

**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 sections 271 and 284 of the Companies Act 1993
In the matter of Ross Asset Management Limited (in liquidation) and related entities

John Howard Ross Fisk and David John Bridgman, as liquidators of Ross Asset Management Limited (in liquidation), Dagger Nominees Limited (in liquidation), Bevis Marks Corporation Limited (in liquidation), United Asset Management Limited (in liquidation), McIntosh Asset Management Limited (in liquidation), Mercury Asset Management Limited (in liquidation) Ross Investments Management Limited (in liquidation) and Ross Unit Trusts Management Limited (in liquidation) each being Chartered Accountants of Wellington and Auckland respectively

Applicants

Application by liquidators for directions

12 December 2017

BELL GULLY

BARRISTERS AND SOLICITORS

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To: The Registrar of the High Court at Wellington

And to: The investors and creditors of Ross Asset Management Limited (in liquidation), Dagger Nominees Limited (in liquidation), Bevis Marks Corporation Limited (in liquidation), United Asset Management Limited (in liquidation), McIntosh Asset Management Limited (in liquidation), Mercury Asset Management Limited (in liquidation) Ross Investments Management Limited (in liquidation) and Ross Unit Trusts Management Limited (in liquidation) (together, the **Ross Group**)

This document notifies you that –

1. The applicants, John Howard Ross Fisk and David John Bridgman, as liquidators of the Ross Group (the **Liquidators**), will on 2017 at apply for orders:
 - (a) that the assets of Ross Asset Management Limited (in liquidation) (**RAM**) and Dagger Nominees Limited (in liquidation) (**Dagger**) be pooled for the purposes of the liquidation and the liquidations of these two companies proceed as if they were one company (the **pooling order**);
 - (b) that all recovered assets of RAM and Dagger, after costs, be treated as forming one common pool of assets for distribution, available to both the general unsecured creditors of RAM and Dagger (the **Creditors**) and investors in RAM at the time of its liquidation (the **Investors**);
 - (c) that the common pool of assets be distributed on the following basis:
 - (i) there will be no tracing of particular Investors' assets;
 - (ii) any Investor who received payments from RAM (adjusted for the Consumer Price Index (**CPI**) with a reference date of 17 December 2012, being the date of liquidation) which exceeded their contributions to RAM (adjusted for CPI with a reference date of 17 December 2012) is not entitled to

any distribution in the liquidation of any of the companies comprising the Ross Group;

- (iii) that in respect of any purported transfers between investment portfolios purportedly held by Investors:
 - (A) such purported transfers be recognised by the Liquidators only to the extent of any positive net contributions balance in respect of the transferring portfolio at the date of transfer;
 - (B) contributions balances be calculated by deducting from any contributions made by an Investor to RAM any payments made by RAM to that Investor (both contributions and payments being adjusted for CPI with a reference date of 17 December 2012 being the date of liquidation);
 - (iv) if because of extraordinary circumstances the direction on inter-portfolio transfers at paragraph 1(c)(iii) above is unjust or ineffective in relation to a specific portfolio or portfolios then:
 - (A) the Liquidators may apply a reasonable and logical alternative methodology; but
 - (B) where such an alternative methodology is adopted, leave is granted to the affected Investors to apply to the Court within this proceeding if they wish to challenge the Liquidators' decision in respect of that particular purported inter-portfolio transfer;
- (d) as to the appropriate method of distribution of those pooled assets to all Creditors and Investors, being the Net Contributions Model (as described in the affidavit of John Howard Ross Fisk filed with this application) or the Alternative Model (as described in the affidavit of John Howard Ross Fisk filed with this application) or such other model as the Court considers fit;

- (e) that Mr Paul Chisnall be appointed as counsel to assist the court in relation to this Application (and any appeal thereof), but with a focus on the benefits of the Alternative Model while acknowledging any merits of the Net Contributions Model or any other model that may be considered in the alternative and/or on such other terms as the Court thinks fit (including that his reasonable costs and that of any lawyer assisting him, on the basis of their usual hourly rates, are a cost of the liquidation);
- (f) that service of this application on Investors and Creditors be deemed to have occurred upon the following steps:
 - (i) publishing this Application on the PricewaterhouseCoopers (**PwC**) website on its webpage dedicated to the Ross Group liquidation, <http://www.pwc.co.nz/services/business-recovery/liquidations/ross-group.html>;
 - (ii) emailing a link to the Application to all Creditors and Investors who have provided an email address to the Liquidators; and
 - (iii) where an email address is not known, sending a letter to the Investor's last known postal address advising that the Application has been made, providing a summary of the Application and directing recipients to the PwC website for more information and a copy of the court documents;
- (g) confirming that the Liquidators are entitled to deduct their costs and expenses in the Liquidation from the common pool of assets;
- (h) that for the purpose of a claim form for Investors who are entitled to receive a distribution in the liquidation of RAM and Dagger:
 - (i) the Liquidators will provide to each such Investor a statement:
 - (A) summarising their transactions with RAM; and

(B) stating their claim in the liquidation based on the distribution model determined by this Court as applicable;

(the **Transaction Summary**); and

- (ii) once the Investor signs the Transaction Summary, the signed Transaction Summary is deemed to be the requisite claim form for the purpose of the Companies Act Liquidation Regulations 1994 (the **Liquidation Regulations**) and section 304 of the Companies Act 1993;
- (iii) if the Investor wishes to object to the Transaction Summary, they must do so in writing, detailing the grounds for the objection, no later than:
 - (A) 20 working days after the Transaction Summary was sent to them, if it was sent by email;
 - (B) 25 working days after the Transaction Summary was sent to the Investor, if it was sent by post to an address in New Zealand; and
 - (C) 40 working days after the Transaction Summary was sent to the Investor, if it was sent by post to an address outside of New Zealand;
- (iv) the Liquidator must make a decision in relation to a written objection within 20 working days and this decision is deemed to be the admission or rejection of the claim (in whole or in part) for the purposes of section 284 of the Companies Act 1993;
 - (i) that where:
 - (i) an Investor has not signed the Transaction Summary for a period of six months after it was issued by the Liquidators and has not provided a written objection in accordance with paragraph 1(h)(iii) above; or

- (ii) the Liquidators have been unable to locate an Investor for the purpose of providing the Transaction Summary;

that Investor's distribution (as set out in the Transaction Summary) shall be:

- (iii) deemed to be Unclaimed Money for the purpose of the Unclaimed Money Act 1971; and
- (iv) paid to the Commissioner of Inland Revenue in accordance with section 4(3) of the Unclaimed Money Act 1971;

- (j) that:

- (i) leave be given to seek the pooling orders as part of this application for directions, instead of pursuant to Part 18 of the High Court Rules; and

- (ii) that the notice requirements in section 271A of the Companies Act 1993 be varied to provide that:

- (A) notice to all Creditors and Investors pursuant to section 271A is deemed to have been given upon service of this Application in accordance with the orders sought at paragraph 1(f) above; and

- (B) that any Creditor or Investor who wishes to oppose the pooling orders file a notice of opposition to this Application within 20 working days which is deemed to be the statement of defence for the purpose of section 271A.

- (k) that pages 112 to 135 of the bundle of exhibits annexed to the affidavit of John Howard Ross Fisk sworn 11 December 2017 be marked confidential on the Court file and:

- (i) are not to be inspected or provided to any third party without further order of the Court on notice to the Applicants; and

- (ii) are to be excluded from the documents to be served on Creditors and Investors;
 - (I) that leave to apply for further directions is reserved.
2. The grounds on which each order is sought are as follows:
- (a) RAM operated a Ponzi scheme.
 - (b) The Ponzi scheme was significant in its scope. At the time of RAM's collapse, RAM was purportedly holding investments worth \$449.6 million for over 860 investors. The Applicants (as receivers of RAM and its related entities and subsequently liquidators) have so far recovered only approximately \$3.724 million of those investments.
 - (c) The payments received by Investors as the purported "profits" on their investment were mostly in fact funded by new deposits from other Investors or the sale of shares other than those supposedly held for that Investor in their portfolio.
 - (d) The Liquidators have, to date, received approximately \$15 million in settlement payments from such Investors in relation to payments by RAM to them.
 - (e) Assuming only those Investors who have not been paid by RAM more than they contributed to RAM, after taking into account the CPI adjustment (**Shortfall Investors**) are entitled to a distribution in RAM's liquidation, 639 Shortfall Investors are eligible for a distribution. These Shortfall Investor claims (on a net contributions basis, being for each investor the total of payments made to RAM, less total payments received from RAM, adjusted for inflation) total \$124,709,390.34.
 - (f) The Ross Group also has 26 general unsecured potential creditors (the **Creditors**) who have claims totalling approximately \$68,195.69.

- (g) The current distribution (based on the Net Contributions Model) to Shortfall Investors and Creditors is approximately 11 cents in the dollar.
3. The further grounds on which particular orders are sought are as follows:
- Pooling assets*
- (a) As to the order sought at paragraph 1(a) and 1(j), regarding the pooling of RAM and Dagger's assets and treating the two companies in liquidation as one company:
- (i) RAM and Dagger are related companies.
 - (ii) Investors are likely to have claims against both Dagger and RAM, as parties to the Management Agreement and the Ponzi scheme.
 - (iii) It would be impossible to divide Investor claims between RAM and Dagger.
 - (iv) Some, if not all, shares held by Dagger at the time of its receivership were purchased using funds misappropriated from Investors.
 - (v) Dagger has no creditors in its own right (aside from the Investors' claims) and therefore no other party would be adversely affected by such an order.
 - (vi) Mr Ross (the sole director of both companies) treated RAM and Dagger as facets of the same enterprise.
 - (vii) It is just and equitable for the pooling orders, and the orders as to the notice requirements in section 271A of the Companies Act 1993, sought to be made.
- (b) As to the order sought at paragraph 1(b), regarding the pooling of trust assets and general assets:

- (i) The assets held by the Liquidators likely comprise trust assets (arising out of the trust arrangements between Investors, RAM and Dagger) and general assets (being trust assets which are not able to be traced back to Investor deposits or assets derived from other sources including the use or threatened use of the Liquidators' statutory powers).
- (ii) In order to maintain a pool of assets for trust assets and a separate pool of assets for general assets, the Liquidators would need to undertake a complex factual and legal exercise to categorise various assets into each pool.
- (iii) Such an exercise would involve tracing various assets to determine whether the asset was acquired using Investor funds. This exercise would be impossible prior to March 2006 and, at least, impractical post March 2006.
- (iv) There are outstanding legal issues which would need to be determined as part of that categorisation exercise. Resolving such issues separately would be time-consuming and expensive.
- (v) The cost of maintaining two pools would outweigh the total debt owing to general unsecured creditors.

Distribution of assets

- (c) As to the orders sought at paragraph 1(c):
 - (i) The Net Contributions Model is a largely orthodox and previously approved model for a Ponzi scheme.
 - (ii) Some Investors are concerned that the Net Contributions Model is unfair as it does not sufficiently take into account the payments an Investor may have received from RAM prior to its collapse.
 - (iii) The Alternative Model seeks to address these concerns by proposing a model for distribution which takes into account

the payments an investor received from RAM prior to its collapse to a greater extent than the Net Contributions Model.

- (iv) Tracing of particular Investor assets (if possible at all) would incur significant costs and generate significant practical difficulties.
 - (v) Allowing Investors whose receipts from RAM exceeded their capital contributions to RAM to claim in the liquidation would significantly complicate the distribution process including quantifying their claims.
 - (vi) RAM operated as an investment manager between 1990 and 2012 (22 years). An adjustment for inflation for Investor claims is appropriate to recognise the different value of claims based on when the funds were paid by the Investor to RAM.
- (d) As to the orders sought at paragraph 1(e), in relation to inter-portfolio transfers:
- (i) They are consistent with the Investors' intentions to recognise purported transfers of value between RAM investment portfolios where, and only to the extent, there was "value" available to transfer (i.e. where, at the time of the transfer, the Investor had not already been paid by RAM more than they had contributed to RAM).
 - (ii) They are just and equitable.

Ancillary orders

- (e) As to the order sought at paragraph 1(f), regarding the appointment of counsel to assist the Court:
- (i) There are over 860 Investors who will have an interest in this application, as persons who may receive a distribution, in addition to 26 general unsecured potential creditors.

(ii) Appointment of counsel to assist the Court will allow the Court to receive submissions on the appropriate distributions model in a manner that is efficient and independent of the Liquidators.

(iii) It is appropriate that the court appointed counsel's reasonable costs be a cost in the Liquidation.

(f) As to the orders sought at paragraph 1(g), regarding service:

(i) Personal service of all documents on all Investors and Creditors (over 880 persons) would delay determination of the application and would incur significant costs, which would be deducted from the pool of available assets, to the detriment of Investors and Creditors.

(ii) Key information regarding the liquidation has previously been communicated in the manner outlined above at paragraph 1(g).

(iii) The Liquidators believe that service in the manner sought will likely bring the Application to the attention of all but 59 of the Investors.

(g) As to the orders sought at paragraph 1(i):

(i) The information RAM provided to Investors about their investment portfolios was fictitious.

(ii) The quantum of each Investor's claim will ultimately be determined by the outcome of this application.

(iii) Explaining to Investors:

(A) why claim forms filled out in reliance on RAM's advice as to the value of their investment portfolio, were rejected; and

(B) how to fill out such forms so that the claim accords with the orders given in this application;

would be time consuming and incur additional and unnecessary costs in the liquidation.

- (iv) Early investors in RAM are unlikely to have retained, or still have access to, records to enable them to calculate their net contributions balance.
- (v) They are just and equitable.

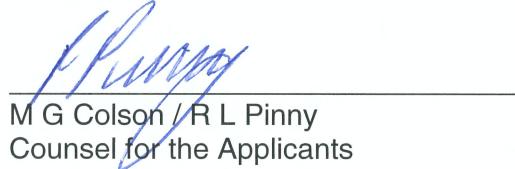
(h) As to the confidentiality orders sought at paragraph 1(l):

- (i) the pages 112 to 135 of the bundle of exhibits annexed to the affidavit of John Howard Ross Fisk sworn 11 December 2017 record specific payments made:
 - (A) by investors to RAM; and
 - (B) by RAM to investors;

in circumstances where those investors may be readily identifiable from those pages;
- (ii) those pages have been provided to the Court to illustrate a “snapshot” of the volume of transactions through RAM’s primary trading account: the identity of the particular investors in those pages is not relevant to this application;
- (iii) such an order is consistent with previous orders granted by the Court in related Ross Group matters, including in: para 2(f) of the order dated 17 December 2012 putting the Ross Asset Management companies into liquidation (CIV:2012-485-2591); and paragraph 14(b) of the Judgment of Williams J dated 22 August 2013 and the Minute of Kos J dated 24 February 2014 (the latter two being both related to applications for orders in relation to proprietary claims in CIV2012-485-2314); and the order of Simon France J of 24 August 2017 in CIV:2017-485-685 as to the procedure for clawback proceedings against RAM investors.

- (i) As further detailed in the affidavit of John Howard Ross Fisk and the memorandum of Paul Chisnall filed herein.
4. The application is made in reliance on: sections 253, 271 and 284(1)(a) of the Companies Act 1993; *Re Registered Securities Ltd* [1991] 1 NZLR 545 (CA); *Re Waipawa Finance Company Limited* [2011] NZCCLR 14; *McKenzie v Alexander (No 1)* (1991) 5 NZCLC 67,030; *McKenzie v Alexander (No 2)* (1991) 5 NZCLC 67,046; *McKenzie v Alexander (No 3)* HC Wellington M No 188/88, 10 December 1991; *Re Ararimu Holdings Ltd* [1989] 3 NZLR 487 (HC); *Re International Investment Unit Trust* [2005] 1 NZLR 270 (HC); *Barlow Clowes International Ltd (in liq) v Vaughan* [1992] 4 All ER 22; *Foskett v McKeown* [2000] UKHL 29; *Re Pacific Syndicates (NZ) Limited (in liquidation)* (1989) 4 NZCLC 54,757, *Re Dalhoff and King Holdings Limited (in liquidation)* (1991) 5 NZCLC 66,974, *Lewis Holdings Limited v Steel Tube Holdings Limited* [2014] NZHC 3311, *Graham & Jackson v Arena Capital Limited (in liq)* [2017] NZHC 973 and *Fisk v McIntosh* [2017] NZSC 78.

Dated this 12th day of December 2017.


M G Colson / R L Pinny
Counsel for the Applicants