IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY
COMMERCIAL LIST

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2019-404-2049
[2020] NZHC 894

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)
AND	an application by MORGAN JOHN KELLY and PHILIP ALEXANDER QUINLAN First Applicants

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Hearing: 3 April 2020

Appearances: Halifax AU by AVL:
A Leopold SC and E Holmes for Applicants
D Hyde for Choo Boon Loo
B Hancock for Atlas Asset Management
J V Gooley for Elysium Business Systems
C Mitchell for J Hingston
Halifax NZ by AVL:
J Caird for Atlas Asset Management
E L Smith for Whitehead Group
S Munro for Chen Wang and Fiona McMullin
J Knight for Interested Party

Judgment: 5 May 2020

JUDGMENT OF VENNING J
On application for directions

This judgment was delivered by me on 5 May 2020 at 11.30 am, pursuant to Rule 11.5 of the High Court Rules.

Registrar / Deputy Registrar

Date…………

an application by HALIFAX NEW ZEALAND LIMITED (IN LIQUIDATION)
Second Applicant

MORGAN JOHN KELLY and PHILIP ALEXANDER QUINLAN
Third Applicants

AND

CHOO BOON LOO
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

FIONA McMULLIN
Fifth Respondent

ANDREW PHILLIP WHITEHEAD and MARLENE WHITEHEAD (as trustees for the Beeline Trust)
Sixth Respondent

ANDREW PHILLIP WHITEHEAD
Seventh Respondent

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Copy to: K&L Gates, Australia
Professor Knight
A Leopold SC, Australia
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Murdoch Clarke, Australia

Introduction

[1] Mr Kelly and Mr Quinlan, in their capacity as liquidators of Halifax New Zealand Limited (in liquidation) and also as trustees, seek directions from the Court confirming they are justified in refraining from:

(a) realising any and all extant investments (closing out) until the determination of all substantive issues in this proceeding, and *In the matter of Halifax Investment Services Pty Ltd (in liquidation)* (Halifax AU) in NSD 2191 of 2018; and

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

[2] In the substantive application the applicants seek 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 AU together with related and ancillary orders. One of the related orders seeks directions in relation to closing out.

Relevant procedural history

[3] There have been a number of case management conferences and interlocutory hearings at which orders and interim directions have been sought by the liquidators and by other parties seeking to be joined to the proceeding.

[4] At an earlier hearing on 18 February 2020 the applicants had sought a direction that they were justified in not closing out before 3 April 2020. The Court declined to make the direction. It noted that the liquidators had not made a decision about closing out but rather had postponed that decision. The Court also considered that it did not have sufficient information to make the direction sought at that time. It was left open for the applicants to renew the application and provide further information through the course of the proceedings.[1]

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[1] Minute/orders (8) dated 21 February 2020 at [31]–[33].

[5] There have been a number of relevant developments since that decision. First, at that hearing four representative respondents were joined. Next, at a recent hearing, on 3 April 2020, a fifth respondent has been joined to both the Australian proceedings and these proceedings to represent a further category of investors. Andrew Phillip Whitehead and Marlene Whitehead as trustees of the Beeline Trust and Andrew Phillip Whitehead (together the Whitehead interests) have also been joined in their personal capacity to these proceedings.[2]

[6] At the hearing on 3 April the applicants renewed and formalised the application for directions in relation to closing out. They have now made a decision not to close out in advance of the substantial hearing. They seek directions confirming that decision.

[7] Mr Kelly has also provided a further affidavit dated 25 March 2020 which addresses the issue of closing out. Mr Kelly has set out the reasons the applicants have decided the appropriate course is to refrain from closing out until determination of the substantives issues raised in the proceeding.

[8] In a decision delivered on 23 April 2020 in the Australian proceeding Gleeson J declined the application for directions by Mr Kelly and Mr Quinlan in their capacity as trustees. She considered that as there was a potential dispute between investors as to the proper administration of the extant investments it was not an appropriate case for judicial advice under s 63 of the Trustee Act 1925 (NSW). However, Gleeson J was satisfied it was appropriate to make the directions sought by the liquidators under s 90-15 Insolvency Practice Schedule (Corporations), Schedule 2 to the Corporations Act 2001 (Cth). I have had the advantage of considering that judgment and the reasons for it.

Background to the issue of closing out

[9] Since the appointment of the applicants to Halifax AU (on 23 November 2018) and Halifax NZ (on 27 November 2018) the applicants have continued to permit investors to close out open positions or to sell or realise investments in financial

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2 Minute/orders (10) dated 20 April 2020.

products but have not entered into any new transactions or trades on behalf of investors. That has enabled investors to convert investments to cash or to crystallise the liability between the Halifax entity and the client. Since appointment a total of 18,235 positions have been closed out by investors. There remain 22,645 open positions.

[10] From an early date the liquidators recognised that the issue of closing out would be a matter of particular interest to investors. As noted, the original application raised the issue. In their notice to investors on 15 November 2019 the applicants included a question asking investors to put forward their views in relation to the closing out issue. Of the 68 investors who responded on the issue:

(a) 49 did not want investor positions closed out;

(b) eight did want investor positions closed out;

(c) 11 did not express any clear view.

[11] The reasons given by those investors who responded in support of closing out included:

(a) the co-mingling of funds meant investors could not be dealt with on an individual basis;

(b) the costs of keeping the trading platforms operational;

(c) the risks in a changing market;

(d) finalisation of accounts would allow distribution decisions;

(e) the ongoing costs of the liquidation;

(f) some investors were reliant on the investments for their retirement needs.

[12] The applicants cannot proceed on the basis that no investor will be able to be dealt with individually. That issue can only be determined at the substantive hearing. At least two of the representatives appointed by the Court to represent the different classes of investors wish to argue that certain investments are traceable and should be dealt with on an individual basis. Jason Paul Hingston represents all clients of Halifax AU and Halifax NZ who transferred shares into the trader work station (also known as Halifax AU's IB Platform or Halifax NZ's IB Platform) from another stockbroker and have not traded those shares. Fiona McMullin represents all clients of Halifax AU and Halifax NZ who invested before 1 January 2016 to propound the argument that investments made before there was a deficient mixed fund are traceable.

[13] Next, while the positions are open and exposed to the market, that cuts both ways. The value of client equity balances has fluctuated from the date of appointment. As Mr Kelly's evidence shows, even with the recent large downturns in the stock market as a result of the Covid-19 pandemic the total value of all investments is still in excess of the figure as at the appointment of the liquidators. The total client equity balance at 17 March 2020 of AUD 244,423,482 was still significantly ahead of the AUD 211,601,823 prior to the appointment of the liquidators.

[14] A major premise underlying the reasons for closing out now as opposed to after the Court's decision on the substantive application appears to be that it will lead to earlier resolution of the liquidation, an earlier return of funds to investors and an attendant reduction in costs.

[15] While there would be a saving in the costs of maintaining the trading platforms (Mr Kelly considers it could be as much as $1.4 million per year), the liquidation will not be able to be completed and the liquidators will not be in a position to return funds to investors in advance of the Court's determination of the substantive issues in this proceeding. Also, while the costs of maintaining the investment platforms are significant, there would be other costs associated with a realisation of the investments. The costs of maintaining the investment platforms could possibly even be outweighed by the benefits of doing so. Further, the realisation process, at least in relation to the investments through the IB platforms, could take three to six months.

[16] It is clear from the steps individual investors have taken and the responses to the notice that there is a difference of opinion amongst investors, although on the basis of the information before the Court it seems that a majority favour the retention of the investments rather than closing out.

The decision not to close out before the substantive hearing

[17] At paras 71 to 80 of his affidavit Mr Kelly gave several reasons why the applicants have now decided to refrain from closing out all extant investments until the determination by the Courts of the substantive issues. In summary, the reasons include:

(a) there are a number of advantages in retaining the ability to make an in specie distribution to investors even in the event particular investments are not traceable;

(b) some investors contend their investments are traceable and so they should not therefore share in the deficiency. Closing out at this stage would preclude that argument;

(c) one of the directions sought is whether pooling orders should be made in the administration of the companies. If the Court ultimately gave directions or advice that pooling should not occur, closing out in advance of the final hearing has the potential to frustrate that outcome;

(d) the vast majority of the investors who have expressed a view on closing out oppose it;

(e) even if a process of closing out was undertaken it is unlikely it would be completed much before the hearings of the substantive applications which are scheduled for two weeks from 30 November;

(f) the reasons given by investors who support closing out are either based on a misapprehension or a misunderstanding, or at least fail to take

account of all relevant background which the liquidators have considered;

(g) the points made by those investors who oppose closing out are, in the liquidators' opinion, more persuasive than the points advanced by those who support closing out.

Legal basis for the directions sought

[18] Section 66 of the Trustee Act 1956 provides:

> **66 Right of trustee to apply to court for directions**
>
> (1) Any trustee may apply to the court for directions concerning any property subject to a trust, or respecting the management or administration of any such property, or respecting the exercise of any power or discretion vested in the trustee.
>
> (2) Every such application shall be served upon, and the hearing may be attended by, all persons interested in the application or such of them as the court thinks expedient.

[19] Section 69 of the Trustee Act confirms that a trustee acting under a direction of the Court shall be deemed to have discharged his duty as trustee. In the absence of fraud or bad faith a direction under s 66 effectively shields the trustee from future related claims by beneficiaries and other parties.

[20] One of the reasons the applicants seek the direction of the Court is that some investors have suggested in their responses that the applicants are acting improperly by not closing out. Some have implicitly or even expressly threatened legal proceedings.

[21] Despite that, none of the respondents before the Court expressed opposition to the liquidators' decision. Mr Loo and Mr Hingston actively supported it.

[22] In support of the application counsel submitted that whether to refrain from closing out was quintessentially a question involving the management or administration of trust property. The extant investments are choses in action. The proceeds from closing out will form part of a deficient co-mingled trust fund held on

behalf of investors by the trustees (Halifax AU, Halifax NZ and in respect of the FMCR Trust, Messrs Kelly and Quinlan).

[23] In a recent decision *FFP Trustee (NZ) Ltd v Peng* Wylie J reviewed the relevant authorities in relation to an application for directions under s 66 of the Trustee Act.[3] As Wylie J noted:

> [58] The jurisdiction under s 66 is intended essentially for private advice by the Court to trustees where they are in doubt as to the proprietary of action that is contemplated. Questions of substance or importance, involving matters in dispute or contest between trustees or allegations of breach of trust (either implicit or explicit), do not lend themselves to applications under s 66. The section is not intended to be used where the rights of adversarial parties need to be determined. Rather, an application must be on agreed facts.

[24] In *Chambers v SR Hamilton Corporate Trustee Ltd* the Court of Appeal confirmed that the High Court's jurisdiction under s 66 is not restricted to minor or procedural issues but an application for directions will not usually be appropriate where important facts are contested.[4] The Court of Appeal approved the following summary by Lord Oliver from *Marley v Mutual Security Merchant Bank and Trust Co Ltd*:[5]

> 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 and professional advice and, if so advised, to protect his position by seeking the guidance of the court.

[25] In *FFP Trustee (NZ) Ltd* Wylie J cited with approval the four situations described by Robert Walker J and approved by the High Court in the United Kingdom in *Public Trustee v Cooper* as being appropriate for directions:[6]

> (a) whether a proposed action is within the applicant trustee's power;
>
> (b) where there is no doubt as to the extent and nature of the trustee's power, but the trustee wishes to obtain the blessing of the Court for the actions on which he/she has resolved because the decision is particularly momentous.

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3 *FFP Trustee (NZ) Ltd v Peng* [2019] NZHC 3301.

4 *Chambers v SR Hamilton Corporate Trustee Ltd* [2017] NZCA 131, [2017] NZAR 882.

5 *Chambers v SR Hamilton Corporate Trustee* Ltd, above n 4, at [32] citing *Marley v Mutual Security Merchant Bank and Trust Co Ltd* [1991] 3 All ER 198 (PC).

6 *FFP Trustee (NZ) Ltd v Peng*, above n 3, at [60], citing *Public Trustee v Cooper* [2001] WTLR 901 (HC).

(c) where the trustee seeks to surrender a discretion vested in him or her; and

(d) where the trustee has taken action and that action has been attacked as being either outside the trustee's power, or an improper exercise of the power.

[26] There is no doubt the applicants, as trustees, have power to make the decision to postpone the closing out of investments until the substantive hearing. The present application falls into the second category. The applicants seek the Court's direction because of the importance of the decision.

[27] The decision is a significant one, and is contentious to the extent the beneficiaries (investors) take differing views. But I would not elevate the issues raised by the investors who support closing out now to amount to an allegation of breach of trust.

[28] There can be no realistic suggestion that the applicants are in a position of personal conflict of interest with the investors. Although reference has been made to the ongoing costs being incurred by the liquidators during the course of the liquidation I am satisfied from the various hearings before this Court and the steps taken to advance the matter by the liquidators they are acting to bring the matter to a conclusion as soon as reasonably possible.

[29] The issue arises, and the applicants seek the advice, because the termination clauses in the Client Services Agreements (CSAs) raise issues as to the powers of the trustees and whether there could be an obligation to activate the termination clauses and close out.

[30] The CSAs of both Halifax NZ and Halifax AU contain termination clauses which permit the companies to terminate the investor agreements following a short period of notice.

[31] Some of the Australian CSAs and all of the New Zealand CSAs impose on the relevant Halifax entity the obligation to close out all "contracts" (which appears to cover investments, including in relation to "securities"), upon termination. Mr Kelly is concerned it may be open for investors to argue that, having regard to the

surrounding circumstances (including but not necessarily limited to the effects of Covid-19 on the stock market) the power to terminate was one which the applicants should have exercised in order to trigger the obligation to close out all the extant contracts.

[32] While applications under ss 66 will not usually be appropriate where important facts are contested, the facts here are not contested. Rather there is a difference of opinion between some investors as to whether all investments should be closed out at this time. But importantly, the decision to refrain from closing out is not a determination of any of the investors' ultimate rights. Rather it is a decision in the course of the administration and management of the Trust.

[33] For the reasons that Mr Kelly has set out he considers that the decision to refrain from closing out until the substantive hearing is the appropriate one but the applicants seek the Court's approval (or blessing as it is put in some cases).

[34] The applicants are entitled to look to the Court for judicial advice. I agree that whether the investments should be closed out is very much a question of management or administration of the trust property, which is at the heart of the jurisdiction of the Court for judicial advice.

[35] Looking at the matter objectively I consider it is preferable to refrain from closing out at this stage and it would be impractical to attempt to resolve closing out as a preliminary issue.

[36] For the above reasons I accept that it is appropriate to grant the direction sought under s 66 of the Trustee Act.

Section 284

[37] Section 284 of the Companies Act 1993 provides:

> **284 Court supervision of liquidation**
>
> (1) On the application of the liquidator, a liquidation committee, or, with the leave of the court, a creditor, shareholder, other entitled person, or director of a company in liquidation, the court may—

> (a) give directions in relation to any matter arising in connection with the liquidation: …
>
> (3) Subject to subsection (4), a liquidator who has—
>
> (a) obtained a direction of a court with respect to a matter connected with the exercise of the powers or functions of liquidator; and
>
> (b) acted in accordance with the direction—
>
> is entitled to rely on having so acted as a defence to a claim in relation to anything done or not done in accordance with the direction.
>
> (4) A court may, on the application of any person, order that, by reason of the circumstances in which a direction was obtained under subsection (1), the liquidator does not have the protection given by subsection (3).

[38] The provision in s 284(1)(a) is broadly expressed and empowers the Court to give directions in relation to any matter arising in connection with the liquidation.

[39] The Court has been prepared to give advice to liquidators concerning decisions which potentially have significant financial consequences. Recent examples include:

(a) whether in order to save costs in the liquidation, the recovered assets of a foreign exchange trader (that operated in practice as a Ponzi scheme) should be treated as forming a common pool available for distribution to both the company's unsecured creditors and its investors on a pro rata pari passu basis, despite the existence of a trust over funds deposited with the company by those investors;[7]

(b) how and on what basis an interim distribution should be made in the liquidation of a company (Ross Asset Management Limited) being a company that operated a Ponzi scheme, including whether the general unsecured creditors and the investors should be treated equally for ranking purposes.[8]

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7 *Graham v Arena Capital Limited (in liq)* [2017] NZHC 973.
8 *Re Fisk* [2018] NZHC 2007.

[40] A major constraint is that as a general rule the Courts have resisted giving directions to liquidators, the effect of which is to curtail pre-existing contractual rights.[9]

[41] But as noted, the individual investors' contractual rights to close out are not affected by the liquidators' decision to postpone closing out. By contrast, if closing out was enforced now that would itself potentially close out some rights. Further, even if the issue could be properly considered fully in advance of the substantive hearing (which I doubt) significant further expense would be incurred in doing so. The Court might well decline to make such a decision prior to the substantive hearing in any event.

[42] The decision of the applicants to refrain from the closing out of investments at this time is a matter properly arising in connection with the administration of the liquidation.

[43] Again, for the above reasons I consider it appropriate to grant the liquidators' application.

Result/orders

[44] Order under s 66 Trustee Act 1956 confirming the applicants (in their capacity as trustees) are justified in refraining from:

(a) realising any and all extant investments (closing out) until the determination of all substantive issues in this proceeding, and *In the matter of Halifax Investment Services Pty Ltd (in liquidation)* (Halifax AU) in NSD 2191 of 2018; and

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

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[9] *Re HIH Casualty and General Insurance (NZ) Ltd* HC Auckland CIV-2003-404-2838, 17 December 2003*; Madsen-Ries v Greenhill* [2016] NZHC 3188 at [117].

[45] Order under s 284(1) Companies Act 1993 directing that the applicants (as liquidators) are justified in refraining from:

(a) realising any and all extant investments (closing out) until the determination of all substantive issues in this proceeding, and *In the matter of Halifax Investment Services Pty Ltd (in liquidation)* (Halifax AU) in NSD 2191 of 2018; and

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

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Venning J