

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY
COMMERCIAL PANEL**

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKURAU ROHE**

**CIV-2019-404-002049
[2020] NZHC 1540**

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

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

.../2

Hearing: 22 May 2020 (by Microsoft Teams)

Appearances: E Holmes and C Trahanas for the liquidators in the Federal Court proceedings and M Kersey and S J Jones for the liquidators in the High Court proceedings
A Munro for J P Hingston
E Hyde for the 1st respondent in the AUS and NZ proceedings
J Caird for 4th respondent in the NZ proceedings
S Munro for F McMullin
E L Smith appears for the Whitehead Group
A Kawalsky for 2nd defendant in Federal Court and High Court
E Phelan for Atlas Asset Management in the AUS proceedings

Judgment: 2 July 2020

**JUDGMENT OF VENNING J
Re: Remuneration Method and Source of Funds**

This judgment was delivered by me on 2 July 2020 at 3.30 pm, 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

Solicitors: Russell McVeagh, Auckland
Tailored Legal Solutions Ltd, Dargaville
Anderson Lloyd, Christchurch
Simpson Grierson, Auckland

Copy to: K&L Gates, Australia
A Leopold SC, Australia
Gilbert + Tobin, Australia
Turks Legal, Australia
Maddocks, Australia
Murdoch Clarke, Australia

Application

[1] By application dated 20 May 2020 the applicants seek orders:

- (a) settling the method for consideration and approval of their remuneration; and
- (b) confirming the source of funds from which payment is to be made.

[2] The applications were heard at a joint hearing with the Federal Court of Australia on 22 May 2020 where a similar application was considered by the Federal Court (NSD 2018 of 2191).

[3] During the course of the hearing, two additional issues were discussed:

- (a) whether the Court should fix a process to review the reasonable legal costs of the representative defendants; and
- (b) whether investors who had closed out their positions should be separately represented or have their separate interests represented by an existing representative.

[4] Following the hearing the Court received further submissions regarding the above issues.

Independent assessor

[5] During the course of the hearing it was proposed that Mr Tony Tesoriero be appointed as an independent assessor to review the costs of the liquidators and report to the Federal Court and to this Court.

[6] I accept that Mr Tesoriero is an appropriate person to be appointed and also that there is jurisdiction for this Court to appoint him to such a role.

[7] Either under the Court's inherent jurisdiction or under HCR 9.36, the Court may appoint an assessor to report on whether the remuneration sought by the

liquidators is reasonable.¹ In respect of the costs of the applicants as trustees under the Financial Markets Conduct Regulations Trust (the FMCR Trust), the Court may exercise its inherent jurisdiction.

[8] In appointing an assessor for that purpose, the Court is not delegating its authority to ultimately determine the appropriate fee. Mr Tesoriero's report will be an independent opinion on the reasonableness or otherwise of the fees claimed. It is a means of assisting the Court to carry out its role of determining the reasonableness or otherwise of the remuneration claimed. Also, the Court will provide the liquidator and other interested parties an opportunity to make submissions in relation to the assessor's report before determining and approving the liquidators' fees.

Remuneration method

[9] During the hearing this Court raised whether it would be possible for a remuneration method to be settled which would enable interim payments to be made on the basis of Mr Tesoriero's reports with one retrospective review to approve the fees to coincide with the substantive hearing.

[10] I understand the position of the Federal Court to be that the Federal Court will determine whether to make a remuneration determination following the receipt of Mr Tesoriero's report on each occasion. It is in the interests of all parties and will be more cost efficient if there can be consistency between the Australian and New Zealand approach on this practical issue. I am content for this Court to adopt a similar approach to that of the Federal Court as to the timing of the reviews and determination of the fees.

[11] For the assistance of the liquidators and Mr Tesoriero I note that I would expect the liquidators to continue the process they have followed to date of a broad apportionment of their costs between the liquidations of Halifax AU and Halifax NZ on the basis of the number and value of investors.

¹ *Re Roslea Path Ltd (in liquidation)* [2013] 1 NZLR 207 at [159].

Other issues

[12] Having heard from counsel and considered the matter further the Court is not minded to make any orders for a process of approving the fees claimed by the solicitors and counsel representing the representative defendants. I consider such an order is unnecessary at present.

[13] Having considered the further submissions of counsel for the liquidators in relation to the position of those investors with closed positions, I consider it is unnecessary to have those investors separately represented. I accept that, given there is a mixed deficient fund in respect of which (with very few exceptions), it is not practically feasible to trace individual investor funds, all investors, even those with all closed positions, will inevitably participate in the upside and downside changes in value. To attribute the costs or a larger portion to those who had open positions on a particular date would be unreasonable. Also the complexity and the consequential costs of the exercise appear to be disproportionate to the benefit to any individual investors.

Orders

Remuneration method

[14] For those reasons the Court makes the following orders:

1. Pursuant to the inherent jurisdiction of the Court or under HCR 9.36 the Court appoints Mr Tony Tesoriero (Assessor) to inquire and report in accordance with the rules of the Court as modified by these directions:
 - (a) whether the remuneration claimed by the liquidators for the period December 2019 to May 2020 is reasonable, taking into account all relevant matters and if not, what remuneration is reasonable;²

² This Court has already approved the liquidators' remuneration to November 2019 in a judgment issued on 26 May 2020 *Re Halifax NZ Ltd (In liq)* [2020] NZHC 1112.

- (b) whether the remuneration claimed by the liquidators for the period June 2020 to August 2020 is reasonable taking into account all relevant matters and if not, what remuneration is reasonable;
- (c) whether the remuneration claimed by the liquidators for the period September 2020 to November 2020 is reasonable taking into account all relevant matters and if not, what remuneration is reasonable.

2. The inquiry is to be conducted as follows:

- (a) for each question the liquidators are to submit the following to the assessor:
 - (i) a remuneration report for the period covered by each inquiry;
 - (ii) a work in progress spreadsheet for the period covered by each inquiry;
- (b) for each question the assessor will provide the Court with a report in accordance with HCR 9.38 and serve a copy of the report on the liquidators within 21 days of receipt of the material submitted to the assessor in accordance with Order 2(a) or such further time as the Court determines in advance that the assessor reasonably requires;³

3. The liquidators are to serve a copy of any report provided to them pursuant to Order 2(b) forthwith.

³ A report in similar form to the form attached to this judgment will be sufficient compliance with HCR 9.38.

4. HCR 9.41(2) is varied to the extent that the costs of the assessor are to be treated as an expense of the liquidation and are to be paid from the same funds that the liquidators' (and trustees') expenses are paid;
5. HCR 9.40 is varied to the extent that liberty is granted to the liquidators and the defendants to apply to be heard on the questions of whether the Court should adopt, vary or object to any report given to the Court in accordance with these orders and whether to make a remuneration determination in accordance with the report, such application to be filed and served within three working days of the report being served on the liquidators and represented defendants. Any such application must state briefly the reasons for the application.
6. The Court will determine on the papers whether to adopt, vary or reject any report given to the Court in accordance with these orders and whether to make a remuneration determination under s 284 of the Companies Act 1993 or its inherent jurisdiction (in relation to the FMCR Trust) in accordance with the report.

Source of funds

7. The Court directs that the applicants are justified in applying the following funds in the specified accounts of investors of Halifax New Zealand Ltd (in liquidation) (Halifax NZ), and Halifax Investments Services Pty Limited (in liquidation) (Halifax AU) to their remuneration, costs and expenses and the legal expenses reasonably incurred by the first, second, third, fourth and fifth defendants in acting as representative defendants to the extent that the funds are held by Halifax NZ or the liquidators on behalf of Halifax NZ:
 - (a) Australian dollars (AUD) in client accounts on the Interactive Brokers AU trading platform (IB AU) and Interactive Brokers NZ trading platform (IB NZ), which hold only AUD as a base currency, have positive cash balances and have no open positions;

- (b) AUD in client accounts on IB AU and IB NZ, which hold AUD as the base currency and have open positions comprised entirely of cash in other currencies and where all cash balances are positive;
- (c) US dollars (USD) in client accounts on IB NZ, which hold only USD as a base currency, have positive cash balances and have no open positions;
- (d) USD in client accounts on IB NZ, which hold USD as the base currency and have open positions comprised entirely of cash in other currencies and where all cash balances are positive;
- (e) New Zealand dollars (NZD) in client accounts on IB NZ, which hold only NZD as a base currency, have positive cash balances and have no open positions; and
- (f) NZD in client accounts on IB NZ, which hold NZD as the base currency and have open positions comprised entirely of cash in other currencies and where all cash balances are positive.

[15] The Court notes that:

- (a) Order 7 is without prejudice to the funds identified therein being restored for the purposes of distribution, or of calculating entitlement to distribution, of funds to the investors who hold those funds during distribution; and
- (b) the access and use of the funds identified in Order 7 is without prejudice to any claims of investors who hold those funds in relation to the continued existence of a trust in respect of those funds or claims that those funds, or any part of them, are traceable.

I, [name], [occupation], certify that:

1. I have reviewed and considered the following documents concerning the fees of Morgan John Kelly and Philip Alexander Quinlan in their capacity as joint and several liquidators of Halifax New Zealand Limited (In Liquidation) (**Liquidators**) for the period from _____ to _____ (**Remuneration Period**):

- a. a remuneration report prepared by the Liquidators for the Remuneration Period (**Remuneration Report**); and
- b. Principle 9 and Practice Standard 1 of the Code of Professional Conduct of the Restructuring, Insolvency and Turnaround Association of New Zealand Inc;

b.c. [LIST OTHER DOCUMENTS, IF ANY*].

2. **[IF APPLICABLE*]** I have spoken to:

- _____
- _____

in the course of my consideration in order to clarify certain issues.

3. I consider the Liquidators' fees set out in the Remuneration Report to be reasonable OR

I consider the Liquidators' Fees set out in the Remuneration Report to be reasonable save for the items listed in the table below:

[DELETE AS APPLICABLE*]

Category	Amount	Remuneration Report page / paragraph / table reference	Brief statement of reasons	Revised amount

4. On the basis of the above, I consider the following Liquidators' fees for the Remuneration Period to be reasonable:

TOTAL: _____

[signed] on [date]

[name]