IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KOTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROE

CIV-2012-485-2591

UNDER	Sections 271 and 284 of the Companies Act 1993 and the High Court Rules
IN THE MATTER OF	Ross Asset Management Limited (In liquidation) and related entities
BETWEEN	**J H R FISK** and **D J BRIDGMAN** as Liquidators of Ross Asset Management Limited (In liquidation) and related entities, each being Chartered Accountants of Wellington and Auckland respectively
	Applicants
AND	**E D FEHSENFELD**
	Respondent

SUBMISSIONS OF AMICUS CURIAE
Dated 11 June 2018

Next even date: Hearing 22 June 2018
Judicial officer: Associate Judge Johnston

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MAY IT PLEASE THE COURT

Introduction

1. Counsel was appointed Amicus Curiae by way of this Honourable Court's Minute dated 13 December 2017.

2. A first memorandum to the Court was filed by counsel on 16 March 2018. The memorandum, at the request of the Court, addressed each particular order sought by the Liquidators. Arising out of that, together with further liaison with the Liquidators' counsel and in conjunction with orders already granted by the Court, the specific orders remaining in the Liquidators' application need to now be addressed, substantively, by the Court.

3. On 18 May 2018 the Liquidators filed their submissions together with a second affidavit of John Fisk dated 18 May 2018 which has provided further helpful information as to the specific orders sought.

4. The factual background and overview of the distribution models available as set out at [3] and [4.1] – [4.4] in the submissions for the Liquidators is adopted.

5. These submissions will address:

   (a) A summary of the orders sought by the Liquidators identifying those that are seen as appropriate and those where more substantive consideration is seen as required.

   (b) Fixing of creditor/Investor claims.

   (c) Classes of assets held by the Liquidators

      (i) Trust funds.

      (ii) Company assets.

      (iii) Liquidators' fees and expenses.

   (d) CPI adjustment.

   (e) Distribution model - Rising Tide (RT).

   (f) Distribution model - Alternative Distribution Model (ADM).

   (g) Order of distribution if more than one class of fund.

6. While the appointment of counsel assisting the Court was on the basis of advancing the merits of the ADM, it remains incumbent to draw all relevant issues arising out of the application to the Court's attention.[1] The submissions will accordingly apply that frame of reference.

Orders sought by the Liquidators

7. The orders sought by the Liquidators (excluding those already granted by her Honour Justice Thomas in the Court's minute of 13 December 2017 and the orders of Associate Judge Johnson dated 10 April 2018) are set out in Schedule One to the Liquidators' submissions (amended as shown in red). A summary of the orders sought (following the numbering used in Schedule One) is set out in the below table. Comment is made as to whether the order should be seen as appropriate or whether it should be substantively considered.

No.	**Summary of order sought**	**Amicus comment**
2	That the assets of RAM and Dagger are pooled and the liquidations of those companies proceed as one.	This is seen as appropriate.
3	That the recovered assets of RAM and Dagger, after costs, be treated as one pool of assets available for distribution to unsecured creditors and investors.	The Court to consider whether two pools should arise in light of the facts, one in respect of company assets and one comprising funds impressed with a trust for Investors.
4	Distribution of assets takes place as follows:	
(a)	No tracing of particular Investor's investments occurs.	This is seen as appropriate
(b)	Any Investor who received payments from RAM (adjusted for CPI to 17 December 2012) which exceeded their contributions to RAM (adjusted for CPI to 17 December 2012) is not entitled to any distribution.	This order is supported aside from the addition/adjustment of CPI which is not supported for either any company assets or any trust funds.

[1] Refer High Court Rule 10.22 and [8] of the Court's minute in this proceeding dated 13 December 2017 citing *The Beneficial Owners of Whangaruru Whakaturia No 4 v Warin* [2009] NZAR 523 (CA).

(c)	In respect of investor portfolio transfers:	
(i)	Transfers are recognised to the extent of any positive net 'contributions balance' in the transferring portfolio as at the date of transfer.	This is seen as appropriate.
(ii)	'Contribution balances' are calculated by deducting from contributions made by an Investor, payments to that investor by RAM (both adjusted for CPI to 17 December 2012).	This is seen as appropriate aside from the addition of CPI.
(d)	If due to extraordinary circumstances the method for calculating the value of transferred portfolios described in (iii) above is unjust or ineffective in specific instances:	This is seen as appropriate.
(i)	The Liquidators are permitted to apply a reasonable and logical alternative methodology.	This is seen as appropriate
(ii)	Where such alternative methodology is adopted,	
(A)	The Liquidators will write to the Investor detailing why the usual inter-portfolio approach is ineffective, the alternative methodology applied and the Investor's right to challenge the method.	This is seen as appropriate.
(B)	Leave is granted to Investors affected to apply to the Court to challenge the method adopted by the Liquidators in respect of the specific portfolio transfer in question within one calendar month of receiving the Liquidators' notice.	This is seen as appropriate.
5	The appropriate method of distribution is the Net Contributions Model, the Alternative Model or the Rising Tide Model.	This is seen as appropriate.
6.	The Liquidators be entitled to deduct their costs and expenses in the liquidation from the common pool of assets;	If there are two funds, the Liquidators' costs and

		expenses should be taken first out of company assets.
7.	Claim forms for Investors entitled to receive a distribution in RAM and Dagger shall be as prescribed at (a) – (d) (p 60 of the Liquidators' submissions).	This is seen as appropriate.
8	Where Investors do not either return their claim for or lodge an objection within 6 months the Investors' distribution will be deemed unclaimed money (as set out at (a) – (d) at p 61 of the Liquidators' submissions).	This is seen as appropriate.
9	Leave to apply for further directions is reserved.	This is seen as appropriate.

Fixing creditor / Investor claims

8. An issue common to all distribution models is identified at [4.5] – [4.15] of the Liquidators' submissions - that Investors may have the right to lodge claims for sums in excess of their net contribution balances pursuant to section 303 of the Companies Act 1993 ("the CA"). For example, Investors could seek to prove in the liquidation sums for their loss of opportunity to make an investment return. If claims over and above Investors' net principal balance in RAM (excluding profits) were allowed to be made, that is likely to affect the orderly distribution of the limited funds recovered.

9. The Liquidators seek orders pursuant to the Court's discretion in sections 284 or 307 of the CA valuing any claim made by Investors, other than on a negative net contributions balance, at zero.

10. This order is supported. There is a very real need for finality in this liquidation. To do otherwise would risk complicating the distribution process and give rise to future indeterminate challenges by Investors. In any event, there appears to be a low risk that any Investor will proceed with such a claim as it is understood that to date no such claims have been made. The orders sought by the Liquidators also give effect to the ancillary orders sought for the fixing of Investor claims as set out in Schedule Four of the Liquidators' submissions (at [8] – [14]).

Classes of funds - company and trust funds

11. With regard to the Liquidators' order number 3 (set out above), as foreshadowed in counsel's first memorandum, the Liquidators obtained funds in the liquidation of RAM and its related entities from four primary sources.

    (a) Funds that were derived from the proceeds of the sale of assets held by the entities themselves. Those funds amount to $4,398,947.58, as set out at [8](a) of Mr Fisk's second affidavit.

    (b) The Liquidators have further identified an amount of $457,876.31, being the net proceeds of the sale of shares claimed to have been held by Mr Ross personally. Those shares are noted to be more likely than not paid for by funds derived from RAM (refer [8](q)).

    (c) Other funds realised from Mr Ross that the Liquidators consider were not derived from Investor funds in the sum of $665,473.37 (refer [8](b) and the table at [9] of Mr Fisk's second affidavit).

    (d) Funds derived from the Liquidators' actions to claw back monies paid to Investors by RAM while it was in operation, and in particular, funds paid to Investors in excess of their original capital investment. The total recovered by the Liquidators through those steps amounts to $19,122,249.38 as set out at [8](y) of Mr Fisk's second affidavit.

12. The question arises as to whether the sources of funds should be treated separately for the purposes of the Liquidators' distribution application on the basis that there are different principles of law applying to each. Mr Fisk recognised in his first affidavit: "*as a matter of law that there would usually be a need to distinguish between these two classes of asset: those clearly derived as a result of the misapplication of trust assets; and other assets.*"[2]

13. The Liquidators seek to distribute all funds as one fund, for reasons including that to do so would expedite the distribution process. However, as the Liquidators in this matter are very experienced, qualified and well equipped to efficiently address any calculations needed to give effect to any two funds approach, and as funds held are reasonably substantial, a principled approach is justified in the circumstances.

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[2] Refer [8.3] of Mr Fisk's first affidavit dated 11 December 2017.

14. The Court is invited to consider whether the funds are distinct, depending on their source. Funds derived from RAM may be seen as trust funds whereas the funds recovered from Investors and other sources by the Liquidators in furtherance of their statutory powers may be seen as company assets.

Trust funds

15. For the reasons set out below, it appears that the funds recovered/realised by the Liquidators from RAM or Dagger directly or indirectly (including the proceeds of shares purported to have been owned by Mr Ross, but likely derived from RAM funds) are impressed with a trust for the benefit of Investors. If so, then the Court should give consideration to such funds being distributed in accordance with equitable principles.

16. A summary of what are seen to be trust funds is set out in Mr Fisk's second affidavit.[3]

(a) Net proceeds from the sale of shares held in the name of RAM or Dagger; totalling $3,023,480.23.

(b) Dividends from those shares in the sum of $115,962.56.

(c) Cash at bank of $61,811.65.

(d) Property purchased by Mr Ross through family trusts using funds derived from RAM or passing through its 00 account plus rental proceeds in the sum of $894,312.85.

(e) Interest on funds held for RAM/Dagger in the sum of $303,380.29.

(f) Net proceeds of sale of shares claimed by Mr Ross as held for him personally: $457,876.31.

17. The total funds, on the information provided by the Liquidators, that should be impressed with a trust in favour of the RAM investors amounts to $4,856,823.89.

18. RAM Investors invested on the basis that RAM would hold their cash and shares on trust for each of them.[4] Investors agreed their funds would be used to purchase shares, the legal ownership of which would be held by Dagger, beneficially owned by that Investor and managed by RAM.[5] RAM/Dagger did not keep to those agreements but instead the business was operated by its

[3] Refer [7](a) – (j), (q) – (u) and the table at [9].
[4] Refer 8.1 of the affidavit of John Fisk dated 11 December 2017.
[5] Refer 3.2 and 3.3 of John Fisk's affidavit dated 11 December 2017 at p 63 of the exhibits.

director David Ross as a Ponzi scheme. Investor funds were used on an ad hoc basis to purchase shares, fund RAM expenditure or withdrawals by other Investors.[6]

19. Dagger and RAM (as manager) were trustees for the Investor funds and defaulted in their obligations. The Supreme Court noted in *McIntosh v Fisk*[7] that upon receivership, the defrauded Investors were left with a pro rata claim to the securities and money held by RAM as investment manager.

20. The Liquidators found in their investigations that tracing individual Investor funds was impossible due to the poor record keeping by the Ross Group.[8] This combination and dispersal of Investor funds does not, however, prevent Investors having a claim to such funds or proceeds thereof recovered from a defaulting trustee.

21. This principle was noted in *Finnigan v Yuan Fu Capital Markets Ltd*,[9] a liquidator directions case where the liquidators proceeded on the basis that the funds at issue were trust funds. Associate Judge Bell cited Fogarty J's statement of law in *Eaton v LDC Finance Ltd*:

> *[72] If all the beneficiaries' entitlements are mixed into one fund which contains no other funds in respect of which there are claims by other persons, then equity has no difficulty in allowing the beneficiaries to wind up the trust and make a direct claim to those assets, as is noted by Underhill and Hayton above. This remedy is available even though no individual beneficiary can identify his or her deposit in the mixed fund. Where funds are mixed particularly with the wrongdoer trustee's assets, then there are various methods deployed by equity all designed to give the beneficiary a remedy. Mixing is not fatal.*

22. Justice Fogarty addressed the position if a trustee (in this case RAM or Dagger) mixed funds held on trust with his own funds.

> *[75] So far as other contributions to the fund are concerned, the position is clear. Re Halletts Estate provides that where money held on trust is mixed with the trustee's personal money, the whole of the resulting fund is treated as trust property and can, following a successful tracing exercise be claimed by the trust beneficiaries. The trustees are presumed to act honestly where personal funds and trust funds are mixed and when there is a shortfall the trustee is presumed to intend to deplete their own funds first.*

23. The significance of the characterisation of the trust funds component of the recoveries from RAM goes to the breadth of the Court's discretion when considering an appropriate distribution model. The Court's discretion may be

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[6] Refer 3.9 – 3.11 of John Fisk's affidavit dated 11 December 2017.
[7] *McIntosh v Fisk* [2017] 1 NZLR 863 at [17]
[8] Refer 9.6 – 9.9 of John Fisk's affidavit dated 11 December 2017.
[9] *Finnigan v Yuan Fu Capital Markets Ltd* [2013] NZHC 2899 at [45].

limited when considering the distribution of company funds/assets because the CA regime is prescriptive. On the other hand, the Court's equitable discretion when considering the distribution of trust funds is not so constrained.

24. When considering the distribution of trust funds, the object is to do justice between the Investors; to be fair to them by giving effect to their intentions, inferred if not express.[10] The Court should search for "*the least unfair result for the investors bearing in mind that no method of distribution will result in perfect justice for all.*"[11]

Company assets

25. The major pool of funds held by the Liquidators is derived from clawbacks from former Investors. To date $19,122,249.38 has been recovered. The methods used by the Liquidators in respect of the clawback funds are described in Mr Fisk's second affidavit at [7](y)(i) - (iii). Only Mr McIntosh paid funds to RAM pursuant to a Court order following the Liquidators' application. Mr Fisk said at [7](y)(ii) of his second affidavit:

> *All other investors paid amounts to RAM following the liquidators advising them of claims against them pursuant to the Property Law Act 2007 and/or the Companies Act 1993 and threatening to issue, or actually issuing, proceedings against them.*

26. In his first affidavit, Mr Fisk recognised that the funds obtained by the Liquidators from Investors using the methods described above are not, or are unlikely to be, traceable to investor funds.[12] This must be correct, given those funds have been paid to the Liquidators by third party investors who are, in effect, strangers to the RAM trusts. There were no claims brought in equity by the Liquidators that Investors had knowingly received trust funds (which would apply to principal and profit), for recovery of overpayments (profit) or otherwise participated in RAM's breach of trust (for example, by dishonestly assisting with the breach).

27. As referred to the submissions for the Liquidators, *Re Hibiscus Coast Marine Centre Ltd (in liq)*[13] is authority for the proposition that funds recovered by liquidators through the exercise of CA powers to recover voidable preference payments are for the benefit of the company's unsecured creditors. While *Re Hibiscus* does not specifically address the equivalent prejudicial disposition

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[10] *Re Forresters Nominee Company Ltd* [2012] NZHC 1216 at [38].
[11] *Re International Investment Unit Trust (In Statutory Management)* [2005] 1 NZLR 270 at [73].
[12] Refer 8.2 of John Fisk's affidavit dated 11 December 2017.
[13] *Re Hibiscus Coast Marine Centre Ltd (in liq)* (1986) 3 NZCLC 99,615

provisions of the Property Law Act 2007, the relevant sections themselves direct that funds recovered following an order from the Court are to be paid to the company in liquidation for the benefit of a debtor company's creditors.[14]

28. *Re Hibiscus*[15], determined before the CA came into force, held that money recovered pursuant to section 309 of the Companies Act 1955 was to be distributed pro rata to all creditors equally and would not be subject to a charge in favour of one (secured) creditor. However, in that case the voidable preference payment was held to have been paid to the liquidators in their own right and not the company.[16]

29. The CA, as amended in 2007[17], now provides any funds payable pursuant to a voidable preference order made under section 295(a) are paid to the company in liquidation itself and not the liquidator(s). Section 295(a) provides:

> *295 Other orders*
>
> *If a transaction or charge is set aside under section 294, the court may make 1 or more of the following orders:*
>
> *(a) an order that a person pay to the company an amount equal to some or all of the money that the company has paid under the transaction:*
>
> ...

30. Before it was amended in 2007 section 295(a) provided:

> *295 Other orders*
>
> *If a transaction or charge is set aside under section 294 of this Act, the court may make one or more of the following orders:*
>
> *(a) An order requiring a person to pay to the liquidator, in respect of benefits received by that person as a result of the transaction or charge, such sums as fairly represent those benefits:*
>
> ...

31. Following the change in wording in section 295(a), the Court's finding in *Re Hibiscus* - that such payments were paid to the liquidators - is unlikely to continue to apply. However, the finding that voidable preference payments

[14] Refer ss 350(1)(b) and 350(2)(a).
[15] *Re Hibiscus Coast Marine Centre Ltd (in liq)* (1986) 3 NZCLC 99,615
[16] Section 269 of the Companies Act 1955 provided: *"If a transaction or charge is set aside under section 268 of this Act, the Court may make one or more of the following orders: (a) An order requiring a person to pay to the liquidator, in respect of benefits received by that person as a result of the transaction or charge, such sums as fairly represent those benefits."*
[17] On 1 November 2007 with the coming into force of the Companies Amendment Act 2006.

recovered by liquidators are expressly for the benefit of all the company's unsecured creditors seems to remain good law.

32. If the funds recovered by the Liquidators pursuant to their exercise or threatened exercise of their statutory powers are company assets, then sections 312 and 313 of the CA should have application.

> *312 Preferential claims*
>
> *(1) The liquidator must pay out of the assets of the company the expenses, fees, and claims set out in the Schedule 7 to this Act to the extent and in the order of priority specified in that Schedule and that Schedule applies to the payment of those expenses, fees, and claims according to its tenor.*
>
> *(2) Without limiting clause 2(1)(b) of the Schedule 7 to this Act, the term "assets" in subsection (1) of this section does not include assets subject to a charge unless the charge is surrendered or taken to be surrendered or redeemed under section 305 of this Act.*
>
> *313 Claims of other creditors and distribution of surplus assets*
>
> *(1) After paying preferential claims in accordance with section 312 of this Act, the liquidator must apply the assets of the company in satisfaction of all other claims.*
>
> *(2) The claims referred to in subsection (1) of this section rank equally among themselves and must be paid in full, unless the assets are insufficient to meet them, in which case payment shall abate rateably among all claims.*
>
> ...

33. The language of sections 312 and 313 is mandatory; "*The liquidator must*". It is therefore axiomatic that any company assets must be distributed in accordance with Schedule 7 first, then, in respect of unsecured creditors, if funds are insufficient to meet all claims, those claims abate rateably amongst those creditors.

34. The mandatory effect of these provisions was noted, for example, by Associate Judge Bell in *Finnigan v Yuan Fu Capital Markets*[18] where it was recognised that if the CA applied (which it would have if the funds in issue were company assets), then there would have been no difficulty with the distribution given the CA's prescribed distribution method. The CA's prescribed method of distribution was seen to be in keeping with the CA's objective - to provide a straightforward and fair procedure for realising and distributing the assets of insolvent companies.

[18] *Finnigan v Yuan Fu Capital Markets Ltd* [2013] NZHC 2899 at [1] and [2]

35. The purpose and objective of the current CA regime was discussed in the Explanatory Note to the Insolvency Law Reform Bill 2005, as cited by the Court of Appeal in *Timberworld Ltd v Levin*.[19]

> *[49] The Explanatory Note to the Bill emphasised the principles according to which the reforms it enacted operated, noting the "fundamental principle" underpinning insolvency law the pari passu or "equal step" principle. The Explanatory Note also described the overall objectives behind the reform of insolvency law as being to:*
>
> - *provide a predictable and simple regime for financial failure that can be administered quickly and efficiently, imposes the minimum necessary compliance and regulatory costs on its users and does not stifle innovation, responsible risk taking, and entrepreneurialism by excessively penalising business failure; and*
> - *distribute the proceeds to creditors in accordance with their relative pre-insolvency entitlements, unless it can be shown that the public interest in providing greater protection to one or more creditors outweighs the economic and social costs of any such priority; and*
> - *maximise the returns to creditors by providing flexible and effective methods of insolvency administration and enforcement which encourage early intervention when financial distress becomes apparent; and*
> - *enable individuals in bankruptcy to participate again fully in the economic life of the community; and*
> - *promote international co-operation in relation to cross-border insolvency.* (footnotes omitted)

36. Associate Judge Bell's comment in *Finnigan v Yuan Fu Capital Markets* regarding the prescriptive distribution regime in sections 312 and 313 of the CA accords with the first point of the Explanatory Note to the Insolvency Law Reform Bill 2005. A standard method of distribution provides: "*a predictable and simple regime for financial failure that can be administered quickly and efficiently, imposes the minimum necessary compliance and regulatory costs on its users …*"

37. For the reasons set out, if the clawback funds are characterised as assets of the company then it is persuasive that such funds are subject to the mandatory rateable distribution method provided in section 313.

Claw back funds subject to trust?

38. The Liquidators' counsel notes at [5.49] of their submissions that counsel intended to consider the application of both backwards tracing and remedial

[19] *Timberword v Levin* [2015] NZCA 111

constructive trust in respect of clawback funds. While that correctly sets out what was highlighted in the memorandum dated 16 March 2018, the Liquidators correctly raised those points as issues that may need to be addressed.

39. The question is, in light of the fact that Investors' funds were to be held on trust by RAM, do the clawback funds paid to the Liquidators retain their original characteristic as trust funds or become trust funds in the hands of the Liquidators? The two options initially identified by the Liquidators, *backwards tracing* and *remedial constructive trusts* can be addressed in fairly short order. A third option, arises from a comment in her Honour Justice Glazebrook's decision in *McIntosh v Fisk.*[20]

40. As set out in the Liquidators' submissions at [5.50], backwards tracing provides a substance over form approach to allow a proprietary claim to trust funds where traditional tracing rules (for example, where payments are made into an overdrawn bank account) may preclude traditional tracing. Here, there has been no attempt to traditionally trace RAM funds through to individual Investors. Further, in light of the findings in *McIntosh v Fisk,* any attempt to trace and recover RAM funds in an Investor's hands would, more likely than not, have resulted in a response that the Investor was a bona fide purchaser for value without notice or similar.

41. The Privy Council recognised backwards tracing could arise in *Federal Republic of Brazil v Durant.*[21] To establish this method of tracing, a claimant must show a co-ordination between the depletion of the trust fund and the acquisition of the asset which is subject of the claim. There must be evidence of the coordinated outward and inward movement of assets.[22]

42. In *Federal Republic of Brazil v Durant,* the plaintiffs sought to impose a constructive trust over funds held in companies which were at the relevant times under the practical control of the former mayor of a Brazilian municipality and his son. The plaintiffs' claimed the defendants were liable as constructive trustees of a sum of about US$10.5m, representing bribes that had been paid to the former mayor in connection with a major public road building contract. It was held there was sufficient connection between the bribes and the sums paid into the defendant companies' accounts (which

[20] *McIntosh v Fisk* [2017] 1 NZLR 863 at [241]-[242].
[21] *Federal Republic of Brazil v Durant* [2016] 1 All ER
[22] Ibid at [40] and [41].

sums constituted an acquired asset) from available inference such that the companies were constructive trustees for the sums paid.

43. Here, in contrast to *Federal Republic of Brazil*, there is no evidence or inference available to establish the kind of coordination understood to be required for backwards tracing. Investors who have repaid clawback funds were third party recipients of misapplied trust funds. They were not entities under the control or effective control of RAM. It is not known whether or not any of the funds paid to Investors were kept separate by them or otherwise used to acquire identifiable assets. Further, the circumstances in which RAM funds were received by Investors have not been tested other than in *McIntosh v Fisk*. Accordingly, no inferences can be drawn as to whether there is any connection between the RAM payment out and the funds clawed back.[23]

44. The second point identified in counsel's first memorandum dated 16 March 2018 was whether or not clawback funds could be impressed with a remedial constructive trust.

45. As noted in the Liquidators' submissions, whether remedial constructive trusts are a remedy available in New Zealand law remains uncertain, although they have not been ruled out as a remedy.[24]

46. In *Fortex v MacIntosh*[25] the Court of Appeal allowed an appeal against a High Court decision to order a restitutionary remedial trust in favour of employees over a sum of money in Fortex's hands equivalent to employee superannuation payments that were required to but were not made by Fortex. The High Court's finding gave the employees as beneficiaries' priority over that sum over Fortex's secured debenture holders.

47. The Court of Appeal held a remedial constructive trust could arise only if it were shown that the debenture holders' consciences were affected such that it would be unconscionable for them to enforce their legal rights to preference over the sum of the retained employee super deductions. Justice Tipping noted further that remedial constructive trusts depended for their very

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[23] No connection was found between funds paid out and those ordered to be repaid in *McIntosh*. The majority finding was that profit had to be repaid because value was not given as required to establish defences to the Liquidators' voidable preference payment or insolvent transaction claims.

[24] For example, see *Paki v Attorney General (No 2)* [2015] 1 NZLR 67 at [163]: *"It is not appropriate in the present proceedings to foreclose the availability of relief by recognition of a constructive trust over property acquired in breach of equitable duties, when the retention of the property would be unconscionable. Whether the classification of any such constructive trust as "institutional" or "remedial" is truly useful is a topic that can be left for another day."*

[25] *Fortex v MacIntosh* [1998] 3 NZLR 171

existence on an order of the Court, with such order being creative rather than confirmatory (at p 173).

48. The situation in this case is somewhat different to that in *Fortex* which involved a fairly commonplace contest between creditors. Here it is not suggested RAM's unsecured creditors are to be prevented from exercising their legal rights given they are unsecured.

49. The starting point for considering whether there could be a remedial constructive trust in this instance is to ask on what basis were the clawback funds recovered from Investors. The clawback funds were paid by Investors to settle with the Liquidators (aside from Mr McIntosh's funds) after they were put on notice that the Liquidators had claims against them to recover voidable preference payments under the CA and/or Property Law Act. For those funds to have been impressed with a remedial constructive trust, a prior order of the Court would have been required declaring the funds paid by the Investors were subject to a trust. No such order was sought or made. As noted above, any attempt to obtain an order would in all likelihood have been met with the equitable defences available to Investors including lack of knowledge.

50. On the other hand, no orders were made (other than in *McIntosh*) that clawback funds were voidable preference payments under the CA or Property Law Act. Since the clawback funds were not the subject of any formal order which could affect their characterisation, it could remain open to the Court to designate them trust funds after the fact. But ultimately, since there is no guidance from prior decisions as to the character of clawback funds in equity (i.e. the availability of equitable defences has not been tested), it would seem to be questionable for the Court to now determine the clawback funds paid back to RAM were impressed with a trust.

51. The third point as to whether clawback funds are trust funds arises from Justice Glazebrook's dissenting judgment in *McIntosh v Fisk.*[26] Her Honour noted, in the context of determining whether funds could be subject to clawback if those funds paid by the company were not that company's property, there was no statutory requirement that the money must belong to the company; only that it was paid by it. This finding approved the Court of Appeal's decision in *Anzani Investments Ltd v Official Assignee*[27] where it was held that a policy choice had been made in respect of the then section

[26] *McIntosh v Fisk* [2017] 1 NZLR 863 at [241]-[242].
[27] *Anzani Investments Ltd v Official Assignee* [2008] NZCA 144

292 such that issues of ownership of property or money paid were deferred and could be addressed either as part of an application for relief under section 296(3) or: "*as part of the liquidator's functions during the distribution phase of a liquidation.*"

52. Justice Glazebrook went on to say: "*While any funds recovered from him would not be available for unsecured creditors (or indeed secured creditors had there been any), they would be available to the other investors.*" (at [241]). In effect this observation (made without detailed reasons) is to the effect that the misappropriated trust moneys paid to Mr McIntosh (and, other Investors) retained their trust character upon being repaid. How that result is reached is not explained further.

53. As previously noted, the Liquidators did not take any actions as trustees on behalf of the Investors, nor was any representative action brought by the Investors as beneficiaries (claiming against other Investors, for example in unjust enrichment or similar). This point was addressed by the parties in *McIntosh* in their submissions to the Supreme Court arising from *Re Diplock*. If any successful claims in equity had been brought then any funds recovered would likely have been impressed by a trust in favour of the Investors.

54. In summary, that clawback funds are company assets appears to be fairly clearly established. The clawback funds received by the Liquidators from settlements with Investors were paid from the Investors' own funds (no tracing was undertaken) and the funds were paid in response to the threatened use of the Liquidators' statutory powers. It is difficult to see how clawback settlement payments could be characterised now as trust property. If the clawback funds are company assets distribution should follow the method prescribed by section 313 of the CA.

Liquidators' expenses and remuneration

55. Liquidators' expenses and remuneration, including legal costs incurred through the liquidation and various proceedings (the present application included), should be paid in accordance with section 278 and Schedule 7, clause 1(1)(a) of the CA, such that all of those costs should be deducted from the company assets prior to pro-rata abatement for the unsecured creditors/Investors.

56. While it is established that the Court may, at its discretion, order liquidators' fees and expenses including legal fees be deducted from funds the

liquidators hold on trust,[28] in this case it is submitted that the Liquidators' expenses and remuneration should be deducted only from company assets and not from the pool of trust funds.

(a) The direction in section 278 and Schedule 7 of the CA for liquidator fees to be paid out of company assets in priority provides a clear statutory basis for the Liquidators' fees to be paid out of company assets in preference to trust funds.[29]

(b) There are sufficient company assets to pay all of the Liquidators' expenses and remuneration.

(c) The company assets form the majority of the funds recovered and held by the Liquidators.

57. The practical relevance of deducting the Liquidators' expenses and remuneration from the company assets is that a greater sum of trust funds will then be available for distribution in accordance with the Court's equitable discretion - which aims to arrive at the most just and equitable outcome for investors.

58. It is not understood this is contentious, with the Liquidators recognising the point at [8.5] of Mr Fisk's first affidavit.

CPI adjustments on Investor balances

59. In proposed order [4](b) the Liquidators' seek Investor contributions to the date of liquidation (17 December 2012) be adjusted for the Consumer Price Index (CPI). It is submitted that the Court should carefully consider whether to grant that given there is already a substantial shortfall to repay Investors. Any upwards adjustment for some will result in a downwards adjustment for others.

60. The relevant considerations of whether to add CPI to Investor claims differ depending whether the Court orders that there are two pools of funds for distribution. With regard to company assets, the CA does not provide for any CPI adjustments on creditor claims (as set out below). In respect of company assets, the Liquidators' application to add CPI is made under the Court's

[28] For example, refer *Graham v Arena Capital* [2017] NZHC 973 at [44] – [47]; *Finnigan v Yuan Fu Capital Markets Ltd* [2013] NZHC 2899 at [70] and *McKenzie v Alexander Associates ltd (No 1)* (1991) 5 NZCLC 67,030 (HC).

[29] This was held to be the position in *Re Ararimu Holdings Ltd* [1989] 3 NZLR 487 at p 504, albeit in respect of statutory receivers under the Companies Special Investigations Act 1958 and the Corporations (Investigation and Management) Act 1989. However, the relevant provisions were seen as analogous to that provided in the Companies Act 1955.

general discretion pursuant to section 284(1)(a) of the CA. If there is a pool of trust funds then the application to add CPI to claims against that fund will be made in the Court's equitable jurisdiction.

61. The CA itself provides guidance as to whether CPI should be added to claims in respect of company assets. Section 311 provides for pre-liquidation interest on creditor claims in two defined circumstances.

> *311 Interest on claims*
>
> *(1) The amount of a claim may include interest up to the date of commencement of the liquidation—*
>
> > *(a) At such rate as may be specified or contained in any contract that makes provision for the payment of interest on that amount; or*
> >
> > *(b) In the case of a judgment debt, [of the amount that is payable] on the judgment debt.*
>
> *(2) If any surplus assets remain after the payment of all admitted claims, [the specified interest must be paid on those claims] from the date of commencement of the liquidation to the date on which each claim is paid, and if the amount of the surplus assets is insufficient to pay interest in full on all claims, payment shall abate rateably among all claims.*

62. Three points arise.

(a) Investor agreements with RAM did not provide for interest to be paid, thus do not qualify for interest under section 311(1)(a). Rather, Investor funds were to be invested in securities held in trust on their behalf. There was never an intention that Investor funds would be protected with an interest or CPI adjustment. Investors took the risk of exposure to market fluctuations when investing with RAM.

(b) None of the Investors have judgment debts owing by RAM or the Ross Group companies thus do not qualify under the second limb of section 311(1)(a).

(c) There will be no surplus assets to meet all admitted claims so interest, pursuant to s 311(2) will not be payable.

63. It is submitted that the Court should properly be confined to the application of the CA in considering the distribution and treatment of company assets, including as to any upwards adjustment to Investor claims (the Liquidators' application to exclude from claims those parts of Investor balances derived from fictitious statements produced by RAM is, as set out above, endorsed). The absence of any statutory provision to add CPI together with the express

treatment of pre-liquidation interest on creditor claims is a strong indication that Parliament did not intend for CPI to be added to creditor claims. To do so is likely to be contrary to the purpose of the CA's regime to provide a predictable and simple regime for financial failure that can be administered quickly and efficiently.

64. If the Court does decline to add CPI to Investor claims to the company assets then practically it may also be preferable to apply that decision to any trust funds to avoid complicated distribution calculations.

65. If that is wrong, and acknowledging there are no equivalent constraints on the Court when considering the distribution of the trust funds, there are further substantive reasons why it may be seen as inappropriate to add CPI to Investor claims.

66. As noted in the Liquidators' submissions, the issue of whether to add an inflation adjustment to investor balances was recently addressed in the US Madoff Ponzi litigation. In the US Court of Appeal Second Circuit decision *In re Bernard L. Madoff Investment Securities LLC*[30] ("*Madoff*") an application to apply interest or inflation to investor balances was rejected. First, it was found the relevant statute - the Securities Investor Protection Act 15 U.S.C 78 (SIPA) – properly construed, excluded such adjustment to creditor claims. The finding that SIPA constrained the Court's jurisdiction to adjust creditor claims for inflation can be applied by analogy to the points above in respect of company assets. In *Madoff*, the addition of CPI was also rejected on broader grounds.

(a) The securities that investors purported to purchase in *Madoff* included value that would have incorporated economic circumstances such as inflation given the Ponzi scheme was predicated on fictitious market investments for investors (p 6).

(b) It was doubtful that the full investor balances would be recovered such that each dollar allocated to earlier investors in recognition of inflation would reduce the amount of principal recovered by later investors (p 8).

(c) The fact that *Madoff* investors did not bargain for any inflation adjustment was also seen as relevant (pp 8 and 10).

67. All of the factors in (a) – (c) above apply equally to RAM.

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[30] *In re Bernard L Madoff Investment Securities LLC* 779 F 3d 74 (2d Cir 2015).

68. In terms of New Zealand authority, the constant dollar approach (understood to be in effect a CPI adjustment) was applied in *Re Waipawa*.[31] There, in a distribution application arising from a failed illegal finance company, the amicus assisting the Court advocated for the addition of CPI through the 'constant dollar' approach on investor balances payable from trust funds held by the company's liquidators. The trust in that case was statutory, arising from the company's breaches of the Securities Act 1978. As the funds in issue were trust funds, the Court was not considering the application of a constant dollar or CPI adjustment under the CA regime.

69. *Re Waipawa*, like this case, also involved a long-standing fraudulent Ponzi scheme that lasted for more than 20 years. It ended owing investors some $19 million with recoveries available for distribution of less than $1 million. While in *Re Waipawa* a CPI adjustment was ordered, the submission of the amicus in that case started with reference to the United States' SEC submission to Congress in the relation to the Madoff Ponzi which favoured the introduction of a CPI adjustment to investor balances for Ponzi schemes of a substantial duration.[32] However, the SEC position, including its submission to Congress, was subsequently rejected in *Madoff.*

70. Similar arguments against the addition of CPI can be made here, as were advanced by counsel for the investors in *Re Waipawa*. Ultimately it can be seen that a CPI adjustment may not be necessary or appropriate to ensure an equitable division between Investors.

    (a) Earlier Investors' money could not be seen to have increased the value of the investment pool over time as there is no evidence that earlier Investor funds were properly applied or appreciated in value through interest or earnings. That said however, the Liquidators have not been able to trace Investor funds through to any assets of RAM that were recovered in the liquidation.

    (b) Earlier Investors' funds were likely lost years ago (to pay out withdrawals) such that the funds recovered are likely to have been more recently invested. This is a manifestation of the rule in *Claytons*

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[31] *Re Waipawa Finance Company Ltd (in liq)* [2011] NZCCLR 14

[32] Refer *In re Bernard L Madoff Investment Securities LLC* 779 F 3d 74 (2d Cir 2015). at [40] and [41] referring to Michael A Conley, US Securities Exchange Commission. Statement before the Capital Markets, Insurance and Government Sponsored Enterprises Subcommittee, United States House of Representatives (December 9, 2009).

Case,[33] the now infrequently applied 'first in first out' rule where those funds invested first were used and lost first.

(c) The rule in *Clayton's Case* arose from presumed intention of investors that a first in first out methodology would be applied, but which intention could be displaced. Here, it could be presumed that all Investors into the fraudulent Ponzi scheme intended to share in the losses. But in light of the 'hands off, invest on behalf of' approach taken by the Investors, there is nothing to suggest there was an intention that their investments would be indexed to CPI. They were taking the risk of the market fluctuations. In contrast to *Re Waipawa,* in RAM there was never any intent or contractual arrangement that interest would be paid (as would arise in a debt security issue). This is an important distinction.

(d) CPI adjustments reward or compensate investors who risk their funds over longer periods, as compared with those who invest and take risks with their money for a much shorter period.

71. There are few examples other than *Re Waipawa* where CPI or the constant dollar approach has been adopted. One recent US decision cited by the Liquidators at [7.19] of submissions, *SEC v Amerindo Investment Advisors Inc*[34] ("*Amerindo*"), found that CPI should be added to investor claims where the Court was considering an SEC appointed Receiver's application.

72. The Receiver's application in *Amerindo* involved the US Court's equitable jurisdiction (refer p 2, Part A, and discussed further below). This can be compared to the present case where the Court is considering the distribution of the pool of trust funds. It can be contrasted to *Madoff* and in the present case where the Court is considering the distribution of company assets, which is submitted to be statutorily constrained.

73. Two further distinctions between the situation in *Amerindo* and RAM can be made. First, the Receivers in *Amerindo* had already recovered and distributed all the investors' principal investments owing. The application in that case related to a distribution of some US$20 million recovered in excess of principal investments. Second, the investment products in *Amerindo* were "Guaranteed Fixed Rate Deposit Accounts". Investors accordingly had bargained for and had a legitimate expectation of interest when investing.

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[33] *Devaynes v Noble; Clayton's Case* (1816) 35 ER 781.
[34] *SEC v Amerindo Investment Advisors Inc* USDC SDNY, 14 July 2017

Here, neither of those factors are present and accordingly *Amerindo*, with respect, may not be particularly useful as an example.

74. There is a predictably mixed effect if CPI adjustments are made to Investor claims. Any benefit of adding CPI in terms of doing equity between the majority of Investors is submitted to be inconclusive. Under the NCM the Liquidators have found that 266 Investors would be better off (make a net gain) with a CPI adjustment, on average amounting to $3,699.23 whereas 373 Investors are worse off in an average amount of $2,638.06 (refer [33] and [34] of Mr Fisk's second affidavit). A similar mixed result arises if CPI is applied to the ADM, 188 Investors would be better off by, on average $3,317.50 whereas 250 would be worse off by $2,494.76 (at [37] and [38] of Mr Fisk's affidavit).

75. In the circumstances, particularly in light of the facts that Investors never bargained for interest or any equivalent CPI component in their investments with RAM and that there will be a substantial shortfall for Investors in the distribution (of approximately 80% of total investments), it is submitted CPI ought not be added to Investor claims in respect of company assets or trust funds.

Distribution models – trust funds

76. Here, all the Investors are victims of a substantial fraud and stand to lose the large majority of their investments. As noted by Barker J in *Re Registered Securities Ltd (in liq).*[35]

> *Each collapse of a contributory mortgage operator inevitably creates varying degrees of hardship for the trusting investors as well as difficult legal problems; the resolution to these problems frequently involves a certain arbitrariness of result.*

77. As discussed above, the task facing the Court is to find the most equitable, or the least unfair, result for the Investors when distributing the shortfall in funds.

78. The Liquidators seek that the distribution to all creditors and Investors is made applying the NCM. This is effectively pari passu distribution based on Investor balances at the time of liquidation that account for deposits, withdrawals and deducts any fictitious profits or adjustments made by RAM.

[35] *Re Registered Securities Ltd (in liq): National Australia Bank NZ Ltd v Tuck* (1990) 5 NZCLC 66,248, at p 66,250, cited at [72] of *Re International Investment Unit Trust* [2005] 1 NZLR 270.

The Liquidators' approach is the same regardless of whether there is a single fund or two funds.

79. The issue with that approach is that it does not take into account withdrawals made during the currency of the RAM Ponzi scheme, such that Investors who made no withdrawals suffer the entire loss of their investment, while others, who were fortunate enough to withdraw funds prior, lose a lesser proportionate amount of their original investment.

80. In contrast distributions using the ADM and the RT do take account of Investor pre-liquidation withdrawals to ascertain what proportion of their original investment has been recovered and what entitlement (if any) each Investor has to a further distribution.

81. A useful, albeit stark, example of the effect of excluding pre-liquidation withdrawals from assessment as part of a hypothetical distribution of $0.10 (helpfully provided by a member of RAM's Investor committee) is summarised below.

    (a) Investor 1 originally invested $100,000 and over the years prior to liquidation withdrew $90,000. On liquidation Investor 1 would have lost $10,000 from his or her original capital investment. In a post-liquidation net contribution distribution of 10 cents in the dollar, Investor 1 would be paid a further $1,000. This would result in a net loss of $9,000 or, an overall capital recovery of 91 cents in the dollar.

    (b) Investor 2 also originally invested $100,000 but over the years prior to liquidation made no withdrawals. On liquidation Investor 2 would have lost $100,000 from his or her original capital investment. Applying the net contributions distribution model, on 10 cents in the dollar distribution Investor 2 would receive $10,000, being a net loss of $90,000, $81,000 less than Investor 1.

82. As noted in the Liquidators' submissions, the conceptual divide is whether or not the Court should consider all funds paid out to beneficiaries of the RAM fraudulent trust over time as one pool (which pool of funds was always limited and insufficient to repay all Investors due to the fraudulent Ponzi scheme being operated), or whether a line should be drawn at the time of liquidation and all Investors' losses be assessed as at that date for the purposes of distribution.

RT - description

83. The RT distributes losses to compensate investors proportionately on a sliding scale subject to the funds available. The RT treats all funds paid out by or from a Ponzi operator as distributions, before and after liquidation. So, in effect there is a gross pool of funds. All payments from the pool are taken into account when distributing proceeds recovered.

84. By way of example, investors who suffer a 100% loss (those who deposited funds and withdrew nothing throughout the life of the Ponzi) may receive a distribution of funds equivalent to 10% of their loss. If there are funds remaining after that distribution, then investors who suffer a 90% loss (which will include those who have received the first distribution bringing their loss to 90%) will receive a distribution equivalent to say 5% of their loss, and so on.

85. Leading US academic on Ponzi schemes, Kathy Bazoian Phelps described the RT[36] as follows.

> *The general concept of the Rising Tide Method is that all investors should, in equity, receive an equal percentage distribution on their lost investments, considering both the prior payments from the Ponzi perpetrator and the distributions to be made from the estate. "Payments received by the claimant prior to the Ponzi Scheme's collapse are treated as 'distributions' on par with the distributions to be made by the Receiver, so that prior amounts paid by [the debtor] are credited against the amount that would otherwise be paid from the Receiver Estate.*

86. The US District Court described the RT in *S.E.C v Parish.*[37]

> *Under the Rising Tide method, however, prior payments to each investor are credited against investors' pro-rata distributions from the receivership. In effect, an individual investor's loss is deemed to be the gross amount actually invested in the scheme. Payments received by the investor prior to the scheme's collapse are treated as "distributions" on par with the distributions to be made by the Receiver, so that prior amounts paid by Parish are credited against (i.e., subtracted from) the amount that would otherwise be paid from the receivership estate. Under this method, investors who received prior payments are entitled to receive a smaller pro-rata payment from the receivership estate than those who received no prior payment. Moreover, investors who previously received payments exceeding their pro rata amount of the total distribution will receive no distribution from the receivership estate.* (at [19])

[36] Phelps, *Handling Claims in Ponzi Scheme Bankruptcy and Receivership Cases*, Golden Gate University Law Review, Vol 42, June 2012. Refer also Davis, *The Rising Tide in the Wake of a Ponzi Scheme*, ABI Journal, 89, July 2013 for another useful description and example of the rising tide method.

[37] *S.E.C. v. Parish*, No. 2:07–cv–00919–DCN, 2010 WL 5394736, at *3 (D.S.C. Feb. 10, 2010).

87. Mr Fisk sets out an example of how the RT would work in this case at [12] - [19] of his second affidavit.

ADM - description

88. The ADM, like the RT takes into account pre-liquidation payments to investors when calculating each investor's entitlement to a post-liquidation distribution.

89. It differs from the RT as post-liquidation distributions are not calculated by threshold stages involving a number of calculations. Rather, there is one calculation of the 'Maximum Distribution Rate' with pre-liquidation payments deducted from the fixed rate. However, in this case, as explained by Mr Fisk in his second affidavit, the end result, regardless which of the RT or ADM is applied, is the same (at [22]).

90. It is understood the name 'alternative model' arose in *Graham v Arena Capital*[38] from an investor's application for a different distribution method to that sought by the liquidators. Accordingly, at least by that name, the ADM is not the subject of any prior judicial comment or academic analysis. That can be contrasted with the RT which has been the subject of judicial and academic comment in the US over a number of years. Both models are however discussed in the recent discussion paper published by the Ministry of Business, Innovation and Employment, "*A new regime for unravelling Ponzi schemes*" dated May 2018 (discussed further below under a separate head).

Submissions on distribution model

91. All Investors into the RAM Ponzi scheme are victims of a fraud and significant breach of trust. They have all suffered that common and shared misfortune. When viewed from that standpoint, that all Investors should be treated equally in terms of the funds they recover from RAM overall (before and after liquidation) is easily justified. To do so would accord with the equitable maxim, equality is equity. To not take account of pre-liquidation withdrawals when assessing proportionate distribution - which withdrawals were more likely than not made using other Investors' funds[39] - gives

[38] *Graham v Arena Capital* [2017] NZHC 973 at [31] – [43]
[39] Refer *Fisk v McIntosh* [2015] NZHC 1403 at [2] where McKenzie J found: "*Investors' funds were not invested in the securities which were reported to them. They did not make the returns shown in their investor statements. Instead, Mr Ross was operating a Ponzi scheme under which investor funds were misappropriated and applied for other purposes. <u>Those purposes included using funds paid in for investment by new investors to repay existing investors who requested repayment of their investments</u>.*" (emphasis added)

withdrawing Investors a benefit to non-withdrawing Investors' detriment and risks giving the RAM Ponzi scheme an air of legitimacy.

92. Accordingly, to assess whether the RT or ADM should be applied in the Court's equitable discretion there is a need to address first the numerical differences between the NCM, RT and ADM as set out in Mr Fisk's affidavits dated 11 December 2017 and 18 May 2018. Second, relevant New Zealand authority including those applying to RAM is canvassed. Third, overseas commentary and case law examples are addressed.

Numerical differences between the NCM, RT and ADM

93. Mr Fisk sets out an updated analysis of the differences between the NCM and the ADM (adjusted for CPI) in the table at p 24 of his second affidavit. It is noted the comparisons are done on the basis that there is in effect one fund and that a single distribution model will be applied to the total funds available for distribution ($18.8 million as at that time).

94. However, as noted above, it is submitted it would be an appropriate outcome in this case for a different model to apply to each of the two sources of funds held by the Liquidators. For the company asset pool, the method directed under section 313 of the CA will result in the NCM when combined with the orders the Liquidators seek as to the fixing of Investor claims. The trust funds however should be distributed to reach the most equitable outcome.

95. As the Liquidators have calculated the numerical outcome between the RT and ADM produces the same result for Investors (refer [15] of Mr Fisk's second affidavit), the ADM has additional benefits including allowing the Liquidators a more straightforward calculation for individual Investor distributions and the ability to advise Investors of their entitlements in a simple manner. On that basis the ADM should be preferred. There does remain the issue, however, of attempting to rationalise the names given to these models so as to provide precedential guidance if they come to be considered in future cases (or in terms of legislative reform).

New Zealand law and principles of equity

96. The effect of the majority decisions in the Court of Appeal and the Supreme Court in *McIntosh v Fisk*[40] was that Investors who withdrew capital (as opposed to fictitious profits) before liquidation were entitled to assert that the original deposit was value/valuable consideration for the later withdrawal

[40] *McIntosh v Fisk* [2016] 2 NZLR 783 (CA) and *McIntosh v Fisk* [2017] 1 NZLR 863 (SC)

(applying the Supreme Court's prior decision in *Allied Concrete v Meltzer*[41]). It was however recognised by the majority in the Supreme Court that the case fell "*on the borderline of insolvency law and trust law*" (at [100]).

97. The relevance of this point is that if the *McIntosh v Fisk* decision was applied to its logical conclusion, the Court ought not take into account any prior payments to Investors when considering the distribution models (understanding that the Liquidators have settled or are in the process of settling clawback claims). However, the Supreme Court did not consider certain equitable maxims (understandably given the case was brought against the background of insolvency law) that could be applied (discussed below).

98. The minority decisions of Miller and Glazebrook JJ in *Fisk v McIntosh* in the Court of Appeal and Supreme Court respectively would have allowed the Liquidators' appeal for all the funds paid to Mr McIntosh to be clawed back. Those minority decisions can be seen as supporting the submission in favour of the ADM or RT; i.e. prior payments by RAM of capital to Investors should be taken into account for policy reasons when considering equitable distribution.

99. In Justice Miller's dissenting judgment in the Court of Appeal it was found Mr McIntosh did not give value for either the fictitious profit component (agreeing with the majority) or the capital he received from RAM prior to its liquidation. Miller J distinguished *Allied Concrete* on the basis Mr McIntosh was not a trade creditor (at [101] – [104]) and his capital contribution/investment did not provide value to RAM. In his Honour's view, Mr McIntosh's investment gave no value in the circumstances of RAM as a Ponzi scheme, where:

> "*... the introduction of new money creates no value but merely delays and worsens the inevitable ruin. As the Supreme Court of the United States put it in 1924 when speaking of the man who lent Ponzi schemes his name "[h]e was always insolvent, and daily become more so, the more his business succeeded.*" (at [107]) (footnote omitted)

100. Justice Miller cited US authority where the question of whether investors gave value to a Ponzi scheme was considered. It was found that the value given to the scheme was to allow it to defraud more people by using the investor's funds to perpetuate the fraud (refer [111]). Ultimately Justice Miller

[41] The majority decision of the Supreme Court in *McIntosh* found at [115] that Mr McIntosh met the two means to find value as required by s 296(3)(c), identified in *Allied Concrete* could be applied, either by way of antecedent transaction (whereby a giving of credit at an earlier point was value for a later payment), or through the discharge hypothesis (where the discharge of the debt owing at the time of the insolvent payment was value).

found that the distinction between Mr McIntosh and other Investors was that he was paid and they were not, which was insufficient grounds to found a defence to repay what was an insolvent transaction, which, in his Honour's view, should have been disgorged in full and then shared rateably.

101. Justice Glazebrook's dissenting judgment in the Supreme Court also distinguished *Allied v Melzer* on the basis that no value was given by Investors who never intended the money be provided to RAM for its own use (267] – [270]). Her Honour also noted the Supreme Court in *Allied v Meltzer* had favoured according primacy to individual creditors as opposed to the interests of creditors as a whole however, in her Honour's view the circumstances in RAM meant that policy rationale ought not apply.

> *The operation of a Ponzi scheme cannot, however, in any way be described as an ordinary commercial transaction. The only purpose of the scheme is to defraud investors. I accept that Mr McIntosh was an innocent investor who had no knowledge of the fraud. However, this was the same for all the investors. In policy terms an accident of timing as to when funds are withdrawn should not favour one defrauded investor over another. This is particularly the case as the very essence of a Ponzi scheme is that investment by new investors is used to pay out those investors who wish to withdraw their funds. As the liquidators submit, the very purpose of the payments made to Mr McIntosh was to defraud other investors.* (at [275])

102. If Justice Glazebrook's judgment was in the majority all funds paid to Mr McIntosh by RAM would have been ordered to be repaid for pro rata distribution amongst all Investors. It is submitted there are thus sound reasons for the Court to consider Investors 'in the round', and those who received funds from RAM during its existence should be considered, in effect, to have already received a distribution.

103. An example in New Zealand where pre-liquidation payments were taken into account can be found in *Re Trans Capital Ltd (in liq) (No. 4)*.[42] There the High Court in a directions application under section 284 of the CA regarding the distribution of trust funds held by liquidators, applied a very similar model to the ADM which in *Trans Capital* was termed 'the base claim' approach.

104. The base claim approach in *Trans Capital* involved two steps. First, the percentage of the principal sum originally invested by each investor or contributor was calculated against the sum that each would receive back in the distribution on a pro rata basis. Second, any sums received by investors/contributors from the defaulting trustee prior to liquidation would be

[42] *Re Trans Capital Ltd (in liq) (No. 4)* HC Wellington, M 84/99 22/5/2000 Wild J

deducted from the sum calculated in step one, with the resulting residue then paid (at [24]).

105. In *Trans Capital* equitable principles in support of the base claim approach were identified including that trustees may deduct sums overpaid to a beneficiary from future instalments and can adjust accounts by retaining overpayments from other interests of the beneficiary (at [20] and [21]). A passage from *Re Akerman*[43] was cited as follows:

> *The principle is to be found laid down in Cherry v Boultbee (1839) 4 My & Cr 442 in the passage to which I have just referred, and also in Courtenay v Williams (1884) 15 U Ch 204, and no doubt, if search were made, it would be found to have been laid down in many other cases. It is this. A person who owes an estate money, that is to say, who is bound to increase the general mass of the estate by a contribution of his own, cannot claim an aliquot share given to him out of that mass without first making the contribution which completes it. Nothing is in truth retained by the representative of the estate; nothing is in strict language set off; but the contributor is paid by holding in his own hand a part of the mass, which, if the mass were completed, he would receive back.*[44]

106. The competing distribution model in *Trans Capital* was referred to as the 'residual claim' approach. The residual claim approach appears to have been effectively the same as the Liquidators' preferred NCM approach. The 'residual claim' approach involved pre-liquidation payments being excluded from the calculation of the percentage entitlement to a distribution, with such payments rather being factored into each contributor's starting balance. Arguments in support of the residual claim approach included that investors/contributors would be entitled to the benefit of bona fide purchaser for value defences, similar to the gave value/valuable consideration defences available to Investors in the present case.

107. Justice Wild held:

> *[35] I consider that the base claim approach best achieves fairness and equity. For the purpose of calculating entitlements to distributions from the trust pool or fund, it requires that sums already received from the pool be taken into account.*

108. His Honour went on to say:

> *[37] I do not regard the result of the residual claim approach as according with equity. For instance, it is difficult to reconcile with the maxim that a party who seeks equity must do equity, or that a party who comes into equity must come with clean hands, or that equity is equity.*

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[43] *Re Akerman* [1891] 3 Ch 212
[44] Supra n 32 above at [23].

109. It is submitted this reasoning can be applied there. Ultimately, because of RAM's defalcations, the pool of funds available to repay Investors has always been less than what was originally invested. Accordingly, deductions from this finite pool should properly be taken into account to do equity between the Investors and thereby achieve a fair outcome.

110. In *Graham v Arena Capital Ltd (in liq)*[45] Justice Mander rejected an investor's application for application of what was termed the 'alternative model' which would have – like the base claim method in *Trans Capital* - taken into account pre-liquidation payments when calculating investors' entitlements to distributions of trust funds. The unrepresented investor's application was dismissed on the basis that to allow pre-liquidation payments to be taken into account would run roughshod over defences available under the CA and Property Law Acts, as established in *McIntosh v Fisk* (by the Court of Appeal at that time). However, the equitable principles as referred to by Justice Wild in *Trans Capital* were not considered.

111. The Liquidators refer in submissions to *Foskett v McKeown*[46] as authority for the proposition that innocent contributors to a trust fund, insufficient to meet all claims, must be treated equally between each other where there is no basis for beneficiary claims to be subordinated to any other beneficiary's claim (at 5.23]. It is submitted this principle can also lend support to the ADM.

112. The application of the principle that innocent contributors should be treated equally can be approached in a Ponzi scheme from the starting point that equality is assessed by reference to distributions made both before and after the Ponzi collapses. This is on the basis that there was always in effect one pool of funds which funds were insufficient to repay all investor beneficiaries. In contrast to RAM, all the claimant beneficiaries in *Foskett* (220 investors who had paid deposits to purchase land to be developed in the Algarve, Spain) were in the same position - with none having received distributions prior to the investment entity's collapse. In RAM some Investors are unpaid in full, some are part-paid and others have been repaid their whole capital investment.

113. As referred to by Justice Wild in *Trans Capital*, it is established that trustees can deduct overpayments from beneficiaries from future entitlements/distributions.[47] Here, if all beneficiaries were to be treated

[45] *Graham v Arena Capital Ltd (in liq)* [2017] NZHC 973 at p 10 and 11.
[46] *Foskett v McKeown* [2001] AC 102
[47] Refer for example Snells Equity, 33rd Edition at 30-047(e): *"A trustee who overpays one beneficiary can adjust accounts by retaining the overpayments out of other interest of the beneficiary, e.g. future*

equally, then those who have received proportionately more than others during the life of RAM can be seen as having been overpaid. To recognise this equitable principle the Court may order the ADM is applied to the trust pool of funds. This equity-based approach, which recognises trustees have the power to adjust beneficiary distributions, would not, on its face, offend against CA or Property Law Act gave value defences.

US approach

114. In the US, Courts have applied the RT in cases where Receivers have brought applications for approval of schemes of distribution of proceeds recovered from Ponzi or other fraudulent investment vehicles. While the US legal system is quite different to New Zealand, on considering a number of these decisions, it appears the principles in issue overlap with the present case to a considerable degree.

115. It is understood Receivers are appointed by the US Securities Exchange Commission (SEC) to take control of entities where the SEC has initiated a prosecution or investigation for breaches of US securities laws. US District Courts exercise a broad, equity-based discretion when considering Receivers' applications for distributions of recovered funds to investors.[48] Receivers are contrasted with bankruptcy administrators there, who are required to apply a prescriptive framework for distributions (the net loss rule) - understood to be in effect the NCM.[49] Thus the equity based consideration of US Receivers' applications for distribution directions has similarities to the present case, at least with regard to the distribution of the pool of trust funds.

116. In *SEC v Huber*[50] the US Seventh Circuit Appeals Court sanctioned the RT for a Receiver's final distribution of $1 million (out of $7 million recovered) to investors in a Ponzi scheme. It was noted:

> *Rising tide appears to be the method most commonly used (and judicially approved) for apportioning receivership assets. See, e.g., In re Receiver, No. 3:10-3141-MBS, 2011 WL 2601849, at *2, *4 (D.S.C. July 1, 2011); CFTC v. Lake Shore Asset Management Ltd., No. 07 C 3598, 2010 WL 960362, at *7-10 (N.D. Ill. March 15, 2010); CFTC v.*

income." *Livesey v Livesey* (1827) 3 Russ 287 and *Re Robinson* [1911] 1 Ch 502 at 508 are cited as authorities.

48 *SEC v A Alleca* 1:12-cv-3261-WSD (N.D. Ga. Nov. 16, 2017): *In equity receiverships resulting from SEC enforcement actions, district Courts have very broad powers and wide discretion to fashion remedies and determine to whom and how the assets of the Receivership Estate will be distributed." SEC v. Homeland Commc'ns Corp., No. 07-cv-80802, 2010 WL 2035326, at *2 (S.D. Fla. May 24, 2010); see SEC v. Elliot, 953 F.2d 1560, 1566 (11th Cir. 1992): "The district Court has broad powers and wide discretion to determine relief in an equity receivership. This discretion derives from the inherent powers of an equity Court to fashion relief."* (citations omitted)

49 For example, see *SEC v. Huber*, 702 F.3d 903 (7th Cir. 2012).

50 Ibid

*Equity Financial Group, LLC, No. Civ. 04-1512 RBK AMD, 2005 WL 2143975, at *24-25 (D.N.J. Sept. 2, 2005); United States v. Cabe, 311 F. Supp. 2d 501, 509-11 (D.S.C. 2003); CFTC v. Hoffberg, No. 93 C 3106, 1993 WL 441984, at *2-3 No. 12-1285 (N.D. Ill. Oct. 28, 1993)* (p 6 - 7). (References included by way of illustration).

117. The Appeals Court in *Huber* went on to note that the net loss method was sometimes used instead, subject to the circumstances of each individual case which should include an analysis of the overall financial effect on the investor group. If a large proportion of investors would receive nothing under the RT, it is likely the net loss approach would be preferred as a generally more equitable outcome (p 8 – 9). In *Huber* the RT was approved where 18% of investors would receive no distribution using the RT.

118. Against the RT, investors who had made pre-receivership withdrawals argued in *Huber* that they should not be penalised for withdrawing some of their money. However, the Court made an important distinction that applies to Ponzi schemes (as compared to other failed financial market participants) - the money was not their money - rather it derived from stolen funds (p 7).

119. In RAM there were some 860 Investors at the time of its collapse.[51] Under the NCM 639 Investors receive a distribution (allowing for CPI adjustment), whereas 434 receive a distribution under the RT. The distribution percentage between models goes from 14.04% to 22.33% between the NCM and RT respectively (if a single model is applied to all of the funds available for distribution).[52] Counsel calculates, taking the 639 investors as 100% of Investors entitled to a distribution (either they received more than their capital or otherwise), in the RT or ADM 32.08% of Investors miss out on a distribution if the RT was applied to all funds recovered by the Liquidators.

120. However, if the Court follows the CA section 313 distribution method for the company assets and the RT or ADM for the trust funds, all entitled Investors will receive a distribution, albeit those who made prior withdrawals will be paid marginally less with a larger share being paid to those who withdrew nothing during RAM's existence. At this point the figures for distribution to Investors based on the two-model approach is not known.

Order of distribution if two funds

[51] Refer [1.2] of Mr Fisk's first affidavit dated 11 December 2017.
[52] Refer table at p 23 of Mr Fisk's second affidavit dated 18 May 2018.

121. If the Court is minded to direct that there are two pools of funds, the NCM be applied to company assets and the ADM to trust funds, the question arises as to which pool of funds should be distributed first.

122. Conceptually it may be that company assets should be distributed first on the basis that Liquidator fees and expenses are likely to be deducted from that fund, which deduction occurs first in the order of distribution mandated in Schedule 7 and section 312 of the CA. After fees and expenses are deducted the NCM can be applied to Investor and unsecured creditor claims.

123. The sum of company assets distributed to each Investor can then be taken into account when calculating Investor entitlements to implement the ADM. Since the ADM accounts for all funds received by Investors, if the trust funds were distributed first the sum each Investor is entitled to / receives in the company asset distribution may not be taken into account.

124. The Liquidators have helpfully analysed the substantive effect on Investors as to the order of distribution between the NCM / company assets and ADM / trust funds. Their spreadsheet calculations using 10 simplified Investor examples and three different hypothetical pools of funds split between company assets and trust funds (being $20,000 company assets / $10,000 trust assets; $25,000 company assets / $5,000 trust assets and $15,000 company assets / $15,000 trust assets) is attached as schedule "**1**".

125. The Liquidators' explain their analysis as follows:

We explain the analysis below by reference to example Investor B and Investor F in the $25,000 company assets / $5,000 trust assets example. The analysis was run using the Alternative Model for the trust assets, but as previously explained, the Liquidators consider the results would be the same using the Rising Tide analysis.

Trust assets first

- *Where the distribution of the trust assets is calculated first, $5k is available for distribution in accordance with the alternative model, which results in a $1,600 (or 16%) Maximum Distribution.*
- *Investor B has already received $100 or 1% so is entitled to a distribution of $1,500.*
- *Investor G has already received $5,000, or 50%, so is not entitled to a distribution.*
- *After the distributions from the trust assets have been calculated, the net contributions balances (NCB) are adjusted to reflect any distribution received from the trust assets. This results in a slightly lower NCB for those investors who received a distribution from the trust assets. That is, Investor B's NCB reduces from $9,900 to $8,400.*

- *The company assets are then distributed equally at a rate of 45 cents in the $.*

- *Investor B receives a distribution from the company assets of $3,818.18, taking their total distribution to $5,318.18. Investor G receives a distribution of $2,272.73 from the company assets but no distribution from the trust assets.*

Company assets first

- *Where the distribution of the company assets is calculated first, all investors receive an initial distribution of 42 cents in the $ on their NCB. This distribution rate is lower than if the trust assets are distributed first (even though the same amount is being distributed) because where trust assets are distributed first the total value of claims (or NCBs) is $5K lower as the amounts already distributed from the trust assets are deducted.*

- *Investor B receives $4,125.00 at this stage and Investor G receives $2,083.33.*

- *When the distribution of the trust assets is subsequently calculated based on the Alternative Model, the distribution from the company assets is included in the withdrawals of capital figures.*

- *The maximum distribution is $5,486.11. Investor G will not receive any distribution from the trust assets. In contrast, Investor B will receive a further $1,261.11 taking their total distribution to $5,386.11.*

Accordingly, Investor G is $189.39 better off where the distribution from the trust assets is calculated first. Investor B would be $67.93 worse off.

126. There is again a mixed effect when the different scenarios are applied. Accordingly, it is submitted the order of distribution that best accords with principle should be followed, which in this case appears to require company assets to be distributed first followed by trust funds.

MBIE discussion paper

127. MBIE has recently released its discussion paper, "*A new regime for unravelling Ponzi schemes*" dated May 2018 seeking submissions on the Government's proposed legislative reform to specifically address how Ponzi schemes are wound up and administered. The present insolvency regime is seen as inapt for addressing the peculiar legal problems that Ponzi schemes give rise to, including how proceeds are distributed after wind-up. The present case is mentioned in the paper, and, in light of the somewhat complex issues it has given rise to, legislative reform appears an appropriate response.

128. The stated objectives are threefold (p 6 – 7). To:

(a) provide consistent outcomes for investors.

(b) share losses among investors as fairly as possible.

(c) minimise the cost to investors of unwinding that scheme.

129. The MBIE paper identifies the current position as reached in *McIntosh v Fisk* as "*inconsistent with public policy settings*" for the reason that investors who withdraw funds prior to a Ponzi scheme's windup get an advantage by an "accident of timing" as they are entitled to keep capital distributions on the basis that their original investment was value for the later withdrawal under the CA and Property Law Act.[53]

130. The discussion paper contains considerable comment relevant to the present case. For present purposes reference is made only to parts of the MBIE analysis of distribution of assets to investors (Part 5), which includes distribution models and the addition of inflation. As a starting point MBIE noted three considerations to be borne in mind, all of which are applicable here (at p 48):

(a) generally, there is a need to attempt to balance the needs of individuals against investors as a whole;

(b) simple solutions may result in unfair outcomes to some but are likely to be more cost effective than more nuanced options;

(c) investors' recovery comes from the same pool of funds so that a greater recovery for one will result in a lower recovery for another.

131. MBIE's paper identifies four main methods of distribution.

(a) The rule in Clayton's case (first in first out) is considered inappropriate for Ponzi schemes due to its disproportionate effect on investors (p 49).

(b) The NCM approach (the model sought by the Liquidators here) is traversed and noted to be "the conventional approach to distributing assets to investors in Ponzi schemes in New Zealand...". The complaint of some RAM Investors is also noted that the NCM approach allows investors who were able to make a withdrawal end up with a higher effective level of recovery where there are insufficient assets to meet all claims. The pros of the method are seen as it is straightforward and targets returns at those who lost their initial capital investments. Cons

[53] Refer p 16, which references Justice Glazebrook's dissenting judgment in *McIntosh v Fisk*.

are that it results in an uneven level of total recovery and does not take into account differing levels of loss investors have suffered (p 52 – 53).

(c) The ADM, (noted to have been put forward by some RAM Investors), is considered and described at [252]. The ADM:

> a. *calculates a provisional debt for each investor based only on their contributions to the Ponzi scheme, then*
>
> b. *applies a provisional distribution rate to those debts*
>
> *This allows a provisional gross entitlement to be calculated for each investor. This figure can then be compared to the total payments received by the investor from the Ponzi scheme:*
>
> a. *If the payments previously received by the investor are less than the provisional gross entitlement then the investor is entitled to the balance.*
>
> b. *If the payments previously received by the investor are more than the provisional gross entitlement then the investor is not entitled to any distribution.*

It is commented that there is no set rate of recovery in the alternative method and pre-liquidation withdrawals are effectively treated as voidable transactions, albeit they are not actually recovered. The equitable maxims as applied by Justice Wild in *Trans Capital (no. 4)* is not however referred to. In terms of pros, it is seen as straightforward to calculate the level of returns and targets investors who have suffered higher losses. The con identified is that it results in an uneven recovery across investors (p 54 – 56).

(d) The RT is also discussed. It is described as:

> 261. *Distributions are then made first to those investors with the greatest percentage of loss. When all of those initial creditors reach a plateau with other creditors then all creditors with that level of loss are eligible to receive distributions in proportion to their remaining debt. This process will continue until all investors have suffered the same losses (measured in percentage terms) at which point the remaining assets would be distributed in proportion to each creditors remaining debt until the assets available to be distributed are exhausted.*

A con of the RT demonstrated by MBIE's example at [263] is that the RT has the potential to concentrate recoveries in a small group of investors, leaving others receiving nothing. Pros are noted as again targeting investors who suffer the greatest losses and providing the most even distribution relative to other models (p 55- 56).

132. The addition of inflation to investor balances is also discussed albeit briefly in MBIE's paper (p 57 – 58).

133. MBIE state they have not formed a view as to which distribution model should be preferred for any legislative reform but reinforce that the five criteria they will measure any proposal against are certainty, predictability, principle, cost and fairness (p 58).

Dated at Wellington this 11th day of June 2018

P R W Chisnall / J D Haig
Amicus Curiae / Counsel assisting

Schedule "1"

On basis of $20k company assets, $10k trust assets

	Investor A	Investor B	Investor C	Investor D	Investor E	Investor F	Investor G	Investor H	Investor I	Investor J	
Contributions	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	
Withdrawals	-	(100.00)	(400.00)	(1,000.00)	(1,500.00)	(2,000.00)	(5,000.00)	(10,000.00)	(20,000.00)	(30,000.00)	
NCB	10,000.00	9,900.00	9,600.00	9,000.00	8,500.00	8,000.00	5,000.00	-	(10,000.00)	(20,000.00)	
NCB Claim	10,000.00	9,900.00	9,600.00	9,000.00	8,500.00	8,000.00	5,000.00	-	-	-	60,000.00
Assume trust assets first											
Alternative											
Reference debt	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	
Maximum Distribution Rate	25%	25%	25%	25%	25%	25%	25%	25%	25%	25%	25%
Maximum Distribution	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	25000
Pre-liquidation withdrawals of capital	-	(100.00)	(400.00)	(1,000.00)	(1,500.00)	(2,000.00)	(5,000.00)	(10,000.00)	(20,000.00)	(30,000.00)	
Distribution Alternative	**2,500.00**	**2,400.00**	**2,100.00**	**1,500.00**	**1,000.00**	**500.00**	**-**	**-**	**-**	**-**	**10,000.00**
NCB											
Old NCB Claim	10,000.00	9,900.00	9,600.00	9,000.00	8,500.00	8,000.00	5,000.00	-	-	-	
New NCB Claim	7,500.00	7,500.00	7,500.00	7,500.00	7,500.00	7,500.00	5,000.00	-	-	-	50,000.00
Distribution Rate	40%	40%	40%	40%	40%	40%	40%	40%	40%	40%	40%
Distribution NCB	**3,000.00**	**3,000.00**	**3,000.00**	**3,000.00**	**3,000.00**	**3,000.00**	**2,000.00**	**-**	**-**	**-**	**20,000.00**
Total distribution	**5,500.00**	**5,400.00**	**5,100.00**	**4,500.00**	**4,000.00**	**3,500.00**	**2,000.00**	**-**	**-**	**-**	**30,000.00**
Effective return	***55%***	***55%***	***55%***	***55%***	***55%***	***55%***	***70%***	***100%***	***200%***	***300%***	
Assume company assets first											
NCB											
NCB Claim	10,000.00	9,900.00	9,600.00	9,000.00	8,500.00	8,000.00	5,000.00	-	-	-	60,000.00
Distribution Rate	33%	33%	33%	33%	33%	33%	33%	33%	33%	33%	33%
Distribution NCB	**3,333.33**	**3,300.00**	**3,200.00**	**3,000.00**	**2,833.33**	**2,666.67**	**1,666.67**	**-**	**-**	**-**	**20,000.00**
Alternative											
Reference debt	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	
Maximum Distribution Rate	56%	56%	56%	56%	56%	56%	56%	56%	56%	56%	56%
Maximum Distribution	5,555.56	5,555.56	5,555.56	5,555.56	5,555.56	5,555.56	5,555.56	5,555.56	5,555.56	5,555.56	55,555.55
Withdrawals (including NCB distribution)	(3,333.33)	(3,400.00)	(3,600.00)	(4,000.00)	(4,333.33)	(4,666.67)	(6,666.67)	(10,000.00)	(20,000.00)	(30,000.00)	
Distribution Alternative	**2,222.22**	**2,155.56**	**1,955.56**	**1,555.56**	**1,222.22**	**888.89**	**-**	**-**	**-**	**-**	**10,000.00**
Total distribution	**5,555.56**	**5,455.56**	**5,155.56**	**4,555.56**	**4,055.56**	**3,555.56**	**1,666.67**	**-**	**-**	**-**	**30,000.00**
Effective return	***56%***	***56%***	***56%***	***56%***	***56%***	***56%***	***67%***	***100%***	***200%***	***300%***	
Trust assets first	5,500.00	5,400.00	5,100.00	4,500.00	4,000.00	3,500.00	2,000.00	-	-	-	
Company assets first	5,555.56	5,455.56	5,155.56	4,555.56	4,055.56	3,555.56	1,666.67	-	-	-	
Variance	(55.55)	(55.55)	(55.55)	(55.55)	(55.55)	(55.55)	333.33	-	-	-	

On basis of $25k company assets , $5k trust assets

	Investor A	Investor B	Investor C	Investor D	Investor E	Investor F	Investor G	Investor H	Investor I	Investor J	
Contributions	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	
Withdrawals	-	(100.00)	(400.00)	(1,000.00)	(1,500.00)	(2,000.00)	(5,000.00)	(10,000.00)	(20,000.00)	(30,000.00)	
NCB	10,000.00	9,900.00	9,600.00	9,000.00	8,500.00	8,000.00	5,000.00	-	(10,000.00)	(20,000.00)	
NCB Claim	10,000.00	9,900.00	9,600.00	9,000.00	8,500.00	8,000.00	5,000.00	-	-	-	60,000.00
Assume trust assets first											
Alternative											
Reference debt	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	
Maximum Distribution Rate	16%	16%	16%	16%	16%	16%	16%	16%	16%	16%	16%
Maximum Distribution	1,600.00	1,600.00	1,600.00	1,600.00	1,600.00	1,600.00	1,600.00	1,600.00	1,600.00	1,600.00	16000
Pre-liquidation withdrawals of capital	-	(100.00)	(400.00)	(1,000.00)	(1,500.00)	(2,000.00)	(5,000.00)	(10,000.00)	(20,000.00)	(30,000.00)	
Distribution Alternative	**1,600.00**	**1,500.00**	**1,200.00**	**600.00**	**100.00**	-	-	-	-	-	**5,000.00**
NCB											
Old NCB Claim	10,000.00	9,900.00	9,600.00	9,000.00	8,500.00	8,000.00	5,000.00	-	-	-	
New NCB Claim	8,400.00	8,400.00	8,400.00	8,400.00	8,400.00	8,000.00	5,000.00	-	-	-	55,000.00
Distribution Rate	45%	45%	45%	45%	45%	45%	45%	45%	45%	45%	45%
Distribution NCB	**3,818.18**	**3,818.18**	**3,818.18**	**3,818.18**	**3,818.18**	**3,636.36**	**2,272.73**	-	-	-	**25,000.00**
Total distribution	**5,418.18**	**5,318.18**	**5,018.18**	**4,418.18**	**3,918.18**	**3,636.36**	**2,272.73**	-	-	-	**30,000.00**
Effective return	***5,418.18***	***5,418.18***	***5,418.18***	***5,418.18***	***5,418.18***	***5,636.36***	***7,272.73***	***10,000.00***	***20,000.00***	***30,000.00***	
Assume company assets first											
NCB											
NCB Claim	10,000.00	9,900.00	9,600.00	9,000.00	8,500.00	8,000.00	5,000.00	-	-	-	60,000.00
Distribution Rate	42%	42%	42%	42%	42%	42%	42%	42%	42%	42%	42%
Distribution NCB	**4,166.67**	**4,125.00**	**4,000.00**	**3,750.00**	**3,541.67**	**3,333.33**	**2,083.33**	-	-	-	**25,000.00**
Alternative											
Reference debt	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	
Maximum Distribution Rate	55%	55%	55%	55%	55%	55%	55%	55%	55%	55%	55%
Maximum Distribution	5,486.11	5,486.11	5,486.11	5,486.11	5,486.11	5,486.11	5,486.11	5,486.11	5,486.11	5,486.11	54,861.11
Withdrawals (including NCB distribution)	(4,166.67)	(4,225.00)	(4,400.00)	(4,750.00)	(5,041.67)	(5,333.33)	(7,083.33)	(10,000.00)	(20,000.00)	(30,000.00)	
Distribution Alternative	**1,319.44**	**1,261.11**	**1,086.11**	**736.11**	**444.44**	**152.78**	-	-	-	-	**5,000.00**
Total distribution	**5,486.11**	**5,386.11**	**5,086.11**	**4,486.11**	**3,986.11**	**3,486.11**	**2,083.33**	-	-	-	**30,000.00**
Effective return	***5,486.11***	***5,486.11***	***5,486.11***	***5,486.11***	***5,486.11***	***5,486.11***	***7,083.33***	***10,000.00***	***20,000.00***	***30,000.00***	
Trust assets first	5,418.18	5,318.18	5,018.18	4,418.18	3,918.18	3,636.36	2,272.73	-	-	-	
Company assets first	5,486.11	5,386.11	5,086.11	4,486.11	3,986.11	3,486.11	2,083.33	-	-	-	
Variance	(67.93)	(67.93)	(67.93)	(67.93)	(67.93)	150.25	189.39	-	-	-	

On basis of $15k company assets, $15k trust assets

	Investor A	Investor B	Investor C	Investor D	Investor E	Investor F	Investor G	Investor H	Investor I	Investor J	
Contributions	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	
Withdrawals	-	(100.00)	(400.00)	(1,000.00)	(1,500.00)	(2,000.00)	(5,000.00)	(10,000.00)	(20,000.00)	(30,000.00)	
NCB	10,000.00	9,900.00	9,600.00	9,000.00	8,500.00	8,000.00	5,000.00	-	(10,000.00)	(20,000.00)	
NCB Claim	10,000.00	9,900.00	9,600.00	9,000.00	8,500.00	8,000.00	5,000.00	-	-	-	60,000.00

Assume trust assets first											
Alternative											
Reference debt	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	
Maximum Distribution Rate	33%	33%	33%	33%	33%	33%	33%	33%	33%	33%	33%
Maximum Distribution	3,333.33	3,333.33	3,333.33	3,333.33	3,333.33	3,333.33	3,333.33	3,333.33	3,333.33	3,333.33	33333.33
Pre-liquidation withdrawals of capital	-	(100.00)	(400.00)	(1,000.00)	(1,500.00)	(2,000.00)	(5,000.00)	(10,000.00)	(20,000.00)	(30,000.00)	
Distribution Alternative	**3,333.33**	**3,233.33**	**2,933.33**	**2,333.33**	**1,833.33**	**1,333.33**	-	-	-	-	**15,000.00**
NCB											
Old NCB Claim	10,000.00	9,900.00	9,600.00	9,000.00	8,500.00	8,000.00	5,000.00	-	-	-	
New NCB Claim	6,666.67	6,666.67	6,666.67	6,666.67	6,666.67	6,666.67	5,000.00	-	-	-	45,000.00
Distribution Rate	33%	33%	33%	33%	33%	33%	33%	33%	33%	33%	33%
Distribution NCB	**2,222.22**	**2,222.22**	**2,222.22**	**2,222.22**	**2,222.22**	**2,222.22**	**1,666.67**	-	-	-	**15,000.00**
Total distribution	**5,555.56**	**5,455.56**	**5,155.56**	**4,555.56**	**4,055.56**	**3,555.56**	**1,666.67**	-	-	-	**30,000.00**
Effective return	***56%***	***56%***	***56%***	***56%***	***56%***	***56%***	***67%***	***100%***	***200%***	***300%***	

Assume company assets first											
NCB											
NCB Claim	10,000.00	9,900.00	9,600.00	9,000.00	8,500.00	8,000.00	5,000.00	-	-	-	60,000.00
Distribution Rate	25%	25%	25%	25%	25%	25%	25%	25%	25%	25%	25%
Distribution NCB	**2,500.00**	**2,475.00**	**2,400.00**	**2,250.00**	**2,125.00**	**2,000.00**	**1,250.00**	-	-	-	**15,000.00**
Alternative											
Reference debt	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	
Maximum Distribution Rate	56%	56%	56%	56%	56%	56%	56%	56%	56%	56%	56%
Maximum Distribution	5,625.00	5,625.00	5,625.00	5,625.00	5,625.00	5,625.00	5,625.00	5,625.00	5,625.00	5,625.00	56,250.00
Withdrawals (including NCB distribution)	(2,500.00)	(2,575.00)	(2,800.00)	(3,250.00)	(3,625.00)	(4,000.00)	(6,250.00)	(10,000.00)	(20,000.00)	(30,000.00)	
Distribution Alternative	**3,125.00**	**3,050.00**	**2,825.00**	**2,375.00**	**2,000.00**	**1,625.00**	-	-	-	-	**15,000.00**
Total distribution	**5,625.00**	**5,525.00**	**5,225.00**	**4,625.00**	**4,125.00**	**3,625.00**	**1,250.00**	-	-	-	**30,000.00**
Effective return	***56%***	***56%***	***56%***	***56%***	***56%***	***56%***	***63%***	***100%***	***200%***	***300%***	

Trust assets first	5,555.56	5,455.56	5,155.56	4,555.56	4,055.56	3,555.56	1,666.67	-	-	-
Company assets first	5,625.00	5,525.00	5,225.00	4,625.00	4,125.00	3,625.00	1,250.00	-	-	-
Variance	(69.44)	(69.44)	(69.44)	(69.44)	(69.44)	(69.44)	416.67	-	-	-