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

Minute: 2 October 2019

MINUTE/ORDERS OF VENNING J

Solicitors: Russell McVeagh, Auckland

Introduction

[1] The second applicant, 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) (**Halifax NZ**) and the third applicants, Morgan John Kelly and Philip Alexander Quinlan (in their capacity as trustees of a trust created by regulation 246 of the Financial Markets Conduct Regulations 2014) (**Trustees**) apply for an order permitting them to commence an application for directions under s 66 of the Trustee Act 1956 by way of originating application.

[2] Morgan John Kelly and Philip Alexander Quinlan (in their capacity as liquidators of Halifax NZ) (**Liquidators**), together with Halifax NZ and the Trustees (together, **Applicants**) apply for directions as to notification and service of the directions application, together with confidentiality and ancillary orders.

Background

[3] Halifax Investment Services Pty Ltd (In liquidation) (**Halifax AU**) was incorporated on 30 May 2001. Halifax NZ was incorporated on 21 May 2008. In 2013 Halifax AU purchased a controlling interest in Halifax NZ. Halifax AU owns 70 per cent of the shares in Halifax NZ. Andrew Gibbs, (a director of Halifax NZ) and Kaye Williams own the remaining 30 per cent of the shares.

[4] Prior to the appointment of administrators on 23 November 2018 Halifax AU operated as a provider of financial services and dealt in financial products on behalf of its clients. On 20 March 2019 it was placed in liquidation. Mr Kelly and Mr Quinlan are its Liquidators.

[5] Halifax NZ also operated as a provider of financial services and dealt in financial products on behalf of its clients. It apparently meets the definition of a derivatives issuer. On 27 November 2018 Mr Kelly, Mr Quinlan, and Stewart

McCallum were appointed administrators of Halifax NZ and on 22 March 2019 at the watershed meeting were appointed Liquidators.[1]

[6] Certain of the funds held by Halifax NZ and Halifax AU (collectively the **Halifax Group**), or by third parties on behalf of the Halifax Group at the time Halifax NZ entered voluntary administration, may have become subject to a single trust in favour of the investors on whose behalf they are held by reason of reg 246(1) of the Financial Markets Conduct Regulations 2014 (FMCR) and as a result of Halifax NZ's status as a derivatives issuer.

[7] The Financial Markets Authority (FMA) has appointed the Liquidators as Trustees of the single trust (Regulation 246 Trust) on 18 September 2019 pursuant to reg 246(2).

[8] Subject to any recoveries from third parties the corporate funds of each of Halifax NZ and Halifax AU appear minimal. The trust funds which following the realisation of all investments made by those who invested through the Halifax Group will be held by Halifax NZ (or the Trustees) and/or Halifax AU as Trustees for those clients and they appear to comprise one deficient mixed fund. The total amount of assets held on trust for or comprised within extant investments by clients as at the date of the appointment of the Liquidators as voluntary administrators in November 2018 should have been in the sum of approximately AUD211.6 million (NZD227.6 million). However the total amount of client moneys actually held was approximately AUD192.6 million (NZD207.2 million). There is therefore a deficiency of approximately AUD19 million (NZD20.4 million).

[9] Approximately 98 per cent of funds held by the Halifax Group are co-mingled across each of the trading platforms across the vast majority of the client accounts in the Halifax Group and as between clients investing through Halifax AU and clients investing through Halifax NZ. The Liquidators' view is that the funds held by the Halifax Group are essentially one deficient mixed trust fund. The affected New Zealand clients therefore have a direct interest in any directions the Federal Court of Australia may give with respect to how to deal with the co-mingled

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1 On 9 May 2019 Mr McCallum resigned as liquidator.

funds and the affected Australian clients have a direct interest in any directions this Court may give with respect to how to deal with the co-mingled funds in accordance with the liquidation of Halifax NZ.

[10] The directions application seeks directions in respect of money which might be considered to be under the control of Halifax NZ. Clients of both Halifax NZ and Halifax AU may have claims in respect of the same deficient mixed fund. An application for directions has also been filed in the Federal Court of Australia. Preliminary orders have been made by that Court.

[11] In addition to making an application for preliminary directions the Liquidators in the Halifax AU proceedings asked the Federal Court to issue a letter of request. In a judgment delivered on 22 August 2019 Gleeson J considered that:[2]

> 76. ... this case presents as a class candidate for cross-border cooperation 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 ...

[12] Gleeson J went on to note that she did not have:

> 59. ... any difficulty with the general proposition that this Court [Federal 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 co-operate could include a concurrent hearing of this court and the NZHC, if the NZHC were amenable to such a hearing ...".
>
> 60. ... 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 Australian application].

[13] However, before finally ruling on the point Gleeson J was of the view that the parties who may respond to the Liquidators' application should be identified, the issues defined and their views sought as to process before any formal request was made by the Federal Court to this Court.

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2 *Kelly, in the matter of Halifax Investment Services Pty Ltd (In Liquidation)* [2019] FCA 1341.

[14] This application has followed. In due course the applicants anticipate seeking further applications/interlocutory directions as to co-ordinating a hearing and case management of the substantive directions application and the substantive directions application in the Federal Court together with various case management, (including representative) orders.

Commercial Panel

[15] As a preliminary matter the Applicants seek the assignment of a Commercial Panel Judge to this proceeding. Although High Court Rule (HCR) 29.2 contemplates a response by the defendant before a decision will be made on application for an assignment of a Judge from the Commercial Panel, that need not always be the case. In this case, given the nature of the applications, and that over 10,000 clients are likely to be served with the application, and the likely responses the Court proposes to deal with the request at this preliminary stage and dispense with service of the request for nomination.

[16] The proceeding satisfies the criteria for the assignment of a Commercial Panel Judge under clauses 5(1)(e) and (g) of the Senior Courts (High Court Commercial Panel) Order 2017:

> *Clause 5(1)(e)*
>
> The application for directions concerns a complex corporate insolvency. The liquidation of Halifax NZ is closely tied to that of its Australian parent company Halifax AU. The liquidators are liquidators of both. This will be a complex cross-border corporate insolvency.
>
> *Clause 5(1)(g)*
>
> The proceeding is of significant importance to a significant number of clients of Halifax NZ and Halifax AU. It is also of significance to the liquidators given their personal duties and potential liabilities as liquidators and trustees.

Also the proceeding may be the first in which co-ordinated hearings of New Zealand and Australian Courts will be sought. Consideration of the Insolvency Cross-Border (Act) 2006 will be required.

[17] The proceeding is assigned to the Commercial Panel. Venning J is the assigned Judge.

Application for leave to commence by originating application

[18] The liquidators may commence an application for directions under s 284(1) of the Companies Act 1993 by originating application as of right: HCR 19.4.

[19] Halifax NZ and the Trustees would, however, normally be required to commence any application for directions under s 66 of the Trustee Act 1956 under Part 18 of the High Court Rules 2016: HCR 18.1(b)(xiii).

[20] But HCR 18.4(2) provides the application of Part 18 does not prevent the commencement of the proceeding by originating application if it is eligible to be so commenced under Part 19.

[21] HCR 19.5 enables the Court to permit a proceeding to be commenced by originating application where it is in the interests of justice to do so.

[22] In this case, where the application made by the Trustees and Halifax NZ essentially seeks the same orders or raises the same issues as the Liquidators' application, and given Halifax NZ is under the control of the Liquidators, and the applications by Halifax NZ and Trustees are unlikely to involve significant factual disputes other than in respect of the methods for distributing the trust funds (which is the direction sought), it is appropriate that leave be granted for the proceeding to be commenced by originating application. Order accordingly.

Confidentiality

[23] Orders are sought that categories of documents be subject to confidentiality restrictions on the basis that the information:

(i) identifies individual clients of the Halifax Group;

(ii) identifies online login details for accounts;

(iii) identifies investment decisions made by individual clients; and/or

(iv) identifies the details of clients' bank accounts.

[24] I accept it is appropriate for the confidentiality orders sought to be made. There will be orders that the following documents (or parts of documents) filed in this proceeding are subject to confidentiality restrictions:

(i) in the interlocutory process dated 3 July 2019 filed in Federal Court of Australia proceeding NSD 2191 of 2018, which is annexed to the affidavit of Morgan Kelly affirmed 24 September 2019 (Kelly Affidavit) and marked MK-7, the Interactive Brokers (IB) account numbers listed on pages 17 to 19;

(ii) in the Australian affidavit of Morgan Kelly dated 26 June 2019 (AU Kelly Affidavit) which is annexed to the Kelly Affidavit and marked MK-1:

(aa) the account numbers at paragraphs [65(a)], [67], [71], [72], [121] and [125];

(bb) the account numbers in items 53 to 61 of the table at paragraph [90];

(cc) the account numbers in items 9 to 14 of the table at paragraph [95];

(iii) in the exhibit to the AU Kelly Affidavit marked Exhibit MJK-1, which is annexed to the Kelly Affidavit and marked MK-2, the account numbers in the tables at pages 338 to 341;

(iv) the whole of the exhibit to the AU Kelly Affidavit marked "Confidential Exhibit MJK-1", which is annexed to the Kelly Affidavit and marked "MK-3A" and "MK-3B";

(v) in the exhibit to the Australian affidavit of Ian Sutherland dated 26 June 2019 (AU Sutherland Affidavit) marked "Exhibit IPS-1", which is annexed to the affidavit of Ian Sutherland sworn 24 September 2019 (Sutherland Affidavit) and marked "IS-2", the account numbers in the tables at pages 46 to 49; and

(vi) the whole of the exhibit to the AU Sutherland Affidavit marked "Confidential Exhibit IPS-1", which is annexed to the Sutherland Affidavit and marked "IS-3",

(Confidential Information).

[25] In addition there will be an order that the Confidential Information, and any subsequent reproduction of the Confidential Information in the proceeding, is:

(i) not to be included in, or is to be redacted from, any documents disclosed to clients of Halifax NZ or Halifax AU in accordance with the orders at paragraph [24] above;

(ii) not to be accessed by any person that is not a party to the Directions Application as a result of a request for access to the court file or otherwise and then only on terms that they keep it confidential;

(iii) not to be disclosed to any non-party by a party to the Directions Application; and

(iv) to be redacted from any publicly available version of minutes, judgments or orders of the Court.

Application for directions as to notification/service

[26] Before making orders as to the notification and service of the application for directions the Court requires a further memorandum from counsel.

[27] The Court notes that at para 65 of Mr Kelly's affidavit he says:

> The interlocutory application requests orders in respect of notification of the directions application to Halifax NZ's clients and for investors who wish to be joined as respondents or otherwise to be heard to make application to that effect by a **certain date**.
>
> (emphasis added).

[28] Despite the reference to a certain date, the application for directions as to notification/service does not provide for any such date or any deemed period of service.

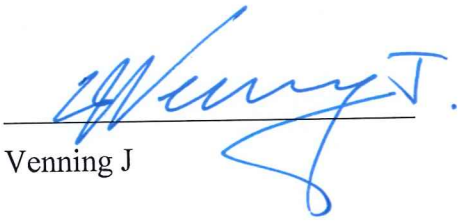
[29] The present situation then is that, by combination of HCR 19.10 and 7.24 parties served with a copy of the substantive application for directions would be required to file a formal notice of opposition within 10 working days of service if they wished to be heard. The memorandum does not otherwise deal with the initial response or how persons served are to indicate their interest or intention to be heard.

[30] Counsel is asked to clarify whether it is proposed that the default response under the rules should apply or whether an amended time and form of response would be more appropriate (as opposed to a notice of opposition).

[31] I note that at para 2.13 of the memorandum in support of the application counsel anticipates that the way in which the clients or groups of clients may be heard or represented in the directions applications in both the Australian directions application and this directions application is a matter on which the guidance of the Court will be sought in due course but I apprehend that is directed at more

substantive case management directions during the course of the proceedings rather than the issue identified above.

[32] Counsel is asked to clarify this point by further memorandum and/or draft order before the Court makes the formal orders in relation to notification and service of the substantive application for directions.



Venning J