

In the High Court of New Zealand
Wellington Registry
I Te Kōti Matua o Aotearoa
Te Whanganui-ā-Tara Rohe

CIV-2012-485-2591

Under the Companies Act 1993
In the matter of Ross Asset Management Limited (in liquidation) and related entities

Between

John Howard Ross Fisk and Malcolm Grant Hollis as liquidators of Ross Asset Management Limited (in liquidation) and related entities

Applicants

Memorandum of counsel for the Liquidators of the Ross Asset Management Group seeking (1) minor directions in respect of a final distribution; (2) approval of Liquidators' remuneration; and (3) procedural order regularising parties following appointment of a new Liquidator

Dated: 2 August 2022

Judicial Officer: Associate Judge Johnston

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May it please the Court:

1. Introduction and overview of orders sought

- 1.1 The Applicants are the liquidators of Ross Asset Management Limited (in liquidation) (**RAM**) (the **Liquidators**), together with seven other related companies, being:
- (a) Dagger Nominees Limited (in liquidation) (**Dagger**);
 - (b) Bevis Marks Corporation Limited (in liquidation);
 - (c) United Asset Management Limited (in liquidation);
 - (d) McIntosh Asset Management Limited (in liquidation);
 - (e) Mercury Asset Management Limited (in liquidation);
 - (f) Ross Investments Management Limited (in liquidation); and
 - (g) Ross Unit Trusts Management Limited (in liquidation);
- (together, the **Ross Group**).
- 1.2 The background to this application is well known. The Ross Group was operating the largest known Ponzi scheme in New Zealand's history. The Ponzi collapsed in late 2012. In November 2012 the High Court appointed John Fisk and David Bridgman as court-appointed receivers to the Ross Group, on the application of the Financial Markets Authority. In December 2012, Mr Fisk and Mr Bridgman were appointed by the Court as the liquidators of the Ross Group, charged with the task of unravelling this Ponzi scheme and realising what limited assets were available for the benefit of RAM's over 850 investors and creditors at the time of liquidation.
- 1.3 The liquidations have been complex and raised a number of novel issues with which the Liquidators, and the Courts, have grappled. However, there have been significant recoveries. At the commencement of the liquidations, the expected return for investors was 3 cents in the dollar. Nine years on, the return for investors is almost 20 cents in the dollar. This was in large part due to the proceeds of litigation taken by the Liquidators, which resulted in over \$25 million being paid to them for the benefit of RAM's investors.¹

¹ Affidavit of John Howard Ross Fisk sworn 22 June 2022 (**Fisk Affidavit**) at [1.5] and [3.1]

1.4 The Liquidators have now concluded the liquidations of these eight companies, save for two matters:

- (a) a final distribution of the assets of RAM and Dagger; and
- (b) obtaining approval of the Liquidators' remuneration.

A Final Distribution

1.5 Pursuant to a decision of Associate Judge Johnston dated 8 August 2018 on the Liquidators' application for directions as to distribution (the **Distribution Application; Distribution Decision**),² the Court set out the methodology for the distribution of the Group's assets to RAM's investors and creditors and granted leave to the Liquidators to apply for additional orders or clarification of those orders if required. Two previous distributions have already been made to RAM's creditors and investors pursuant to that decision. The application in respect of additional orders relating to the final distribution is made pursuant to the leave reserved in that decision.

1.6 The Liquidators presently hold funds of approximately \$205,000 in the liquidations of RAM and Dagger.³ While some of these funds will be applied to their approved remuneration and costs, they anticipate they will have almost \$150,000 available at the end of the liquidations.⁴ They will need to distribute these funds to RAM's creditors and investors in order to conclude the liquidations.

1.7 Although the likely sum of the residual fund is not insignificant, given that there are over 600 RAM investors and creditors who would otherwise be eligible for a distribution and the value of claims in the liquidation (\$128 million), a payment to all investors and creditors on a pro-rata basis is not economic or practicable. The Liquidators therefore seek additional directions relating to the distribution of that residual fund, namely that:

- (a) The Liquidators are to pay a final distribution to the general unsecured creditors and investors of RAM and Dagger in accordance with the methodology set out in the Distributions Decision but that any final distribution will only be made to those creditors and investors who would be eligible to receive a distribution of \$100.00 or more.

² *Re Fisk* [2018] NZHC 2007

³ Fisk Affidavit at [1.6](a)

⁴ Fisk Affidavit at [7.2]

- (b) Where a final distribution is to be made to an investor who has been unable to be located by the Liquidators for the purpose of paying the two previous distributions, it shall be deemed to be unclaimed monies for the purpose of the Unclaimed Money Act 1971 and the Liquidators may pay such monies to the Inland Revenue Department pursuant to the Unclaimed Money Act 1971 at the time of paying the final distribution.

Approval of remuneration

- 1.8 Pursuant to the Distributions Decision, the Liquidators are required to seek approval of their remuneration in the liquidation at the conclusion of the liquidations. The specific remuneration for which they seek approval are detailed in Part 3 below and Schedule One.

Procedural orders regularising the parties

- 1.9 Finally, there is a routine procedural matter on which the Liquidators seek an order. The Liquidators appointed by the Court in 2012 were Mr John Fisk and Mr David Bridgman. On 9 December 2020 Mr Bridgman retired as liquidator to the Ross Group and, pursuant to section 283 of the Companies Act 1993 (the **Act**), appointed Mr Marcus McMillan, a Licensed Insolvency Practitioner and a director at PwC, as his successor. On 17 August 2021 Mr Marcus McMillan retired as liquidator to the Ross Group and appointed Mr Malcolm Hollis, a Licensed Insolvency Practitioner and partner at PwC as his successor, pursuant to section 283 of the Act.⁵
- 1.10 Therefore, the Liquidators also seek an order under High Court Rules 4.51 and 4.52 formally substituting Mr Hollis for Mr Bridgman as the second named applicant in this proceeding. Mr Fisk remains a liquidator of the Ross Group and therefore continues as the first named applicant to this proceeding.

Roadmap

- 1.11 This memorandum has the following parts:
 - (a) Part Two explains the additional orders sought in respect of the final distribution.

⁵ Fisk Affidavit at [1.4], Affidavit of Malcolm Hollis sworn 1 August 2022

- (b) Parts Three to Six relate to the request for approval of the Liquidators' remuneration.
 - (i) Part Three explains the legal principles applying to a Liquidators' request for approval of remuneration.
 - (ii) Part Four provides an overview of the remuneration for which approval is sought.
 - (iii) Part Five provides a summary of the work carried out in the liquidation.
 - (iv) Part Six provides an analysis of the remuneration for which approval is sought (with further details of that remuneration provided in Schedule Two).
- (c) Part Seven explains the procedural order sought relating to the substitution of the applicant in this proceeding.

1.12 The specific orders now sought are detailed in Schedule One to this memorandum.

2. Distribution: Additional orders for final distribution

- 2.1 The Liquidators anticipate holding a fund of approximately \$150,000 at the conclusion of the RAM and Dagger liquidations.⁶
- 2.2 While this is a reasonable sum of money, given the magnitude of claims in the RAM/Dagger liquidation, distributing these funds on the basis set out in the Distributions Decision is not economic or practicable. The Liquidators therefore seek additional directions for the final distribution.
- 2.3 The affidavit of John Fisk in support of this application sworn 22 June 2022 (the **Fisk Affidavit**) illustrates the outcome of a final distribution of a fund of \$150,000 paid on the same basis as that applied for the previous two distributions,⁷ as below:

⁶ This assumes the Liquidators' remuneration, as sought, is approved.

⁷ See Fisk Affidavit at [7.4]

Table One: Distributions to Shortfall Investors

Value of Distribution	Number of investors	Total Class Value	Average Distribution
>=\$1,000	20	\$ 36,671.71	\$ 1,833.59
\$500 to \$999	61	\$ 42,262.25	\$ 692.82
\$100 to \$499	261	\$ 59,798.50	\$ 229.11
\$50 to \$99	105	\$ 7,604.82	\$ 72.43
\$10 to \$49	133	\$ 3,543.04	\$ 26.64
<\$10	32	\$ 188.75	\$ 5.90
Total	612	\$150,069.06	

Table Two: Distributions to Creditors

Value of Distribution	Number of Creditors	Total Class Value	Average Distribution
>=\$1,000	0	\$ -	\$ -
\$500 to \$999	0	\$ -	\$ -
\$100 to \$499	0	\$ -	\$ -
\$50 to \$99	1	\$ 51.08	\$ -
\$10 to \$49	0	\$ -	\$ 34.18
<\$10	16	\$ 15.69	\$ 0.66
Total	17	\$ 66.78	

2.4 A final distribution on the same basis as the two previous distributions would result in a further recovery of 0.1239 cents in the dollar for investors and creditors.⁸ As these tables illustrate, in practical terms:

- (a) 629 investors and creditors would receive a distribution.
- (b) 270 investors would receive a distribution of less than \$100.00.
- (c) Of these 270 investors:

⁸ Fisk Affidavit at [7.4]

- (i) 165 investors would receive a distribution of less than \$50.00;
and
 - (ii) 32 investors would receive a distribution of less than \$10.00.
 - (d) Of the 17 eligible creditors, only one creditor is eligible for a distribution of over \$10.00, being entitled to \$51.08.
 - (e) Conversely, 81 investors will receive a distribution of \$500.00 or more with 20 of those investors to receive over \$1,000.
- 2.5 It will likely cost in excess of \$20,000 to make the distribution.⁹ This reflects the time taken to correspond with eligible investors, check bank account details held were still correct and comply with any anti-money laundering requirements.
- 2.6 In addition to the economic cost of making a distribution on this basis, the Liquidators are conscious of the potential emotional impact such low distributions may have. The collapse of RAM has been incredibly distressing for many of its former investors, with some investors suffering from anxiety and/or depression as a result. The Liquidators are concerned that receiving a distribution of a very low sum, in the context of extensive losses they have suffered may reopen these issues, for very limited benefit.¹⁰
- 2.7 The Liquidators therefore seek additional directions for the final distribution. They propose that a final distribution be made:
- (a) applying the same methodology as was applied to the first and second distributions (i.e. the methodology set out in the Distributions Decision);
 - (b) however, unlike the first and second distributions, they propose that they are only required to make a final distribution where the investor or creditor is entitled to receive a distribution above a certain amount. They propose \$100.00 as the appropriate threshold.
- 2.8 On this basis, (and adopting the same parameters as that for Tables 1 and 2 above) 351 investors would receive a distribution. This is illustrated below.¹¹

⁹ Fisk Affidavit at [7.9]

¹⁰ Fisk Affidavit at [7.11]

¹¹ See also Fisk Affidavit at [7.13]

Table Three: Distribution to Shortfall Investors with \$100 threshold

Value of Distribution	Number of investors	Total Class Value	Average Distribution
>=\$1,000	25	\$ 44,608.57	\$ 1,784.34
\$500 to \$999	62	\$ 43,321.53	\$ 698.73
\$100 to \$499	264	\$ 62,205.75	\$ 235.63
\$50 to \$99	0	\$ -	\$ -
\$10 to \$49	0	\$ -	\$ -
<\$10	0	\$ -	\$ -
Total	351	\$150,135.84	

- 2.9 This differs from the 629 investors and creditors proposed in paragraph 2.4 above, as the claims of investors and creditors who would otherwise have been entitled to receive less than \$100 are now excluded from the distribution calculation and the funds which would have otherwise been paid to them are made available only for those who would receive a distribution under the higher threshold. Under this model, the distribution is 0.1332 cents in the dollar and nine investors who would have received a distribution of less than \$100.00 if distributions were made to all investors, now receive a distribution of slightly more than \$100.00.¹²

Unclaimed Monies

- 2.10 If the Court were to make these directions, there would be six investors who would be eligible for a distribution, but whom the Liquidators have been unable to locate. The previous two (larger) distributions for these investors are presently unclaimed. Each investor would be eligible to receive less than \$500.00, with the total distribution for these six investors being \$1,227.14¹³
- 2.11 Under the Distributions Decision, the Liquidators were required to hold previous unclaimed distributions for a period of six months before passing those distributions to IRD as unclaimed monies.
- 2.12 The Liquidators consider that requirement should not be included in the additional orders as to a final distribution. If the Liquidators were required to

¹² Fisk Affidavit at [7.14]

¹³ Fisk Affidavit at [7.15]

retain these distributions for a further period of six months, this will simply delay finalising the liquidations in circumstances where:¹⁴

- (a) these investors have been unable to be located for the two previous and larger distributions; and
- (b) these investors have not been located in the nine years during which RAM has been in liquidation, notwithstanding the extensive media coverage of the liquidation and the Liquidators' previous efforts to locate them.

2.13 Given this, the Liquidators respectfully submit that it is unlikely these investors will be located for payment of any final distribution. They therefore request that the final distribution to these six investors can be treated as unclaimed monies pursuant to the Unclaimed Money Act 1971 and paid to IRD at the time of paying the final distribution.

3. Remuneration: Principles applying to a request for approval for remuneration

3.1 The principles applying to a retrospective application by liquidators for approval of remuneration are well established and are set out in the decision of the Full Court (Heath and Venning JJ) in *Re Roslea Path Limited (in liquidation)*¹⁵ (recently approved by the Court of Appeal in the decision of *Madsen-Ries v Salus Safety Equipment Limited*.¹⁶) The key principles, relevant to this application, are as follows:¹⁷

- (a) The onus is on the Liquidator to prove the reasonableness of his or her remuneration.
- (b) In fixing a Liquidators' remuneration, the Court is determining the fairness and reasonableness of what has been charged when measured against the work undertaken and the result achieved.
- (c) Fair and reasonable remuneration was reflected in the value of the services to the creditors and the company in liquidation; recognising that value is an elusive concept which goes beyond mathematical

¹⁴ Fisk Affidavit at [7.16]

¹⁵ [2013] 1 NZLR 207

¹⁶ [2022] NZCA 101

¹⁷ At [102] – [108]

application of hourly rates to hours spent in administering the company's affairs.

- (d) Liquidators' remuneration had to be proportionate to the nature, complexity and extent of the work undertaken.
- (e) The factors used to assess costs rendered by a solicitor were equally applicable to assessing the remuneration for a liquidator's services. Those factors were:
 - (i) the skill, specialised knowledge and responsibility required;
 - (ii) the time and labour expended;
 - (iii) the value or amount of any property or money involved;
 - (iv) the importance of the matter to the client and the results achieved;
 - (v) the complexity of the matter and the difficulty or novelty of the questions involved;
 - (vi) the number and importance of the documents prepared or perused;
 - (vii) the urgency and circumstances in which the business is transacted; and
 - (viii) the reasonable costs of running a practice.

3.2 The Court in *Roslea Path* also observed that:

- (a) Where appointees are known by a Court to be independent and experienced, the Court is likely to have confidence in such people to abide by the ethical standards of any professional organisation to which they belong and to adhere to their obligations as officers of the High Court.¹⁸
- (b) It is open to a liquidator to disclose, voluntarily, in the second and subsequent reports the amount of fees charged and the largest components of them together with the ability of any creditor or shareholder to challenge remuneration received under section 284(1)(e) of the Act. If such disclosure was made and no steps had

¹⁸ *Re Roslea Path Limited (in liq)* at [107]

been taken by a creditor or shareholder to challenge the remuneration by the time the retrospective application was made, this would impact the extent of the inquiry a Court would make into the remuneration.¹⁹

- (c) On an application for approval, only the remuneration of the liquidator was subject to review, not the liquidator's expenses.²⁰

4. Remuneration: Overview of remuneration for which approval is sought

4.1 The Liquidators seek approval for remuneration as follows (all figures excluding GST):²¹

- (a) In respect of RAM and Dagger, \$2,404,173.71
- (b) In respect of Bevis Marks Corporation Limited (in liquidation), \$10,750.00.
- (c) In respect of United Asset Management Limited (in liquidation), \$8,133.55.
- (d) In respect of McIntosh Asset Management Limited (in liquidation), \$4,919.35.
- (e) In respect of Mercury Asset Management Limited (in liquidation), \$6,001.42.
- (f) In respect of Ross Investment Management Limited (in liquidation), \$2,369.35.
- (g) In respect of Ross Unit Trusts Management Limited (in liquidation), \$1,624.84.

4.2 The Liquidators have also incurred disbursements of \$4,172,454.60 in these liquidations. This figure includes net legal fees and legal disbursements of \$3,835,638.47. (Again, all figures exclude GST).²²

¹⁹ *Re Roslea Path Limited (in liq)* at [151] and [152]

²⁰ *Re Medforce Healthcare Services Limited (in liquidation)* [2001] 3 NZLR 145 at [18], approved in *Re Roslea Path Limited (in liquidation)* [2013] 1 NZLR 207. See also *Madsen-Ries v Salus Safety Equipment* at [74]

²¹ Fisk Affidavit at [8.2]

²² Fisk Affidavit at [5.1]

- 4.3 The figures for which approval is sought include some provision for tasks still to be carried out prior to conclusion of the liquidations.²³ Therefore, if the cost in respect of those tasks is less than that for which approval is sought, the amounts actually charged to the liquidations will be less than that approved.
- 4.4 This memorandum only focuses on the costs in the RAM and Dagger liquidations. The costs sought in respect of the other liquidations are minor in comparison and have been paid from the limited assets available in each of those liquidations.
- 4.5 These costs reflect the complexity of the liquidation. As Mr Fisk's affidavit of 22 June 2022 records, this has been one of the most complex liquidations he has been involved in. The extent of the Ross Group's fraudulent operations gave rise to a number of novel legal and practical issues, which required significant forensic accounting, substantial assistance from legal counsel and novel directions from the Court.
- 4.6 Additionally, the costs are to be viewed in light of what has been achieved. At the commencement of these liquidations, the assets in the liquidation were valued at only around \$4 million.²⁴ This can be compared with the statement of receipts and payments for the RAM and Dagger liquidations which records that \$23.8 million has already been distributed to RAM's investors and creditors.²⁵

5. Remuneration: Summary of work carried out in the liquidation

- 5.1 The Fisk Affidavit details the work which was carried out in the liquidation. That work is summarised below.

Analysis of Ross Group's assets and creditors

- 5.2 The Liquidators undertook a significant amount of analysis of the Ross Group's banking records and third party documentation in order to reconstruct RAM's actual financial position over the relevant periods.²⁶ This was necessary in order to:

²³ Fisk Affidavit at [5.2] and [5.3]

²⁴ Fisk Affidavit at [1.4]

²⁵ Fisk Affidavit Schedule Three

²⁶ Fisk Affidavit at [2.2] to 2.15]

- (a) understand whether there were any other assets, which could potentially be clawed back for the benefit of RAM's investors and creditors;
- (b) understand the nature and extent of the Ponzi;
- (c) quantify the claims against Mr and Mrs Ross and their family trusts, which were ultimately settled through various personal and trust assets being brought into the liquidation;
- (d) value the historic share portfolio in order to assist investors to recover tax they had paid to IRD on fictitious investments;
- (e) verify proprietary claims raised by investors to assets held by RAM and Dagger;
- (f) determine the value of investor claims in the liquidation; and
- (g) progress the clawback litigation against investors who had received payments from RAM in excess of their contributions to RAM (known as "fictitious profits").

5.3 This was a significant but complex and time consuming process. There were three key factors contributing to its complexity.

- (a) *RAM's records were largely incomplete and unreliable.*²⁷

RAM changed its computer system in June 2000, meaning there were no available computer records prior to that date. The Liquidators were therefore reliant on RAM's incomplete and unreliable hardcopy files and documents provided by third parties for the period prior to June 2000. Additionally, bank statements for RAM's main bank account were only held from March 2006.

- (b) *The extent and duration of the fraudulent activities.*²⁸

As is explained in the Fisk Affidavit, the Ponzi was well established by at least mid 2000; 12 years before it was placed into liquidation. By that date approximately 60% of shares by value recorded as held by RAM for investors in its investor database were recorded as being held by "Bevis Marks". This was the fictitious broker RAM used to record fictitious investments. Therefore, 60% by value of the shares

²⁷ Fisk Affidavit at [2.5] to [2.9]

²⁸ Fisk Affidavit at [2.5] to [2.8]

reportedly held at June 2000 likely did not exist. Additionally, key characteristics of the Ponzi were present from the early 1990s, leading the Liquidators to conclude that at least part of RAM's operations were fraudulent as early as the early 1990s. This meant the Liquidators could not rely on the accuracy of RAM's records.

(c) *The scale of RAM's operations and the extent of the shortfall.*

At the time of RAM's receivership in November 2012 it was reportedly holding \$449.6 million of assets for over 860 investors. However, the Liquidators could only recover \$4.38 million of those purported investments.²⁹

Contact with Investors and Creditors

5.4 The liquidation has involved extensive contact with investors and creditors.³⁰ This included:

- (a) identifying the creditors and investors;
- (b) issuing statutory reports and numerous additional updates on key matters in the liquidation to investors and creditors;
- (c) preparing transaction summaries for each investor and liaising with them on the accuracy of those summaries, refining summaries as further information came to light and re-issuing summaries after the Distribution Decision;
- (d) receiving, and responding to, voluminous queries and correspondence from investors; and
- (e) identifying those investors who had received significant payments from RAM prior to its liquidation and corresponding with them on a possible clawback claim.

Recovery of Ross Group's assets

5.5 The Liquidators took a number of steps to recover and realise assets of the Ross Group.³¹ Key steps included:

²⁹ Fisk Affidavit at [1.4]

³⁰ Fisk Affidavit at [2.19]

³¹ Fisk Affidavit at [2.20]

- (a) physical assets such as artwork and furniture were sold;
- (b) shares which were in fact held by the Ross Group were identified and sold where it was practicable and cost-effective;
- (c) settlements were reached with Mr and Mrs Ross and their family trusts resulting in some personal and trust assets being realised for the benefit of RAM's investors and creditors;
- (d) proprietary claims to assets held by RAM made by investors were assessed and, if valid, those assets were transferred to the particular investor; and
- (e) lodging a claim in the bankruptcy of Mr Ross on behalf of RAM.

5.6 The Liquidators considered, and took advice on, whether they or the company in liquidation had a claim against RAM's bank, ANZ, arising from the Ponzi. Following receipt of that advice, they liaised with the Liquidation Committee on whether the investors would advance any such claim.³²

Liaising with other parties

5.7 Throughout the nine year liquidation, the Liquidators have liaised with various other parties on matters relating to the Ross Group's operations and the liquidation. This has included:³³

- (a) providing assistance to the Serious Fraud Office and the Financial Markets Authority into their investigations in RAM and David Ross;
- (b) detailed discussions with IRD on agreeing a process for investors to file amended tax returns and to seek refunds of tax they paid on reported but fictitious profits on RAM investments;
- (c) attending 14 meetings with the liquidation committee and liaising with the liquidation committee on various matters; and
- (d) providing assistance to the Official Assignee in the administration of Mr Ross' bankruptcy.

³² Fisk Affidavit at [2.25](f)

³³ Fisk Affidavit at [2.25]

Litigation against other RAM investors

- 5.8 Clawback litigation against former investors in RAM was the biggest issue in the liquidation. The Liquidators spent around 50% of their time on this aspect of the liquidation and the vast majority of the legal fees incurred related to these claims. However, it also provided the most significant recovery of assets for the benefit of investors, resulting in payments to RAM of \$25.7 million for the benefit of investors and creditors.³⁴
- 5.9 The clawback litigation is detailed in Part 3 of the Fisk Affidavit.
- 5.10 There were 208 investors who were subject to a clawback claim; that is a claim seeking that they repay to RAM amounts they received from RAM prior to its liquidation. Only two clawback claims resulted in a substantive hearing and the Liquidators were successful on both those claims. One of those claims was the subject of an appeal to the Court of Appeal and subsequently the Supreme Court.³⁵
- 5.11 While the first clawback claim was progressing through the appellate Courts, the Liquidators negotiated around 100 limitation standstill agreements with investors to ensure that the clawback claims against those investors did not become subject to a limitation defence which might have otherwise arisen, pending the appellate court decisions.³⁶
- 5.12 Although the claims may have appeared, on their face, similar, in reality litigating and negotiating settlement of each of the claims was a complex process. Following the first clawback decision in favour of the Liquidators, the key issue in most of these claims was the merits of a change in position defence raised by the investor. Assessing the merits of this defence involved a detailed consideration on both how the funds received from RAM were applied by the investor and the investors' particular circumstances. Additionally, some investors sought a reduced settlement on the basis of financial hardship. In these cases, the Liquidators considered in detail the investors' financial position. This meant that the settlement considerations and negotiations for every claim were different. Decisions on settlements were managed by the Liquidators at a more senior level (director and

³⁴ Fisk Affidavit at [3.1]

³⁵ *Fisk v McIntosh* [2015] NZHC 1403; *McIntosh v Fisk* [2016] NZCA 74, [2016] 2 NZLR 78; *McIntosh v Fisk* [2017] NZSC 78, [2017] 1 NZLR 863 and *Fisk v Holden* [2019] NZHC 55

³⁶ Fisk Affidavit at [3.8]

liquidator), to ensure that notwithstanding the over 200 clawback claims, a consistent approach to resolution of those claims was maintained.³⁷

5.13 A number of investor defendants did not settle the claims against them until court proceedings against them had been advanced, and in some cases well advanced.³⁸

- (a) Statements of claim were drafted in respect of claims against 32 investors and creditors.
- (b) Detailed affidavits were prepared substantiating the Liquidators' claims in ten proceedings.
- (c) Affidavits were filed by investors in nine proceedings, to which the Liquidators considered and then filed reply evidence in eight of those proceedings.
- (d) Substantive written submissions were prepared in respect of seven proceedings.
- (e) There were three opposed interlocutory applications of substance.
- (f) Discovery and inspection was carried out in respect of one clawback proceeding.
- (g) One proceeding involving a complex and high value clawback claim was only settled in the month prior to the scheduled hearing, following a full day mediation.

5.14 In addition to clawback litigation, the Liquidators were also involved in a claim against two RAM investors in respect of a significant proprietary claim to certain shares. That claim involved a four day hearing in the High Court. The adverse decision was appealed by the Liquidators to the Court of Appeal, but the investors' claim was settled before that appeal was heard.³⁹

Application for directions as to distribution

5.15 Given the number of novel issues which arose in the liquidation, in December 2017 the Liquidators applied for directions as to the distribution of RAM's assets.⁴⁰ Due to the complexity of the issues and the significance of

³⁷ Fisk Affidavit at [3.11]

³⁸ Fisk Affidavit at [3.12] to [3.15]

³⁹ Fisk Affidavit Part 4

⁴⁰ Fisk Affidavit at [2.21 to 2.23]

those issues for investors, counsel assisting the court were appointed and two investors sought to present submissions to the Court during a full day hearing.

- 5.16 Following the Distributions Decision being issued, the Liquidators:
- (a) corresponded with investors and creditors on the Distributions Decision and the practical implications of that decision for them;
 - (b) reviewed all investor and creditor claims in light of that decision;
 - (c) implemented the bespoke distributions process as determined by that decision; and
 - (d) made two distributions to investors and creditors totalling 19.5705 cents in the dollar.

6. Remuneration: Analysis of fees for which approval is sought

- 6.1 The Fisk Affidavit provides a detailed breakdown of the time incurred in the RAM and Dagger liquidations.⁴¹ That breakdown shows that over 8030 hours have been spent on these liquidations. Of that time:
- (a) Just over 50% of that time has been spent on clawback claims.
 - (b) Almost 25% of that time has been dealing with investors and investor claims. That time includes dealing with the high volume of investor queries, considering proprietary claims, reviewing RAM's records to ascertain the net contributions balances for the more than 850 investors, paying distributions and attempting to locate investors for payment of unclaimed distributions. It also includes time in respect of the proceeding relating to the proprietary claim referred to in paragraph 5.14 above and the application to the Court for directions as to the distribution of RAM's assets.
 - (c) The remaining 25% of time related to various other workstreams on the liquidations including selling shares, liaising with third parties such as IRD, FMA and the SFO, establishing the claims against Mr and Mrs Ross and the subsequent settlement of those claims and general liquidation administration matters.

⁴¹ Fisk Affidavit at Schedule One

- 6.2 The Liquidators have been conscious of the fees incurred on this matter and taken a number of steps to reduce the fees in this liquidation.
- 6.3 Notwithstanding the position that there is no jurisdiction to review disbursements incurred,⁴² this part of the submissions also explains what steps the Liquidators' primary legal advisers have taken to reduce the legal fees in the liquidation.

Reduced rates applied

- 6.4 The rates which have been applied by both PwC and their legal advisers are below their standard rates.
- 6.5 Throughout the entirety of the liquidation, PwC has charged the rates initially approved when RAM was first placed into liquidation in 2012. Those rates were the same standard rates for liquidations which have been in place since 2004 (the **2004 Rates**).
- 6.6 In the case of *In re Apollo Bathroom and Kitchen Limited*⁴³ the Court considered whether the 2004 Rates were still the appropriate rates in 2018. The Court accepted those rates were not reasonable in 2018. In particular, the Court recorded that:⁴⁴
- (a) between the fourth quarter of 2004 and the third quarter of 2017 the general consumer price index had increased by 30%; and
 - (b) salaries had increased 45% since 2004 reflecting changes in the market.
- 6.7 This led the Court to conclude that the increases to the rates proposed in that case (which it acknowledged would apply to court-ordered liquidations more generally) were reasonable. The change to the rates were material and included, for example:
- (a) Liquidators and directors' rates changed from the 2004 Rates of \$375.00 to \$450.00 per hour to \$485.00 to \$550.00 per hour.
 - (b) Associate directors' rates changed from the 2004 Rates of \$300.00 to \$375.00 per hour to \$395.00 to \$485.00 per hour.

⁴² See *Re Roslea Path* at [157], *Medforce* at [19] and *Salus Safety Equipment* at [74]

⁴³ [2018] NZHC 18

⁴⁴ *In re Apollo Bathroom* at [16]

Similar increases were made for each tier of expertise/experience.

- 6.8 In that decision, the Court also acknowledged that in large-scale and complex liquidations higher rates of remuneration have been approved for liquidators, including up to \$650 per hour.⁴⁵
- 6.9 Notwithstanding these cases providing a basis to review the rates initially consented to by the Court in 2012, the Liquidators have not sought an increase to their rates of remuneration. They have continued to apply the 2004 Rates throughout the duration of the liquidation. This reflects their desire to maximise recovery for RAM investors.⁴⁶
- 6.10 PwC's primary legal advisers, Bell Gully, have also applied discounted rates to this matter throughout the life of the liquidation. Bell Gully applied a 20% discount to its standard charge out rates on this matter. It also applied a service charge (which covers various disbursements incurred) of 1% instead of the usual 2.5%. These discounted rates continued to apply when the Liquidators' primary legal advisers left Bell Gully and went to the independent bar.⁴⁷

Delegation of work

- 6.11 The Liquidators have sought to delegate work where appropriate. In particular, the day to day management of the liquidation has been managed by Mr Marcus McMillan since 2012, a director at PwC rather than the Liquidators' themselves, but under the supervision of the Liquidators.⁴⁸ Where possible and appropriate, work was delegated further to Analysts and Associate Directors. The impact of this delegation can be seen from the blended hourly rate of \$295.⁴⁹
- 6.12 A similar approach was taken by Bell Gully, with the day to day management of the liquidation files being undertaken by a Senior Associate, rather than at Partner level. Work was further delegated to junior and mid level solicitors as appropriate. This has led to a blended hourly rate of \$299 over the duration of the liquidation.⁵⁰

⁴⁵ *In re Apollo Bathroom* at [13]

⁴⁶ Fisk Affidavit at [5.15]

⁴⁷ Fisk Affidavit at [6.4]

⁴⁸ While Mr McMillan subsequently became a liquidator, between November 2012 and December 2020 he was not a liquidator, but worked on the liquidations as a director at PwC.

⁴⁹ Fisk Affidavit at [5.5]

⁵⁰ Fisk Affidavit at [6.4]

Further discounts applied at the point of invoicing

- 6.13 Both the Liquidators and Bell Gully also elected not to charge for some attendances on this matter or applied further discounts at the time of invoicing. These additional discounts totalled over \$850,000 (excluding GST).⁵¹
- 6.14 These discounts were predominantly applied prior to the first decision on the clawback litigation, at a time when it was unclear whether there would be recoveries from the clawback litigation available for the benefit of investors.⁵²
- 6.15 Again, these decisions reflect an intention to maximise the recovery for investors.

Comparison to other complex liquidations

- 6.16 The remuneration and costs incurred in the Ross Group liquidations can be compared to other complex liquidations involving novel legal issues over a similar period. For example (all figures exclude GST):
- (a) For the period from 28 February 2013 to 28 February 2022 the liquidators' fees in the Mainzeal Group liquidation was reported to be \$4.231 million with legal costs incurred of \$7.639 million.⁵³
 - (b) For the period 14 May 2019 to 10 December 2021 the liquidators' fees in the Cryptopia Limited liquidation was reported to be \$4.345 million with legal costs incurred of \$2.702 million.⁵⁴
 - (c) For the period 27 November 2018 to 22 March 2022 the reported fees for the administrators/liquidators in the Halifax New Zealand Limited in liquidation were \$2.47 million with legal fees and disbursements of \$2.21 million.⁵⁵
- 6.17 While each of these liquidations had their own novel legal issues to deal with, none have been ongoing for as long as the Ross Group liquidations nor involved the volume of litigation involved in this liquidation. Each of these liquidations are not yet concluded or near concluded.

⁵¹ Fisk Affidavit at [5.16] and [6.4](d)

⁵² Fisk Affidavit at [6.4](d)

⁵³ Fisk Affidavit at [5.20]

⁵⁴ Fisk Affidavit at [5.20](b)

⁵⁵ Fisk Affidavit at [5.20](c)

7. Procedural order to regularise the parties to this proceeding

- 7.1 The final order sought is a routine procedural matter.
- 7.2 The Liquidators appointed by the Court in 2012 were Mr John Fisk and Mr David Bridgman. There has since been a change to the liquidators: due to the retirement as liquidator of Mr David Bridgman in 2020 and subsequently his successor, Mr Marcus McMillan in 2021, the current liquidators of the Ross Group are Mr John Fisk and Mr Malcolm Hollis.⁵⁶
- 7.3 Any application by the Liquidators for further directions and for approval of their remuneration is properly made by the current liquidators, being Messrs Fisk and Hollis. Accordingly, they seek an order substituting Mr Malcolm Grant Hollis for Mr David John Bridgman as the second named applicant in this proceeding. (Mr Fisk remains the first named applicant.)
- 7.4 Such an order is made pursuant to High Court Rules 4.51 and 4.52.
- 7.5 High Court Rule 4.51 provides:
- A proceeding may be continued by or against a person to or on whom an estate or title is assigned, created, or devolved if the assignment, creation or devolution takes place when a proceeding is pending.*
- 7.6 High Court Rule 4.52 provides that the Court can make an order that a proceeding be carried on between the continuing parties and a new party (known as a new parties order) where there has been an event after a proceeding has been commenced which caused a change or transmission of interest or liability or an interested person comes into existence, making it necessary or desirable that a person be made a party to the proceeding. *McGechan on Procedure* confirms that an order pursuant to High Court Rule 4.52 can be used to substituted parties to a proceeding and that in such a case:⁵⁷
- (a) the substituted party stands in the same position as the party replaced;
 - (b) the substituted party is bound by the former party's acts; and

⁵⁶ Fisk Affidavit at [1.4]

⁵⁷ *McGechan on Procedure* (online ed; Thomson Reuters) at [HR4.52.04]

- (c) the substituted party may be subject to or entitled to costs from the beginning of the action.

7.7 Accordingly, the Liquidators submit that it is appropriate that Mr Malcolm Hollis, as liquidator of the Ross Group, be substituted for Mr David Bridgman as the second named applicant in this proceeding.

8. Final matters

8.1 The orders now sought are set out in Schedule One to these submissions.

8.2 This application has been served on all investors and creditors of RAM in the manner ordered by the Court in the orders to facilitate the progress of the application for directions dated 14 December 2017.

8.3 Counsel are available to appear before the Court should that be of assistance.



M G Colson QC / R L Pinny
Counsel for the Liquidators

2 August 2022

Schedule One: Orders now sought

1. The Liquidators are to pay the final distribution to the general unsecured creditors and investors of RAM and Dagger on the same basis as set out in the Court's order of 8 August 2018 (being the Distributions Decision), save that:
 - (a) Any final distribution will only be made to those creditors and investors who would be eligible to receive a distribution of \$100.00 or more.
 - (b) Where a final distribution is to be made to an investor who has been unable to be located by the Liquidators for the purpose of paying the previous two distributions that distribution shall be deemed to be unclaimed monies for the purpose of the Unclaimed Money Act 1971 and the Liquidators may pay such monies to the Inland Revenue Department pursuant to the Unclaimed Monies Act 1971 at the time of paying the final distribution.
2. The Liquidators' remuneration be approved as follows:
 - (a) In respect of Ross Asset Management Limited (in liquidation) and Dagger Nominees Limited (in liquidation), \$2,404,173.71.
 - (b) In respect of Bevis Marks Corporation Limited (in liquidation), \$10,750.00.
 - (c) In respect of United Asset Management Limited (in liquidation), \$8,133.55.
 - (d) In respect of McIntosh Asset Management Limited (in liquidation), \$4,919.35.
 - (e) In respect of Mercury Asset Management Limited (in liquidation), \$6,001.42.
 - (f) In respect of Ross Investments Management Limited (in liquidation), \$2,369.35.
 - (g) In respect of Ross Unit Trusts Management Limited (in liquidation), \$1,624.84.
3. Malcolm Grant Hollis be substituted for David John Bridgman as the second named applicant in this proceeding.

4. Leave be granted for the Liquidators to return to the Court to vary the orders above or seek additional orders in the event that there are unforeseen significant issues or attendances in the liquidations.