

**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 and the High Court Rules
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

**Memorandum of counsel in support of initial orders to
facilitate progress of application**

12 December 2017

BELL GULLY

BARRISTERS AND SOLICITORS

J H STEVENS / R L PINNY
SOLICITOR FOR THE APPLICANTS
WELLINGTON LEVEL 21, 171 FEATHERSTON STREET
PO BOX 1291, WELLINGTON 6140, DX SX11164, NEW ZEALAND
TEL 64 4 915 6800 FAX 64 4 915 6810 EMAIL RACHEL.PINNY@BELLGULLY.COM

MIKE COLSON, STOUT STREET CHAMBERS
COUNSEL FOR THE APPLICANTS
LEVEL 6, HUDDART PARKER BUILDING
1 POST OFFICE SQUARE, WELLINGTON
PO BOX 117, WELLINGTON
TEL 04 260 5040 EMAIL MIKE.COLSON@STOUTSTREET.CO.NZ

May it please the Court:

Introduction

1. This is an application by the liquidators of Ross Asset Management Limited (**RAM**) and associated companies (the **Liquidators**) for directions as to the distribution of assets (the **Application**).
2. The Liquidators request that four orders be granted on the papers to facilitate the progress of this application for directions:
 - (a) the appointment of counsel (Paul Chisnall) to assist the Court (paragraph 1(e) of the Application);
 - (b) orders as to service of the Application (order 1(f) of the Application);
 - (c) confidentiality (order 1(k) of the Application); and
 - (d) timetabling of the Application.
3. A list of the orders now sought are set out at Schedule One to this memorandum.

Background to this application

4. The background to this application is the collapse of RAM, which was placed into liquidation on 17 December 2012. Upon its collapse, it was discovered that RAM was operating a Ponzi scheme.
5. At the time of its collapse, RAM purportedly held investments worth \$449.6 million on behalf of over 860 investors (**Investors**). To date, only approximately \$3.72 million of those investment assets could be located and realised.¹ Almost all investment assets purportedly held for investors were a fiction.
6. The payments received by Investors as the purported “profits” on their investment were mostly in fact funded by new deposits from other

¹ Affidavit of John Howard Ross Fisk sworn 11 December 2017 (**Fisk Affidavit**) at 1.3.

Investors or the sale of shares other than those supposedly held for that Investor in their portfolio.

7. The Liquidators have, to date, received approximately \$15 million in settlement payments from such Investors in relation to payments by RAM to them.²
8. The Liquidators' analysis shows that 639 Investors paid RAM more than they received from RAM (after an adjustment for CPI) (**Shortfall Investors**). Their claims total \$124,709,390.34 (calculated on the basis, for each Shortfall Investor, of total amount paid to RAM, less total amount received by RAM, each amount being adjusted for CPI).³
9. RAM's liquidation is on-going. However, the Liquidators consider that they are now in a position to make an interim distribution of \$14 million.⁴
10. Given that RAM's operations were a Ponzi, the distribution of its assets raises a number of complex and novel issues. The most significant issue in this Application is how to distribute the assets between the various groups of creditors and investors in RAM.
11. In this application, the Liquidators are seeking the following directions.
 - (a) That the assets of RAM and its related entity, Dagger Nominees Limited (in liquidation) (**Dagger**), be pooled and the liquidation of the two companies proceed as if they are one company. The Liquidators do not expect this direction to be contentious. The two companies were in effect run as one and both were parties to the standard investment agreement with all Investors.
 - (b) That there should be only one common pool of assets for distribution for both general unsecured creditors and investors in RAM rather than two pools of assets (a trust pool and a general pool of assets). Again, this direction is not expected to be contentious. General unsecured (non-investor) creditors

² Fisk Affidavit at 6.13.

³ Fisk Affidavit at 5.4.

⁴ Fisk Affidavit at 6.16.

(Creditors) total less than \$70,000.⁵ It would be uneconomic to seek to distinguish between them and Investors for the purpose of distribution.

- (c) As to the basis of distribution of the assets now held by the Liquidators. The Liquidators, in response to views of the Liquidation Committee, have put forward two alternative distribution models (which are described in the affidavit of John Fisk filed in support):⁶
 - (i) the Net Contributions Model (based on the usual approach to distributions to creditors); and
 - (ii) the Alternative Model (which seeks to take into account pre-liquidation payments by RAM to Shortfall Investors to achieve what is, on one view of it, a fairer overall outcome amongst Shortfall Investors).

This direction is expected to be the major focus of submissions in this Application. The two models present quite different outcomes for Investors.

- (d) Ancillary orders, including as to the appointment of counsel assisting the court, payment of the Liquidators' costs from the common pool of assets, service of this application, limited confidentiality orders and an alternative procedure to the standard proof of debt process. We do not expect these orders to be contentious.

Appointment of counsel assisting the Court

12. The Liquidators propose that the Court appoints counsel to assist it given:

- (a) the overall importance of the Application to RAM's investors;

⁵ Fisk Affidavit at 1.5(b).

⁶ See Fisk Affidavit at 9.13 – 9.37.

- (b) the significant number of interested persons to the Application who are not parties to the Application and who may have conflicting interests; and
 - (c) the need to ensure all legal issues are fully canvassed before the Court.
13. The Court's inherent jurisdiction to appoint counsel to assist it is well known.⁷ In *Erwood v Holmes* Moore J noted that:⁸

Counsel will ordinarily be appointed to assist where there is a danger that an important and difficult point of law will require a determination without having been the focus of argument.

14. The Court in *Erwood* then cited with approval the following remarks of Brennan CJ in *Levy v Victoria*:⁹

The hearing of an *amicus curiae* is entirely in the Court's discretion. That discretion is exercised on a different basis from that which governs the allowance of intervention. The footing on which an *amicus curiae* is heard is that the person is willing to offer the Court a submission on law or relevant fact which will assist the Court in a way in which the Court would not otherwise have been assisted.

15. Similar comments have been made by the Court of Appeal in *The Beneficial Owners of Whangaruru Whakaturia No 4 v Warin* which found that the role of counsel assisting:¹⁰

...involves giving assistance to the court in a neutral and comprehensive way, particularly to ensure that all aspects of a dispute are teased out and addressed.

16. In *Erwood v Holmes*, the Court identified the following examples of where it was appropriate to appoint counsel to assist:¹¹

⁷ *Erwood v Holmes* [2017] NZAR 971 (HC) at [34].

⁸ At [35].

⁹ [1997] HCA 31.

¹⁰ [2009] NZAR 523 (CA) at [20].

¹¹ *Erwood v Holmes*, at [39].

- (a) cases where parties to the proceedings have chosen not to participate;
 - (b) cases raising issues “the determinations of which are likely to significantly affect the interest of a sector of society which is not a party to the proceedings”; and
 - (c) cases involving complex issues.
17. The Liquidators have identified over 860 investors who believed they held current investment portfolios with RAM at the time of its collapse.¹² (This figure excludes general unsecured creditors of RAM.) This Application will significantly affect some of those investors. By way of illustration if the outcome of this Application is that the Court orders that the Alternative Distributions Model be applied, instead of the Net Contributions Model:
- (a) 387 Shortfall Investors will be eligible for an (increased) distribution in the liquidation, compared with the Net Contributions Model.¹³
 - (b) However, 221 Shortfall Investors who would receive a distribution under the Net Contributions Model, will no longer be eligible for a distribution.¹⁴
18. The Liquidators also propose that investors other than Shortfall Investors will receive no distribution in the liquidation, even though they may have claims against RAM in relation to its activities. There are a very large number of investors in this category.
19. Unsurprisingly, Investors have strong views as to the appropriate distribution model. However, none of those investors are a party to this Application. Nor would it be practicable to join all those persons as parties to the Application. Given the significance of the issues to those persons, and the complex and novel nature of the issues to be

¹² Fisk Affidavit at 1.3.

¹³ Fisk Affidavit at 9.34.

¹⁴ Fisk Affidavit at 9.32 and accompanying table.

determined, the Liquidators believe it is important to ensure that all aspects of the legal and practical issues are fully addressed.

20. Accordingly, the Liquidators and their counsel consider, with respect, that it is appropriate for counsel to assist to the Court to be appointed to:
 - (a) consult with Investors, through the Ross Group Liquidation Committee (or otherwise); and
 - (b) provide independent submissions to the Court on the appropriate distributions model and such other parts of the Application as may be necessary.
21. While the nature of any instruction to the counsel assisting the court is a matter for the Court, the Liquidators respectfully propose that counsel assisting the Court be instructed to provide submissions to the Court 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.
22. The Liquidators' counsel would then take the opposite approach – that is, to provide submissions to the Court with a focus on the benefits of the Net Contributions Model while acknowledging any merits of the Alternative Model or any other model that may be considered in the alternative.
23. This approach should enable all relevant issues to be teased out and addressed.
24. The appointment of counsel to assist the court has received general support by the Liquidation Committee of RAM.
25. The Liquidators propose Mr Paul Chisnall be appointed as counsel assisting the Court. Mr Chisnall has considerable insolvency experience and has previously acted as counsel assisting the Court. He has also confirmed to the Liquidators that he is willing and able to accept the appointment. He has no conflicts, in that he is not currently acting for any RAM investor or former RAM investor who is the subject of a clawback claim in the Ross Group liquidations. He has confirmed that

he will not accept any instructions from any current or former RAM investor in respect of the Ross Group liquidations should he be appointed as counsel assisting the Court.

26. A memorandum from Mr Chisnall is filed with this Application.
27. The Liquidators also seek orders that the Mr Chisnall's reasonable legal costs in assisting the Court (and those of a member of his chambers to support him) would be a cost in the liquidation.

Appeal rights

28. The Liquidators wish to draw the Court's attention to one further matter. As counsel assisting the Court is not a party to the proceeding, such counsel has no rights of appeal from any decision issued.¹⁵ The Liquidators suggest that this matter be considered with the Court in due course.
29. The Liquidators will provide a summary of this application on their webpage dedicated to the Ross Group liquidation. Through this, they intend to advise interested persons that:
 - (a) the Liquidators do not intend to appeal the Court's decision as to which distribution model is to be applied in the Ross Group liquidations, absent extraordinary reasons;
 - (b) that the counsel assisting the court has no rights of appeal;
 - (c) that if any person wishes to preserve their right to appeal any decision on the Application, they ought to take legal advice; and
 - (d) the general issue of appeal rights will be raised with the Court.

Service of the Application

30. The Liquidators also seek alternative orders as to service of the Application on Investors and Creditors of RAM.

¹⁵ *The Beneficial Owners of Whangaruru Whakaturia No 4 v Warin* at [33] and [36].

31. It is not in the best interests of the Creditors and Investors of RAM that the Liquidators be required to personally serve the Application on every person who may be affected by it:
- (a) There are approximately 886 persons (Investors and Creditors) with an interest in this Application.¹⁶
 - (b) There would be significant costs associated with personally serving each of those Investors and Creditors, with those costs being deducted from the pool of assets available for distribution, to the detriment of Investors and Creditors generally.
 - (c) Such personal service would also be time consuming and will likely significantly delay determination of this Application.
32. The Liquidators therefore propose that service of the Application (i.e. the Application itself and all supporting evidence and memoranda) be deemed to have occurred upon the following steps being taken:
- (a) publishing the 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>;
 - (b) emailing a link to the Application to all RAM Creditors and Investors who have provided an email address to the Liquidators; and
 - (c) where no email address is known, sending a letter to such Investors and Creditors at their last known postal address, advising of the application having been made, providing a summary of the Application and directing them to PwC's website for more information and a copy of the documents filed.
33. The mechanisms above are the means the Liquidators have used to communicate information about the liquidation to affected investors throughout the liquidation.

¹⁶ See Fisk Affidavit at paras 1.3 and 5.1.

34. Adopting this process for service of this Application would enable the Application to be served on interested parties in a speedy, expeditious and cost effective manner.
35. Of the over 860 Investors, the Liquidators have either a physical address or an email address for all but 59.¹⁷ Accordingly, the Liquidators expect that the process above would bring the Application to the attention of over 90% of those persons with an interest in the Application.
36. The Liquidators have no knowledge of the location of the 59 remaining investors.¹⁸ RAM's liquidation has been extensively covered in New Zealand media over the past five years. This media coverage has caused a number of investors to contact the Liquidators. Despite this extensive coverage, these 59 investors have not contacted the Liquidators. Therefore, the Liquidators do not consider that they could promptly and cost-effectively locate these remaining 59 investors, to bring the Application to their attention.¹⁹
37. The Liquidators believe it is not in the best interests of the remaining 827 Creditors and Investors of RAM that significant time (and associated cost) be incurred attempting to locate these 59 investors for service of this Application.²⁰
38. However:
- (a) of these 59 Investors, 49 Investors are Shortfall Investors (that is, they would be likely to receive a distribution under the Net Contributions Model);²¹ and
 - (b) of those 49 Shortfall Investors, nine have a net contributions balance of in excess of \$100,000 (and so would expect to receive a distribution of at least \$10,000 each under the Net Contributions

¹⁷ Fisk Affidavit at 11.13.

¹⁸ Fisk Affidavit at 11.13.

¹⁹ Fisk Affidavit at 11.10 – 11.16.

²⁰ Fisk Affidavit at 11.10.

²¹ Fisk Affidavit at 11.14.

Model).²² The Liquidators will be making active enquiries to try to locate these nine investors for service of the Application but do not wish those enquires to hold up determination of the Application.²³

Confidentiality orders

39. The Liquidators have sought orders 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:
- (a) are not to be inspected or provided to any third party without further order of the Court on notice to the Liquidators; and
 - (b) are to be excluded from the documents to be served on Creditors and Investors.
40. As is detailed in the affidavit of John Fisk, those pages compromise one month of bank statements from RAM's primary trading account, the account referred to in Mr Fisk's affidavit as the **00 Account**.²⁴ Those pages have been produced to illustrate to the Court the volume of transactions through the 00 Account.
41. Those bank statements have been provided to the Court on an unredacted basis. As such, they contain information that will likely identify some, if not all, of the investors who deposited funds into the 00 Account or were paid funds from the 00 Account during that period. The identity of those individual investors is not relevant to this Application.
42. Since their appointment, the Liquidators have sought to maintain investor confidentiality where reasonably possible unless that conflicts with the interests of the liquidation. As Mr Fisk details, RAM's collapse has been utterly devastating for many affected investors, including affecting their mental health.²⁵ Enabling the investors who are recorded in those bank

²² Fisk Affidavit at 11.14.

²³ Fisk Affidavit at 11.14.

²⁴ Fisk Affidavit at 11.22.

²⁵ Fisk Affidavit at 11.24 – 11.25.

statements to be publicly identified may cause significant unnecessary distress.

43. The orders sought are consistent with orders this Court has previously granted in the Ross Group liquidations. In particular:²⁶
- (a) When they were first appointed liquidators, the Liquidators sought, and obtained, an order that in complying with their duties under section 255 of the Companies Act 1993 (i.e. preparing a list of creditors) they were to keep that list confidential.
 - (b) When the Liquidators sought directions as to whether individual investors had valid proprietary claims, they sought and obtained orders that the supporting affidavits and exhibits be kept confidential. When the Court has made orders on these applications however, it has published the names of the relevant proprietary claimants.
44. For the avoidance of doubt, the unredacted pages will be made available to counsel assisting the Court.

Timetabling directions

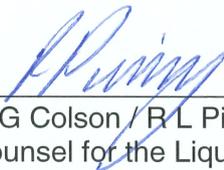
45. The Liquidators seek the following timetabling directions in respect of the Application:
- (a) that the counsel assisting the Court file a memorandum of counsel by Friday 23 February 2017 on:
 - (i) whether counsel assisting the Court intends to advance and provide submissions on any other distribution model (aside from the Net Contributions Model and the Alternative Distributions Model), and if so, a description of that model; and
 - (ii) whether counsel assisting the Court intends to advance submissions on any of the other orders sought by the Liquidators in the Application;

²⁶ Fisk Affidavit at 11.25.

with this memorandum of counsel to be served by the Liquidators on Investors and Creditors in the same way as the Application;

- (b) that a conference with the Court be set down for the end of February or beginning of March 2018 to determine:
 - (i) the hearing date for the Application;
 - (ii) timetabling for any additional evidence and synopsis of submissions;
 - (iii) considering the issue of appropriate appeal rights, if any, for affected Investors; and
 - (iv) any additional procedural matters.

46. Counsel is available to appear before the Court, in person or by telephone, if that would be of assistance to the Court.



M G Colson / R L Pinny
Counsel for the Liquidators

12 December 2017

Schedule One: Orders now sought on the papers

1. 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 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;
2. That service of this application (being the Application itself and all supporting evidence and memoranda) on Investors and Creditors be deemed to have occurred upon the following steps:
 - (a) 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>;
 - (b) emailing a link to the Application to all Creditors and Investors who have provided an email address to the Liquidators; and
 - (c) 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;
3. 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:
 - (a) are not to be inspected or provided to any third party without further order of the Court on notice to the Applicants; and
 - (b) are to be excluded from the documents to be served on Creditors and Investors; and

4. The following timetabling directions:
- (a) that counsel assisting the Court file a memorandum of counsel by Friday 23 February 2017 on:
 - (i) whether counsel assisting the Court intends to advance and provide submissions on any other distribution model (aside from the Net Contributions Model and the Alternative Distributions Model), and if so, a description of that model; and
 - (ii) whether counsel assisting the Court intends to advance submissions on any of the other orders sought by the Liquidators in the Application;with this memorandum of counsel to be served by the Liquidators on Investors and Creditors in the same way as the Application; and
 - (b) that a conference with the Court be set down for the end of February or beginning of March 2018 to determine:
 - (i) the hearing date for the Application;
 - (ii) timetabling for any additional evidence and synopsis of submissions;
 - (iii) considering the issue of appropriate appeal rights, if any, for affected Investors; and
 - (iv) any additional procedural matters.