IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV 2012-485-2591

UNDER — The Companies Act 1993 and the High Court Rules

IN THE MATTER OF — **ROSS ASSET MANAGEMENT LIMITED (IN LIQUIDATION) AND RELATED ENTITIES**

JOHN HOWARD ROSS FISK AND DAVID JOHN BRIDGMAN as Liquidators of Ross Asset Management Limited (in Liquidation), Dagger Nominees Limited (in Liquidation), Bevis Marks Corporation Limited (in Liquidation), United Asset Management Limited (in Liquidation), McIntosh Asset Management Limited (in Liquidation), Mercury Asset Management Limited (in Liquidation), Ross Investments Management Limited (in Liquidation) Ross Investments Management Limited (in Liquidation) and Ross Unit Trusts Management Limited (in Liquidation)

Applicants

SUBMISSIONS FOR EOIN DAVID FEHSENFELD

PRESENTED FOR FILING BY:
THOMAS DEWAR SZIRANYI LETTS
Solicitors,
Level 2 – Corner Queens Drive & Margaret Street, Lower Hutt
P O Box 31-240, DX RP42011
Tel: (04) 570-0442
Fax: (04) 569-4260
Email: gerarddewar@tdsl.co.nz
Solicitor dealing with proceeding:
D G DEWAR

MAY IT PLEASE THE COURT:

Introduction

1. Dr Fehsenfeld was the single largest investor in Ross Asset Management Limited ("RAM"). His introduction to the company and its principal David Ross, and the relationship that developed in which he was "cultivated" and systemically defrauded, is not untypical and began in the 1994.

2. By reason of the fact that he is the individual most affected in a consideration of differing distribution models, Dr Fehsenfeld has been given standing in this matter.

3. Dr Fehsenfeld is, in fact, the individual referred to "Investor A", as appearing at page 34 of Mr Fisk's affidavit of 11 December 2017. That records deposits by him of $7,800,004.74 and withdrawals of $2,185,040.76; a net difference of $5,614,963.98. These are CPI adjusted figures. (The difference between the figures as actually paid and withdrawn appears again in the schedule at page 21 of Mr Fisk's supplementary affidavit of 18 May.)

4. The Fraudster's modus operandi was one within which he selected and cultivated victims, inveigling himself into their confidence and often into their personal and family lives. Dr Fehsenfeld was one of these and was constantly implored to take advantage of "opportunities".

5. Material produced by the Liquidators shows Dr Fehsenfeld commencing his investments on 4 October 1994. The RAM records show five portfolio accounts. The schedule attached is a summary of payments to and withdrawals from RAM from the record provided by the Liquidators. (It is not CPI adjusted.)

6. The Court is asked to note that these figures are taken from the record the Liquidators have been able to extract. Dr Fehsenfeld (who is presently residing in Australia) has not been able to extract and analyse his own records against the many withdrawals and payments attributed to him in detail and some further enquiry will have to follow. However, for the purpose of this exercise it is clear that substantial deposits were made in the four years prior to liquidation against which there were no withdrawals.

Summary of Dr Fehsenfeld's submission as to the proposed Distribution

7. Dr Fehsenfeld's submission is that the "net contribution" model, as described by the Liquidator, is the only basis upon which distribution ought to be made whether under the Companies Act or in equity. This submission will develop points already made by the Liquidator; namely:

   - That such an approach is the only approach that reasonably complies with the Liquidator's duty in respect of company funds.
   - That the net contribution (or "pari passu" or "pro rata") distribution model is orthodox and consistent with expectations in all insolvencies, including those resulting from fraud and whether at "law" or in "equity".
   - That the alternative models are artificial, unwieldly and lead to uncertainty.
   - That comparison with United States insolvency cases may not be valid.
   - That in the facts of this case the proposed alternative models cause significant injustice.

8. As to the matter raised by Amicus as to "separate" funds, the analysis brought to the matter, while correct as far as it goes, is to

invite a distinction as to distribution of those funds on one of the two alternative distribution models, and if applied to Dr Fehsenfeld would deprive him of any portion of that fund, notwithstanding that he has almost certainly contributed towards it.

9. There is some doubt as to the actual quantum of withdrawals but, on the information presently available, it is undisputed that between October 2009[1] (the last withdrawal) and the date of liquidation, Dr Fehsenfeld provided cash to RAM of $2,729,763.60 against which there were no withdrawals.

10. There was said to be a withdrawal on 24 April 2008 across four portfolios totalling $1,052,074.21. (The total quantum of the withdrawal is in doubt.) The balance of the other withdrawals taken into account in the figure are spread between 1995 and 2003.

11. Thus, even on this cursory view, the effect of the alternative distribution model is glaring in that Dr Fehsenfeld will have made a recent contributions totalling $2,729,763.60 in cash into a fund from which, under either alterative model, he not only receives nothing himself, but effectively provides a benefit to others.

12. A further illustration of the effect of the proposed alternative models is shown when viewing the withdrawals themselves. His first withdrawal of $15,000.00 occurred on 20 October 1995. That transaction, more than seventeen years prior to the liquidation, counts against him in favour of those who may have joined the scheme much later, on the one hand, and, on the other hand, those who have been fortunate enough to have withdrawn capital retain it and contribute nothing.

---

[1] There are two withdrawals shown in October 2009; one of $15,393.75 in Portfolio 222 and the other of $212,818.38 in Portfolio 805. On the same day, however, there is a deposit in Portfolio 682 of $212,818.38. Thus, it appears almost certain that $212,818.38 was not withdrawn at all.

13. Finally, for the purposes of this overview, the significant injustice that would result from alternative distribution models is simply illustrated by the fact that a deduction from the existing contribution amount representing funds previously withdrawn ignores the almost certain fact that funds or capital withdrawn in the previous fifteen years has been reintroduced.

The Liquidators' and Amicus' submissions as to Distributions

14. It is not proposed to traverse the helpful and full submissions put forward by the Liquidators' Counsel and Counsel appointed to assist, as it relates to the analysis of those funds recovered by the Liquidators pursuing the Liquidators' clawback remedies.

15. Both submissions agree that these are company funds and that the orthodox application arising from Section 313 of the Companies Act results in an application of what is described as a net contribution or "pro-rata" distribution of those funds (approximately $19 million) to creditors, including Dr Fehsenfeld.

16. To the extent necessary, he adopts and agrees with those submissions and conclusions.[2]

17. Both Counsel recognise that there is a fund effectively held on trust for investors, as characterised differently to the funds that are properly seen as "assets of the company".[3]

18. For Dr Fehsenfeld it is submitted that on the facts of this case, pari passu or "net contributions" is also the only equitable method of achieving "***the least unfair result for the investors***" (as His

---

[2] Submissions for Liquidators, paras 5.13 and 5.20 and Amicus at paras 37 and 54.

[3] Para. 5.67 Liquidators' submission.

Honour Justice Williams held in *Re International Investment Unit Trust*[4]).

19. As to whether or not funds are to be "pooled" and whether or not distribution of trust funds should be on a basis other than pro rata or net contributions, the suggested approach is that the equitable response to the distribution question rather defines the answer. If equity requires a pro rata distribution, it matters not whether there is one fund or two.

20. There are five essential points to develop.

    (i) Firstly, in our jurisprudence Parliament has enacted law applicable to creditor payments in both the Insolvency Act and Companies Act which attempts to restore some equality between the creditors of insolvent persons or entities who have suffered loss. While equity may aid the common law, it ought not defeat it. Should equity respond to a situation in which the law entitles one creditor to retain all of the capital withdrawn during the insolvency period to the disadvantage of other creditors by enabling a liquidator "in equity" to remediate that by denying another creditor any portion of his or her capital? To do so defeats the spirit of the law developed by Parliament for these very situations.

    (ii) Secondly, with one possible exception, the cases that have considered the point in New Zealand have all consistently concluded that where tracing is not realistic, equity calls for the equal distribution of "mixed funds" such as here, with one possible exception. The cases have been referred to by both Counsel and are respectively *Re International*

[4] *Re International Investment Unit Trust (in Statutory Management)* [2005] 1 NZLR 270 at para. 73.

Investment Unit Trust (in Statutory Management) [2005] 1 NZLR 270; *National Australia Bank NZ Limited v Tuck* [1995] NZCLC 66, 248; *Re Waipawa Finance Company Limited (in Liq.)* [2011] NZCCLR 14.

(iii) Thirdly, it seems to Counsel that there is a flaw in the proposed distribution models themselves, which is touched upon in paragraph 13 above, in that the money of investors like Dr Fehsenfeld is effectively double counted.

(iv) A second flaw in the models proposed, touched upon in paragraph 9 above, is that fresh deposits made to the company in the four years prior to its liquidation are disqualified as to any applicable dividend by reason of withdrawals as much as seventeen years prior to liquidations. This cannot be "equitable".

(v) It ought not be assumed that American cases lend themselves to comparison with New Zealand law or practice.

(i) The comparative relevance of insolvency rules under the Insolvency Act and Companies Act applicable to Trust Funds

21. Both the Insolvency Act and Companies Act have provisions laid down by Parliament applicable to an equalisation of "loss" between the victims of insolvency, whereby an assignee or liquidator may require restoration of funds paid out during a period of insolvency to the company for the benefit of the general body of creditors.

22. It would be an anomaly then if an insolvent company's property is held by reason of a statutory trust, where the primary equitable remedy of tracing is not possible, that it is required to distribute on a different basis. The effect is graphically illustrated by the *McIntosh* case itself. Mr McIntosh has retained all of his capital by

reason of his good fortunate in having withdrawn it. The Supreme Court, by a majority, has ruled that Mr McIntosh, in effect, gave value to the company. (In fact that that value was nothing other than in reality the ability to perpetuate fraud by giving his money to someone else unlawfully has made no difference). Someone who deposited $500,000.00 on the same day as Mr McIntosh, but drew nothing, will receive back a small percentage of his or her capital, and Mr McIntosh has retained 100 percent.

23. Equity cannot cure that, but to impose a rule whereby capital remaining in the company is to be taxed against "partial" withdrawals is to defeat the legal principle. One party who withdrew his capital is not penalised. Another party who withdrew part of his capital is penalised to 100 percent of his dividend entitlement.

(ii) **The prior Legal Cases**

24. As referred in (ii), the possible exception, as referred to by Amicus, is *Re Trans Capital Limited (in Liq.) (No. 4)* HC Wellington M84/99 22/5/2000 Wilde J, which is dealt with below.

25. As Amicus has correctly pointed out, the Court in that case effectively applied an alternative model, having determined that the Liquidator was the trustee of trust monies and characterised claims as "base claims" or "residual claims". (Base claims being calculated on the basis of investments less withdrawals, in the same manner as is proposed in the alternative model.)

26. To understand the case, some regard must be had to the facts, which were essentially that the affected creditor (Pacific Marina) had paid $600,000.00 to Trans Capital, but had not done so as an investor, rather as a deposit against a loan Trans Capital was to grant to it of $2.4 million for the purpose of construction of a

marina in Lyttleton Harbour. The $600,000.00 had been deposited with a (now disgraced) lawyer acting for Trans Capital, who had misapplied much of them. Pacific Marina had received $341,000.00 as part of the overall advances to be made under the loan contracts.

27. In theory, a $600,000.00 deposit remained. For Pacific Marina, it was argued that its receipt of the $341,000.00 was in its capacity as a "bona fide purchaser for value without notice". Therefore, the advance of $341,000.00 could not be clawed back and the creditor was entitled to a dividend based on the $600,000.00 deposit.

28. To remedy this, His Honour adopted a "base claim" value and, although it is not entirely clear on Counsel's reading of the Judgment, it would appear that through this approach what is effectively the alternative distribution model was adopted because it appeared to go on to stipulate that the withdrawal was treated as a distribution. (It is not entirely clear to this Counsel, but His Honour expressly approved an example put forward by Counsel at paragraph 35 of the Judgment, which seems to have this effect. The Judgment contains an order attached as a schedule, which, with respect, does seem ambiguous.)

29. Accepting, however, for the purpose of argument, that this is an application of an alternative distribution model, the facts were significantly different and for Dr Fehsenfeld it is simply submitted that the approach adopted by the Court in *Arena* and *Waipawa* is to be preferred.

30. The case further categorised creditors as categories "A" (those advantaged if funds were not deemed to be trust funds), "B" (those advantaged if trusts were found) (with tracing to follow) and "C" (those advantaged by "pooling").

31. The citation is for the fourth decision. There was a third decision in which the above creditor categories were identified.

(iii) Both the ADM and Rising Tide models work an injustice on the facts and are "flawed"

32. To hypothesise: On the ADM as proposed, an investor who had deposited $2 million at the early stage of the scheme, withdrew $1 million (say, to buy a house) and then reintroduced the $1 million after selling the house, has "invested" $3 million, but has "withdrawn" $1 million; he or she receives no dividend.

33. There is very little, if any, commentary upon this. To the extent that ADM's have been considered in New Zealand, and Judges have directed their minds to the matter, the prospect of funds being withdrawn and then reinvested does not seem to have been considered.[5]

34. Having raised this with the Liquidators, I am indebted to the diligence of the Liquidators' Counsel who have pointed to what commentary there is in the US case, *SEC v Huber*, referred to by both Counsel for the Liquidators and Amicus. It contains the following passage:

> *"We are given pause, however, by the situation of an investor who having withdrawn some money from the Ponzi scheme then reinvests it. Suppose he had initially invested $150,000 and then, shortly after withdrawing $50,000 he reinvested it, thus restoring his balance to $150,000, all of which he lost when the scheme collapsed. Under the rising tide method he would be credited with having invested $200,000 ($150,000 plus $50,000) and having recouped a quarter of that amount by his withdrawal, and thus would receive a reduced share of recovered assets compared to a*

[5] Just as Mr Fisk has done in his affidavit, Mander J put a hypothesis to himself at para. 32 of the Judgment in *Arena Capital*.

> *person who had invested $150,000 and lost it without any interim withdrawals. We can't see why those two investors should be treated differently, as would be obvious if the withdrawals and reinvestment had occurred on successive days. In cases of withdrawal followed by reinvestment, the investor's maximum balance in the Ponzi scheme ($150,000 in our example) should be treated as his investment; the withdrawals, having in effect been rescinded, should be ignored."*

35. Under the alternative distribution model or Rising Tide model, as described, if the hypothetical situation proposed by Mander J is considered, were client 1 to have reinvested his $2,000.00, his total contributions would be $7,000.00, yet he would be counted as having already received a $2,000.00 dividend.

36. Thus, it is plain that the point, as described above, has not been considered and it is submitted that the simple proposition described is enough to illustrate that neither the rising tide or ADM will, in fact, do equity on the facts of this case.

(iv) **"Fresh" Deposits**

37. As set out in paragraph 9 above, Dr Fehsenfeld is said to have withdrawn approximately $1 million in 2008. There was a very small net withdrawal in 2009 of approximately $15,000.00, after which he has introduced nearly $3 million without deduction or withdrawal. Dr Fehsenfeld's funds have either been given to other creditors or possibly formed part of the "trust" fund. It is by no means clear.

38. Whatever the circumstances, these are fresh funds and could not be possibly be tainted by bona fide capital withdrawals made many years earlier. To do so is inequitable and is tantamount to saying that he is denied all remedy because of the extent of the

effectiveness of the fraudster's actions in defeating the Liquidators and Investigators, thereby advantaging others. This is simply wrong thinking and cannot accord with anyone's view of equity.

(v) **The validity of US Comparisons**

39. New Zealand has its own well developed insolvency jurisprudence. The argument for alternative models is based almost entirely on consideration being given to Ponzi schemes in the US. US insolvency law is not thought to mirror New Zealand's. The cases referred to; particularly *Waipawa* and *Arena*, illustrate predictable, reasonable and equitable responses and should be applied.

Dated this 15th day of June 2018

D G Dewar
Solicitor/Counsel for Eoin Fehsenfeld

DR FEHSENFELD – PAYMENTS BY YEAR

	Deposits $	Withdrawals $	Net $
1994	166,022.00	Nil	166,022.00
1995	35,453.00	32,020.14	169,454.86
1996	65,390.00	Nil	234,844.86
1997	Nil	Nil	
1998	Nil	120,000.00	114,844.86
1999	Nil	50,000.00	64,844.86
2000	Nil	Nil	
2001	Nil	100,000.00	-35,155.14
2002	Nil	250,000.00	-285,155.14
2003	174,155.35	22,000.00	-132,999.79
2004	Nil	Nil	
2005	830,392.33	Nil	697,392.54
2006	1,842,088.85	Nil	2,539,481.39
2007	1,024,086.79	Nil	3,563,568.18
2008	Nil	1,092,074.21	2,471,493.97
2009 *	212,818.38	228,212.13	2,456,100.22
2010	1,450,198.00	Nil	3,906,298.22
2011	198,264.29	Nil	4,104,562.51
2012	868,716.84	Nil	4,973,279.35
Totals	6,867,585.83	1,894,306.48	4,973,279.35