

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

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

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)

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

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

AND MORGAN JOHN KELLY and PHILIP
ALEXANDER QUINLAN
Third Applicants

AND CHOO BOON LOO & ORS
Respondents

Date: 30 August 2022

**MINUTE/ORDERS (28) OF VENNING J
Re: Funding application**

Solicitors: Russell McVeagh, Auckland
Copy to: K&L Gates, Australia – E Holmes

[1] On 11 August 2022 the applicants, Morgan Kelly and Philip Quinlan as Liquidators of Halifax New Zealand Limited (in liquidation) (Halifax NZ) (Liquidators), Halifax NZ and Morgan Kelly and Philip Quinlan (in their capacity as trustees of a trust created by reg 246 of the Financial Markets Conduct Regulations 2014 (jointly the applicants) applied for orders:

- (a) the Liquidators were justified in allowing commingled investor funds held by Halifax NZ and Halifax Investment Services Pty Ltd (in liquidation) (Halifax AU) and/or the Liquidators to be used for the purpose of paying the remuneration of the Liquidators in their capacities as Liquidators of Halifax AU for bringing and prosecuting claims against the former auditors and lawyers of Halifax AU following receipt by the Halifax AU Liquidators of directions and/or judicial advice from the Federal Court of Australia that they would be justified in pursuing those claims;
- (b) the applicants' costs of and incidental to this application be costs and expenses in the liquidation of Halifax NZ and paid out of the funds and accounts listed in Order 3(g) of the sealed orders of this Court dated 30 July 2020; and
- (c) for confidentiality in relation to the affidavit of Morgan Kelly dated 11 August 2022 in support of the application, confidential exhibit MJK-15¹ to the affidavit, and the memorandum of counsel/ submissions filed in support.

[2] As noted, the applicants also separately sought judicial advice or directions from the Federal Court of Australia in relation to the proposed claims against the former auditors and lawyers of Halifax AU and the funding of such claims.

[3] On 26 August 2022 counsel for the applicants filed an updating memorandum to which they attached the orders made by Markovic J in the Federal Court of Australia on 25 August 2022. In summary, Markovic J made

¹ The application refers to MJK-14, however the correct reference is MJK-15.

confidentiality orders similar to those sought on this application and dispensed with service of the application and accompanying affidavit. The Judge then granted approval to the applicants to enter into a funding agreement with litigation funders, and confirmed the applicants were justified in bringing and prosecuting proceedings substantially in the form of those set out in the draft statement of claim to Mr Kelly's affidavit. Markovic J also directed that the applicants were justified in paying their remuneration costs and expenses in respect of the proceedings in accordance with the process provided for by the orders of Gleeson J made on 2 July 2020 and that the applicants' costs of and incidental to the application to the Federal Court were costs and expenses in the liquidation of Halifax AU, and were to be paid out of the funds and accounts listed in the orders made by Gleeson J on 2 July 2020.

[4] Although the proceedings against Halifax AU's former auditors and lawyers are to be pursued in Australia, the limited orders noted above are sought in the New Zealand proceedings as the Liquidators' remuneration in relation to the proceedings will be paid from commingled funds. For those reasons the applicants seek the above orders. As Mr Kelly confirmed in his affidavit:

56. In my capacity as liquidator of Halifax NZ, I recognise that if the Liquidators enter into the Funding Agreement and for the Liquidators to pursue the claims against Bentleys, KWM and Mr McCosker, the Liquidators' remuneration may be funded from commingled assets. I consider that it is in the best interests of the creditors and investors of Halifax NZ for that to occur because any recoveries may be shared between the investors of Halifax AU and Halifax NZ, particularly if commingled funds have contributed to the recovery.

[5] Having reviewed the material provided to the Court, including the:

- application;
- affidavit of Morgan Kelly of 11 August 2022 and exhibits;
- memorandum of counsel dated 11 August 2022, and the subsequent memorandum of counsel dated 26 August 2022 and annexures;

the Court is satisfied that the orders sought in the application of 11 August 2022 are appropriate and ought to be made.

[6] As counsel submits there is limited potential downside to investors in the proposed proceedings as a result of the litigation funding agreement, as their exposure is limited to the Liquidators' remuneration which will be incurred in the recovery proceedings as confirmed by Mr Kelly. This is not a case (unlike in some other cases) in which the creditors are of the nature that they would be likely to be in a position to provide alternative litigation funding themselves. The Liquidators estimate of their costs appears appropriate and reasonable.

[7] I accept that requiring the application to proceed on notice would cause undue delay or prejudice as this application fundamentally concerns the commencement of proceedings in relation to Halifax AU in Australia which is time sensitive. Orders have been made by the Federal Court to enable that to occur.

[8] I also accept that material filed in support of the application contains information that is confidential, privileged and/or commercially sensitive to the Liquidators as set out in Mr Kelly's affidavit. Service of the application would make protection of that information difficult and cause delay.

[9] Although the confidentiality orders sought are broad I accept they are in this case appropriate, at least until further order of the Court.¹ The proposed funding agreement is presently confidential. Other aspects of the material over which confidentiality is made could, if disseminated to the prospective defendants, have the risk of conferring a tactical advantage.

[10] For the above reasons, the Court makes orders in accordance with paras 1(a), (b), (c) of the without notice interlocutory application for supplementary directions dated 11 August 2022 and, in addition, reserves leave for any further orders or directions as may be appropriate.



Venning J

¹ *FFP Trustee (NZ) Ltd & Anor v Low Hock Peng & Ors* [2021] NZHC 3507; *McCallum Jnr v McCallum* [2021] NZCA 237, (2021) 5 NZTR 31-005; and *Erceg v Erceg* [2016] NZSC 135.