

**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)

Applicants

**Joint memorandum of counsel for the Applicants and
counsel assisting the court in advance of conference on 9
April 2018**

6 April 2018

BELL GULLY

BARRISTERS AND SOLICITORS

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May it please the Court:

1. The background to this proceeding is the collapse of Ross Asset Management Limited (**RAM**) and associated companies in December 2012. Upon its collapse, it was discovered that RAM was a Ponzi.
2. In this proceeding the liquidators of RAM and associated companies (the **Liquidators**) seek directions as to the distribution of assets in the liquidation (the **Application**). Given that RAM was a Ponzi, the distribution of its assets raises a number of complex and novel issues.
3. In a minute dated 13 December 2017 Justice Thomas directed that a conference be set down with the Court to determine:
 - (a) the hearing date of the Application;
 - (b) timetabling of any additional evidence and synopsis of submissions;
 - (c) considering the issue of appropriate appeal rights, if any, for affected investors; and
 - (d) any additional procedural matters.
4. The Applicants and counsel assisting the Court have conferred on these matters, as outlined below.

The hearing date of the Application

5. The Applicants and counsel assisting the Court respectfully request that a one day hearing be fixed for:
 - (a) ideally, between 11 June 2018 and 3 July 2018; or
 - (b) alternatively, between 4 June 2018 and 8 June 2018.

Counsel for the Applicants are unavailable from 5 July 2018 to 23 July 2018.

6. While there are a number of substantive issues to be determined in the Application, many of the orders sought by the Liquidators are not

expected to be contentious and are supported by counsel assisting the court. Accordingly, counsel consider that a one day hearing will be appropriate on the basis that:

- (a) the Applicants will file detailed written submissions addressing all orders sought; and
- (b) unless the Judge requests otherwise at, or in advance of, the hearing, the submissions at the hearing will focus on:
 - (i) those orders where counsel assisting the Court has indicated he considers they ought to be the subject of a detailed argument (namely the appropriate distributions model and the proposed adjustment to investor contributions for the Consumer Price Index (CPI)); and
 - (ii) those orders which are, in principle, supported by counsel assisting the court, but where counsel assisting has indicated that the orders sought require further detail and/or clarification.

Additional parties

- 7. Counsel advise that to date, only one interested person has indicated an intention to apply to join this proceeding as a party. In early March 2018 the investor identified in Mr Fisk's affidavit of 11 December 2017 as "Investor A" (being the investor most adversely affected by the Alternative Model of distribution proposed) indicated that they were considering applying to be joined as a party to the proceeding. Investor A is legally represented. Despite this indication, no application has yet been made.
- 8. Counsel do not consider any orders need to be made in respect of this. However, and for the avoidance of doubt, in addition to serving this memorandum in the manner directed by Justice Thomas in the minute of 13 December 2017, the Applicants intend to send a copy of this memorandum to Investor A's legal counsel.

Timetabling of additional evidence and submissions

9. Counsel assisting the Court has requested that the Applicants provide a supplementary affidavit addressing:
 - (a) a breakdown of the funds recovered in the liquidation to date and their sources; and
 - (b) the impact for investors of the Rising Tide Model proposed by counsel assisting the Court, compared with the two distribution models proposed by the Applicants.
10. Aside from this supplementary affidavit from the Applicants, no further evidence is anticipated.
11. As indicated above, and given the large number of investors with an interest in the proceedings, it is proposed that both the Applicants and counsel assisting the court file and serve detailed written submissions in advance of the hearing.
12. Accordingly, counsel respectfully request the following timetabling directions (subject to the setting of a fixture date):
 - (a) the Applicants file and serve a supplementary affidavit addressing the matters outlined in paragraph 9 above by 27 April 2018;
 - (b) the Applicants file and serve detailed written submissions by 4 May 2018;
 - (c) counsel assisting the court file and serve detailed written submissions by 18 May 2018;
 - (d) the Applicants file and serve any submissions in reply, together with bundles of evidence and authorities by 1 June 2018 (with the requirement to serve the bundles of evidence and authorities on investors and creditors in RAM being dispensed with); and
 - (e) a one day hearing being allocated as above.

Appeal rights

13. A substantive issue to discuss at the conference is appeal rights.
14. In the memorandum of counsel for the Applicants of 12 December 2017, the issue of appeal rights was identified as a matter to be considered with the Court in due course (see paragraph 28 and 29).
15. The current position is:
 - (a) The only party with any rights of appeal is the Applicants. As counsel assisting the Court is not a party to the proceeding, he has no rights of appeal from any decision issued.¹
 - (b) The Applicants do not intend to appeal the Court's decision as to which distributions model is to be applied in the Ross Group liquidations or whether investor contributions are to be adjusted for CPI, absent extraordinary reasons.
16. Investors and creditors have been advised of this issue, and of the Applicants' intention not to appeal a decision as to the appropriate distributions model absent extraordinary reasons through a summary of the application provided on PwC's webpage dedicated to the Ross Group liquidation. A copy of the relevant page of that summary is attached. (That summary does not mention the Applicants' intention not to appeal a decision on the CPI adjustment as, at that time, it was not known that counsel assisting the court would be raising the CPI adjustment as a matter requiring detailed submissions.) That summary advised:

If any person wishes to preserve their right to appeal any decision on the Application, they ought to seek legal advice on this.

The only person who has indicated an intention to preserve a right to appeal is Investor A, as mentioned above. However, despite being legally represented, Investor A has not yet filed any application to be joined to the proceeding.

¹ *The Beneficial Owners of Whangaruru Whakaturia No 4 v Warin* (2009) 19 PRNZ 296 at [36]

Further procedural matters

17. There is one further procedural matter to be considered at the conference.
18. The Application seeks orders that:
 - (a) leave be given to seek the pooling orders as part of this application for directions, instead of pursuant to Part 18 of the High Court Rules; and
 - (b) that the notice requirements in section 271A of the Companies Act 1993 be varied to provide that:
 - (i) notice of the application for the pooling orders be deemed to have been given upon service of the Application on investors and creditors in accordance with the minute of Justice Thomas of 13 December 2017; and
 - (ii) that any Creditor or Investor who wishes to oppose the pooling orders file a notice of opposition to this Application within 20 working days which is deemed to be the statement of defence for the purpose of section 271A.
19. The reason for this order was to avoid the Applicants having to make (and serve) two separate applications – one pursuant to section 284 of the Companies Act 1993 dealing with all orders sought save for the pooling orders and a separate application pursuant to section 271A for the pooling orders.
20. The pooling orders are not expected to be contentious, and are supported by counsel assisting the court.
21. To date, no investor has raised any concerns with either the Applicants or counsel assisting the court as to the pooling orders.
22. Accordingly, the Applicants seek that the orders set out at paragraph 1(j) of the Application be granted, save that the order sought at 1(j)(ii)(B) be amended to provide that any notice of opposition be filed within 20 working days of service on Investors and Creditors of the

court's order on this issue in accordance with the Minute of Justice
Thomas of 13 December 2017.

23. Counsel assisting the court does not raise any issue with this proposed
order.



M G Colson / F L Pinny
Counsel for the Applicants



PRW Chisnall / J D Haig
Counsel assisting the Court

6 April 2018



Ross Group Distribution – Summary of Application

The Liquidators of the Ross Group wish to make a distribution to investors and creditors in the Ross Group of companies. They have filed an application with the High Court in Wellington seeking directions from the Court relating to how the distribution should be paid out (the **Application**). This will likely be the largest distribution which will be made in the liquidations.

The key parts of the Application will most likely be determined by the Court in the second quarter of 2018. However, the Court has granted some of the procedural directions sought already, as detailed below.

What directions are being sought?

The Liquidators are seeking the following directions:

- **Pooling Orders**
 - Most of the assets held by the Ross Group are held by Ross Asset Management Limited (in liquidation); **RAM**. However, Dagger Nominees Limited (in liquidation) (**Dagger**) holds cash of approximately \$1 million. Dagger has no creditors of its own.
 - The Liquidators are seeking a direction that the assets of RAM and Dagger be pooled together and the liquidations of the two companies proceed as if they are one company.
 - The effect of these directions is that there will be an additional \$1 million available for distribution to RAM's creditors and investors. The Liquidators do not consider there is any downside to these directions for RAM investors.
- **One common pool of assets for both general unsecured creditors and investors in RAM**
 - There are two possible approaches to distribution:
 - Maintain two pools of assets: one pool being assets which can be proved to have been derived as a result of the misapplication of investors' funds which should have been held on trust; and one pool with all other assets realised by the Liquidators. On this approach, only the RAM investors (**Investors**) would have a claim to the trust assets pool; while both the Investors and general unsecured creditors (i.e. non-investor trade creditors) of RAM (**Creditors**) would have a claim to the "other assets" pool.
 - Maintain one common pool of assets for both Creditors and Investors.
 - The Liquidators seek a direction that they only maintain one common pool of assets. They do not expect this direction to be contentious: it would be uneconomic to undertake the legal and accounting work necessary to maintain two pools. This is because:
 - there are a number of legal and practical issues to overcome in order to maintain two pools of assets, including the legal and factual difficulties in establishing into which pool a particular asset falls;
 - the potential claims for general unsecured creditors of RAM total less than \$70,000; and
 - the actual payment to them from this distribution would be less than \$20,000.

How can an Investor or Creditor feedback their views on the Application?

Mr Chisnall intends to consult with the Ross Group Liquidation Committee on the views of investors on the Application. Accordingly, if you wish to feedback your views on the Application, we suggest you contact any member of the Liquidation Committee. Any correspondence in this regard which is received by the Liquidators will be passed to the Liquidation Committee

Can an Investor or Creditor oppose the application?

If you wish to oppose the application, we recommend you seek legal advice.

Appeal Rights

The Liquidators do not intend to appeal any decision of the Court as to which distribution model is to be applied in the Ross Group liquidations, absent extraordinary reasons. (For example, if the model ordered by the Court is not one which the Liquidators can, in practical terms, implement.) They are conscious that any appeal will delay a distribution being made to investors and would incur additional costs.

As the counsel assisting the court is not a party to the proceeding, Mr Chisnall has no right to appeal the decision of the Court.

If any person wishes to preserve their right to appeal any decision on the Application, they ought to seek legal advice on this.

The Liquidators will however be raising the general issue of appeal rights with the Court. They will update Investors further on this issue.

Have the Liquidations finished?

The liquidations of the Ross Group companies have not finished. The Liquidators are continuing to pursue avenues of recovery of RAM's assets – including clawback claims against investors who received payments of "fictitious profits" from RAM - which they expect will enable them to make a further distribution to Investors and Creditors at some point. However, given that they have funds available now, they did not wish to defer any distribution until the conclusion of the liquidations.