I am aware of the following CSAs entered into by Halifax NZ with Clients (**New Zealand CSAs**):

(a) CSA dated 1 May 2015. Exhibited at pages 299 to 321 of the Exhibit is a copy of this CSA;

(b) CSA dated 8 July 2018 (Company). Exhibited at pages 322 to 356 of the Exhibit is a copy of this CSA;

(c) CSA dated 8 July 2018 (Individual). Exhibited at pages 357 to 382 of the Exhibit is a copy of this CSA;

(d) CSA dated 8 July 2018 (Joint). Exhibited at pages 383 to 409 of the Exhibit is a copy of this CSA;

(e) CSA dated 8 July 2018 (Trust). Exhibited at pages 410 to 411 of the Exhibit is a copy of this CSA.

24. There may be other CSAs for either Halifax AU or Halifax NZ, but those within the Exhibit are the only ones which the Liquidators and our staff have been able to locate.

25. Each Australian CSA confers on Halifax AU the power to terminate the agreement by giving 10 Business Days' written notice to the Client (by providing that either party "may" close out). In this regard, adopting the subparagraph lettering referred to in paragraph 22 above, the relevant clause in each Australian CSA is as follows:

(a) Clause 16(a);

(b) Clause 16(a);

(c) Clause 17(a);

(d) Clause 17(a);

(e) Clause 18.1;

(f) Clause 18.1;

(g) Clause 17.1;

(h) Clause 21.1;

(i) Clause 21.1.

26. Some of the Australian CSAs (namely, the Australian CSAs dated 29 July 2016, 1 July 2015, 20 October 2014, 2 October 2013 and 16 August 2012), provide that, upon termination of the CSA, unless otherwise agreed in writing, Halifax AU "*will … close out all of the Client's futures contracts and close out, abandon or exercise any options not yet exercised*" (emphasis added).

27. The Australian CSAs dated dated 3 September 2018, 20 October 2016, 29 July 2016, 1 July 2015 and 20 October 2014) include, in clause 11.1 or in clause 10.1 of Schedule 1, a right to close out on termination of any CFD Transaction, FX Transaction or FX Option Transaction.

28. All of the New Zealand CSAs referred to in paragraph 23 above provide that either party "may" terminate the CSA by giving notice "*at any time*" or by giving two Business Days' notice.

29. The relevant termination clause in each New Zealand CSA is in clauses 3.j and 18.

30. All of the New Zealand CSAs referred to in paragraph 23 above provide:

(a) at clause 3.j, that "Upon termination of this Agreement and unless otherwise agreed in writing, Halifax NZ will close out all Contracts and close out, abandon or exercise any options that have not yet been exercised" (emphasis added); and

(b) at clause 18(c), that "Upon termination of this Agreement, unless otherwise agreed in writing, Halifax NZ will close out all of Contracts and close out, abandon or exercise any options that have not yet been entered into by Halifax NZ for the Client" (emphasis added).

31. Other than in the case of termination on a basis which does not appear to be presently relevant, none of the Australian CSAs expressly cover any form of realisation of

investments (eg sale of stocks) other than "closing out", that is, closing out of open positions in derivative products.

Uncertainty as to rights or obligations under CSAs

32. These various provisions raise the following issue for the Plaintiffs: The power to terminate, by using the word "may" seems to confer an absolute discretion on the relevant Halifax entity to terminate, but the Plaintiffs believe that they face potential allegations from Clients that the discretion is not absolute, for example, that the interests of each Client must be taken into account by the Liquidators of the relevant Halifax entity in the exercise of the power. As noted immediately above, there is also a question about the power to sell stocks.

33. As I say below, the Plaintiffs have decided in all the circumstances to refrain from causing the relevant 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 Courts that they are justified in adopting that course. The uncertainty referred to immediately above appears to me to bear on that decision in the following way.

34. A number of Clients have communicated to the Liquidators that they wish the Liquidators to proceed to close out all investments (see the details of this below). I believe that there is a significant prospect that Clients in that category may allege that the Plaintiffs are in breach of duty by refraining from exercising a discretion to terminate the CSAs (and consequently to close out investments, where that is an automatic consequence of termination). I believe that they may say that, given the volatile markets which have coincided with the spread of COVID-19, they are anxious to be no longer exposed to the financial markets and that the Plaintiffs are in breach of duty by depriving them of their ability to cease that exposure by refraining from terminating their CSAs so as to enliven the obligation to close out all Contracts.

Process for realising extant investments

35. Clients invested through Halifax AU or Halifax NZ in a range of different financial products, which may be classified broadly as:

    (a) exchange-traded financial products, which are financial products which either comprise assets such as equities, or which are derivatives (including options and futures) which were benchmarked to, or indexed by reference to, a wide range of assets including equities, currencies or commodities, and which in all cases were investments which were made through the exchange on which they were traded; and

(b) "*over-the-counter*" (**OTC**) financial products, which are financial products in the nature of derivatives which are not listed on a regulated exchange such as the ASX but were traded via a private contract between the Investor and either Halifax AU or Halifax NZ. OTCs included derivatives such as contracts for difference (**CFDs**) (on stocks, indexes, precious metals and commodities) and margin foreign exchange products.

36. The exchange-traded financial products were available for trading through the IB Australia, IB NZ, MT4 and MT5 platforms. OTC products (being non-exchange-traded products) were available for trading through the MT4 and MT5 platforms.

MT4/MT5 Platforms

37. As set out in paragraphs 51 to 68 of my First Australian Affidavit and paragraph 42 of my First New Zealand Affidavit, the MT4 and MT5 platforms were in effect "*virtual*" trading platforms. They were concerned only with OTC products. The OTC products were <u>not</u> listed on a regulated exchange (but the pricing of the OTC products did have regard to exchange traded prices). The OTC products were the subject of private contracts between the Client and Halifax AU. Except to the extent that Halifax AU elected to hedge its *own* exposure to B-Book Clients, there was no acquisition by any Client of any underlying shares, options, commodities or the like and, as such, the Client had none of the rights of an owner of a financial product. The contract was between the Client and Halifax AU <u>as principal</u>. Whilst referable to the price of an underlying product listed on an external exchange or to an index published by an external exchange, the contract was ultimately one to the effect that, on the close-out date, the Client would pay to Halifax AU, or Halifax AU would pay to the Client, an amount calculated on that date by reference to a price or index listed externally (resulting in debits or credits to each party depending on the profit or loss of each trade).

38. In respect of "*A-Book*" Clients (which included Clients that had been identified by Halifax AU as being sophisticated Investors, as well as all MT5 Clients who invested in stocks), Halifax AU hedged trades made by those Clients:

(a) in the case of CFDs or other derivatives relating to stocks, by making the underlying investment through Interactive Brokers (i.e., by purchasing the relevant stock on its own account); and

(b) in the case of investments in OTC derivatives, by replicating the Client's trade with entities trading in the names "*Invast*" and "*Gain*". (Gain has, since the Appointment Dates, unilaterally closed out all hedged positions and remitted to Halifax AU the funds yielded from that closing out.)

39. Halifax AU generally did not hedge investments made by "*B-Book*" Clients.

40. Given that the MT4 and MT5 Platforms are in effect "*virtual*" trading platforms, the process of closing out or realising any extant investments made by Clients with a Halifax entity does not require any financial product to be realised because no underlying financial product was actually acquired by the Client. It is merely a matter of bringing the contractual position taken as between the Client and the relevant Halifax entity to an end. As well as the ability of each Client to close out their own positions (as discussed further below at paragraphs 51 and 52, Halifax AU staff are able to close each Investor's position manually by logging onto each individual Client's account and closing each position.

41. Because the investments by "*B-Book*" Investors were generally not hedged, nothing more would be required to close out the open position of such a Client than what appears immediately above.

42. However, with "*A-Book*" Investors, the Plaintiffs cannot take the risk of closing out the open position pursuant to the contract between the Client and the relevant Halifax entity unless it contemporaneously closes out its own hedged position with Invast or IB. Halifax would be exposed to financial loss if it closed out the Client position without closing out its own related hedged position. However, the system is set up (and was at the Appointment Dates) so as to ensure it automatically closes out the Halifax hedged position as soon as the Client position is closed out. The ability to close out hedged positions taken by Halifax AU in respect of "*A-Book*" Investors is not a power conferred by the CSAs or any other document given that it was a corporate position taken by Halifax in its hedging activities rather than anything done under the CSA.

43. The amount the subject of the hedged positions with Invast is in the order of $1.8 million and the number of positions comprising those hedged positions is approximately 42. The amount the subject of the hedged positions with IB is in the order of $24 million; and the number of separate transactions comprising those hedged positions is approximately 5,134.

IB Platform

44. As set out in paragraphs 69 to 82 of my First Australian Affidavit (and see paragraph 32 of my First New Zealand Affidavit), all investments made on the IB Platform were exchange-traded.

45. The stocks which are held on the IB Platform by IB are held in the name of Halifax NZ or Halifax AU. Given that, in the CSAs, Halifax AU and Halifax NZ, as brokers, were appointed by the Clients as "agent" to trade in the relevant financial products on behalf of

the Clients, the products held by IB in the name of Halifax NZ or Halifax AU are held by the relevant Halifax entity as agent for the individual Clients.

46. Halifax AU staff are able to close each individual Investor's position on the IB Platform manually by logging onto each individual Client's account and closing each position. Alternatively, the Liquidators are able to instruct IB to close out positions.

47. There is a total of approximately 20,336 separate investments still held on the IB Australia and IB NZ platforms. As further discussed in paragraphs 51 and 52 below, the Clients holding an interest in those investments have not decided to close out their positions to date, but could do so if they so wish.

Timeline for realisation of all investments

48. Since the date of the Investor Notice, I have consulted the KPMG capital markets team and Mr Toby Grob of Strategic Business Solution Partners to ascertain the likely timeline to realise all extant investments. Mr Grob has informed me, and I believe, that, with such a large volume of investments to be realised, realising all extant positions on the IB Australia or IB NZ platforms would take approximately three to six months in total.

49. I expect that the time involved to close out extant investments will be the same whether the extant investments are realised now, or at some later point. Given the length of time that the process of closing extant investments is expected to take, however, it may be that even if the process of closing extant investments commenced now, that process may not be completed by, or may only be completed shortly before, all other issues on the Interlocutory Applications are determined. That is an expectation I have formed in the context of discussions which have taken place in my presence, in open court, 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.

50. Given the need for the hedged investments to be closed out contemporaneously with the "*virtual*" Client positions (which happens automatically as explained in paragraph 42 above), I am of the view that the Client positions on the MT4 and MT5 platforms would need to be closed out in stages over the period of approximately three to six months to which I have referred above.

Closing positions since the Appointment Dates

51. Since the Appointment Dates, the Liquidators have continued to permit each Investor to close out open positions, or to sell or realise investments in financial products, on the trading platforms at the Investor's own discretion, but have not entered into any new transactions or trades on behalf of Investors. In effect, 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 been determined. The Investors have been notified on a number of occasions of their ability to close extant investments, including (without limitation) by Reports to Creditors, FAQs posted to the Halifax AU and Halifax NZ websites, and Investor Notices.

52. However, notwithstanding these Investor notices, since the Appointment Dates, a total of only 18,235 positions have been closed by Investors, still leaving 22,645 open positions.

Communications from Investors as to Liquidators realising extant investments

53. The question of whether all extant investments should be realised is one which affects the total pool of funds available for distribution at the conclusion of the proceedings. However, the way in which it will impact on individual Investors will depend on the manner of distribution directed by the Courts and, if there are to be proportionate distributions, the date on which the percentage entitlement of each Investor is to be calculated. Accordingly, depending on the manner of distribution ultimately directed by the Courts, and the formula for calculation of individual Investor entitlements, different Investors have different interests in whether and when extant investments should be realised. That (together with the different individual circumstances of Investors) may explain why different Investors have different views on whether and when extant investments should be realised.

54. Since the Appointment Dates, the Liquidators and their staff have received a number of communications from Investors on the question of whether or not extant investments should be realised (in addition to the formal responses from Investors in response to the Investor Notice, which are considered further below). Exhibited at pages 442 to 489 of the Exhibit are copies of the written communications from Investors on this issue.

55. 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. Communications which assert harm on the part of Investors and/or which implicitly or expressly threaten legal proceedings are emails at pages 490 and 491 of the Exhibit.

Investor Notice

56. Early on in the administration of Halifax AU and Halifax NZ, I formed the view that funds held by Halifax AU and Halifax NZ were part of a "*deficient mixed fund*" and that it would be necessary to obtain directions from the Federal Court of Australia and the High Court of New Zealand as to the appropriate manner in which to distribute the fund to Investors. For the reasons set out at paragraphs 215 to 228 of my First Australian Affidavit, and see also paragraphs 21-22 of my First New Zealand Affidavit, I formed the view that it would be desirable to minimise the risk of inconsistent directions or judicial advice being provided by the Federal Court of Australia and the High Court of New Zealand and, to that end, it would be desirable to have a joint sitting of the Federal Court of Australia and the High Court of New Zealand if possible. For that reason, much of the work carried out by the Liquidators until around November/December 2019 was to facilitate a process where the matters in respect of which the Liquidators and Halifax AU were seeking directions and judicial advice were dealt with jointly by the Federal Court of Australia and the High Court of New Zealand.

57. On 15 November 2019, and in advance of the joint case management hearing of the Federal Court of Australia and the High Court of New Zealand which took place on 18 December 2019, the Liquidators issued a notice to Investors (**Investor Notice**). The Investor Notice was sent in accordance with directions of both the Federal Court of Australia and the High Court of New Zealand.

58. The Investor Notice, amongst other things, invited Investors to put forward their views in relation to the closing out of extant positions by returning Annexure C of the Investor Notice to the Liquidators. A copy of the Investor Notice is at pages 492 to 509 of the Exhibit.

59. A total of 68 responses were received in relation to Annexure C. The responses were overwhelmingly in support of refraining from closing out. The 68 Investors who responded to this issue included:

    (a) 49 Investors who advised that they did not want Investor positions to be closed out;

    (b) 8 Investors who advised that they wanted Investor positions to be closed out; and

    (c) 11 Investors who responded on the issue, but did not put forward any clear position.

60. The Investor responses to Annexure C are exhibited to the Affidavit of Ian Phillip Sutherland sworn 11 December 2019 and marked "IPS-9".

Investors who do not want the open positions to be closed out

61. The 49 Investors who did not want open positions to be closed out gave a number of reasons as to why, in their view, the positions should not be closed out. A summary of the key points advanced by those Investors is as follows:

(a) Investors would incur divestment costs on an investment being closed (for example brokerage and commission), and reinvestment costs if the Investor wished to re-acquire the same investment. Those costs would not be incurred (at least not immediately) if Investor positions remained open.

(b) Investors may incur capital gains tax and other taxation obligations which may not arise if Investor positions remain open.

(c) Investors may be exposed to costs associated with currency conversion that may not be incurred if Investor positions remained open.

(d) Closure of positions may disrupt Investors' investment strategy or result in loss of an income stream (for example, if an Investor was receiving dividends from any investment, particularly if that Investor was a retiree who was dependent on dividends for income).

(e) The amount of the deficiency is not sufficiently large (based on the Liquidators' current estimate at the time of the Investor Notice, being approximately 9% of Investor positions) to make it reasonable to realise all positions for the purpose of distributing the funds. Some Investors identified alternative methods of distribution, in particular through an *in specie* distribution, with each Investor paying cash to Halifax to the extent that the value of the assets distributed through the *in specie* distribution exceeded what the Courts calculated to be their share of or entitlement to the proceeds ultimately distributed. Those Investors who raised *in specie* distribution as a possibility included those expressing concern about capital gains tax, those who had self-managed superannuation funds and those who expressed concerns about insider trading.

(f) Investors viewed their investment(s) as being traceable and as such believed that they should receive the whole of the value of their extant investments and not merely a proportionate share of their investments at the time when proceeds are distributed by the Halifax entities, and therefore did not consider that open positions should be closed out.

Investors who think that all open positions should be closed out

62. As set out above, eight Investors returned Annexure C to the Liquidators stating that they wanted Investor positions to be closed out. A summary of the key points advanced by those Investors is as follows:

    (a) As a result of the "*commingling effect*" Investors can generally not be dealt with on an individual basis (apparently on the basis that the effect of the commingling is that no individual has any right to the amount of the funds held on investment through Halifax).

    (b) The costs of keeping the trading platforms operational are too high and are eroding Investor funds.

    (c) The Liquidators' costs will increase the longer this matter goes on.

    (d) While the positions are open, they are at risk to the changing market.

    (e) Finalisation of accounts allows accurate distribution decisions.

    (f) IInvestors would like to "get on with their lives".

    (g) Some IInvestors are reliant on their investment for their retirement (which, again, I understand to be an argument in favour of realising investments now on the assumption that realising investments now would allow a quicker distribution to be made to Investors).

63. Because the decision the Plaintiffs have made, referred to below, is to refrain from closing out or realising extant investments until the final determination of the substantive issues in the proceedings (subject to obtaining judicial advice that they would be justified in proceeding in that way), I focus below on the views of the Investors who have urged that all open positions should be closed out.

Further analysis following the response to the Investor Notice

Taxation matters

64. As set out above, one of the issues that was raised in response to the Investor Notice was that realising extant investments may expose Investors to potentially adverse taxation consequences.

65. Since the date of the Investor Notice, I have consulted members of the KPMG Tax Team in respect of potential taxation issues which may arise if all extant Investor positions are realised.

66. In the light of my discussion with members of the KPMG Tax Team, I believe that the taxation implications are potentially complicated for reasons including (expressed below as a very high level summary):

(a) where assets are not traceable, whether the Investor is absolutely entitled to any property;

(b) whether any Investors are to receive an *in specie* distribution because that may either eliminate or defer any capital gains tax.

The Plaintiffs' decision

67. At the time the Investor Notice was issued, I considered that there may be utility in seeking a direction and/or judicial advice in respect of the closing out of extant investments in advance of the determination of the other issues raised in the Interlocutory Application, that is, in seeking an expedited hearing of that part of the Interlocutory Applications.

68. However, since the time of the Investor Notice in November/December 2019, I have considered the position further, particularly in light of the further information I have gained and further views that have been conveyed to me, which are summarised above, at least in broad terms. In undertaking this further consideration, I have had regard to all the matters identified above and below, including in particular the responses to the Investor Notice. There are competing considerations in favour of and against closing out extant investments.

69. However, based on the material available to me, I have decided that, subject to receiving directions and judicial advice from the Court I would be justified in doing so, the appropriate course is to refrain from realising all extant investments until the determination by the Courts, following the final hearing, of the substantive issues raised in the Interlocutory Applications.

70. My reasons for making this decision are as follows.

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 a

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 (see my First Australian Affidavit at [24]) 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, as I have said in paragraph 52 above, 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*, as I have said in paragraph 49 above, 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. As I have also said above, 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 refer to paragraphs 61 to 62 above. In particular, I have carefully considered and taken account of all of the factors, summarised in paragraph 62 above, 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, as the table in paragraph 11 above indicates, 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, summarised in paragraph 61 above, 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.

Concerns that breach of duty may be alleged

81. I am concerned, given that a number of Investors have expressed the view that realisation of all extant investments should occur immediately, that if I were to refrain from doing so, there may be allegations that I have acted in breach of duty, either by:

(a) causing Investors financial loss in respect of their investments; or

(b) causing Halifax AU to continue to incur costs in respect of the trading platforms. by foregoing the opportunity to save the weekly amounts in respect of platform maintenance, which is the differential between the two figures in the table in paragraph 20 above.

82. This is particularly so in light of the communications referred to in paragraph 55 above.

83. One concern I have is that it may be said by these Investors that, in all the circumstances, the only proper exercise of the power to terminate conferred by the Australian CSAs and the New Zealand CSAs to (which would consequently, in the case of a number of the

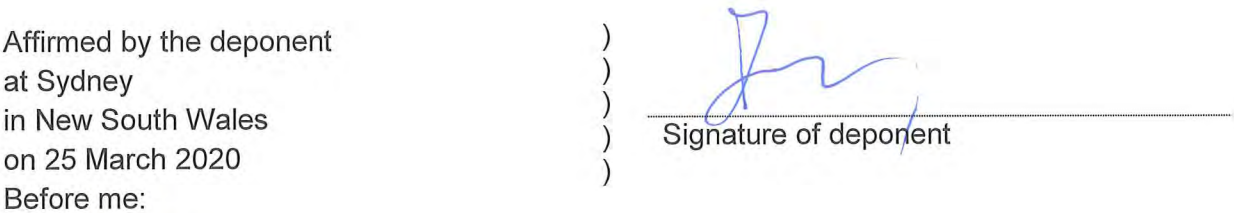
CSAs, make closing out mandatory) would be to terminate the CSAs. (See paragraph 32 above.)

84. By this application I seek to protect myself and all the Plaintiffs against such allegations and potential action.

Judicial advice sought

85. For the reasons set out above, the Plaintiffs seek judicial advice and/or a direction from both the Courts that the Plaintiffs would be justified in refraining from realising all extant investments until the final determination of the other substantive issues raised by the Interlocutory Applications (and would be justified in refraining from bringing an expeditious application before the Courts for a direction that they would be justified in realising all extant investments as soon as practicable).

Affirmed by the deponent)
at Sydney)
in New South Wales)
on 25 March 2020)
Before me:)



Signature of deponent

Signature of witness

Name of witness: Catherine Louise Crawford
Address of witness: Level 31, 101 Connell Street Sydney NSW 2000
Qualification of witness: Solicitor