

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)**, a duly incorporated company having its registered office at c/- KPMG, 18 Viaduct Harbour Avenue, Auckland 1140

AND of an application by **MORGAN JOHN KELLY and PHILIP ALEXANDER QUINLAN** (in their capacity as liquidators of Halifax New Zealand Limited (in liquidation)), Insolvency Practitioners of KPMG, Level 38, Tower Three, International Towers Sydney, 300 Barangaroo Avenue, Sydney, Australia

First Applicants

AND of an application by **HALIFAX NEW ZEALAND LIMITED (IN LIQUIDATION)** (in its capacity as trustee of a trust in respect of money and property held on behalf of clients but not subject to the trust of which the Third Applicants are trustees), a duly incorporated company having its registered office at c/- KPMG, 18 Viaduct Harbour Avenue, Auckland 1140

Second Applicant

(continued over page)

ORIGINATING APPLICATION FOR DIRECTIONS
DATED 25 SEPTEMBER 2019

Russell
McLeagh

Counsel: A Leopold SC (Aust) M Kersey
E Holmes P +64 9 367 8000
J S Burnett F +64 9 367 8163
PO Box 8
DX CX10085
Auckland

AND

of an application by **MORGAN JOHN KELLY and PHILIP ALEXANDER QUINLAN** (in their capacity as trustees, appointed on 18 September 2019 by the Financial Markets Authority, of a trust created by regulation 246 of the Financial Markets Conduct Regulations 2014), Insolvency Practitioners of KPMG, Level 38, Tower Three, International Towers Sydney, 300 Barangaroo Avenue, Sydney, Australia

Third Applicants

TO: the Registrar of the High Court at Auckland

AND TO: the parties directed to be served

THIS DOCUMENT NOTIFIES YOU THAT:

1. The First Applicants ("**Liquidators**"), Second Applicant ("**Halifax NZ**") and Third Applicants ("**Trustees**") will, on _____ at _____ am/pm, apply to the Court for:

Directions

- (a) Directions as to the manner in which, following the sale, closing out or realisation of extant investments, the funds held by Halifax NZ should be distributed to clients of Halifax NZ and/or Halifax Investment Services Pty Limited (in liquidation) ("**Halifax AU**"), subject to the directions sought below;
- (b) Directions as to whether the Applicants would be justified in:

Pooling

- (i) grouping or pooling all or some of the funds (including interest thereon) and property in all (or some and, if so, which) of the accounts held by Halifax NZ or alternatively whether there should be such grouping or pooling together with the funds (including interest thereon) and property in all (or some and, if so, which) of the accounts held by Halifax AU ("**Accounts**");
- (ii) paying each of the clients of Halifax NZ (or alternatively Halifax NZ and Halifax AU), out of the pooled funds, an amount equal to the proportion of the pooled funds which is the same proportion that that client's entitlement would have been of the pooled funds had there not been a deficiency in the funds held by Halifax NZ and Halifax AU on behalf of their clients;
- (iii) distributing the funds in some other way and if so in which way;

Foreign currency

- (iv) converting any funds held in other currencies into Australian dollars (subject to any particular exclusions, and if so, which) for the purpose of calculating the quantum of the funds to be distributed and, if not, how and when the value of any funds held in other currencies should be calculated for the purposes of distribution to clients of Halifax NZ (or alternatively Halifax NZ and Halifax AU);
- (v) converting any funds held in Australian dollars to New Zealand dollars (subject to any particular exclusions, and if

so, which) for the purposes of making distributions to clients of Halifax NZ;

Sale, closing out and realisation

- (vi) selling, or directing the sale of, or closing out, or directing the closing out of, open investments held through the investment platform operated by Halifax NZ through Interactive Brokers LLC ("**IB New Zealand**") (and if so, when);
- (vii) closing out, or directing the closing out of, open positions held by clients through the investment platforms known as "MT4" and "MT5" (and if so, when);
- (viii) realising the investments held by clients through IB New Zealand or through the MT4 and MT5 investment platforms in some other way and if so in which way (and if so, when);
- (ix) realising investments which were made by way of hedging Halifax NZ's position in respect of investments by clients through the MT4 and MT5 investment platforms (and if so, when);
- (x) (if a direction is given that the Applicants are justified in proceeding in the manner referred to in paragraphs (vi) to (ix) above) depositing the proceeds of sale, closing out or realisation of investments into an existing Account, or, if not, into some other account(s) and which other account(s);

Date of calculation of value of client's investments

- (xi) calculating the value of the investments by each client, for the purposes of distributions, as at 23 November 2018 (being the date on which the Administrators were appointed to Halifax AU), on 27 November 2018 (being the date on which the Administrators were appointed to Halifax NZ), on the date of sale, closing out or realisation of each individual investment or, if none of the above, on what date;

Netting off of multiple accounts of the same client

- (xii) setting off positive net account balances credited to a particular client against negative net account balances incurred by the same client;

Disregarding small balances

- (xiii) treating clients who (after netting off any negative balance or balances) have a credit balance of (or equivalent in value to) AU\$100 (or some other amount and if so what amount)

or less as having no right to participate in the distribution of funds.

- (c) Directions to the Trustees, in their capacities as trustees of the trust created by regulation 246 of the Financial Markets Conduct Regulations 2014, to which they have been appointed as trustees by the Financial Markets Authority ("FMA") ("Regulation 246 Trust") as to:
- (i) the money and/or property that is subject to the Regulation 246 Trust;
 - (ii) whether the Trustees are required to take any further steps (and, if so, what steps) in order to identify money and/or property that is subject to the Regulation 246 Trust;
 - (iii) whether the Trustees would be justified in dealing with the money and/or property that is subject to the Regulation 246 Trust in the same manner as outlined in paragraph (a) and (b) above, or if not, in what way they should deal with that money and property.

Liquidators' costs

- (d) Orders that the remuneration, costs and expenses of the liquidators of Halifax NZ, and the remuneration, costs and expenses of the Liquidators in their capacity as voluntary administrators of Halifax NZ prior to their appointment as liquidators, and the costs and expenses of Halifax NZ (including in each case on an interim basis) in connection with:
- (i) administering property held by Halifax NZ as a trustee, including (without limitation) funds held in the Accounts;
 - (ii) recovering (or attempting to recover) property held, or to be held, by Halifax NZ as trustee;
 - (iii) otherwise in carrying out their duties or responsibilities as liquidators and trustee respectively; and
 - (iv) the costs and expenses of this Application,
- be paid and recouped out of the Accounts (and, if so, which of the Accounts) or, if not, from such other account(s) as directed or advised by the Court.
- (e) Directions to the Liquidators as to the procedure to be adopted in connection with the payment and/or recoupment of the remuneration, costs and expenses, including the costs and expenses of this Application, referred to in paragraph (d) above.

Trustees' costs

- (f) Orders that the remuneration, costs and expenses of the trustees of the Regulation 246 Trust in connection with:
- (i) administering property held by them as trustee, including (without limitation) funds and property subject to the Regulation 246 Trust;
 - (ii) otherwise carrying out their duties or responsibilities as trustee; and
 - (iii) the costs and expenses of this Application,
- be paid or recouped out of the Accounts (and, if so, which of the Accounts) or, if not, from such other account(s) as directed or advised by the Court.

Other orders

- (g) Such further or other orders and/or directions as the Court considers appropriate.

2. The grounds on which the orders are sought are as follows:

Background

- (a) The First Applicants are the liquidators of the Second Applicant, Halifax NZ, and were the voluntary administrators of Halifax NZ prior to its liquidation.
- (b) Halifax NZ was placed into liquidation on 22 March 2019.
- (c) Halifax NZ is the trustee of statutory and general law trusts in respect of the funds held by it on behalf of its clients (and such further funds as will be held by it following the sale, closing out or realisation of extant client investments).
- (d) On 18 September 2019, Morgan Kelly and Philip Quinlan were appointed by the FMA as trustees of the Regulation 246 Trust.
- (e) The liquidation of Halifax NZ is closely related to and interconnected with the liquidation of its Australian parent company, Halifax AU. The Liquidators are also the liquidators of Halifax AU.
- (f) The Liquidators' investigations to date have established that:
 - (i) subject to potential actions for recovery against third parties, Halifax NZ will not have sufficient funds to meet all claims in the liquidation by its creditors or to satisfy in full the entitlements of its clients who invested money with Halifax NZ prior to it entering voluntary administration;
 - (ii) the business of Halifax NZ was significantly interrelated with the business of Halifax AU, and the money and

property held by Halifax NZ and Halifax AU are substantially commingled; and

- (iii) the money and property held by Halifax NZ and Halifax AU together constitute a "deficient mixed fund", in that, as at 23 November 2018, there was a deficiency of some A\$19 million (or NZ\$19.7 million) in the amount clients invested through Halifax AU and Halifax NZ and in that those funds that are held by or invested through Halifax NZ and Halifax AU are to a very significant extent practicably unable to be traced to particular clients.
- (g) The Liquidators are in doubt as to the appropriate manner to proceed with the realisation, management and distribution of money and property currently held by Halifax NZ, which money and property is all or nearly all money and property held on trust for the clients of Halifax NZ or of Halifax AU (given that the money and property held by Halifax NZ is commingled with money and property that may have derived from investments through Halifax AU).
- (h) Generally, without the directions requested at paragraph 1 above, the Liquidators are at risk of breaching their duties as liquidators, or causing Halifax NZ to breach its duties as trustee, or the Trustees are at risk of breaching their duties as trustees.

Urgency of orders as to sale, closing out or realisation

- (i) The Applicants are anxious to obtain orders, at least in respect of paragraph 1(b)(vi) to (x) above (sale, closing out or realisation of extant investments) because extant investments have, in aggregate, increased significantly since the appointment of Administrators in November 2018. However, were there to be a substantial downturn in global markets, that might in turn have a significant impact on returns to investors.

Co-ordination with proceedings in Federal Court of Australia

- (j) The Liquidators and Halifax AU have brought an Interlocutory Process in proceedings in the Federal Court of Australia (proceedings no. NSD 2191 of 2018) seeking directions similar to those sought above by Halifax NZ, in respect of the money and property held by Halifax AU on behalf of clients who invested through it ("**AU Directions Application**").
- (k) On 29 and 30 July 2019, in the AU Directions Application, Gleeson J heard an application that the Federal Court of Australia, under section 581(4) of the *Corporations Act 2001* (Cth), issue to this Court a letter of request seeking that this Court act in aid of and be auxiliary to the Federal Court of Australia in relation to the AU Directions Application by sitting jointly with the Federal Court of Australia whilst the Federal Court determines the AU Directions Application, with a view to each Court hearing all of the evidence and all of the submissions in both proceedings together, on the basis that the Courts would, although determining each Application separately,

deliberate together so as to seek to achieve so far as possible an outcome in which inconsistency between the directions given by each Court in respect of the same commingled pool of funds would be effectively eliminated.

- (l) On 22 August 2019 Gleeson J delivered judgment ([2019] FCA 1341), saying at [78]-[80] that it was premature to issue a letter of request, on the basis that (at [79]):

“the parties who will respond to the liquidators’ application should be identified, the issues between them and the liquidators defined and their views sought as to the most efficient and effective way of proceeding in this case, before any formal request is made by this Court to the NZHC. One or more of those parties may oppose a concurrent hearing of the FCA and the NZHC. In addition, once the contradictors to the application are identified and their positions understood, it should be possible to identify with more precision ... the respect or respects in which the NZHC will be asked to act in aid of and auxiliary to this Court and, quite probably, vice versa. More will also be known about the course of the proposed NZ application in the NZHC”.

- (m) However, her Honour stated amongst other things:
- (i) at [59], that her Honour did not have “any difficulty with the general proposition that this Court and the NZHC should endeavour to cooperate to the extent possible to promote the objectives of the liquidations of Halifax AU and Halifax NZ. Nor do I have any difficulty with the general idea that such cooperation could include a concurrent hearing of this court and the NZHC, if the NZHC were amenable to such a hearing”;
 - (ii) at [60], that, if the proposed letter of request were issued, “One means by which the NZHC might act in aid of and be auxiliary to this Court ... might be to participate in a concurrent hearing of the proposed NZ application with the hearing of the interlocutory process” in the AU Directions Application;
 - (iii) at [76], that “this case presents as a classic candidate for cross-border co-operation between courts to facilitate the fair and efficient administration of the winding up of Halifax AU (and Halifax NZ) that will protect the interests of all relevant persons, particularly the investor clients of Halifax AU and Halifax NZ who may have claims against the funds held by Halifax AU”;
 - (iv) at [77], that her Honour considered that the proposed letter of request did not raise concerns of international comity.

Pooling

- (n) The evidence establishes that tracing individual client entitlements in respect of various accounts under the control of the Halifax Group is impossible, or, alternatively, not feasible or disproportionately burdensome. In those circumstances, there are authorities which suggest that the appropriate course is the pooling of funds in the various accounts and a proportionate distribution to clients in accordance with their respective individual entitlements. There may, however, be clients or groups of clients who wish to argue that one or more of the issues below (or other issues) justify a distribution to them of something greater than a proportionate distribution. The Applicants seek the directions of the Court as to the appropriate course in the circumstances of the present case.

Foreign Currency

- (o) Foreign currency amounts may need to be converted into Australian Dollar amounts in order for the respective individual entitlements of clients to be quantified, although it may be possible for a notional conversion to be carried out in order to quantify individual entitlements.
- (p) The date as at which the foreign currency holdings are calculated will inevitably have an impact on the value of assets held on trust for clients.

Sale, closing out and realisation

- (q) Open positions must (or must generally) be sold, closed out or realised in order for distributions to be made to clients, although it may be possible for some distributions *in specie* to occur.
- (r) The date as at which open positions are sold, closed out or realised will inevitably have an impact on the value of assets held on trust for clients.

Date of calculation of value of client's investments

- (s) Without certainty as to the date on which claims are to be calculated, distributions to creditors are not feasible.
- (t) The date as at which the value of a client's position is calculated will inevitably have an impact on the value of respective individual client entitlements.

Netting off multiple accounts of same client

- (u) Netting off multiple accounts of the same client is likely to be more efficient than distributing to the client the amount in credit and separately seeking payment from the client of the amount in debit.

Disregarding small balances

- (v) Disregarding small balances will ensure that amounts distributed to clients will not be outweighed by the costs of administering the distributions.

Liquidators' costs

- (w) The Liquidators have a statutory entitlement to recover their remuneration, costs and expenses from the assets of the company. Halifax NZ has no funds available from which its costs and expenses as trustee and the Liquidators' remuneration, costs and expenses may be paid or recouped.
- (x) The orders sought are appropriate for this purpose and, in any event:
 - (i) the Liquidators seek the direction of the Court as to the appropriate procedure for such payment or recoupment by way of the order sought at 1(d) and (e) above; and
 - (ii) the remuneration of the Liquidators remains subject to review by the Court pursuant to s 284(1)(e).

Trustees' costs


- (y) The Trustees should reasonably be entitled to remuneration on a professional services basis as well as indemnification for any costs and expenses incurred by them in carrying out their duties as trustees.

3. This application is made in reliance on:

- (a) *Re BBY Ltd (No. 2)* [2018] NSWSC 346, (2018) 363 ALR 492;
- (b) *BBY Limited (receivers and managers appointed) (in liquidation) (No 3)* [2018] NSWSC 1718;
- (c) *Re Ararimu Holdings Limited* [1989] 3 NZLR 487 (HC);
- (d) *Re Ross Asset Management Limited (in liquidation)* [2018] NZHC 2007;
- (e) *Re Forresters Nominee Company Limited and Hubbard Churcher Trust Management Limited* [2012] NZHC 1216;
- (f) section 284 of the Companies Act 1993;
- (g) sections 66 and 71 of the Trustee Act 1956;
- (h) rules 1.2, 1.6, 7.22, 7.23, 7.43A, 7.46, and Part 19 of the High Court Rules 2016;
- (i) the affidavit of Morgan Kelly affirmed in support of this application on 24 September 2019; and

- (j) the affidavit of Ian Sutherland sworn in support of this application on 24 September 2019.

DATED 25 SEPTEMBER 2019



M Kersey
Solicitor for the Applicants

This document is filed by **MATTHEW KERSEY**, solicitor for the Applicants, of the firm Russell McVeagh, whose postal address is Level 30, Vero Centre, 48 Shortland Street, PO Box 8, DX CX10085, Auckland 1010.

The address for service of the Applicants is Level 30, Vero Centre, 48 Shortland Street, Auckland 1010. Documents for service may be left at that address or may be:

- (a) posted to the solicitor at PO Box 8, Auckland, 1010;
- (b) left for the solicitor at a document exchange for direction to DX CX10085; or
- (c) emailed to the solicitor at matt.kersey@russellmcveagh.com with a copy to josh.suyker@russellmcveagh.com.