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)
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

Hearing: 18 February 2020

Attendances: *Halifax AU by AVL*
A Leopold SC, E Holmes, and J Burnett for Applicants
B Hancock for Atlas Asset Management
J V Gooley for Elysium Business Systems
D Funston for McMillan Interests
C Mitchell for J Hingston
Halifax NZ
M Kersey and S J Jones for Applicants
E L Smith for Whitehead Group
S Munro for Chen Wang
Professor Knight in person

Minute: 21 February 2020

MINUTE/DIRECTIONS NO (8) OF VENNING J

---

[1] At the case management conference in this proceeding on 18 December 2019 the Court made the following orders:

(a) Any application to join or seek to be heard in these proceedings (in the matter of Halifax New Zealand Limited (in liquidation)) together with any supporting affidavits and submissions are to be filed in this Court and served by 4 February 2020.

(b) The applications will be considered at a case management conference to be convened in this Court on 18 and 19 February 2020 at 11.15 am.

(c) Leave to apply on 24 hours' notice.

[2] The following parties have filed applications with this Court seeking to be joined or to be heard in the NZ proceedings:

(a) Chen Wang;

(b) Andrew Whitehead, and Andrew Whitehead and Marlene Whitehead as trustees of the Beeline Trust (together the Whitehead Group); and

(c) Professor John Knight

(the NZ applicants for joinder).

[3] The following parties filed applications seeking to be joined as representative parties to the proceedings before the Federal Court of Australia (the Australian proceedings) in the matter of the liquidation of Halifax Investment Services Pty Ltd (in liquidation) (Halifax AU):

(a) Choo Boon Loo;

(b) Elysium Business Systems Pty Ltd;

(c) Jason Hingston;

(d) Atlas Asset Management Pty Ltd; and

(e) Fiona McMullin as trustee for Cool Creek Superannuation Fund Pty Ltd.

[4] On 18 February 2020 a joint hearing of the Australian proceedings and these proceedings was convened by AVL to address the various applications.

[5] The liquidators identified the following four categories of investor as classes who should be represented:

(i) Investors of both Halifax AU and Halifax NZ whose proportionate entitlement to will share funds from the single deficient mixed fund will be greater after the realisation of all extant investments than it was on a date administrators were appointed;

(ii) Investors of both Halifax AU and Halifax NZ whose proportionate entitlement to or share of funds from a single deficient mixed fund will be lower after the realisation of all extant investments than it was on the date administrators were appointed;

(iii) Investors of both Halifax AU and Halifax NZ who transferred shares into the IB platforms from another stockbroker and have not traded in those shares (and whose investments are therefore fully traceable) (and who wish to argue that they should not therefore share in the deficiency);

(iv) Investors of both Halifax AU and Halifax NZ whose investments are not traceable (who wish to argue that all investors should share in the deficiency).

[6] After considering the various applications and the supporting material orders were made in the Australian proceedings for Mr Loo to be added as a first defendant to represent investors in the class identified in [5](i). Elysium Business Systems Pty Ltd was added as a second defendant and was appointed to represent investors in the class identified in [5](ii). Jason Hingston was added as third defendant and appointed to represent investors in the class identified in [5](iii). Atlas Asset Management Pty Ltd as trustee for the Atlas Asset Management Trust was added as a fourth defendant and appointed to represent investors in the class identified in [5](iv).

[7] To minimise the overall costs of these proceeding this Court agreed in principle to add the same parties as defendants/respondents in the Halifax NZ

proceedings and to appoint them to represent the same classes of investors in the Halifax NZ proceedings.

[8] Mr Kersey has attached copies of the applications and accompanying documents filed in the Australian proceedings to a memorandum filed in the New Zealand proceedings. The investors to be appointed as representatives in the NZ proceedings should, however, also file pro forma applications in the NZ proceedings.

[9] That leaves the applications by Mr Wang, the Whitehead Group, and Professor Knight in the NZ proceedings and the application by Ms McMullin in the Australian proceedings. Mr Wang, Ms McMullin and Mr Whitehead (in his personal capacity) say they fall into a category of investors who originally invested before 1 July 2016 so that their original investments pre-dated the deficit date referred to in the liquidators' evidence. It appears, however, that they may have traded their investments, at least in part, from that date. In the case of the other investments by the Whitehead Group, Mr Whitehead understands that the Whitehead Group may have been identified as a wholesale investor and may have been placed in a separate, traceable group.

[10] Mr Leopold SC for the liquidators emphasised that while the liquidators identified the date of 1 July as the date by which there definitely was a deficiency, the deficit date may in fact precede 1 July 2016.

[11] During the course of the hearing both the Federal Court and this Court indicated they would be assisted by further information from the liquidators on this and other issues. To assist that exercise the Federal Court issued subpoenas in the Australian proceedings.

[12] Professor Knight sold his shares in January this year. On the current information before the Court it appears his interests would be represented by the arguments to be presented by Mr Loo in support of the investors in the class identified in [5](i). That is on the basis that the funds used to make the investments were part of the co-mingled fund. Professor Knight is to consider whether, in light of the developments at the hearing, he wishes to pursue his application further.

[13] To advance the outstanding applications, orders were made that the applications of Ms McMullin as trustee for the Cool Creek Superannuation Fund Pty Ltd in the Australian proceedings and the applications by Chen Wang, John Knight and Andrew Whitehead and the Whitehead Group to be added as defendants or granted leave to be heard in the New Zealand proceedings be stood over to be determined at a further hearing on 3 April 2020.

[14] If Ms McMullin wishes to pursue an application to be joined in the NZ proceedings she should file an application in these proceedings. If the NZ applicants for joinder seek to be joined in the Australian proceedings as well as the NZ proceedings they should file applications in those proceedings.

[15] The liquidators are to file notices of opposition to the applications for joinder, together with any further affidavit evidence, by 25 March 2020. It would be helpful if the liquidators' affidavits expressly address the issues raised in the affidavits of the applicants for joinder.

[16] The NZ applicants for joinder and Ms McMullin are to file and serve any further submissions in response to that further information from the liquidators by 1 April 2020.

Tracing

[17] A number of the investors and some of the applicants for joinder have raised the issue of whether tracing may be feasible. The liquidators' current position as recorded in the recent report by Mr Sutherland is that 10 of the 65 investors who claim their investments are traceable have investments that may be practically feasible to trace (at least partially). They are investors who had stocks transferred from another broker and did not flow through a co-mingled Halifax account. It may be that those 10 investors are adequately represented by Mr Hingston.

[18] Again, it would be helpful if the liquidators could address this issue further in the reply affidavits.

Costs

[19] From the information before the Court the four classes of investor identified by the liquidators and which the parties identified in [6] have been appointed to represent are classes that will require representation to enable the Court to determine the application for directions. The reasonable costs of parties appointed as representatives should be covered. I am content to adopt the same general form of order made in the Australian proceedings.

Closing out

[20] The liquidators also seek an order from the Court confirming a direction or judicial advice from the Court that the liquidators and trustees are justified in not closing out investor positions before the next hearing on 3 April 2020.

[21] In his recent affidavit affirmed on 17 February 2020 Mr Kelly confirmed that Mr Sutherland's issues paper reflects his views and conclusions. The update by Mr Sutherland discloses the following information:

(a) As at 31 January 2020 there were 23,949 open positions across the trading platforms (involving 2,207 investors) with a notional value of in excess of AUD 160 million.

(b) Of the 68 investors who responded to the request for their views in relation to the closing out of positions:

(i) forty-nine (72 per cent) stated they did not want investor positions to be closed out;

(ii) eleven investors responded on the issue without propounding a clear position; and

(iii) eight supported closing out.

[22] A number of reasons were given by the investors against close out, including:

(a) investors would incur additional divestment/reinvestment costs;

(b) investors may incur capital gains tax and other tax obligations;

(c) investors may be exposed to costs associated with currency conversion;

(d) closure of positions may disrupt investors' investment strategy and will result in a loss of income stream (through dividends);

(e) the amount of the deficiency is not sufficiently large to make it reasonable to realise all positions for the purpose of distributing the funds. There may be alternatives available in particular through an in specie distribution;

(f) investors view their accounts as traceable and do not want those traceable positions closed out.

[23] Against that, a number of considerations support early closing out:

(a) the ongoing exposure to market movements;

(b) closure may result in a more timely resolution of the liquidation; and

(c) the ongoing costs incurred in relation to the maintenance of the platforms. The additional costs of maintaining the platform on a weekly basis is estimated as approximately $26,530.

[24] The liquidators seek a direction and/or judicial advice to the effect that they are justified in not closing out investors' positions before the next hearing on 3 April whilst the issues that have been raised are considered further. It is proposed that the liquidators provide further information to all investors who responded to the investor notice issued on 15 November 2019 on the issue of closing out and that any investor who wishes to be heard in respect of the issue of closing out give further notice by 27 March 2020 and also appear before the Courts on 3 April 2020.

[25] At the conclusion of the hearing the Court reserved its position on whether such a direction/judicial advice was appropriate.

[26] Mr Leopold and Mr Kersey have filed further submissions to support the liquidators' application.

[27] In the submissions counsel accept it would be inappropriate for the Court to give judicial advice or directions if the decision to refrain from closing out were properly characterised as a pure commercial decision.[1] But counsel submit that the issue of closing out is substantially broader than a pure commercial decision. The decision is likely to be contentious.[2] There are competing views of investors.

[28] Counsel rely in particular on the following passage of Black J in the matter of *Idoport Pty Ltd (in liquidation)*:[3]

> [6] It is important to recognise that **the Court's reluctance to give directions in respect of commercial matters is qualified in respect of matters which are capable of giving rise to legal controversy**. In an application concerning the corresponding section applicable to voluntary liquidators, s 511 of the *Corporations Act*, in *Handberg (in his capacity as liquidator of S & D International Pty Ltd (in liq) v MIG Property Services Pty Ltd* [2010] VSC 336; (2010) 79 ACSR 373, Warren CJ, in considering whether to approve a compromise of litigation, observed that the liquidator in that case was:
>
> > "Not seeking commercial advice from the Court. He has already made what he regards as the appropriate and reasonable commercial decision. It is contained in the settlement deed. Having made that decision, he now asks the Court to protect him from the potentially unreasonable behaviour of other parties involved in these proceedings. He is seeking the protection which the Court is able to provide him in light of the difficult and litigious circumstances in which he finds himself, and the risk that they pose to his continuing ability to effectively and equitably wind up the second plaintiff."
>
> [7] It seems to me that this case, **like *Handberg*, is not one where the liquidator is seeking to have the Court make a commercial judgment for him.** As will emerge below, he has made a commercial judgment, based on a series of factors which are identified in the evidence before me. As in *Handberg*, he has formed a view as to what is an appropriate and reasonable commercial decision, namely to enter into the Deed of Release. In the particular circumstances, which involve an extraordinarily long history of

---

1 *Finnigan v Butcher* [2012] NZHC 810 at [17]–[18]; and *Re Ansett Australia Ltd (No. 3)* (2002) 115 FCR 409 at [65]..

2 *Re Ansett Australia Ltd (No. 3)*, above n 2, at [65]; *Sanderson v Classic Car Insurances Pty Ltd* (1985) 10 ACLR 115 at 117.

3 *In the matter of Idoport Pty Ltd (in liquidation)* [2015] NSWSC 1412 at [6]–[7] (emphasis added).

> litigation, by any standards, it is not surprising that the liquidator is concerned as to the possibility that his decision might be attacked, and here, like in *Handberg*, **it seems to me that he is seeking the protection which the Court may provide, in confirming that his decision is justified, having regard to the matters which he has indicated he has taken into account.** The importance of such a direction is that a liquidator is then protected against a claim for breach of duty if he acts in accordance with that direction and he has made full disclosure to the Court in the relevant application.

[29] Both the case of *Idoport* and the case referred to in it of *Handberg (in his capacity as liquidator of S & D International Pty Ltd) (in liq) v MIG Property Services Pty Ltd* involved cases where decisions had been made by the liquidator.[4] In *Idoport*, it was to enter a deed of release. In *Handberg*, it was to compromise the litigation. In the present case the liquidators have not made a decision on closing out. They have identified the conflict between investors on the issue and have identified the competing considerations but no decision has yet been made whether to close out or not.

[30] Nevertheless, in reliance on *Re Kerr* counsel submit that it is not inappropriate for the Court to give advice to a liquidator that they would be justified in "doing nothing".[5] But in that case the liquidator had made a decision, which was to await the outcome of the Garnishment proceeding before instituting a new appeal. In the present case the liquidators seek further information and input from the investors before making a decision one way or the other on closing out.

[31] While I am sympathetic to the position the liquidators find themselves in I do not consider this Court can give the advice sought at this time. The liquidators have not made a decision about closing out but have postponed that decision. They will need to consider the further responses from investors before making a decision. They may need to take further legal advice on the issue. It is likely that the liquidators will still not be in a position to advise the Court formally as to a final position as to closing out even at the hearing on 3 April 2020.

[32] The Court, like the liquidators, at present lacks sufficient information to give the advice sought. What the Court can do is record that on the information currently

---

4 *In the matter of Idoport Pty Ltd (in liquidation)*, above n 3, citing *Handberg (in his capacity as liquidator of S & D International Pty Ltd) (in liq) v MIG Property Services Pty Ltd* [2010] VSC 336; (2010) 79 ACSR 373

5 *Re Kerr (as special purpose liquidator of Octaviar Ltd (in liq)* (2019) 139 ACSR 192.

available to the Court it is reasonable for the liquidators to seek further information and input from affected investors before making a decision about closing out.

[33] It may well be that in light of further information that is able to be provided to the Court through the course of these proceedings the Court will feel able to provide a more definite order or direction to the liquidators on this issue, but I am not satisfied that is the case at the present time.

Representation

[34] During the course of the hearing counsel noted that there are a number of Australian counsel who may wish to make submissions and address the Court in the course of the New Zealand proceedings. There is of course no issue where counsel are admitted in New Zealand through the Trans-Tasman Mutual Recognition Act 1997. Where, however, counsel are not so admitted, s 27(1)(b)(ii) of the Lawyers and Conveyancers Act 2006 covers the position. That section enables a Court to allow any person to appear as an advocate or to represent any person before the Court as an exception to the general rule that only a barrister or solicitor admitted in New Zealand may appear. The section reflects the inherent jurisdiction of the Court confirmed in *Black v Taylor*.[6]

Draft order

[35] Counsel have helpfully filed a draft order which addresses the above issues. With the deletion of para [11] of the draft order relating to closing out, the draft attached to this minute may be sealed.

[36] The Court will reconsider the outstanding issues on 3 April 2020 at 9.15 am Sydney time, 11.15 am NZ time.

Venning J

Solicitors:	Russell McVeagh, Auckland Tailored Legal Solutions Ltd, Dargaville Anderson Lloyd, Christchurch
Copy to:	Professor Knight A Leopold SC, Australia Gilbert + Tobin, Australia Turks Legal, Australia Maddocks, Australia Murdoch Clarke, Australia

6 *Black v Taylor* [1993] 3 NZLR 403 (CA).