

**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

Between

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)

Applicants

and

Eoin David Fehsenfeld,

Respondent

**Joint memorandum of counsel in advance of hearing on 22
June 2018**

18 June 2018

For hearing on **22 June 2018**

Judicial Officer: Associate Judge Johnston

BELL GULLY

BARRISTERS AND SOLICITORS

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May it please the Court:

1. This joint memorandum responds to the matters raised in Associate Judge Johnston's minute of 15 June 2018 (the **Minute**).

Relevant documents

2. The documents listed in paragraph 2 of the Minute were the substantive documents filed at that time. Counsel for Mr Fehsenfeld has now filed submissions. A joint bundle of authorities (from the Liquidators and counsel assisting the court) has also now been filed.

The key contentious issues

3. The three issues identified by the Court at paragraph 5 of the Minute are the key ones although there is more commonality of approach than paragraph 5 identifies. The Liquidators will also touch on the other orders sought but they are not contentious. The key contentious issues and each parties' respective positions on those issues are as follows:

The Jurisdiction Issue:

- (a) The first issue is whether Part 16 of the Companies Act 1993 (and in particular section 313) means the Court has no ability to order distribution of the assets in the liquidation on a basis other than on a rateable abatement basis, which combined with the orders as to the fixing of creditor claims, will result in the application of the "Net Contributions" method.
 - (i) All counsel agree that Part 16, and in particular section 313, may mean that the Court, subject to the Court itself being satisfied, has no ability to order that those funds held by the Liquidators held to be "company assets" be distributed on a basis other than that prescribed under the Companies Act 1993.
 - (ii) All counsel agree that Part 16, and in particular section 313, does not constrain the Court's ability to order the manner in which "trust assets" are to be distributed. That is, all

counsel agree that the Court has jurisdiction to order that trust assets be distributed on a basis other than that set out in section 313. (The Liquidators and Mr Fehsenfeld will submit though, that section 313 is relevant to this issue i.e. for reasons of consistency and analogy.)

The Appropriate Distributions Model

- (b) If the Court accepts counsels' submissions on the Jurisdiction Issue above, then:
- (i) the company assets may have to be distributed on the Net Contributions basis;
 - (ii) the Court has a discretion as to how the trust assets are to be distributed - according to the Net Contributions basis or the Alternative / Rising Tide basis;
 - (iii) the Court will need to determine whether the various types of assets held by the liquidators are company assets or trust assets. While there is broad agreement on this, Mr Chisnall identifies some reasons why the funds being held by the Liquidators in respect of the clawback claims may be capable of being categorised as trust assets. He concludes that it is difficult to see that they are trust assets. (The Liquidators say they are company assets); and
 - (iv) if the Court considers that the trust assets should be distributed on the Alternative / Rising Tide basis (so that there is a "hybrid distribution" i.e. company assets and trust assets are distributed on different bases) then an ancillary issue arises – should the company assets or the trust assets be distributed first? (The order of distribution has some impact on the amount of each eligible investor's payment.)

The Liquidators and Mr Fehsenfeld will submit that the trust assets should also be distributed on the Net Contributions basis.

Mr Chisnall has also put forward reasons as to why the trust assets should be distributed on the Alternative / Rising Tide basis.

If there is a hybrid distribution then the Liquidators consider that trust assets should be distributed first; Mr Chisnall takes the contrary view.

The CPI Adjustment Issue

- (c) Under each of the distribution models proposed, the issue of a CPI adjustment arises. That is, whether the Court should direct that the Liquidators apply a CPI adjustment to investor deposits and payments to calculate their claim in the liquidation.
- (d) The Liquidators submit that the CPI adjustment is appropriate. Mr Chisnall submits that the CPI adjustment may not be appropriate. Mr Fehsenfeld will abide by the decision of the Court on CPI.


Request by Mr Prince for joinder

- 4. The Liquidators do not oppose the joinder of Mr Prince to the proceeding if his email is treated as such an application. There is one caveat to this. Any oral submissions to the Court by him should be limited given the hearing is for only one day and the issues will be well traversed by the Liquidators and counsel assisting the court.

Order of submissions

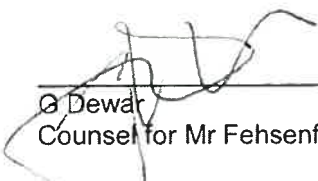
- 5. Counsel have conferred and agree the most appropriate order for submissions is as follows:
 - (a) Mr Colson and Ms Pinny for the Liquidators.
 - (b) Mr Dewar for Mr Fehsenfeld. Mr Dewar will only address the Net Contributions Model vs Alternative Model/Rising Tide Model issue. He anticipates less than 30 minutes will be required for his submissions.

- (c) Mr Prince (should an application to be heard be made, and granted by this Court),
- (d) Mr Chisnall as counsel assisting the Court.



M G Colson / R L Pinny
Counsel for the Liquidators

P Chisnall / J Haig
Counsel assisting the Court



G Dewar
Counsel for Mr Fehsenfeld

18 June 2018

- (c) Mr Prince (should an application to be heard be made, and granted by this Court).
- (d) Mr Chisnall as counsel assisting the Court.

M G Colson / R L Pinny
Counsel for the Liquidators



P Chisnall / J Haig
Counsel assisting the Court

G Dewar
Counsel for Mr Fehsenfeld

18 June 2018