In the High Court of New Zealand
Wellington Registry
I Te Kōti Matua o Aotearoa
Te Whanganui-ā-Tara Rohe

CIV-2012-485-2591

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

Between

John Howard Ross Fisk and David John Bridgman

Applicants

and

Eoin David Fehsenfeld

Respondent

Memorandum of counsel for the Applicants opposing Dr Fehsenfeld's application for costs

7 September 2018

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May it please the Court –

1. Counsel for the Liquidators refer to the memorandum on behalf of Dr Fehsenfeld seeking that his solicitor-client costs in respect of the Liquidators' application for directions be paid from the assets in the liquidation (the **Fehsenfeld Memorandum**).

2. The Liquidators:

   (a) oppose Dr Fehsenfeld's application; and

   (b) in the event that this Court were minded to grant an order of costs, say that any costs award should be based on scale costs not indemnity costs.

Dr Fehsenfeld's costs should not be a cost in the liquidation

3. There are three reasons why Dr Fehsenfeld's costs should not be a cost in the liquidation:

   (a) Dr Fehsenfeld did not raise any new arguments which prevailed. He fundamentally supported the position adopted by the Liquidators.

   (b) In reality Dr Fehsenfeld only sought to be joined to preserve his appeal rights, if the Court came to a decision which was adverse to his personal interests.

   (c) Dr Fehsenfeld was acting purely in his own interests. He was not representing, nor purporting to represent, the interests of any of other 860 investors affected by the application.

   Each of these reasons is addressed below.

4. However, as a preliminary matter, there are two points in the Fehsenfeld Memorandum which are incorrect.

   (a) The Fehsenfeld Memorandum states that Dr Fehsenfeld was invited to seek party status as a result of the position he was in

with respect of the alternative distribution model.[1] That is not correct. The Liquidators personally informed ten investors of the Application: the five investors most beneficially affected by the Alternative Distribution Model and the five investors most detrimentally affected by the Alternative Distribution Model (which included Dr Fehsenfeld). The purpose of this was to ensure that these investors were aware of the Application and its impact on them. The Liquidators did not invite any of them to join as parties to the Application.

In the Liquidators' general correspondence with all affected investors and creditors, the Liquidators advised that if any investor or creditor wishes to oppose the application or wished to preserve their right to appeal any decision on the Application, they would need to seek legal advice.[2]

(b) The Fehsenfeld Memorandum states that the joinder of Dr Fehsenfeld was effectively consented to by the Liquidator.[3] Rather, the Liquidators did not oppose his application for joinder and advised the Court that they would abide its decision on the application.[4]

Dr Fehsenfeld did not raise any new arguments which prevailed

5. Dr Fehsenfeld produced no evidence in the Application. His submissions were, with one exception, simply supporting those of the Liquidators. This is evident from his written submissions which expressly recorded that those submissions would "develop points already made by the Liquidator."[5]

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[1] Fehsenfeld Memorandum, para 2.

[2] See the Liquidators' summary of Application to investors at www.pwc.co.nz/pdfs/Liquidations/ross-group/2017/distribution-application-summary-of-application.pdf.

[3] Fehsenfeld memorandum, para 5.

[4] Memorandum of counsel for the Liquidators dated 16 April 2018, para 2.

[5] Written submissions for Dr Fehsenfeld dated 15 June 2018 (**Fehsenfeld Submissions**) at para 7.

6. The only new point Dr Fehsenfeld raised in submissions was how "fresh deposits" and "reinvested" funds were treated under the Alternative Distribution model.[6] This was acknowledged by His Honour in the judgment where he summarised:

> *He emphasised many of the points that [counsel for the Liquidators] has made. In addition he submitted that there were at least two difficulties with the alternative distribution model that he invited me to conclude meant it was not possible to have confidence that it would achieve equity in this case.*[7]

7. After summarising those two difficulties, his Honour held:

> *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…* [8]

8. If Dr Fehsenfeld had not been joined as a party and had not presented any submissions at the hearing of the Application, it is apparent from his Honour's judgment that the orders granted would have been the same. In such circumstances, it cannot be said that Dr Fehsenfeld was "successful" for the purpose of Rule 14.2.

9. If he is entitled to claim his costs from the assets of RAM and Dagger, his involvement will simply have increased the costs in the liquidation, at the expense of other investors and creditors in RAM when his motivation for participating was purely personal.

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[6] Fehsenfeld Submissions paras 32 to 38.

[7] Decision of Associate Judge Johnston on the Application at [126].

[8] Decision of Associate Judge Johnston on the Application at [133].

Purpose of joinder was to simply preserve his appeal rights

10. At the time of Dr Fehsenfeld's application for joinder, the Liquidators had publicly stated that they would not appeal any decision of the Court on the Application unless the decision ordered a model which, in practical terms, the Liquidators could not implement.[9]

11. Dr Fehsenfeld's application for joinder was made, primarily, to ensure he had the ability to appeal a judgment adverse to his interests. This is apparent from the memorandum of counsel filed in support of his application for joinder which provided:

> *The application is to give him standing in the matter to be heard and, particularly to ensure he has an appellate right in respect of orders made in consequence of the [Application]*
>
> *...*
>
> *...his presence is necessary to justly determine the issues arising and, in particular, to preserve to him such appellate rights as may arise from the determination to be made given the Liquidators' indication that the Court's decision is otherwise unlikely to be the subject of any appeal.*[10]

Dr Fehsenfeld was acting in his own interests

12. The Fehsenfeld Memorandum suggests that Dr Fehsenfeld was acting in a representative capacity, on behalf of other investors so affected.[11] This is not correct. While there were, of course, other investors who would also have been detrimentally affected if the Alternative Distributions Model had been ordered, Dr Fehsenfeld was not purporting to act on behalf of any of them. Nor was he representing that he would exercise his appeal rights for the benefit of anyone other

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[9] See the Liquidators' summary of Application to investors at www.pwc.co.nz/pdfs/Liquidations/ross-group/2017/distribution-application-summary-of-application.pdf.

[10] Memorandum of counsel in support of Dr Fehsenfeld's application for joinder dated 18 April 2018 at paras 2 and 5.

[11] Fehsenfeld Memorandum, para 13.

than himself. There is no suggestion he consulted with any other affected investors. Dr Fehsenfeld's joinder and his submissions were motivated entirely by self-interest. The Liquidators make no criticism of Dr Fehsenfeld in that regard. However, it is not correct to suggest now that his joinder was somehow for the benefit of a greater body of investors.

If costs are to be awarded, they should be scale costs only

13. The High Court Rules provide that where the Court is minded to grant a costs award, costs will generally be awarded in accordance with the scale set out in the High Court Rules. This reflects the overarching principles that any costs award should be:

    (a) a contribution to the actual costs incurred, with a recovery rate of around two thirds of actual costs (Rule 14.2(1)(d)); and

    (b) predictable and expeditious (Rule 14.2(1)(g));

    unless there is good reason to make an award for increased or indemnity costs.

14. The Rules provide that the Court can make an award of indemnity costs in certain specified circumstances set out in Rule 14.6(4). The specified circumstances listed illustrate a high threshold for indemnity costs, including where a party has acted frivolously, vexatiously or improperly or has ignored or disobeyed a court direction or breached an undertaking.

15. Dr Fehsenfeld has not identified which of these circumstances he relies on for his application for indemnity costs. The only ground which could have any application would be Rule 14.6(4)(c), i.e. that:

    (a) costs are payable from a fund;

    (b) the party claiming costs is a necessary party to the proceeding affecting the fund; and

    (c) the party claiming costs has acted reasonably in the proceeding.

However, for the reasons outlined above, Dr Fehsenfeld was not a necessary party to the proceeding.

16. Accordingly, the usual rule should apply; if the Court is minded to make a costs award, it should be for scale costs only.

17. Scale costs (on a 2B basis) are $6,913 as particularised in the attached schedule plus disbursements of $500.

18. In the interests of minimising costs in the liquidation, the Liquidators are content for the Court to determine this cost application on the papers.

Dated 7th September 2018

M G Colson / R L Pinny
Counsel for the Liquidators

Schedule: Scale Costs

Scale costs on a 2B basis for Dr Fehsenfeld are as follows:

Step in the proceeding	Time allocation	Cost
Filing an interlocutory application for joinder	0.6	$1,338.00
Written submissions for interlocutory hearing	1.5	$3,345.00
Attendance at hearing	1.0	$2,230.00
TOTAL	**3.1**	**$6,913.00**