IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-Ā-TARA ROHE

CIV-2012-485-2591
[2018] NZHC 2007

UNDER	Sections 271 and 284 of the Companies Act 1993
IN THE MATTER	of Ross Asset Management Limited (in liquidation) and related entities
RE	JOHN HOWARD ROSS FISK and DAVID JOHN BRIDGMAN Applicants

Hearing: 22 June 2018

Appearances: M G Colson and R L Pinny for applicants
D G Dewar for Dr E D Fehsenfeld
J B Prince in person
P R W Chisnall and J D Haig as Amici Curiae

Judgment: 8 August 2018

JUDGMENT OF ASSOCIATE JUDGE JOHNSTON

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Issue for determination

[1] In late 2012, news broke that the investment business established and run by Mr David Ross was in trouble. It turns out that since the early 1990s Ross and his various companies and other entities — primarily Ross Asset Management Ltd — had been operating a Ponzi scheme.[1]

[2] In short, the whole operation was an elaborate fraud. Hundreds of investors lost the money that they had invested. In some cases this was their life savings and they were left destitute.

[3] On 17 December 2012, this Court appointed the applicants, Wellington accountants Mr John Fisk and Mr David Bridgman, as liquidators of RAM and other key companies in the RAM group. The same day Messrs Fisk and Bridgman passed resolutions placing the remaining companies in liquidation and appointing themselves as liquidators. Their job was to salvage what they could from the wreckage.

[4] Five and a half years on, Messrs Fisk and Bridgman are approaching the end of their task. The stark reality is that, on their analysis, general unsecured creditors and investors who may be entitled to share in any distribution have claims totalling approximately $125,000,000 as against about $17,500,000 available for distribution at this stage. Messrs Fisk and Bridgman now seek the Court's directions in relation to the distribution of these funds.[2]

[5] The core issue for determination is the most appropriate algorithm for calculating how to distribute what funds there are.

[6] The issue is scarcely justiciable. But the liquidators are entitled to ask the Court for directions. And the Court must provide an answer.

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1 This term is a reference to a fraudulent investment scheme perpetrated by Charles Ponzi in the United States in the 1920s.

2 The liquidators' application is made pursuant to ss 271 and 284 of pt 16 of the Companies Act 1993 by originating application dated 12 December 2017.

Ponzi schemes

[7] Ponzi schemes have some common characteristics. They involve the soliciting of investment from members of the public, usually with promises of better-than-market returns at low or no risk. In fact the investment regime is partially or wholly fictitious. Funds invested are used to finance the operation of the scheme, repay investments or pay fictitious profits and fund the (often very extravagant) lifestyle of those running the scheme.

[8] Such schemes may operate for shorter or longer periods of time. But sooner or later they implode. Then receivers or liquidators will be appointed. Their role is to wind the scheme up. Invariably there is a catastrophic shortfall of funds available to pay claimants.

[9] In the case of a large Ponzi scheme that has been operating for a long time the task of those responsible for winding it up will inevitably be complicated by a range of factors such as the following:

(a) the expectations of some investors may be based not on the amount of their capital investment — what they paid into the scheme — but on their capital investment together with accumulated returns that they have been told they have earned;

(b) depending on their age, circumstances and objectives, investors will have dealt differently with their investments over the years. So there will be investors who have never withdrawn any funds from the scheme; other investors who have made irregular withdrawals to — say — fund the repayment of debt or acquire assets; and yet other investors who have taken regular withdrawals for living expenses;

(c) amongst those categories of investors there will be investors who have withdrawn more than the amount of their capital investments (net winners) and other investors who have withdrawn less than the amount of their capital investments or nothing at all (net losers).

[10] When those responsible for the winding up of a Ponzi scheme have determined how much money, if any, is available for distribution, the difficult question arises of how best to calculate claimants' entitlements.

Some essential background

[11] It seems almost superfluous to describe the factual background against which the issues in this case arise for determination. It is a sorry tale of deception and fraud which is now notorious. To be blunt, one would have to have been living under a rock since late-2012 not to be familiar with the story.

[12] Nevertheless, some background will serve to contextualise the discussion that follows.

[13] Ross formed RAM and the other entities in the group in the early 1990s. He was the sole director and controlled every facet of the business. Aside from Ross, RAM employed two administrative staff. RAM solicited investments from the public and traded on Ross' reputation as an experienced and astute investor. At times when the market was delivering sub 10 per cent returns, RAM was claiming to be able to achieve 30 per cent returns. After RAM the most significant company in the group was Dagger Nominees Ltd. There were a dozen or so other companies and other entities at least one of which — a broker referred to in the documentation as Bevis Marks — was completely ficitious.

[14] The RAM group entered into contractual arrangements with individuals or other entities wishing to invest. The parties that contracted with investors were RAM and Dagger.

[15] These contracts provided that investment monies paid or securities transferred to the group would be channelled through RAM but held by Dagger for the investor and if the investor wished to withdraw funds these would be repaid by Dagger through RAM. They provided also for RAM to take fees for its services. It is common ground that RAM and Dagger stood in a position of trusteeship vis-a-vis investors.[3]

[3] In relation to any assets held by them for investors pursuant to these arrangements.

[16] The terms of the contractual arrangements were reflected in regular reports provided by the group to each investor.

[17] These reports provided detailed descriptions for the relevant period of each investor's opening position, transactions such as the acquisition and disposal of securities, fees charged, withdrawals and a closing position. Invariably they showed impressive returns.

[18] But they were complete fictions. Assets, such as cash or securities, transferred by investors to the RAM group were held in the name of RAM or Dagger and used — consistent with the usual pattern for Ponzi schemes — to fund the group's operating expenses or repay investments or pay fictitious profits. Otherwise they were misappropriated by Ross.

[19] All of this became evident following investigations into the RAM group by the Serious Fraud Office and the Financial Markets Authority in late 2012. Not only did it lead to the liquidation of RAM and Dagger and the appointment of Messrs Fisk and Bridgman but also to criminal charges for fraud-related offences against Ross.

[20] Ross eventually pleaded guilty to these charges and was sentenced to imprisonment for 10 years and 10 months. He is still serving that sentence.

[21] Following their appointment, Messrs Fisk and Bridgman and their staff embarked upon a detailed analysis of the RAM group's operations. No useful purpose would be served by detailing all the work involved or where this has lead the liquidators. But in short they have:

(a) liquidated what assets were available and successfully pursued claims against Ross and members of his immediate family;

(b) assisted as necessary in the criminal proceedings against Ross;

(c) dealt with any claims by secured creditors and parties able to trace legal interests in property in the possession of RAM group entities;

(d) identified general unsecured creditors and investors, and quantified their claims;

(e) initiated and pursued complex and protracted litigation against one representative investor in order to obtain guidance in relation to the proper treatment of investors' claims;[4]

(f) identified potential claims against investors (the net winners) to "claw back" payments over the amount of their investments for distribution and pursued these in accordance with the conclusions reached — ultimately by the Supreme Court — in the *Fisk v McIntosh* litigation.

[22] The liquidation of the RAM group is not complete. The liquidators are still pursuing "clawback" claims and it is probable that more funds will be recovered. But they have reached a point where they are able to come to the Court with a relatively complete picture of things and seek directions in relation to an interim distribution of funds. There is a substantial fund —in absolute, if not relative, terms —available for distribution.

[23] In summary, the position is this:

(a) there are 26 general unsecured creditors. Their claims total $68,195.69. Accordingly, whilst not quite de minimus, the claims of these creditors are not a significant feature of this liquidation;

(b) as at the date of liquidation there were 860 investors. They fall into two camps:

(i) those who contributed less than they withdrew from the scheme (net winners or, as they are referred to in the evidence, "Overpaid Investors");

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[4] I will refer to this as the *Fisk v McIntosh* litigation. The case proceeded in the High Court (*Fisk v McIntosh* [2015] NZHC 1403), Court of Appeal (*McIntosh v Fisk* [2016] NZCA 74, [2016] 2 NZLR 783) and Supreme Court (*McIntosh v Fisk* [2017] NZSC 78, [2017] 1 NZLR 863).

(ii) those who contributed more than they withdrew from the scheme (net losers or "Shortfall Investors").

(c) there are 639 Shortfall Investors. Collectively, their claims total $124,709,390.34. To be clear, that is the total amount of their capital investments less the total amount of their withdrawals from the scheme;

(d) as at 18 May 2018 (the date of Mr Fisk's most recent affidavit filed in support of the application before the Court) the liquidators were holding approximately $18.8 million and propose an interim distribution to general unsecured creditors and Shortfall Investors of $17.5 million.

[24] In carrying out the analysis that produced these figures, the liquidators applied CPI-based adjustments to investors' claims. It will be necessary to return to this.

[25] In this application the liquidators seek a series of directions from the Court that will enable them to distribute those funds (and any further funds that become available for distribution).

[26] In their originating application as amended prior to, and for the purposes of, the hearing, the liquidators seek eight orders or directions:

> 1. 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**).
>
> 2. 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**).
>
> 3. That the common pool of assets be distributed on the following basis:
>
>   3.1 there will be no tracing of particular Investors' assets;
>
>   3.2 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;

3.3 that in respect of any purported transfers between investment portfolios purportedly held by Investors:

3.3.1 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;

3.3.2 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);

3.4 if because of extraordinary circumstances the direction on inter-portfolio transfers at paragraph 3.3 above is unjust or ineffective in relation to a specific portfolio or portfolios then:

3.4.1 the Liquidators may apply a reasonable and logical alternative methodology; but

3.4.2 where such an alternative methodology is adopted:

3.4.2.1 the Liquidators will write to the Investor (by email, if an email address is held, failing which by post) detailing:

- why the Liquidators consider the usual approach to interportfolio transfers is unjust or ineffective;

- the Liquidators alternative methodology applied; and

- Investors' right to apply to challenge the method as per 3.4.2.2 below; and

3.4.2.2 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 within one calendar month of receiving the Liquidators' notice as per order 3.4.2.1 above; and

4. 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 sworn 11 December 2017) or the Alternative Model (as described in the

affidavit of John Howard Ross Fisk filed with this application) or the Rising Tide Model as described in the article attached to the memorandum of counsel assisting the court dated 16 March 2018.

5. That the Liquidators are entitled to deduct their costs and expenses in the liquidation from the common pool of assets;

6. That for the purpose of a claim form for Investors who are entitled to receive a distribution in the liquidation of RAM and Dagger:

    6.1 the Liquidators will provide to each such Investor a statement:

        6.1.1 summarising their transactions with RAM; and

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

    (the **Transaction Summary**); and

    6.2 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;

    6.3 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:

        6.3.1 20 working days after the Transaction Summary was sent to them, if it was sent by email;

        6.3.2 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

        6.3.3 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;

    6.4 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;

7. That where:

    7.1 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 6.3 above; or

7.2 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:

7.3 deemed to be Unclaimed Money for the purpose of the Unclaimed Money Act 1971; and

7.4 paid to the Commissioner of Inland Revenue in accordance with section 4(3) of the Unclaimed Money Act 1971.

8. That leave to apply for further directions is reserved.

Order 1 — should RAM and Dagger be treated as one entity?

[27] As already described, the assets in the possession or control of the RAM group as at the date of liquidation were all held by RAM or Dagger. These included assets apparently owned by them and assets held by them on behalf of investors. There appears to have been no rhyme or reason why assets in either category were held by RAM or Dagger. It seems to have been a matter of dumb luck.

[28] In those circumstances the liquidators seek an order enabling them to treat RAM and Dagger as one entity.

[29] No argument is advanced against this.

[30] RAM and Dagger are related companies as that term is defined in s 2(3)(d) of the Companies Act 1993 because, the liquidators' uncontested evidence is, their affairs have been carried on in such a way that the separate businesses are not readily identifiable.

[31] Section 271(1)(b) of the Act provides that the Court may order the liquidation of two or more related companies to proceed together as if they were one company where it is satisfied that this is just and equitable. Section 272(2) goes on to provide that, in considering whether it is just and equitable in any given case, the Court is to have regard to:

(a) the extent to which any of the companies took part in the management of any of the other companies;

(b) the conduct of any of the companies towards the creditors of any of the other companies;

(c) the extent to which the circumstances that gave rise to the liquidation of any of the companies are attributable to the actions of any of the other companies;

(d) the extent to which the businesses of the companies have been combined; and

(e) such other matters as the Court thinks fit.

[32] In *Steel and Tube Holdings Ltd v Lewis Holdings Ltd*, the Court of Appeal described the decision to be made under s 271 (1)(b) as involving the balancing of the important concept of separate corporate identity and the objective of avoiding an overly strict application of that principle which would lead to unfairness in the context of a liquidation.[5]

[33] In this case the liquidators point to several aspects of the way in which the RAM group operated as justifying the pooling of the RAM and Dagger assets:

(a) Ross was the sole director of both companies;

(b) Ross' complete control of RAM, Dagger and the group;

(c) the operations of RAM and Dagger were "… inextricably intertwined …" in the sense that Dagger's sole role was to hold investors' assets channelled to it through RAM;

(d) investors contracted with both RAM and Dagger;

(e) neither RAM nor Dagger operated in the way contemplated in the contractual arrangements; their breaches of their contractual obligations to investors were joint breaches;

(f) the two administrative staff employed by RAM effectively treated Dagger as a division of that company;

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5 *Steel and Tube Holdings Ltd v Lewis Holdings Ltd* [2016] NZCA 366 at [27].

(g) Dagger’s operating expenses were minimal;

(h) although Dagger had its own bank accounts, those were generally nothing more than channels through which funds passed from and to RAM’s principal trading account;

(i) it is evident from an analysis of the flow of funds between RAM and Dagger that funds held by them were intermingled;

(j) although the contractual arrangements with investors provided that securities were to be held by Dagger many were in fact held by RAM.

[34] On those bases, the liquidators submit that all of the factors referred to in s 272(2) of the Act point to this being an appropriate case in which to treat RAM and Dagger as one entity.

[35] The liquidators refer to two other considerations which I accept are also relevant.

[36] First, the liquidators say that it would be practically impossible for them to disentangle the affairs of RAM and Dagger so as to proceed with two separate liquidations.

[37] Second, they say that no party will be adversely affected by treating RAM and Dagger as one entity because Dagger has no creditors of its own other than investors.

[38] On the above bases, my judgement is that this is a case in which it would be just and equitable to treat RAM and Dagger as one entity for the purposes of their liquidations and pool their assets.

Order 2 — one pool or two?

[39] There are two components to the second order sought.

[40] The first concerns claimants. The second concerns the assets available for distribution.

General unsecured creditors and investors

[41] As already said, there are two classes of claimants:

(a) general unsecured creditors; and

(b) investors.

[42] Mr Colson's submissions for the liquidators proceeded on the basis that general unsecured creditors would be treated in the same way as investors. The basis for this is essentially Mr Fisk's evidence that to separate the two classes of claimants would not be economic given the relative insignificance of the claims of the former. Neither of the investors represented at the hearing, nor Mr Chisnall, objected to this course. I propose to proceed on the same basis, which appears to me to be the pragmatic course.

Company assets and trust assets

[43] It is common ground that the liquidators are holding assets that fall into two categories:

(a) those apparently owned by RAM or Dagger (company assets), such as the proceeds of the sale of office furniture; and

(b) those impressed with a trust (trust assets), such as the proceeds of the sale of securities held for investors.

[44] It will only be necessary for any order to deal with these two categories of assets differently if I conclude that pt 16 of the Act requires the company assets to be distributed on one basis and that the trust assets can and should be distributed on a different basis. Accordingly, I propose to put this issue to one side and return to it if necessary.

Order 3 — what are the appropriate starting premises for distribution?

[45] There are several components to the third order sought.

[46] I will deal with them in the order that appears most logical.

Tracing

[47] From the outset the liquidators have accepted that where a third party has a traceable legal interest in an asset that interest prevails.

[48] I am informed that where any claimant has been able to demonstrate a traceable legal interest the liquidators have yielded to that interest. There are, as I understand it, no outstanding claims of this nature. So that exercise may be regarded as complete.

The rule in Clayton's Case

[49] At common law, once a claimant's assets become mixed with those of others — in a mixed fund — tracing is no longer possible. Equity, however, allows tracing into a mixed fund.

[50] In such cases the issue is how the relative entitlements of claimants are to be calculated.

[51] In *Clayton's Case*, it was decided that the correct approach was to analyse contributions to and withdrawals from the fund on a first-in-first-out basis.[6] But *Clayton's Case* was decided over 200 years ago. It has been the subject of criticism.[7] It is obvious that the fiction on which it is based has the potential to give rise to injustices.

[52] Mr Fisk's evidence is that analysing the RAM group's finances over a 20-year period in order to apply *Clayton's Case* would be practically impossible and that any attempt to do so would be extremely time consuming and expensive, not least because of changes over the years to the group's computing systems.

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6 *Devagnes v Noble* (1816) 35 ER 781 (Ch) (*Clayton's Case*).

7 See *Re International Investment Unit Trust* [2005] 1 NZLR 270 (HC) at [50]–[57].

[53] In the course of his submissions Mr Colson referred me to recent cases in which the courts have rejected *Clayton's Case* in favour of alternative approaches,[8] such as the approach that the authors of *Equity and Trusts in New Zealand* refer to as the "modern pari passu approach".[9]

[54] No argument was advanced before me for the application of *Clayton's Case* here.

[55] I am satisfied that it would not serve claimants at all well to order that *Clayton's Case* should be applied here as a means of enabling equitable tracing.

[56] I reject it as an approach.

Net winners

[57] The liquidators seek an order that those investors who, as at the date of liquidation, had withdrawn more from the RAM group scheme than they had invested should not participate in any distribution.

[58] It is not necessary to spend much time addressing this component of the third order. That is the effect of the High Court, Court of Appeal and Supreme Court judgments in the *Fisk v McIntosh* litigation.[10] No argument was advanced to the contrary. I will make the order sought.

Transfers between portfolios

[59] The evidence is that the RAM group allowed investors to transfer value between portfolios. So, for example, a couple with children might establish portfolios for each of them and transfer a certain proportion of their own portfolio value to each of the new portfolios. Of course such transfers of value were invariably fictitious

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8 *Re Registered Securities Ltd* (in liq) [1991] 1 NZLR 545 (CA); *Graham v Arena Capital Ltd (in liq)* [2017] NZHC 973; *Barlow Clowes International Ltd (in liq) v Vaughan* [1992] 4 A11 ER (CA); and *Re Waipawa Finance Co Ltd (in liq)* [2011] NZCCLR 14 (HC).

9 *Equity and Trusts in New Zealand* (2nd ed, *Thomson Reuters*, Wellington 2009) at [33.3.5](4)(c)

10 See n 4 above.

because the balances of the portfolios from which the value was being transferred were themselves fictitious.

[60] The question arises as to how such apparent transfers of value are to be dealt with.

[61] The liquidators propose that as a general rule they recognise these transfers to the extent of any positive net value in the portfolios from which the transfers were made. In other words, that they recognise value to transfer to the extent only that the amount contributed to the scheme by the transferor or transferors was greater than the amount of their withdrawals from the scheme.

[62] On its face, this approach appears to me to be sensible, and neutral in terms of its impact on other investors.

[63] Neither of the investors represented before me — Dr Fehsenfeld and Mr Prince — raised any objection to it.

[64] The liquidators recognise that, potentially, there are circumstances in which the approach they are proposing might operate unfairly. They seek a reservation in any order that the Court may make providing that where they consider that the above approach would lead to a result that is unjust or ineffective they should devise an alternative approach and that, where they do so, leave be granted to the affected investor or investors (within this proceeding) to challenge their decision. That appears appropriate.

[65] Mr Chisnall raised a concern that any order the Court makes should deal with service on affected investors with a timetable to file any challenge. The liquidators have responded to this by grafting onto the order originally sought a process designed to meet this concern.

[66] I will make the orders sought, which include a process meeting the concerns properly raised by Mr Chisnall.

Constant dollar approach

[67] As already said, in calculating the value of investors' claims as at the date of liquidation, the liquidators have applied a constant dollar approach — that is to say they have adjusted investments and withdrawals by reference to the consumer price index over the relevant period of time to reflect inflation.

[68] This emerged as a controversial issue shortly prior to the hearing.

[69] In his submissions on the liquidators' behalf Mr Colson submitted that a constant dollar approach was necessary in order to ensure that investors were treated even-handedly. As he submitted, a dollar invested or withdrawn early in the life of the scheme had a very different value, as at the date of liquidation, from a dollar invested or withdrawn over 20 years later, shortly before the scheme collapsed. He referred me to *Re Waipawa Finance Co Ltd (in liq)* where the High Court had accepted that argument and approved the adoption of a constant dollar approach.[11]

[70] Neither Mr Dewar for Dr Fehsenfeld nor Mr Prince addressed this issue.

[71] Mr Chisnall did.

[72] He distinguished between company assets and trust assets. He submitted that the provisions of the legislation governing the former make no express provision for the application of a constant dollar approach, which I accept, and do not allow for such an approach, which I do not accept. Sections 306 and 307 of the Act deal with the valuation of claims by liquidators and the Court. Section 309 enables a claim in respect of a debt not due for payment until after the date of liquidation to be discounted accordingly. These provisions appear to me to envisage the application of a degree of judgement to the valuation of claims. The application of a constant dollar approach is simply that.

[73] Mr Chisnall also made a more general submission against a constant dollar approach. He put the argument in this way:

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[11] *Re Waipawa*, above n 8.

> …when considering the addition of CPI to the trust funds, it is submitted to do so would give Investors the benefit (or dis-benefit) of something they never expected to receive. In contrast to cases where investors bargain for interest (as in both the cases where CPI has been awarded: *Waipawa* and the US example of *Amerindo*), RAM investors deposited funds to be invested in financial markets on their behalf. The uneven effect of adding CPI to Investor claims given there is a substantial shortfall available for distribution means the Court in my view, should err on the side of caution and decline to modify investment balances as sought by the Liquidators. There are very relevant extracts in *Maddof* and *Amerindo* that should be carefully considered.

[74] A constant dollar approach to the valuation of claims is not a proxy for interest for which investors did not bargain. It is simply a mechanism that reflects the reality of the time cost of money.

[75] I am persuaded that the liquidators' proposal is consistent with the even-handed treatment of investors.

[76] I propose to endorse the application of a CPI-based constant dollar approach to valuing the claims of investors.

Potential claims by investors for damages

[77] The liquidators acknowledge that there may be investors who have arguable claims against the RAM group for damages over and above their claims for recovery of their capital. The most obvious possibility is claims for damages reflecting the lost opportunity to make investment returns.

[78] My understanding is that as matters stand no such claims have been threatened or made.

[79] Nevertheless, the possibility of such claims means that it is necessary to address the issue.

[80] In his submissions, Mr Colson reminded me that:

> (a) shortfall investors will only receive a fraction of their lost capital contributions. The current expected dividend (based on the CPI adjusted net contributions model) is 14 cents in the dollar;

(b) there is a finite pool of money available for distribution to investors. Any return to Investors in respect of a damages claim for the loss of an opportunity to make an investor return, will reduce the return available to Investors on their lost capital contributions. The Liquidators consider that the fairest approach is that lost capital contributions be paid in priority to other contingent claims against RAM;

(c) to require the Liquidators to consider claims other than simply on a net contribution balance basis will be time consuming and complex. The Second Fisk Affidavit details some of the complexities at paragraphs 46-54. The Liquidators consider that it will result in a distributions process which is time consuming and fraught. It will add further complexity, increase investor confusion about their expectations in the distributions process, and in turn will increase the costs of the liquidation;

(d) it will also have an immediate effect on the interim distribution proposed. The Liquidators are currently proposing to make an interim distribution from $17.5 million of funds. This distribution fund assumes total claims of $124,709,390.34 (net contribution of claims for Shortfall Investors adjusted for CPI). Requiring the Liquidators to consider other potential claims means that there is an unknown value of claims which the Liquidators have not, and indeed currently cannot, quantify. Accordingly, in the absence of the order sought excluding such claims from the distribution model, the Liquidators would need to delay paying out an interim distribution until they have a better assessment of the likely value of such claims. This would be in no-one's interests.

[81] Section 284 of the Act confers on the Court a wide discretion to make orders necessary for this liquidation to proceed pragmatically. Mr Colson referred me to two cases in which, by slightly different means, this Court made orders having the effect of excluding the possibility of claims comparable to those hypothesised here.[12]

[82] In reliance on those authorities Mr Colson submitted that the Court has jurisdiction to make orders that the claims of general unsecured creditors and investors in respect of their capital investment will be paid in priority to any other claims investors may have against the RAM group. He contended that such an order might be made either pursuant to s 284 by directing that the liquidators may value any secondary claims by investors as having a value of zero or by ordering that the liquidators are only required to make a distribution in respect of any such claims after

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[12] *Re Kim International Airlines Ltd (in liq)* HC Auckland CIV-2005-404-7051, 26 July 2006; and *Re HIH Casualty and General Insurance (NZ) Ltd* HC Auckland CIV-2003-404-2838, 17 December 2003.

their primary claims have been paid in full, or alternatively pursuant to s 307(1)(b) by simply valuing the claims at zero.

[83] Mr Colson concluded his submission in relation to this issue by referring me to *Graham v Arena Capital Ltd (in liq)*[13] and *Re Waipawa*,[14] in both of which cases orders consistent with those sought here were made. He also referred me to the orders made in the *Madoff* litigation in the United States where the United States Second Circuit Court of Appeals approved comparable orders.[15]

[84] The liquidators' submission in relation to this issue encountered no resistance from Mr Dewar, Mr Prince or Mr Chisnall.

[85] I am satisfied that this is an appropriate order to make. The liquidators need a series of orders that will enable them to bring this liquidation to a conclusion. The reality is that there is a huge gap between the uncontestable claims by general unsecured creditors and investors' claims in respect of their capital investments and the funds available for distribution. In my view, those claims are entitled to priority. As against that, there is the remote prospect of investors advancing speculative damages claims. The situation speaks for itself.

[86] I will make an order under s 284 of the Act directing the liquidators to treat the claims of general unsecured creditors and investors in respect of their investments as having priority so that only when they have been paid in full — which of course they will not be — are any other claims to be considered.

Order 4 — what is the optimum algorithm for calculating claimants' entitlements?

[87] This is the core issue in the case.

[88] For reasons that will become clear, it must be approached in stages.

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13 *Graham v Arena Capital Ltd (in liq)*, above n 8, at [17].

14 *Re Waipawa*, above n 8, at [30].

15 *In Re Bernard L Madoff Investment Securities LLC* 654 F 3d 229 (2d CIR 2011) at 241.

Distribution model options

[89] There is more than one algorithm available for determining the basis upon which claimants will receive distributions from a mixed fund.

[90] Even a cursory literature search will throw up a number, starting with what is generally referred to as the “last statement model” which, as the name suggests, takes the last statement issued to contributors as a starting point, through increasingly complex approaches.

[91] Three models were the subject of submissions in this case:

(a) the “net contribution model”;

(b) the “alternative distribution model”; and

(c) the “rising tide model”.

[92] Mr Fisk’s unchallenged evidence is that the alternative distribution model — developed by the liquidators in this case as I understand it — and the rising tide model, though based on subtly different arithmetic, produce precisely the same outcomes. That being so, I do not propose to differentiate between them. As counsel have done, I will refer to the alternative distribution model.

[93] The net contribution model involves identifying each investor’s capital investment in the scheme (ignoring fictitious returns), deducting the amount of any withdrawals by that investor and thereby identifying the investor’s net loss. The funds available for distribution are then divided pro-rata based on each investor’s net loss. The alternative distribution model too begins by identifying each investor’s capital investment to the scheme. It then involves calculating the amount of each investor’s withdrawals as a percentage of his or her capital investment. Distributions are then calculated having regard to the proportion of each investors investment that has already been repaid.

[94] The essential difference between the two models is best illustrated by asking what each seeks to achieve. At the risk of oversimplification, the net distribution model seeks to achieve equality of treatment between investors by reference to their relative capital losses. The alternative distribution model, on the other hand, seeks to achieve equality by reference to the percentage of each investor's capital contribution that has been repaid.

Company assets

[95] As already said, as at the date of liquidation, a proportion of the assets available for distribution were apparently owned by RAM and Dagger and not impressed with a trust in favour of investors.

[96] On the liquidators' analysis such assets represent $19,941,769.14 of the total funds recovered by the liquidators — about 80 per cent of the total of $24,798,593.64.

[97] It is common ground that these company assets must be distributed on the basis provided for in pt 16 of the Act, the relevant provisions of which are mandatory.[16]

[98] The submissions made by Mr Colson on behalf of the liquidators, Mr Dewar on behalf of Dr Fehsenfeld and Mr Chisnall were all to the effect that the relevant provisions of the Act require that company assets be distributed on the basis of the net contribution model.

[99] I am not necessarily persuaded that the Act is as clear cut as counsel would have it.

[100] The key provision is s 313. It says in subs (1) that after paying any preferential claims liquidators are to apply the company assets to the satisfaction of all other claims. Then in subs (2) it says that such claims are to "… rank equally amongst themselves …" and if there is a shortfall "… payment shall abate rateably among all claims". Mr Colson, Mr Dewar and Mr Chisnall all submit that the effect of s 313 is

[16] Companies Act 1993, s 313.

to preclude the Court from ordering that the liquidators in this case distribute the company assets other than in accordance with the net contribution model.

[101] In doing so they contend that s 313 is based on the pari passu principle. I accept that. Since *British Eagle International Airlines Ltd v Compagnie Nationale Air France*, it has been an accepted premise of company law that in liquidations, distributions to classes of claimants are to be governed by that principle.[17] A more recent New Zealand exposition of the principle is to be found in *Attorney-General v McMillan & Lockwood Ltd*.[18]

[102] But whether one focusses on the words used in the current New Zealand legislation, as I would prefer to do, or introduces the Latin expression into the analysis, I am inclined to think that one arrives at the same point. The key term in s 313 is "equally". The ablative, singular phrase "pari passu" translates, literally, as "at an equal step". The underlying principle is simply that unsecured creditors, as a class, must be treated equally. For completeness I mention that I do not see the term "rateably" as used in s 313(2) as in any way constraining that. To say that payments are to abate rateably is simply to say that they will abate consistently on the basis of the underlying principles applied to their calculation in the first instance.

[103] The real question is what equality of treatment means in any given case, and more particularly, what it means here.

[104] The legislation contemplates liquidators, and, if necessary, the Court, determining the amount of unsecured creditors' claims. Section 306 provides that such claims are to be valued as at the date of liquidation. Section 307 provides that if for any reason there is a question about the value of any claim the liquidator may determine this or refer the question to the Court which "… shall determine the amount of the claim as it sees fit".

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17 *British Eagle International Airlines Ltd v Compagnie Nationale Air France* [1975] 2 All ER 390.
18 *Attorney-General v McMillan & Lockwood Ltd* [1991] 1 NZLR 53 (CA).

[105] Obviously that must be done on a principled basis, but, in my view, there is nothing in any of these provisions that expressly requires unsecured creditors' claims to be valued on a net contribution basis.

[106] Nor was I referred to any case from New Zealand or elsewhere that expressly says so.

[107] In my view, there is nothing in pt 16 of the Act itself that would prevent the Court from ordering the liquidators to apply a different model provided that the principle of equality applies so that unsecured creditors as a class are treated even-handedly.

[108] That said I accept that the Act, and indeed the corresponding provisions in the earlier 1908, 1933 and 1955 Acts, have consistently been applied in the way described by counsel and it appears to me that the position advanced on behalf of the liquidators and Dr Fehsenfeld, and by Mr Chisnall, is now so well entrenched that any change should be brought about by the Legislature.[19]

[109] I also accept the practical point that Mr Colson emphasised that if there is more than one available method for the distribution of company assets then that would mean that liquidators would have no certainty and would find themselves effectively obliged to apply to the Court for directions in every case or at least every case involving the distribution of a substantial pool of money.

[110] For those reasons I conclude that the company assets must indeed be distributed by applying the net contribution model.

Trust assets

[111] It is common ground that the Act has no direct application to the trust assets.

[112] Insofar as these are concerned strong arguments can be advanced in support of both the net contribution model and the alternative distribution model.

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[19] Change in this area may not be far away. In May of 2018 the Ministry of Business, Innovation and Employment released a report concerning the way that the law deals with Ponzi schemes.

[113] This is amply demonstrated by the submissions of Mr Colson and Mr Dewar in support of the former, and Mr Chisnall (and of course Mr Prince) in support of the latter.

[114] In the course of argument the parties contending for both of the distribution models in play sought to demonstrate by reference to examples how each would throw up anomalies. I am not convinced that extreme examples are helpful. The reality is that whatever approach is adopted there will be claimants whose positions are dramatically affected, positively and negatively.

[115] In his evidence Mr Fisk summarised the impact of the application of both models in these terms:

> 9.31 The total amount for distribution under each model is the same. However, the effect of the Alternative Model is, broadly, two-fold:
>
> (a) the number of investors eligible for a distribution would reduce from 639 under the Net Contributions Model to 418 under the Alternative Distributions Model. See for example Investors A and B above who would be eligible for a distribution under the Net Contributions Model but would not be eligible for any distribution under the Alternative Distributions Model;
>
> (b) the effect of this is to increase the likely distribution from 11.23 cents in the dollar under the Net Contributions Model based on a funds distribution of $14 million (to a maximum of 18.23 cents in the dollar) under the Alternative Distributions Model for those eligible for a distribution. Only those investors who made no withdrawals prior to the collapse of RAM would receive a full 18.23 cent distribution in the liquidation.

[116] Thus, under the net contribution model a larger number of claimants would receive some payment but average distributions would (of course) decrease.

[117] The argument in favour of the net contribution model (in respect of trust assets) was advanced on behalf of the liquidators by Mr Colson and supported on behalf of Dr Fehsenfeld by Mr Dewar.

[118] Mr Colson's first drew an analogy with the Companies Act regime and in particular s 313 of the Act which he submitted provides for "… the overall pari passu

approach …". He contended that "… pari passu is a hallmark of Commonwealth insolvency law …" and that to apply a different approach to the trust assets "… would make a substantial gouge into that hallmark …". I have difficulty following this argument. It is common ground that the Court is dealing with two distinct categories of assets — company assets and trust assets. I do not see why the established regime for dealing with the former would be undermined by adopting a different approach in dealing with the latter.

[119] Mr Colson's second submission, which, as he says, is closely related to his first, is that the Companies Act regime provides that the amount of any claim must be ascertained as at the date of the liquidation. He submits that, whereas the net contribution model is consistent with this, the alternative distribution model is not because it brings to account pre-liquidation payments. Again, it is difficult to see the force in this contention given that the Court is dealing with two distinct categories of assets.

[120] The third submission advanced by Mr Colson is that adopting different approaches to company assets and trust assets in a liquidation would involve additional layers of cost and uncertainty. First, there would need to be an assessment of what are company and what are trust assets. Second, it would always be necessary to assess how to distribute the latter. There is some force in this. But my sense is that it would be easy to overstate the magnitude of the problem. The vast majority of company liquidations do not involve trust assets and equitable tracing exercises. And of course, uncertainties around distribution methodology for mixed pools of trust assets arise outside the company liquidation regime.

[121] Mr Colson's fourth submission is effectively that the application of anything other than the net contribution model to the distribution of the trust assets in this case would be inconsistent with the provisions of the Companies Act and the Property Law Act 2017 which were the subject of discussion in the *Fisk v McIntosh* litigation. As Mr Colson says, these Acts provide for change-of-position defences. He emphasised that the Supreme Court applied these provisions in holding that the liquidators here could claw back payments that exceeded claimants' contributions subject to such defences. It is certainly true that the application of the alternative distribution model

would bring to account pre-liquidation withdrawals as a matter of course and that some of these may not be payments in relation to which the investor would be able to advance a change-of-position defence.

[122] The fifth submission made on the liquidators' behalf by Mr Colson is that the alternative distribution model may be inconsistent with claimants' existing proprietary rights. In relation to this submission he referred to the House of Lords' judgment in *Foskett v McKeown*, where the House of Lords concluded that investors whose funds had been misapplied in breach of trust were entitled to trace into the premiums that had been paid from those funds and described the rights of the investors to do so as "… hard-nosed property rights".[20] He also referred me to the observation made by the Supreme Court in the *Fisk v McIntosh* litigation that "… the defrauded investors were left only with a pro-rata claim to the securities and money held by RAM as investment manager by those investors".[21] I am not persuaded that *Foskett v McKeown* is a useful case to introduce into the argument. There, the House of Lords was dealing with the issue of the proper reach of equitable tracing orders. Here, we are dealing with a fund that everyone accepts consists of unidentified trust assets and considering the question of the appropriate methodology for equitable tracing. However, I accept that the passage from the Supreme Court's judgment in the *Fisk v McIntosh* litigation appears to proceed on the basis that the net contribution model would be applied in respect of all available assets.

[123] The sixth submission made by Mr Colson is effectively that the weight of authority in this country and throughout the Commonwealth is in favour of a net contribution model.

[124] Mr Colson's final submission as to the most appropriate methodology for distributing the trust assets was in the nature of a warning that the American cases — which tend to treat alternative distribution models, particularly the rising tide model, as viable options in a way that is not as evident elsewhere — arise against the background of different legislation and may not be very helpful.

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[20] *Foskett v McKeown* [2001] 1 AC 101 at 109.
[21] *McIntosh v Fisk* (SC), above n 4, at [17].

[125] On behalf of Dr Fehsenfeld, Mr Dewar submitted that the net contribution model was "… the only equitable method of achieving "the least unfair result for investors"" (adopting the expression used by Williams J in *Re International Investment Unit Trust)*.[22]

[126] He emphasised many of the points that Mr Colson had made. In addition he submitted that there were at least two difficulties with the alternative distribution model that he invited me to conclude meant that it was not possible to have confidence that it would achieve equity in this case.

[127] The first issue Mr Dewar raised relates to how withdrawals and subsequent reinvestments are accommodated by the two models.

[128] He posited a situation in which investor A invested $2 million and withdrew nothing and investor B invested $2 million, withdrew $1 million and then reinvested $1 million.

[129] Putting aside any impact of the constant dollar approach, the net contribution model would treat investors A and B as being in the same position. Both have suffered a loss of $2 million. But the alternative distribution model would not. On this model, investor A has received a zero per cent return, but investor B, who has invested $3 million ($2 million plus $1 million) and withdrawn $1 million, has received a 33.3 per cent return. Thus, on the net contribution model, investors A and B would participate in any distribution equally, whereas, on the alternative distribution model, investor A would have to recover 33.3 per cent of his or her $2 million loss before investor B would be entitled to participate.

[130] This issue — if indeed it is correct to regard it as an issue — is not touched on in any of the New Zealand cases. But it was the subject of attention by the United States Seventh Circuit Court of Appeals in *SEC v Huber*.[23] That Court concluded that the most appropriate way of addressing the point was to treat reinvestments as "rescinding" earlier withdrawals so that each investor's maximum

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22 *Re International Investment Unit Trust,* above n 7, at [73].
23 *SEC v Huber* 702 F 3d 903 (7th Cir 2012).

balance in the scheme would be regarded as the baseline for calculating of his, her or its percentage recovery.

[131] The second point Mr Dewar raised concerns what he refers to as "fresh deposits". He pointed out that, on the liquidators' analysis, Dr Fehsenfeld is said to have made certain investments and withdrawals in the early days of the scheme and invested $3 million in the latter stages.

[132] Mr Dewar's submission in relation to this was as follows:

> Whatever the circumstances, these are fresh funds and could not possibly be tainted by bona fide capital withdrawals made many years earlier. To do so is inequitable and is tantamount to saying that he is denied all remedy because of the extent of the effectiveness of the fraudster's actions in defeating the Liquidators and investigators, thereby advantaging others. This is simply wrong thinking and cannot accord with anyone's view of equity.

[133] I do not find that contention especially persuasive. It tends to ignore the core question in relation to which the liquidators seek the Court's direction, that is to say, the most appropriate method of distributing a mixed trust fund amongst a number of investors all of whom have legitimate claims.

[134] The alternative distribution model was advanced as the preferable approach by Mr Chisnall who was supported by Mr Prince.

[135] Mr Chisnall submitted first that insolvency law principles, which are designed to apply to bona fide but financially troubled businesses, are inapt for Ponzi schemes which are, by their nature, fraudulent.

[136] Second, Mr Chisnall submitted that the fact that the New Zealand courts in various cases have concluded that the net contribution model was the one that would come closest to doing overall justice did not mean that the same conclusion should be reached here.

[137] Mr Chisnall's third submission was that to the extent that the issue of how the alternative distribution model deals with reinvestments was a concern, the solution was to be found in *SEC v Huber* and the application of the maximum balance

approach, which could very easily be grafted onto the liquidators' alternative distribution model.

[138] Fourth, Mr Chisnall submitted that the second concern raised by Mr Dewar on Dr Fehsenfeld's behalf relating to his late investment involved the introduction of tracing, which he suggested was neither relevant nor helpful.

[139] Finally, Mr Chisnall submitted that the broad equitable considerations manifest in the American cases may be more directly applicable here than the narrowly focused enquiry in the New Zealand cases such as *Waipawa* and *Arena*.[24]

[140] In the end, I have reached the conclusion that the trust assets should, like the company assets, be distributed in accordance with the net contribution model. It would be nothing short of intellectual dishonesty to claim that there is not an element of intuitive judgment in that. However, there are some key points which have persuaded me that that is the appropriate approach in this case.

[141] Before focussing on these, however, it is important to make it clear that, in my view, there are circumstances in which it would have been open to the Court to order that liquidators adopt a different approach such as the alternative distribution model in relation to a mixed fund impressed with a trust. Whilst the question of how to distribute the trust assets here arises in the context of the liquidation of RAM and the other companies in the group, that is a mere matter of happenstance. The essential inquiry is as to the most appropriate basis to allow the claimants to a mixed fund impressed with a trust to participate in that fund. I do not accept the contention that Mr Colson for the liquidators came close to advancing, and which Mr Dewar for Dr Fehsenfeld certainly advanced, that the Companies Act and the principles that apply to the distribution of company assets under that Act should also dictate — or at least heavily influence — the distribution of the trust assets. In that regard, I accept the submissions made by Mr Chisnall that insolvency law principles are not necessarily appropriate for application to Ponzi schemes.

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[24] *Re Waipawa*, above n 8; and *Graham v Arena Capital Ltd*, above n 8.

[142] The bases upon which I have concluded that the liquidators should adopt the net contribution model in assessing the claims for trust assets in this case are a combination of legal and practical points.

[143] It is true, as Mr Colson submits, that all of the New Zealand authorities to which I was referred in argument, bar one, ultimately order distribution on a net contribution basis.[25] Whilst it needs to be borne in mind that only *Graham v Arena Capital Ltd* and *Re Trans Capital Ltd (in liq)* focus any real attention on an approach similar to the alternative distribution model, and in one of those cases, *Re Trans Capital Ltd (in liq)*, Wild J expressly preferred a version of the alternative distribution model, I accept the submission made by Mr Colson and Mr Dewar that the net contribution model is entrenched in Commonwealth law. On this basis it might be said that persons investing in any scheme in this country could expect that, if the scheme fails, a net contribution model will govern the distribution of available assets.

[144] As Mr Colson submitted it is clear from the judgment in the *Fisk v McIntosh* litigation that the Supreme Court proceeded on the assumption that a net contribution model would govern the distributions of all available assets. Whilst the issue of the basis for distribution was not before the Supreme Court in quite the direct sense that it is before me, I am nevertheless influenced by this.

[145] Although I am not entirely convinced that this is the issue that it is perceived to be, I am influenced also by Mander J's concerns as outlined in *Graham v Arena Capital Ltd* that the distribution of the trust assets on the alternative distribution model might circumvent the voidable transaction provisions of the Companies Act and the Property Law Act.[26] I expect that such considerations were behind the Supreme Court's observations about distribution methods in the *Fisk v McIntosh* litigation.

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25 The New Zealand cases (not all of which even recognise the existence of the alternative models for calculating distributions such as the rising tide model) are: *Re Registered Securities (in liq)*, above n 8; *Re International Investment Unit Trust*, above n 7; *Re Waipawa,* above n 8; *Finnigan v Yuan Fu Capital Markets Ltd (in liq)* [2013] NZHC 2899; *Graham v Arena Capital Ltd*, above n 8; and *Re Trans Capital Ltd (in liq)* (No. 4) HC Wellington M84/99, 26 May 2000. The other Commonwealth cases to which counsel made some reference are: *Barlow Clowes International Ltd (in liq) v Vaughn,* above n 8 ; and *Foskett v McKeown*, above n 20.

26 *Graham v Arena Capital Ltd*, above n 8, at [38]–[39].

[146] As already recorded, of the funds available for distribution, the company assets represent 80 per cent and the trust assets represent 20 per cent. Thus the overwhelming majority of the funds available for distribution are to be distributed in accordance with the net contribution model. Mr Fisk's evidence is that distributing the company assets and the trust assets on different bases would add appreciably to the costs involved in the completion of the liquidation. I can see very little advantage in ordering a hybrid distribution the additional costs of which will further erode the assets available for claimants.

[147] In the end, on the particular facts of this case, I do not accept that there is anything more inherently equitable or fair in distributing the trust funds that are available in accordance with either the net contribution model or the alternative distribution model. I am inclined to favour the algorithm that benefits the greater number of claimants, which is the net contribution model as Mr Fisk's evidence indicates. But, frankly, there is very little in it. In the end, I find myself reaching the same conclusion as Williams J reached in *Re International Investment Unit Trust* that the net contribution model is the one that achieves the least unfair result for the largest number of claimants.[27]

[148] Because I have concluded that both the company assets and the trust assets should be distributed on the same basis, it is unnecessary to return to the issue of whether the liquidators' assessment of what monies fall into each category is correct. Little attention was paid to this issue by counsel. However, my preliminary view is that the liquidators' assessments are correct.

Order 5 — how should the liquidators' costs be dealt with?

[149] The liquidators are entitled to be paid their actual and reasonable costs on the pre-determined terms. The only available source for the payment of these is the common fund. There is no opposition to the liquidators being paid from the common fund.

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[27] *Re International Investment Unit Trust*, above n 7.

[150] However, I will direct that, prior to the finalisation of the liquidation, the liquidators provide the Court with a final report detailing their costs for the liquidation for final approval.

Order 6 — how should the liquidators engage with claimants in the distribution process?

[151] In the sixth order the liquidators propose a process for advising investors of the outcome of the assessment of distributions. I have reviewed this. It seems entirely appropriate, giving the investors an opportunity to be heard, a mechanism for bringing the matter to conclusion and of course any investor is able to seek a review pursuant to s 284 of the Act.

[152] I will approve the proposed process.

Order 7 — how should unclaimed amounts be dealt with?

[153] In the seventh order the liquidators propose that if it comes about, as it surely will, that they are unable to locate some investors, that after making reasonable efforts to do so, the amount of money involved is to be treated as unclaimed monies pursuant to the Unclaimed Monies Act 1971 and paid to the Commissioner of Inland Revenue in accordance with s (4)(3) of that legislation.

[154] There is no objection to this course. On its face, it seems appropriate and I am prepared to make the necessary order. But I propose to direct the liquidators to retain the funds for an extended period.

Order 8 — what of the future?

[155] The last order that the liquidators seek is that leave to apply for further directions be reserved.

[156] I am prepared to make that order.

Conclusion and orders

[157] For the above reasons I make the following orders:

Order 1

Pursuant to s 271(1)(b) of the Companies Act 1993, Ross Asset Management Ltd (in liq) and Dagger Nominees Ltd (in liq) are to be treated as one company for the purposes of their liquidations.

Order 2

A Pursuant to s 284 of the Companies Act 1993, I direct that the liquidators treat the claims of general unsecured creditors and the claims by investors for their capital investment as ranking equally.

B The company assets apparently owned by Ross Asset Management Ltd (in liq) and Dagger Nominees Ltd (in liq) as at the date of their liquidation and the trust assets held by them on behalf of investors are to be treated as forming one pool of assets for the purposes of distribution.

Order 3

A I order that there is to be no tracing into the common fund.

B I order that the liquidators are not to apply the rule in *Clayton's Case* in relation to the distribution of the common fund.

C Having regard to the effect of the Supreme Court's decision in *McIntosh v Fisk* [2017] 1 NZLR 863, I order that no investor who has recovered his or her capital investment in the fund (as determined by the liquidators) is to be included in any distribution.

D I make the orders sought by the liquidators at [3.3]–[3.4] of their (amended) originating application (as recorded at [26] above) in relation to the treatment of transfers between portfolios.

E I order that in approaching the valuation of investors' entitlements the liquidators are to apply the constant dollar approach based on the consumer price index as proposed by them in their (amended) originating application.

F Pursuant to s 284 of the Companies Act 1993 I order that the liquidators give priority to the payment of claims by general unsecured creditors and claims by investors in respect of their capital investment, and in particular that any other claims by investors for damages are not to be paid unless and until the priority claims are paid in full.

Order 4

I order that the liquidators are to apply the net contribution model for the purposes of distribution of the fund to general unsecured creditors and investors (so that in doing so it is unnecessary to distinguish between company assets and trust assets).

Order 5

I order that the liquidators' costs are to be paid from the common fund on the basis originally provided for by order of this Court on 17 December 2012. Before concluding the liquidations and finalising their costs the liquidators are to provide the Court with a final report and seek approval of those costs.

Order 6

The liquidators are to communicate with trade creditors and investors in the manner referred to at [6] of their (amended) originating application.

Order 7

The liquidators are to deal with unclaimed monies in the manner set out at [7] of their (amended) originating application, except that they are to retain and hold in the trust account of PricewaterhouseCoopers or Bell Gully, all

unclaimed monies for a period of six months and use their best endeavours to locate the owners of the same before paying such monies over to the Inland Revenue Department pursuant to the Unclaimed Monies Act 1971.

Order 8

Leave is reserved to the liquidators or any other party to come back to the Court to seek clarification of this order or any necessary additional orders.

Associate Judge Johnston

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