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

CIV 2012-485-2591

Under the Companies Act 1993 and the High Court Rules
In the matter of Ross Asset Management Limited (in liquidation) and related entities

Between

John Howard Ross Fisk and David John Bridgman, as liquidators of Ross Asset Management Limited (in liquidation), Dagger Nominees Limited (in liquidation), Bevis Marks Corporation Limited (in liquidation), United Asset Management Limited (in liquidation), McIntosh Asset Management Limited (in liquidation), Mercury Asset Management Limited (in liquidation) Ross Investments Management Limited (in liquidation) and Ross Unit Trusts Management Limited (in liquidation)

Applicants

and

Eoin David Fehsenfeld,

Respondent

Submissions for the Applicants

18 May 2018
For hearing on **22 June 2018**
Judicial Officer: Associate Judge Johnston

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May it please the Court:

1. Introduction

1.1 Ross Asset Management Limited (**RAM**) and its related companies were placed into liquidation on 17 December 2012. RAM was operating a Ponzi scheme.

1.2 At the time of its collapse, RAM purportedly held investments worth $449.6 million on behalf of over 860 investors (**Investors**). To date, only approximately $3.72 million of those investment assets have been located and realised.[1] Almost all investment assets purportedly held for Investors were a fiction.

1.3 The payments received by Investors as the purported "profits" on their investment were mostly funded by new deposits from other Investors or the sale of shares other than those supposedly held for that Investor in their portfolio.

1.4 The Liquidators have, to date, also received approximately $18.5 million in settlement payments from such Investors in relation to payments by RAM to them.[2]

1.5 The Liquidators currently hold total funds of approximately $18.8 million.[3]

1.6 RAM's liquidation is on-going. However, the Liquidators consider that they are now in a position to make an interim distribution of $17.5 million.[4] They seek directions to facilitate this.

1.7 Given that RAM's operations were a Ponzi, the distribution of its assets raises a number of complex and novel issues. The most significant

[1] Affidavit of John Howard Ross Fisk sworn 11 December 2017 (**First Fisk Affidavit**), para 1.3.

[2] Affidavit of John Howard Ross Fisk sworn 18 May 2018 (**Second Fisk Affidavit**), para 7(y).

[3] Second Fisk Affidavit, para 6.

[4] Second Fisk Affidavit, para 4.

issue in this Application is how to distribute the assets between the various groups of Creditors and Investors in RAM.

1.8 The Liquidators' analysis shows that 639 Investors paid RAM more than they received from RAM (after an adjustment for the Consumer Price Index (**CPI**)) (**Shortfall Investors**). Their claims total $124,709,390.34 (calculated on the basis, for each Shortfall Investor, of total amount paid to RAM, less total amount received by RAM, each amount being adjusted for CPI).[5]

2. Summary of issues and directions sought

2.1 The Court's overarching task in respect of this application is aptly summarised by Williams J in *Re International Investment Unit Trusts* [2005] 1 NZLR 270:[6]

> To meet, as far as it can now be met, their common misfortune, what is required is a search for the least unfair result for the investors, bearing in mind that regrettably, no method of distribution will result in perfect justice for all.

2.2 The issues in this application can be separated into three categories as follows:

Orders as to pooling and pools

2.3 The Liquidators seek directions that the assets of RAM and its related entity, Dagger Nominees Limited (in liquidation) (**Dagger**), be pooled and the liquidation of the two companies proceed as if they are one company.

(a) The Liquidators do not expect this direction to be contentious and it is supported by counsel assisting the court. The two companies were in effect run as one, and both were parties to the standard investment management agreement with all Investors.

[5] First Fisk Affidavit, para 5.4.

[6] *Re International Investment Unit Trusts* [2005] 1 NZLR 270 at [73].

(b) Dagger has no creditors of its own (save for Investors). Therefore, no party is prejudiced by this order.

2.4 The Liquidators seek a direction that there should be only one common pool of assets for distribution for both general unsecured creditors and Investors rather than two pools of assets (a trust pool and a general pool of assets) with Investors (only) having a claim on the trust pool and both general unsecured (non-Investor) creditors (**Creditors**) and Investors having a claim in the general pool. The Liquidators seek this direction on the basis that:

(a) Creditors total less than $70,000.[7] It would be uneconomic to seek to distinguish between them and Investors for the purpose of distribution.

(b) However, the one common pool direction could become the focus of greater attention if the Court considered it were constrained by the provisions of the Companies Act 1993 (the **CA**) in relation to its choice of distribution models (see below).

Orders as to the basis of distribution

2.5 The basis for the distribution of the assets now held by the Liquidators is the key issue.

2.6 The Liquidators have put forward two alternative distribution models (which are described in the First Fisk Affidavit and summarised in Part Four below):[8]

(a) The **Net Contributions Model** which is largely based on the usual approach to distributions to creditors; i.e. the amount owing to them as at the date of liquidation. The Liquidators also seek a direction that distributions only be made to Shortfall Investors.[9] To be clear, this would preclude distributions to Investors on the

[7] First Fisk Affidavit, para 1.5(b).

[8] See Fisk Affidavit, paras 9.13 – 9.37.

[9] See Application for Directions, order 1(c)(ii).

basis of a contingent claim against RAM quantified, for example, on the basis of a lost opportunity to earn investment returns.

(b) The **Alternative Model** which seeks to take into account pre-liquidation payments by RAM to Shortfall Investors to achieve what is, on one view of it, a fairer overall outcome amongst Shortfall Investors.

2.7 The two models present quite different outcomes for Investors.

2.8 Counsel assisting the court has proposed a further distribution model, the **Rising Tide Model** which also takes into account pre-liquidation payments by RAM in a manner similar to the Alternative Model. The Liquidators consider that the Rising Tide Model produces the same result as the Alternative Model for Investors.[10]

2.9 There is a preliminary legal issue as to whether the Court has the jurisdiction under the CA to order that company assets can be distributed in a manner other than the one based on the Net Contributions Model.

2.10 If this Court were to determine that it did not have the jurisdiction to order that company assets can be distributed pursuant to the Alternative Model or the Rising Tide Model (or otherwise), the one pool or two pools issue explained at paragraph 2.4 above becomes significant. This is because a further issue would then arise as to whether a two pool approach could enable the Court to distribute the company assets (i.e. the general pool) pursuant to the Net Contributions Model, but the trust assets (i.e. the trust pool) pursuant to a different model and if so, whether the Court should make such an order.

2.11 The Liquidators also seek directions:

(a) that Investor contributions and withdrawals be adjusted for CPI for the purpose of calculating distributions. Counsel assisting the

[10] Second Fisk Affidavit, paras 13, 15 and 22.

court has recommended that this issue be substantively argued at the hearing; and

(b) confirming the correct treatment of transfers or purported transfers of value between RAM portfolios for the purpose of distribution. This direction is not expected to be contentious and is supported by counsel assisting the court.

Ancillary orders

2.12 The Liquidators seek orders designed to progress and expedite the liquidation, including payment of the Liquidators' costs from the common pool of assets, an alternative procedure to the standard proof of debt process and a process for dealing with unclaimed distributions. These orders are not expected to be contentious.

2.13 The Liquidators consider that the directions sought are consistent with their principal duty to realise and distribute the assets held in the Ross Group liquidation in a reasonable and efficient manner.[11]

Roadmap of submissions

2.14 The body of these submissions deals with orders which may be contentious. The submissions as to the other orders are detailed in schedules to these submissions.

2.15 These submissions have the following parts:

(a) Relevant Factual Background.

(b) Overview of the three proposed distribution models.

(c) Whether the Court can order a distributions model other than the Net Contributions Model.

(d) The Most Appropriate Distributions Model.

(e) Adjustments for CPI.

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[11] Companies Act 1993, s 253.

(f) Conclusion.

(g) Schedule One: List of orders sought.

(h) Schedule Two: Pooling orders and one pool or two.

(i) Schedule Three: Common features of the distributions models.

(j) Schedule Four: Ancillary Orders.

3. Relevant factual background

3.1 The relevant factual background is detailed in the affidavits of John Howard Ross Fisk, sworn 11 December 2017 (the **First Fisk Affidavit**) and 18 May 2018 (the **Second Fisk Affidavit**).

3.2 Since the early 1990s RAM marketed itself as offering investment services to its clients. RAM's sole director was Mr David Ross. Mr Ross had sole responsibility for all (supposed) funds management, research and investment decisions made by him on behalf of clients or by RAM.[12]

3.3 Ross Group investors typically entered into an agreement with RAM and a related party, Dagger Nominees Limited (**Dagger**), when placing their investments with RAM (the **Management Agreement**).[13]

3.4 The Management Agreement provided that shares were to be legally owned by Dagger, beneficially owned by the respective investors and managed by RAM. Any cash in an investor's portfolio was to be held in a bank account in the name of that investor.[14]

3.5 Investors were led to believe that if they transferred money or shares to RAM, this was in turn transferred to Dagger who would hold those shares and cash on their behalf. Any cash withdrawals that the

[12] First Fisk Affidavit, para 3.1.

[13] First Fisk Affidavit, para 3.2.

[14] First Fisk Affidavit, para 3.3.

investors wished to make would be received from RAM following the sale of shares by Dagger.[15]

3.6 In exchange for providing these services RAM was entitled to receive various management fees and transaction fees. However, in reality, these fees were not paid.[16]

3.7 Investors were provided with quarterly reports for each of their portfolios which purported to record transactions within their portfolio. However, the reports were fictitious.[17]

How the Ross Group actually operated

3.8 In reality investor monies were not dealt with as investors had been led to believe. In particular:

(a) Cash or shares were transferred by investors to RAM or, occasionally, a broker used by RAM. Rather than being immediately transferred to Dagger and kept separately, on trust, for the respective investors, they became part of a diminishing pool of shares and cash owned by the Ross Group.[18]

(b) The pool of assets was used to pay the operating expenses of RAM, personal drawings by David Ross and payments to investors and share purchases.[19]

(c) In substance RAM operated one bank account in its own name through which such payments and deposits were made. This main bank account had significant fluctuations and was occasionally in overdraft.[20]

(d) If funds were obtained from investor deposits, these "new" investor funds were intermingled with other monies received by

[15] First Fisk Affidavit, para 3.4.

[16] First Fisk Affidavit, paras 3.5 – 3.6.

[17] First Fisk Affidavit, paras 3.7 and 3.12.

[18] First Fisk Affidavit, para 3.9.

[19] First Fisk Affidavit, para 3.9.

[20] First Fisk Affidavit, paras 3.10 and 6.6.

RAM, such as the proceeds of sale of shares or dividends. These intermingled funds were then used for trade creditor payments, wages, the purchase of shares and payments to investors.[21]

(e) If there were insufficient funds available then shares owned by any of the companies within the Ross Group were sold and the proceeds paid to RAM to enable RAM to meet payments. The shares actually sold to pay monies to investors did not usually match the shares which RAM reported it was selling in its quarterly reports to investors.[22]

3.9 The effect of the above arrangements was that RAM was running a Ponzi scheme which was dependent on new investors investing money to pay prior investors. In fact, investor deposits were mostly used to repay previous investors, rather than to purchase shares.[23]

3.10 Mr Ross admitted, through the Agreed Summary of Facts in the criminal proceedings brought by the Serious Fraud Office, that he had since at least June 2000:[24]

(a) deliberately or purposefully dealt with investor funds otherwise than in accordance with the agreed terms by using investor funds to repay other investors' investments and to fund the operations of RAM; and

(b) was running a Ponzi scheme.

3.11 The June 2000 date was the focus of the criminal charges as RAM changed its computer system at that date. It did not have computer records available prior to that time.[25] However, evidence suggests the

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21 First Fisk Affidavit, paras 3.9 and 3.11.

22 First Fisk Affidavit, paras 3.11 – 3.12.

23 First Fisk Affidavit, para 3.13.

24 First Fisk Affidavit, para 3.16 and exhibit pages 92 – 99 at [28] – [29].

25 First Fisk Affidavit, paras 4.3 – 4.4.

Ponzi was well entrenched by June 2000, and was likely in existence as early as the early 1990s.[26] In particular:[27]

(a) As at June 2000, approximately 60% of shares by value were recorded by RAM as being held by "Bevis Marks". Bevis Marks was a fictitious broker Mr Ross used to record fictitious shareholdings. Accordingly, as at June 2000, it is likely that at least 60% of the shareholdings (by value) RAM reported as holding for investors were fictitious.

(b) The Liquidators have "tracked back" in some cases when shares recorded as held by the fictitious broker as at June 2000 were reported by RAM as first purchased. The Liquidators have tracked back Bevis Marks shares as being reportedly acquired as early as 1997.

(c) RAM's hardcopy records show that the intermingling of investors' funds, which is a key aspect of the Ponzi, was occurring at least as early as 1996.

(d) Since the early 1990s, ANZ Nominee bank statements for investors are inconsistent with what the Liquidators would expect to see if cash held by RAM or Dagger on behalf of the investor was being held separately, as required by the terms of the Management Agreement.

3.12 Accordingly, the Liquidators believe that RAM had been running a Ponzi since the 1990s.[28] As explained below, the long running nature of the scheme has given rise to a number of novel legal and practical issues.

3.13 The scale of the Ponzi is unprecedented in New Zealand. At the time of RAM's receivership, it was purportedly holding 958 individual investment portfolios for over 860 individual investors. (There had been a total of 1,720 total portfolios purportedly held, but some of those

[26] First Fisk Affidavit, para 3.17.

[27] First Fisk Affidavit, paras 4.3 to 4.11.

[28] First Fisk Affidavit, para 4.11

had been “closed” prior to the receivership.)[29] The volume of transactions undertaken by RAM through its bank accounts in any given month were significant. The volume of share transactions reported by RAM in any given month were also significant, although many of these transactions may well have been fictitious.[30]

4. Overview of the three proposed distribution models

4.1 As outlined above, there are three proposed distribution models: the Net Contributions Model, the Alternative Model and the Rising Tide Model.

4.2 The key difference between these models is how pre-liquidation withdrawals by an Investor are treated.

4.3 Before considering the differences between these models, it is important to identify the three common key features.

(a) First, no model would involve the tracing of particular investor assets, due to the significant costs and practical difficulties associated with such an exercise.

(b) Second, only Shortfall Investors would be eligible for distribution payments. Investors who, at the time of RAM’s liquidation, had already been paid more by RAM than they had contributed (**Overpaid Investors**) would not receive any distribution.

(c) Third, claims would be calculated based on contributions (payments or transfers of shares) made by or on behalf of the Investor to RAM, less payments made by RAM to, or on behalf of, the Investor. That is, claims would not take into account any purported “profits” earned on an Investor’s RAM investment.

The reasons for these three common features is explained in detail in Schedule Three; the jurisdiction to order a distributions model based on the second and third of the common features is discussed below.

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29 First Fisk Affidavit, para 4.18.

30 First Fisk Affidavit, paras 4.19 to 4.20.

4.4 The issue of a CPI adjustment is addressed in Part 7 of these submissions. If a CPI adjustment is to be applied, it will be applied equally to any of the three models, as explained in the First Fisk Affidavit. For ease of explanation, the explanations below ignore any CPI Adjustment.

Jurisdiction to order the common key features

4.5 Investors may have claims for damages against RAM outside of one which simply seeks their net contributions balance. In particular, a damages claim for the lost opportunity to make an investment return. Such a damages claim is an admissible claim pursuant to section 303(1) of the CA.

4.6 However, the reality of RAM's liquidation is that:

(a) Shortfall Investors will only receive a fraction of their lost capital contributions. The current expected dividend (based on the CPI adjusted net contributions model) is 14 cents in the dollar.[31]

(b) There is a finite pool of money available for distribution to investors. Any return to Investors in respect of a damages claim for the loss of an opportunity to make an investment return will reduce the return available to investors on their lost capital contributions. The Liquidators consider that the fairest approach is that lost capital contributions be paid in priority to other contingent claims against RAM.

(c) To require the Liquidators to consider claims other than simply on a net contribution balance basis will be time consuming and complex. The Second Fisk Affidavit details some of these complexities at paragraphs 46 to 54. The Liquidators consider that it will result in a distributions process which is time consuming and fraught. It will add further complexity, increase investor confusion about their expectations in the distributions process, and in turn will increase the costs of the liquidation.

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[31] Second Fisk Affidavit, para 32(b).

(d) It will also have an immediate effect on the interim distribution proposed. The Liquidators are currently proposing to make an interim distribution from $17.5 million of funds. This distribution fund assumes total claims of $124,709,390.34 (net contribution of claims for Shortfall Investors adjusted for CPI).[32] Requiring the Liquidators to consider other potential claims means that there is an unknown value of claims which the Liquidators have not, and indeed currently cannot, quantify. Accordingly, in the absence of the order sought excluding such claims from the distribution model, the Liquidators would need to delay paying out an interim distribution until they had a better assessment of the likely value of such claims.[33] This would be in no-one's interests.

4.7 Section 284 of the CA provides the Court with a wide discretion to make orders necessary for a liquidation to proceed in a pragmatic manner and have granted orders which achieve a similar result.

4.8 In *Re Kiwi International Airlines Limited (in liquidation)*[34] the Liquidators sought orders relieving them of their duty to account to unsecured creditors, where the distribution would be less than one cent in the dollar at best, and there were unresolved issues which could cost all of the available funds to resolve.

4.9 The Court held:

(a) The duty under section 253 of the CA (to realise and distribute the assets in a reasonable and efficient manner) does not require the liquidators to take all usual steps regardless of the likely outcome. The duty is to take what steps are reasonable and efficient towards the end purpose of distribution.[35]

(b) The starting point must be that the unsecured creditors should be treated equally. However, common sense must also be applied

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[32] Second Fisk Affidavit, para 53.

[33] Second Fisk Affidavit, para 53.

[34] *Re Kiwi International Airlines Limited (in liquidation)* HC Auckland CIV-2005-404-7051, 26 July 2006.

[35] *Re Kiwi International Airlines Limited (in liquidation)* at [15].

in unusual cases, rather than slavish adherence to that starting point.[36]

(c) An insolvent liquidation invariably creates difficulty and hardship. Resolution frequently requires “a certain arbitrariness of result”.[37]

(d) Given the circumstances of that case; being a large group of creditors, claims far greater than the comparatively small realised surplus and unresolved practical difficulties facing any distribution, there were realistically only two options available – adopt the liquidators’ proposal or require all unsecured creditors to complete a process which had all the prospects of becoming an exercise in futility for most if not all of the creditors.[38]

Accordingly, the Court granted the order relieving the liquidators of their duty to account to unsecured creditors and ordering them to pay the remaining funds into the Crown Liquidation Surplus Account, on the basis that it was the “least unfair result for the creditors as a whole.”[39]

4.10 In *Re HIH Casualty and General Insurance (NZ) Limited*[40] the Court achieved a similar result by a different route. In *Re HIH* there were policy holders who could claim against either HIH (in liquidation) or QBE, a solvent insurer who had assumed liability for a number of policies. The Liquidators sought directions that:[41]

(a) the claims of such policyholders be deemed to not be a claim against HIH for the purpose of section 303 of the CA; or

(b) alternatively, that for the purpose of any distribution, that such a claim by those policyholders be valued at zero and that the liquidators were not required to make any provisions for those claims.

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36 At [23].

37 At [31].

38 At [32].

39 At [33].

40 *Re HIH Casualty and General Insurance (NZ) Limited* HC Auckland CIV-2003-404-2838, 17 December 2003.

41 *Re HIH* at [7].

4.11 The Court stated, that while it was not necessary to decide the point, its preliminary view was that the power under s 284 did not extend to declaring that a claim under a contract was not a "claim" for the purpose of s 303 of the CA. It considered that such an order was an alteration of contractual rights of a third party, not a direction to the liquidator.[42] However, the Court granted the direction that such claims would be valued at zero for the purpose of a distribution in the liquidation, noting that were sound commercial reasons for giving this direction.[43]

4.12 This direction was given in reliance on s 284 of the CA. An equivalent order could have been made under s 307(1)(b) of the CA which provides:

> If a claim is subject to a contingency, or is for damages, or, if for some other reason, the amount of the claim is not certain, the liquidator may –
>
> (b) refer the matter to the court for a decision on the amount of the claim.

4.13 Notably, the Court in *Re Kiwi International Airlines Limited* distinguished *Re HIH* on the basis that there were sufficient funds to meet all potential claims under the policies, due to QBE's assumption of those policies, meaning there were not the practical or economic difficulties facing the liquidators in *Re Kiwi International Airlines Limited.*[44]

4.14 Accordingly, the Court can make the orders that net contribution claims will be paid in priority to any other claims Investors may have against RAM or Dagger. It can make these orders by way of any of the following:

(a) Pursuant to the general power under section 284, to direct that either:

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[42] *Re HIH* at [17]. The Courts have repeated this concern about using section 284 to curtail contractual rights in *obiter* statements in *McGreal Floor Coverings Limited (in liquidation) v McGreal* [2014] NZHC 2884 and *Madsen-Ries v Greenhill* [2016] NZHC 3188.

[43] *Re HIH* at [17].

[44] *Re Kiwi International Airlines Limited* at [18].

(i) the Liquidators:

A. can value any claims lodged by an Investor on any basis other than a negative net contributions balance (as adjusted for CPI if so ordered) as having a value of zero; and

B. are not required to make any provisions for those claims; or

(ii) the Liquidators only be required to make a distribution in respect of any claim lodged by an Investor on any basis other than a negative net contributions balance (as adjusted for CPI if so ordered) when claims by Investors on the basis of a negative net contributions balance (as adjusted for CPI if so ordered) have been paid in full.

(b) Pursuant to section 307(1)(b), valuing these claims at zero.

4.15 This approach to such claims is consistent with the approach the Court has taken in similar Ponzi liquidations (although the distribution of assets in these instances were not governed by the CA). In particular:

(a) In *Arena*, the Court held "As between innocent beneficiaries a division of assets based on the contribution of each investor is to be viewed as the only "rationale mode of distribution" in order to achieve substantial justice between the parties."[45] The Court adopted the Net Contributions Model in that case.

(b) In *Re Waipawa*, the distribution was based on payments in and payments out, as adjusted for the constant dollar approach. In that case, the Court noted that given the fictitious nature of the purported "interest" on investments, if the liquidators used the funds to pay "interest" it would be tantamount to furthering the fraud.[46]

[45] *Graham & Jackson v Arena Capital Limited (in liquidation)* [2017] NZHC 973 at [17].

[46] *Re Waipawa Finance Company Limited (in liq)* [2011] NZCCLR 14 (HC) at [30].

(c) It is also consistent with overseas authority. In particular, it is consistent with the approach taken in the Madoff litigation. In that litigation, investors argued that the Trustee should not quantify claims based on the net contributions method, but rather the last statement method, based on the securities which were reported by Madoff to investors as held for them. However the US Court of Appeals found that if the Trustee did adopt an approach other than the net contribution method, "the whim of the defrauder would have controlled the process that is supposed to unwind the fraud".[47]

The Net Contributions Model

4.16 The Net Contributions Model is a more orthodox approach to distributions in a liquidation. If focuses on the amount owed by RAM to the Shortfall Investor as at the date of liquidation. It calculates the claim by taking into account all deposits and withdrawals made by the Investor and calculating a running account balance (also known as the **Net Contributions Balance**). This figure becomes the Reference Debt for that Investor. The calculation for that Investor would then become:

Reference Debt x Rate (being the amount available for distribution ÷ sum of all Reference Debts) = Distribution.

4.17 This model does not treat Investors differently, based on pre-liquidation withdrawals. The focus is purely on the amount of the Net Contributions Balance as at the date of RAM's liquidation.

4.18 The Net Contributions Model can be seen unfairly to prefer those Investors who received payments prior to the collapse of RAM. By failing to take into account pre-liquidation payments, those Investors who received such payments will ultimately receive a higher overall recovery of their investment than those who did not receive pre-liquidation payments. See example Investors W and Y at paras 9.16 to 9.18 in the First Fisk Affidavit.

[47] *In re Bernard L Madoff Investment Securities LLC* 654 F 3d 229 (2d Cir 2011) at 241.

4.19 The Alternative and Rising Tide Models seek to address that concern by taking into account payments received by an Investor from RAM when calculating the distribution to an Investor.

Alternative Model

4.20 The first step in the Alternative Model is to calculate a "provisional" Reference Debt for each Investor which is the total amount the Investor contributed to RAM. Any withdrawals are not considered at this stage.

4.21 A provisional distribution rate is applied to the Reference Debts.

4.22 This allows a provisional gross entitlement to be calculated for each Investor. This provisional gross entitlement figure for each Investor is then compared to the total of all payments made by RAM to that Investor:

(a) If the payments are less than the provisional gross entitlement then the balance becomes the Investor's distribution entitlement.

(b) If the payments are greater than the provisional gross entitlement then the Investor is not entitled to any distribution.

4.23 There is an obvious relationship between the distribution rate, the amount of the distribution and whether or not an Investor is entitled to a distribution. So iterations of the model are run with different rates of distribution until the position is achieved that the amount available for distribution is distributed.

4.24 Ultimately distribution under this model is more focussed on achieving an overall rate of recovery of an Investors' RAM investment as a whole. There is no uniform rate (% or cents on the dollar) applied to the Net Contributions Balance. Investors who have not withdrawn any funds would be entitled to a distribution in the liquidation at the full provisional distribution rate. Those who had withdrawn some funds but less than their provisional gross entitlement under this Model would receive a lower effective distribution rate in the liquidation (as their pre-liquidation payments from RAM are taken into account). See example Investors W and Z at paras 9.26 to 9.27 in the First Fisk Affidavit.

Rising Tide Model

4.25 The Rising Tide Model is similar to the Alternative Model.

4.26 The starting point is to establish the percentage of loss suffered by each Investor. The Investors with the largest percentage of losses are paid first, with a view to the distribution bringing Investors up to a reduced but more equalised percentage of loss across RAM Investors as a group. This approach is carried out incrementally, with the highest percentage of loss reducing (or the "tide" rising) with each increment. Once all Investors are at the same loss tier, the assets will be distributed rateably across all Investors.

4.27 Consider the example in paragraphs 17 to 19 of the Second Fisk Affidavit.

(a) Four Investors suffer losses of their capital contributions of 80%, 60%, 100% and 96%.

(b) The first increment distributes enough funds to bring all Investors to 96% loss, meaning only the third Investor receives an allocation of funds in that increment. Following that interim allocation, the losses suffered by the Investors are 80%, 60%, 96% and 96% respectively.

(c) The second increment allocates enough funds to bring all Investors to the next threshold of loss, 80%, meaning only the third and fourth Investors receive an allocation of funds in that increment. Following the second interim allocation of funds, the losses suffered by the Investors are 80%, 60%, 80% and 80%.

(d) This incremental approach is repeated until either:

(i) all Investors reach the same loss threshold, at which point the remaining funds are distributed rateably; or

(ii) the funds have been entirely distributed.

4.28 While this approach adopts the net contributions balance as its starting point (in order to calculate the percentage of loss), it is strikingly similar to the Alternative Model. Like the Alternative Model, it focuses on achieving a (on one view) more equal overall recovery rate amongst Investors. In particular, whether an Investor receives a distribution and if so, the level of that distribution, takes into account the level of their pre-liquidation withdrawals.

4.29 The Liquidators have carried out an analysis of both the Rising Tide Model and the Alternative Model and confirm that they appear to produce the same result for Investors. This is explained at paragraphs 17 to 22 in the Second Fisk Affidavit.

4.30 The Liquidators' confirmation accords with a consideration of the Rising Tide model from a theoretical perspective. The Rising Tide model was described by the US Seventh Circuit Appellate Court in *SEC v Huber* as follows:[48]

> Under the rising tide model, withdrawals are considered part of the distribution received by an investor and so are subtracted from the amount of receivership assets to which he would be entitled had there been no withdrawals. (When there are no withdrawals, rising tide yields the same distribution of receivership assets as net loss).

4.31 This description could equally be applied to describe the Alternative Model. The Alternative Model adopts a different starting point and route to the Rising Tide Model. But they are both premised on the same principles and will ultimately achieve the same result.

4.32 The Liquidators prefer the Alternative Model over the Rising Tide Model for two reasons:[49]

(a) The Alternative Model can be more easily explained to Investors and Investors can check the Liquidators' calculations. In contrast, under the Rising Tide Model it will be exceptionally difficult to explain to an Investor the specific calculation for their distribution. The Liquidators expect that the lack of transparency under the

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[48] *Securities and Exchange Commission v Huber* 702 F 3d 903 (7th Cir 2012) at 905.

[49] Second Fisk Affidavit, paras 24 – 27.

Rising Tide Model may be a source of frustration and confusion for some Investors.

(b) The costs of conducting the Rising Tide model analysis will invariably be higher than that for the Alternative Model. This is simply because there are more calculations as part of this model, which would need to be checked before any distributions were paid.

5. Can the Court order a distributions model other than the Net Contributions Model?

5.1 The first legal issue is whether the Court has jurisdiction to order a distributions model other than the Net Contributions Model (being the orthodox approach).

5.2 "Claim" for the purpose of part 16 of the CA is defined through sections 303 and 306, as follows:

(a) Section 303(1) of the CA provides that:

> …a debt or liability, present or future, certain or contingent, whether it is an ascertained debt or a liability for damages, may be admitted as a claim against a company in liquidation.

(b) Section 306(1) of the CA provides:

> The amount of the claim must be ascertained as at the date and time of commencement of the liquidation.

5.3 Section 307 of the CA further provides:

> (1) If a claim is subject to a contingency, or is for damages, or, if for some other reason, the amount of the claim is not certain, the liquidators may:
>
> (a) make an estimate of the amount of the claim; or
>
> (b) refer the matter to the court for a decision on the amount of the claim.

(2) On the application of the liquidator, or of a claimant who is aggrieved by an estimate made by the liquidator, the court shall determine the amount of the claim as it sees fit.

5.4 Crucially, section 313 of the CA provides (emphasis added):

(1) After paying preferential claims in accordance with section 312, the liquidator **must** apply the assets of the company in satisfaction of **all other claims**.

(2) The claims referred to in subsection (1) rank equally amongst 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**.

5.5 These provisions are mandatory. The liquidator does not have a discretion to pay claims out of the company assets in the manner he/she considers is just and equitable. Following payment of preferential claims, the assets of the company **must** be applied:

(a) in satisfaction of **all other claims**; and

(b) where the assets of the company are insufficient to pay all claims in full (as is clearly the case here), payment shall abate rateably among all claims.

5.6 This gives rise to four issues:

(a) First, does section 313 of the CA mean the assets of the company cannot be applied as proposed by the Alternative Model or the Rising Tide Model?

(b) Second, if so, do these provisions apply to assets held by the company on trust for Investors?

(c) Third, if those provisions do not apply to assets held on trust, what assets are the company's assets, as opposed to assets held on trust for Investors?

(d) Finally, how should the assets held on trust be applied?

Alternative Model and Rising Tide Model are inconsistent with section 313 of the CA

5.7 There are two characteristics of the Alternative Model and the Rising Tide Model which are inconsistent with section 313.

(a) First, these models do not purport to apply the assets of the company in satisfaction of all claims. No payments will be made in respect of a number of claims.

(b) Second, claims will not be paid rateably. The nature of these models is that the rate of recovery on a claim will differ between Investors.

5.8 The definitions of "rateably" and "claim" for the purposes of the CA are fundamental to these points.

5.9 "Rateably" is not defined in the CA. However, the Court has generally interpreted it to be synonymous with the *pari passu* principle.

(a) In *Stotter v Equiticorp* the Court held:[50]

> First, the way in which an insolvent's estate is to be distributed among the general body of unsecured creditors begins with the fundamental principle that claims rank equally among themselves and abate rateably in the event of a deficiency: see s 313(1) of the Companies Act 1993 (the pari passu principle). All creditors suffer in an insolvent liquidation. The presumption is that the burden should be spread rateably between them.

(b) This is consistent with the way in which that term has been applied by other jurisdictions. For example, see *Foskett v McKeown*.[51]

(c) The commentary in both *Heath and Whale on Insolvency* and *The Law of Insolvency in New Zealand* also identify section 313 as a statutory codification of the pari passu principle.[52]

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[50] *Stotter v Equiticorp Australia Ltd (in liquidation)* [2002] 2 NZLR 686 (HC) at [36].

[51] *Foskett v McKeown* [2001] 1 AC 102 (HL) at 132.

5.10 The very nature of the Alternative Model and the Rising Tide Model is that:

(a) Investors will not receive the same rate of return on their net contributions balance; and

(b) some Investors will not receive any return on their net contributions balance.

5.11 Consider for example Investors A to E in the Second Fisk Affidavit (all figures below are adjusted for CPI).

(a) Under the Net Contributions Model, all Investors will receive 14.04 cents in the $ on their net contributions balance. That is:

(i) payments will be made to satisfy (in part) **all** claims; and

(ii) all claims will rank equally and all Investors will share rateably in the fund.

(b) In contrast, under the Alternative Model:

(i) Investors A and B will not receive any payment towards their claims in the liquidation; and

(ii) while Investors C, D and E will receive a distribution in the liquidation, their rates of recovery on their net contributions balances vary, as follows:

- Investor C will receive a distribution of $51,351.05 against a net contribution balance of $318,419.44, being a recovery rate of 16.13 cents in the $.

- Investor D will receive a distribution of $140,058.62 against a net contribution balance of $627,085.40, being a recovery rate of 22.33 cents in the $.

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[52] Paul Heath and Michael Whale *Heath and Whale on Insolvency* (online looseleaf ed, LexisNexis) at [20.37]; Lynne Taylor and Gran Slevin *The Law of Insolvency in New Zealand* (Thomson Reuters, Wellington, 2016) at [29.1].

- Investor E will receive a distribution of $515,988.43 against a net contribution balance of $2,417,120.27, being a recovery rate of 21.35 cents in the $.

5.12 Accordingly:

(a) the available funds would be applied in (partial) satisfaction of some claims only; and

(b) Investors do not share rateably in the funds.

5.13 Of course, the purpose of the Alternative Model and Rising Tide Model is to achieve greater fairness between Investors who received pre-liquidation withdrawals and those who did not. Accordingly, it might be argued that the approach of those models is not inconsistent with the overarching principles of *pari passu*. In particular, the Alternative Model and the Rising Tide Model would see all Investors obtain, at least, a recovery of 22.34 cents in the $ on their capital contributions to RAM, based on the cumulative effect of their pre-liquidation withdrawals and their distribution in RAM's liquidation. Accordingly, if the Court were to take the total capital contributions as the "Claim" in the liquidation, the gains and losses in the RAM scheme are borne by Investors rateably.

5.14 However, this approach is inconsistent with:

(a) the wording of section 313 of the CA;

(b) the overall scheme of Part 16 of the CA, which deals with pre-liquidation payments through the voidable transaction provisions;[53] and

(c) the definition of "claim" for the purpose of the CA.

5.15 As set out above, "claim" is defined in sections 303 and 306 of the CA. Those definitions were discussed in *Stotter v Equiticorp*, where the Court held that:[54]

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[53] See *Graham & Jackson v Arena Capital Limited (in liquidation)* [2017] NZHC 973 at [38].

> … a creditor's proof is limited to that sum for which the liquidation debtor would have been liable, assessed as at the date of the liquidation. That proposition is given statutory force in s 306(1) of the Companies Act which provides that "The amount of a claim must be ascertained as at the date and time of the commencement of the liquidation."
>
> … [T]he sum for which a creditor proves cannot exceed that sum for which the creditor could have obtained judgment as at the date of the liquidation.

5.16 Consider, for example, Investor A in the Second Fisk Affidavit. He invested $7,800,004.74 in RAM. He withdrew $2,185,040.76. Accordingly, his net contribution as at the date of the liquidation was $5,614,963.98 (all figures adjusted for CPI). His "claim" has to be ascertained as at the date and time of commencement of the liquidation. Accordingly, this must be $5,614,963.98. It cannot be the Reference Debt under the Rising Tide and Alternative Models of $7,800,004.74, as this fails to take into account the payments RAM made to him prior to its liquidation.

5.17 In summary, the terminology in section 313 of the CA is mandatory – the Liquidator must apply the assets of the company (post payment of preferential creditors) in a way which:

(a) is in satisfaction of **all claims**; and

(b) where the assets of the company are insufficient to pay all claims in full (as is clearly the case here), payment shall abate rateably among all claims (i.e. *pari passu*).

5.18 The Alternative and Rising Tide Models do not apply the assets of the company in this way.

5.19 The Liquidator has no discretion in this. Similarly, there is no obvious provision in the CA which allows the Court to permit the Liquidator to deviate from the mandatory provisions in section 313.

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[54] *Stotter v Equiticorp Australia Ltd (in Liquidation)* [2002] 2 NZLR 686 (HC) at [38] and [40].

5.20 Accordingly, section 313 of the CA means that the assets of the company cannot be distributed in accordance with the Alternative Model and Rising Tide Model.

Does section 313 apply to assets held by the company on trust?

5.21 Where funds or assets are held on trust for Investors, they are not "assets of the company" and are not available in the liquidation of the company.[55] Accordingly, section 313 does not apply to the distribution of assets held on trust for Investors.

5.22 The correct approach to distribution of assets in equity is to adopt the rules which will achieve equity as between the beneficiaries, depending on the context.[56]

5.23 However, the starting point is, generally, for equity between beneficiaries. As Lord Millett held in *Foskett v McKeown:*[57]

> Innocent contributors, however, must be treated equally inter se. Where the beneficiary's claim is in competition with the claims of other innocent contributors, there is no basis upon which any of the claims can be subordinated to any of the others. Where the fund is deficient, the beneficiary is not entitled to enforce a lien for his contribution; all must share rateably in the fund.

5.24 Accordingly, the Court should adopt the same approach to distribution of trust funds as is required to company assets, and distribute the funds rateably amongst all beneficiaries.

5.25 The equity as it applied to this case is discussed further in Part Six below.

Assets of the company vs assets held on trust for Investors

5.26 Given the submissions above that section 313:

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55 *Re Ararimu Holdings Limited* [1989] 3 NZLR 487 (HC) at 504 and *Graham & Jackson v Arena Capital Limited (in liquidation)* [2017] NZHC 973 at [44].

56 See *Eaton v LDC Finance Limited (in rec)* [2012] NZHC 1105 at [59] to [61] and *Graham & Jackson v Arena Capital Limited (in liquidation)* [2017] NZHC 973 at [17].

57 [2001] 1 AC 102 (HL) at 132.

(a) requires that the assets of the company be distributed in accordance with the Net Contributions Model; but

(b) does not provide for a mandatory distribution model for assets held by the company on trust;

it is necessary to consider what assets are held by the Liquidators and which are company assets as against assets held on trust.

5.27 The Second Fisk Affidavit details the assets held by the Ross Group at paragraphs 7 to 9. Some are clearly company assets, some are clearly assets held on trust and some fall into an uncertain category.

5.28 It is well established that where a trustee wrongfully uses trust money to provide part of the cost of acquiring an asset, the beneficiary is entitled, at his option, to claim a proportionate share of the asset or to enforce a lien upon it to secure his personal claim for the amount of the misapplied funds. It does not matter whether the trustee mixed the trust money with his own in a single fund before using it to acquire the asset.[58]

5.29 As explained in the First Fisk Affidavit, investor funds were intermingled in RAM's bank accounts, in a manner which means a particular investors funds were no longer individually identifiable. While those funds cannot be traced to any particular investor, they can be traced to the investor group more generally. Accordingly, where assets were purchased with funds from the intermingled trust funds, the investors will have an equitable proprietary right to those assets, in a share proportionate to the proportion paid for by the intermingled investors' funds.

5.30 Investors will have paid monies into RAM's bank accounts at different times. This gives rise to two issues:

(a) First, it would be impossible to try to ascertain a particular Investor's proportionate share in a particular shareholding

58 *Foskett v McKeown* [2001] 1 AC 102 (HL) at 124.

purchased from the intermingled Investors' funds at any given time.

(b) Second, it is possible that an Investor deposited funds into the intermingled pool of funds after a particular shareholding was purchased from those funds.

5.31 However, this does not preclude the Investors having an equitable proprietary right to the shares held by RAM or Dagger, purchased with the intermingled trust assets. As the Courts have previously acknowledged, the availability of equitable remedies ought to depend upon the substance of the transaction in question and not upon the strict order in which associated events happened. Accordingly, the Court can take a pragmatic approach to the Investors' equitable proprietary interest in the assets held by RAM and Dagger.[59]

5.32 Based on the principles above, the funds held by the Liquidators can be allocated as follows:[60]

Assets held on trust for Investors

(a) *Net share realisations of $3,023,480.23*

The shares held by RAM and Dagger and the Arria shares held by the DRG Ross Family Trust as at the liquidation were very likely purchased from the intermingled pool of investor funds. Accordingly, the Court should find the Investors would have an equitable proprietary interest in those sale proceeds; i.e. they are held on trust for Investors.

(b) *Dividends on shares of $115,962.56*

As above, the relevant shares were very likely purchased from the intermingled pool of investor funds. Accordingly, the Court should find that the Investors have an equitable proprietary

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[59] See *Priest v Ross Asset Management Limited (in liquidation)* [2016] NZHC 1803, (2016) 4 NZTR 26-016 at [168]

[60] Second Fisk Affidavit, para 7.

interest in the dividends earned on those shares; i.e. they are held on trust for Investors.

(c) *Cash at Bank $61,811.65*

As detailed at paragraphs 3.9 – 3.11 of the First Fisk Affidavit, the funds held by RAM and Dagger in their bank accounts were generally either:

(i) the result of intermingled investor deposits, which were supposed to be held on trust for Investors; or

(ii) the proceeds of the sale of shares, where the shares were either supposed to be held on trust for an Investor or alternatively, were purchased with funds from the intermingled pool of assets.

Accordingly, the Court should find that the Investors have an equitable proprietary interest in the funds held by RAM and Dagger in their bank accounts; i.e. they are held on trust for Investors.

(d) *Net sale proceeds and rental from property owned by Mr Ross or related family trusts (other than the family home) of $894,312.85*

Mr Ross and Mrs Ross agreed that two properties owned by family trusts were tainted property as they had been purchased with funds from RAM or funds which had passed through RAM's 00 Account. Accordingly, the Court should find that the Investors will have an equitable proprietary interest in these sale proceeds; i.e. they are held on trust for Investors.

Company assets

(e) *Management Fees of $27,303.92*

As detailed in paragraph 7(k) of the Second Fisk Affidavit, these fees were recovered by the Liquidators on shares or the sale proceeds of shares returned to Investors in the liquidation who could establish a valid proprietary claim to those shares. They were amounts RAM was entitled to receive, as income, under the various management agreements with those Investors on shares which were not, in fact, misappropriated by RAM. Therefore, these fees are company assets.

(f) *Net proceeds of office furniture sales $7,716.40*

This is the proceeds of the sale of assets owned by RAM. It is simply not clear when they were purchased and how the purchase was funded. As there is no evidence to suggest their purchase was funded by investors' funds, these would be company assets.

(g) *Miscellaneous receipts of $621.60*

The Liquidators received $621.60 from investors, relating to the costs of recovering information for those investors. Accordingly, this would be company assets.

Assets where the categorisation as company assets or held on trust is not clear or is mixed

(h) *Recoveries from clawback claims: $19,122,249.38*

The status of these funds is complex and is discussed below.

(i) *Reparations from David Ross of $1,087,707.76*

The reparations from David Ross fall into two distinct categories:

(i) Proceeds of the sale of shares which Mr Ross claimed were his or his family's personal shares. The Liquidators have not carried out a tracing analysis to establish how the purchase of these shares were funded as such an exercise would be time consuming and costly. However, they consider these shares may have been funded by misappropriated investor funds.[61]

[61] Second Fisk Affidavit, para 7(q).

(ii) Sale proceeds from household furniture, paintings and from Mr and Mrs Ross' former residence. There is no evidence to suggest that these furnishings, paintings or the residence were purchased using misappropriated investor funds.

In each case, the funds were received by the Liquidators as reparation for claims the Liquidators of the Ross Group had against:

(iii) Mr and Mrs Ross arising from a current account debt of approximately $1.9 million owing by them to various companies in the Ross Group; and

(iv) Mr Ross personally, arising from his misappropriation of investor funds.

The Liquidators consider that the current account debt is necessarily linked, as a practical matter, to the misappropriation of investor funds. As explained in the Second Fisk Affidavit, the Ross Group had no genuine income to fund the current account advances to Mr and Mrs Ross. Accordingly, those advances were in all likelihood funded from misappropriated investor funds.[62]

The status of these assets as either company assets or assets held on trust for investors is discussed at paragraphs 5.65 and 5.66 below.

(j) *Interest of $457,876.31*

Whether interest earned is a company asset or funds held on trust will ultimately depend on the legal ownership of the funds on which that interest was earned.

Of the amount above, $154,047.00 is interest on the recoveries of clawback claims.[63]

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[62] Second Fisk Affidavit, para 7(s).

[63] Second Fisk Affidavit, para 7(p).

If one assumes that the funds comprising company assets above were applied first to pay the costs of the liquidation (as discussed in Schedule Four below), then the interest of $303,380.29 (i.e. excluding interest earned on clawback recoveries) would have been predominantly earned on assets in which the Investors had an equitable proprietary interest.

Clawback recoveries: assets held on trust or company asset?

5.33 Most of the funds held by the Liquidators are the result of settlements (or in one case, a judgment sum) of actual or threatened clawback proceedings against Investors who received payments from RAM prior to its liquidation.

5.34 The clawback claims on which the Liquidators relied are pursuant to:

(a) Sections 345 to 348 of the Property Law Act 2007 (the prejudicial disposition provisions of the **PLA**). These sections permit the Liquidators (or any creditor prejudiced by the disposition in issue) to clawback payments made by RAM which were made either:

(i) with intent to prejudice creditors, in that they were made with intent to hinder, delay or defeat creditors of RAM in the exercise of any right of recourse in respect of the property; and/or

(ii) without RAM receiving reasonably equivalent value in exchange; and/or

(b) Sections 292 and 294 of the Companies Act 1993 (the voidable transactions provisions of the CA). These sections permit the Liquidators to clawback payments made by RAM where the payments were made during the specified period (as defined in the CA) at a time where RAM was unable to pay its due debts and enabled the recipient Investor to receive more towards the satisfaction of a debt owed by RAM than they would have received in RAM's liquidation. Section 295 provides that the order for compensation must be in favour of the company.

5.35 The recoveries from clawback claims were received following the decisions in the High Court, Court of Appeal and/or Supreme Court in the proceeding of *McIntosh v Fisk*.

5.36 Mr McIntosh was a former investor in RAM. He had paid RAM $500,000.00 for investment purposes in 2007. He made no withdrawals from RAM until 2011 at which time he was paid $954,047.62 by RAM, purportedly being returns on investments RAM and Dagger held for him in his investment portfolio. The Liquidators challenged all payments made by RAM to Mr McIntosh pursuant the prejudicial disposition provisions of the PLA and the voidable transactions provisions of the CA. The High Court, Court of Appeal and Supreme Court all held that:[64]

(a) the payments made by RAM to Mr McIntosh could be clawed back pursuant to both the prejudicial disposition provisions of the PLA and the voidable transaction provisions of the CA; but

(b) that Mr McIntosh had a value defence to the extent of the capital contributions paid by him to RAM.

5.37 On this basis, Mr McIntosh was required to repay the difference between the payments received from RAM and the payment he made to RAM, being $454,047.62 (plus interest).

5.38 The issue of beneficial ownership of clawback recoveries is not straightforward. While the Liquidators consider that the funds paid out by RAM to investors who are subject to clawback claims were ultimately funded by misappropriated trust assets, this does not mean that recoveries from a clawback claim are likewise an asset held on trust. There is no evidence that any funds paid by former Investors to the Liquidators or RAM in respect of clawback claims are traceable (in a conventional, FIFO sense) to the funds they received from RAM.

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[64] *Fisk v McIntosh* [2015] NZHC 1403, (2015) 11 NZCLC 98-033 at [59], [74], [93] and [151]-[152]; *McIntosh v Fisk* [2016] NZCA 74, [2016] 2 NZLR 783 at [39] and [52]; *McIntosh v Fisk* [2017] NZSC 78, [2017] 1 NZLR 863 at [41], [65] and [136]. Justice Miller (CA) and Justice Glazebrook (SC) dissented; they would have permitted the plaintiffs to claw back all payments made by RAM to Mr McIntosh.

Further, there is caselaw which indicates that such recoveries are held by the liquidators for the benefit of all Investors and Creditors.

Re Hibiscus

5.39 In *Re Hibiscus Coast Marine Centre Limited (in liquidation)*[65] the liquidators had received a payment from Westpac, pursuant to a judgment ordering it to make that payment, on the basis that a pre-liquidation payment by the company to Westpac was a voidable transaction. The issue in *Hibiscus* was how the liquidators were to distribute the funds representing the judgment sum. That is, were the liquidators required to pay those funds to the secured creditor or for the benefit of all general creditors?

5.40 The secured creditor argued that by virtue of its debenture over the company's assets, the funds comprising the voidable payment were subject to the secured creditor's charge at the time of payment. Accordingly, it argued that the payment of the judgment sum was simply repayment to the company of the funds paid out and therefore were likewise subject to the secured creditor's debenture.

5.41 The Court held that the judgment sum was to be paid out for the benefit of general creditors, not the secured creditor. In particular Casey J held:[66]

(a) There was a long line of authority to the effect that the doctrine of fraudulent preference was "entirely for the purpose of distribution among the creditors generally; not for the benefit of any single creditor".

(b) Amounts recovered by a liquidator from a voidable transaction were ultimately amounts recovered through the exercise of a statutory right of the liquidator and the liquidator therefore holds what is recovered for the benefit of all creditors, subject to the rights of any secured creditor impressed on the property before it

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65 *Re Hibiscus Coast Marine Centre Limited (in liquidation)* (1986) 3 NZCLC 99,615 (HC).

66 *Re Hibiscus Coast Marine Centre Limited (in liquidation)* (1986) 3 NZCLC 99,615 (HC) at 99,618.

comes into his/her hands, following the exercise of that statutory right.

(c) Where a disposition is to be set aside, the Court can order:

(i) transfer of the specific property; or

(ii) payment of such sum as the Court thinks proper, not exceeding the value of the property as at the date of the disposition.

(d) In the voidable transaction judgment in *Hibiscus,* the court had ordered the latter – the judgment ordered a payment to the liquidators, not the return of the specific property (i.e. return of the specific money paid to Westpac). This meant the money was paid to the liquidators in their own right and not to the company.

(e) Accordingly, the Court was unable to identify that the payment made to the liquidators was the same money paid to Westpac.

5.42 *Hibiscus* has been consistently cited as the authority for the principle that sums recovered under the voidable transaction provisions of the CA are for the benefit of general creditors.[67] This is a sound principle. The rationale for the regime of voidable transactions is to ensure equal distribution among creditors generally on the basis of the section 313 *pari passu* statutory direction. It would be anomalous if the fruits from those statutory provisions were applied on some other basis.

5.43 There is no reason to take a different approach to recoveries made in respect of a clawback claim pursuant to the PLA claim, for the same reasons as identified by Casey J in *Hibiscus.*

5.44 Counsel assisting the Court has correctly stated that the provisions of the CA have changed since *Hibiscus* was decided.[68] At the time of

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[67] See for example *Strategic Finance Limited v Bridgman* [2013] NZCA 357, [2013] 3 NZLR 650 and *National Bank of New Zealand Limited v Nellies* HC Dunedin M93/00, 14 March 2001.

[68] First memorandum of *amicus curiae* as to directions and orders of the Court dated 13 December 2018, dated 16 March 2018 (**Memorandum of counsel assisting the Court**) at [26].

Hibiscus the equivalent section to section 295 of the CA provided that recoveries under voidable transactions were paid directly to the liquidator. In 2007 section 295 of the CA was amended to provide that the voidable transaction recoveries would be paid to the company. However, this change in wording does not change the principles as applied in *Hibiscus.* In particular:

(a) First, the decision in *Hibiscus* was premised on two grounds:

(i) that the recoveries were held by the liquidator in their own right, not the company; and

(ii) that where funds are received pursuant to a court order to make a payment to the liquidators – not an order for the return of the specific monies paid to the creditor – the funds received are not the same funds as those paid out.

The change in wording in 2007 to require voidable transaction recoveries to be paid to the company, rather than the liquidator, has no relevance to the second point. Where a court orders simply that payment be made to the company pursuant to the voidable transaction provisions, rather than the return of the specific funds paid out, the payment made is not the same funds as those initially paid out.

(b) Second, as noted above, the entire premise of the voidable transaction regime is to ensure that creditors share equally in the company's assets. It would be entirely inconsistent with this principle for the proceeds of voidable transaction claims to be distributed in any other way. If Parliament was intending such a radical change, one would expect it to be effected in a more obvious manner than simply providing that such recoveries are to now be paid to the company in liquidation, rather than the liquidators.

5.45 The courts generally appear to be striving to ensure that the proceeds of voidable transaction provisions are used for the benefit of all creditors, not just some creditors or secured creditors. This is apparent not only from *Hibiscus* and cases that have since followed *Hibiscus*, but also the Australian approach.

5.46 Under the Australian Corporations Act 2001 (and its predecessor, the Corporations Law 1989), recoveries from voidable transaction claims are paid directly to the company. In *Elfic Limited v Macks*[69] the Court of Appeal of Queensland held:

> There is nothing in the provisions of the Corporations Law to suggest that moneys recovered under s 565 of the Corporations Law [transactions void against the liquidator] are to be held by a liquidator on terms different to those on which the liquidator holds the general assets of the company.

The Court went onto find that recoveries under section 588FF (court orders in respect of voidable transactions; substantially similar to section 295 of the CA) were likewise property of the company.[70]

5.47 The issue is even more clear cut in this instance:

(a) Of the recoveries from clawback claims, only one Investor paid funds pursuant to a judgment – Mr McIntosh, pursuant to the decision in *McIntosh v Fisk* [2017] NZSC 78. The Supreme Court upheld the High Court decision requiring Mr McIntosh to "pay to the liquidators the sum of $454,047.62."[71] There is no suggestion in the court order that it was requiring the specific funds paid to Mr McIntosh to be returned to RAM – it was accepted that those funds had been applied to other purposes by Mr McIntosh. Accordingly, on the basis of *Hibiscus*, the funds paid by Mr McIntosh to RAM are not the same funds which RAM paid out to Mr McIntosh.

(b) This is relevant because it means that although Mr McIntosh was paid from misappropriated trust funds, the funds paid to the liquidators by Mr McIntosh were not the misappropriated trust funds he received. It was reasonable compensation, paid

69 *Elfic Limited v Macks* [2001] QCA 219, [2001] 162 FLR 41 at 58.

70 *Elfic* at 59. See also *Kratzmann Pty Limited v Tucker* (1968) 123 CLR 295 (HCA).

71 *Fisk v McIntosh* [2015] NZHC 1403, (2015) 11 NZCLC 98-033 at [152].

pursuant to the liquidators exercising a statutory right. Accordingly, those funds are held for the benefit of all creditors pursuant to *Hibiscus* above.

(c) All other recoveries from clawback claims came pursuant to settlements with Investors. Each of those settlements was agreed:[72]

(i) following the Liquidators threatening to exercise their statutory right to challenge various payments by RAM to the investor as a prejudicial disposition under the PLA and, where applicable, the voidable transaction provisions of the CA, and in some cases actually commencing proceedings against the Investor; and

(ii) on the basis that the Investor did not accept any liability for such claims to RAM, Dagger or the Liquidators.

(d) Accordingly, in the case of settlement payments where no liability is admitted by the Investor, it is even more difficult to argue that the settlement sums paid were the return of misappropriated trust assets. It was simply the payment of money by an Investor to RAM to avoid a disputed claim progressing to a court hearing.

5.48 For completeness, generally, the Liquidators cannot distinguish whether each clawback recovery paid to them or RAM resulted from claims pursuant to the CA or the PLA. This is because the various settlement agreements generally make no distinction between the two claims and the court in *McIntosh* found for the Liquidators pursuant to both claims. However, there will be some settlements entered into, where there was no CA claim against the investor (i.e. no pre-liquidation payments were made within the "specified period" as defined in the CA).[73] To determine the value of settlements falling within this category would require a review of all settlements entered into to date.

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[72] Second Fisk Affidavit, para 7(y).

[73] Second Fisk Affidavit, para 7(y)(iii).

5.49 Counsel assisting the court has indicated that he intends to consider the application of both backwards tracing and remedial constructive trusts to the characterisation of recoveries from clawbacks; namely whether those funds are properly characterised as trust funds rather than funds of the company.[74] Counsel for the Liquidators intend to address these issues, in substance, in reply. However, for the purpose of advancing submissions, these submissions outline some of the issues with the application of these doctrines to the Ross Group liquidation.

Backwards tracing

5.50 Backwards tracing allows a court to take a substance over form approach to tracing and allow a proprietary remedy, even though the traditional tracing rules would preclude relief.

5.51 The leading case is *Brazil v Durant.*[75] In *Brazil* a person had received USD10.5 million as bribes and funnelled those payments overseas through bank accounts in the name of the defendants. It was accepted on appeal that USD 7.7 million of the bribes could be traced through to the defendants' bank accounts. However, they argued that the remaining bribes could not be traced because:

(a) some of the bribes were paid into the intermediary's account after the intermediary had made payment of funds to the defendants; and

(b) the intermediary's account was a mixed fund and drawings were made on the account before payment to the defendants' account, meaning some of the funds paid to the defendants' bank account must have come from other sources.

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[74] See Memorandum of counsel assisting the Court.

[75] *The Federal Republic of Brazil v Durant International Corp* [2015] UKPC 35.

5.52 The Privy Council permitted "backwards tracing" to find that the full sum of the bribes could be traced to the defendants' bank accounts. It focused on a 'substance over form' approach[76] and held:[77]

> …the claimant has to establish a coordination between the depletion of the trust fund and the acquisition of the asset which is the subject of the tracing claim, looking at the whole transaction, such as to warrant the court attributing the value of the interest acquired to the misuse of the trust fund.

5.53 The Courts' focus was on ensuring that the law could adapt to sophisticated money laundering operations rather than expanding the remedy of tracing to enable beneficiaries' claims to take priority over ordinary unsecured creditors.

(a) The lower Court observed that to find otherwise would enable any sophisticated fraudster "to defeat an otherwise effective tracing claim simply by manipulating the sequence in which credits and debits were made to his account."[78]

(b) Likewise, the Privy Council held:[79]

> The development of increasingly sophisticated and elaborate methods of money laundering, often involving a web of credits and debits between intermediaries, makes it particularly important that a court should not allow a camouflage of interconnected transactions to obscure its vision of their true overall purpose and effect. If the court is satisfied that the various steps are part of a coordinated scheme, it should not matter that, either as a deliberate part of the choreography or possibly because of the incidents of the banking system, a debit appears in the bank account of an intermediary before a reciprocal credit entry.…the availability of equitable remedies ought to depend on the substance of the transaction in question and not upon the strict order in which associated events occur.

[76] *Brazil v Durant* at [38].

[77] *Brazil v Durant* at [40].

[78] *Brazil v Durant* at [13].

[79] *Brazil v Durant* at [38].

(c) The Court also cautioned against expanding the equitable rules beyond what was strictly required, stating:[80]

> The courts should be very cautious before expanding equitable proprietary remedies in a way which may have an adverse effect on other innocent parties. If a trustee on the verge of bankruptcy uses trust funds to pay off an unsecured creditor to whom he is personally indebted, in the absence of special circumstances it is hard to see why the beneficiaries' claim should take precedence over those of the general body of unsecured creditors.

5.54 The case of *Brazil* is quite different to the RAM facts. This case does not concern reconciling slight differences in temporal tracing to recognise the substantive transaction. Rather, applying backwards tracing to this instance would require the Court to find that, for example, a payment to an investor of misappropriated trust funds in 2010 could be traced to a settlement payment by that investor made to avoid threatened court proceedings, without any admission of liability, in 2017. This is a significant stretch from the application of the backwards tracing doctrine in *Brazil*.

5.55 Additionally, finding the necessary "coordination" would require the Court to overrule *Hibiscus* above, for at least those settlement payments made where there was a claim pursuant to the voidable transaction provisions of the CA. This in turn would have significant ramifications on Parliament's prescribed *pari passu* regime, as set out in the CA.

5.56 The Court should not rely on the doctrine of backwards tracing to supplement section 313 of the CA.

Remedial constructive trusts

5.57 Counsel assisting the Court has also suggested that a remedial constructive trust could be imposed on the recoveries from clawbacks,

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80 *Brazil v Durant* at [33].

so that they were not assets of the company.[81] However, for the reasons explained below:

(a) it is not clear that remedial constructive trusts are a part of New Zealand law;

(b) there is not the requisite unconscionability to justify the imposition of a remedial constructive trust; and

(c) even if there were (which is not accepted), to introduce the remedy into the area of insolvency would be fundamentally at odds with the approach the Court has taken previously, and, as above, Parliament's prescribed *pari passu* regime.

5.58 In the case of *Fortex Group v MacIntosh*,[82] the Court of Appeal considered whether to impose a remedial constructive trust over company assets, in order to give employees priority over secured and unsecured creditors for superannuation contributions paid into the employer's overdrawn bank account.

5.59 The Court expressed some doubt as to whether remedial constructive trusts were a part of New Zealand law and deliberately sidestepped making such a finding. However, its judgment went on to detail some of the parameters of the remedy, if it were a part of New Zealand law.[83] (Notably, in 2013 the Court of Appeal in *Strategic Finance Limited v Bridgman* likewise sidestepped determining that issue, noting that whether such a remedy existed was still a matter of unresolved controversy).[84]

5.60 The Court held:[85]

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[81] Memorandum of counsel assisting the Court, para 29.

[82] *Fortex Group v MacIntosh* [1998] 3 NZLR 171 (CA).

[83] *Fortex Group v MacIntosh* at 173 (per Tipping, Gault & Keith JJ) and 182 (per Blanchard J).

[84] *Strategic Finance Limited v Bridgman* [2013] NZCA 357, [2013] 3 NZLR 650 at [122] and [125] to [126].

[85] *Fortex Group v MacIntosh* at 175.

> But before the Court can contemplate declaring that assets owned in law by A should, by way of remedy, be held by A on trust for B, there must be some principled basis for doing so, both vis-à-vis A and vis-à-vis any other person who has a proper interest in the subject matter which would be affected by the imposition of the trust. … In order to defeat, pro tanto, the secured creditors' rights at law under their security by the imposition of a remedial constructive trust, the plaintiffs must be able to point to something which can be said to make it unconscionable – contrary to good conscience – for the secured creditors to rely on their rights at law. If such can be shown, equity may restrain the exerciser of those rights to the extent necessary to afford the plaintiffs appropriate relief.

5.61 In *Fortex Group v MacIntosh*,[86] the Court emphasised that as it was the secured creditors who would be prevented from enforcing their security if the remedial constructive trust was imposed, it was their conscience that was in issue – not that of the employer. The Court found there was nothing affecting the conscience of the secured creditors at all, let alone to the extent that they should be deprived of their contractual rights to exercise their security.[87]

5.62 A similar issue arises in this instance. If a remedial constructive trust were imposed, the parties prevented from exercising their legal rights to claim against the assets of the company will be RAM's ordinary (trade) creditors. Accordingly, the Court would need to find that the conscience of those creditors (and not that of RAM's) was impugned, such to justify equity intervening to prevent them from claiming a share in the clawback recoveries. However, there is simply no suggestion of anything affecting their conscience, such that they should be prevented from claiming against those assets.

5.63 Even if there could be such a suggestion (which is not accepted), the Courts have previously indicated that if the remedy of remedial constructive trusts does exist, the Courts should be very hesitant to allow it into the area of insolvency. In particular, the Court of Appeal has twice cautioned that such an introduction could open the door to

[86] *Fortex Group v MacIntosh* [1998] 3 NZLR 171 (CA).

[87] *Fortex Group v MacIntosh* at 178-179.

significant uncertainty in insolvency, with the additional costs and protracted litigation that would go with such uncertainty:

(a) In *Fortex Group v MacIntosh,* Blanchard J commented that caution should be exercised "in proceeding to do anything which would disturb the settled pattern of distribution in an insolvency."[88]

(b) In *Strategic Finance Limited*, the Court noted that the chief objection to the remedy is that the basis of "unconscionability is too open-ended and offends against settled insolvency rules on too loose a basis by according priority via a constructive trust".[89]

5.64 Accordingly, there is no basis to impose a remedial constructive trust over the clawback recoveries, at the expense of the (non-Investor) Creditors. Additionally, to do so would:

(a) significantly expand the scope of the remedy; and

(b) introduce a significant element of uncertainty into the settled principles of insolvency.

Reparations from Mr Ross and related parties

5.65 While the analysis above addressed the correct categorisation of clawback recoveries, the same principles should apply to the reparations received from Mr Ross and related parties as settlement of claims against those parties arising from the misappropriation of investor funds. That is:

(a) Some of the funds received as reparation were clearly not "tainted" by misappropriated investor funds, being the proceeds of sale of assets Mr Ross and related parties owned prior to RAM's incorporation (i.e. proceeds of sale of the former residence, the furnishings and paintings). Accordingly, these

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[88] *Fortex* at 182.

[89] *Strategic Finance Limited (in receivership & liquidation) v Bridgman* [2013] NZCA 357 at [124].

funds are clearly not the same funds as those misappropriated from investors.

(b) Some of the funds received as reparation may have been funded by investor funds, even if only indirectly (being the proceeds of sale of shares Mr Ross claimed were owned in his personal capacity).

(c) The reparation was made in respect of claims which ultimately arose from the misappropriation of investor funds.

(d) However, the claims which caused the reparation payments to be made, were ultimately claims the Liquidators could have used their statutory powers to pursue.

5.66 Accordingly, the reparations should therefore be treated as company assets in the same way as the clawback recoveries.

5.67 On this basis, the assets held by the Liquidators are held as follows:

(a) $4,398,947.58 are assets held on trust for Investors;

(b) $20,245,599.06 are assets of the company.

6. The most appropriate Distributions Model

6.1 This Court will need to consider this issue if it has the jurisdiction to order a distributions model other than the Net Contributions Model for all or some assets (presumably the “trust assets”) held by the Liquidators.

6.2 As explained above, the key difference between the Net Contributions Model and both the Alternative Model and the Rising Tide Model is their approach to pre-liquidation withdrawals. Both the Alternative Model and the Rising Tide Model take into account pre-liquidation withdrawals when determining the distribution to an Investor. The Net Contributions Model does not.

6.3 The Liquidators appreciate why some Investors consider that a model which takes into account pre-liquidation withdrawals produces a fairer result. Both the Alternative Model and the Rising Tide Model ultimately seek to ensure that those Investors who withdrew some (but not all) of their funds contributed to RAM prior to the liquidation do not receive a distribution, which enables them to receive an even greater return on their RAM investment, at the expense of those who did not withdraw any funds from RAM.

6.4 Consider the example Investors W and Y in the First Fisk Affidavit (paragraphs 9.16 to 9.19).

(a) Both investors invest the same amount ($5,000) with RAM on the same day.

(b) Investor W withdraws $2,000 on 1 January 2012. Investor Y makes no pre-liquidation withdrawals.

(c) Assuming a 10 cent in the dollar distribution and an adjustment for CPI, under the Net Contributions Model:

(i) Investor W's total recovery of his/her RAM investment will be $2,312.23 (being the $2,000 withdrawn prior to the liquidation adjusted for CPI, plus a distribution of $292.82).

(ii) Investor Y's total recovery of his/her RAM investment will be a distribution in the liquidation of $514.16.

(d) Under the Alternative Model, Investor W would not receive a distribution in the liquidation due to the level of his/her pre-liquidation. The amounts which would otherwise become payable to Investor W are effectively added back into the pool to increase the rate of distribution for other investors, including Investor Y.

6.5 That is, the investors made the same investment, but under the Net Contributions Model, Investor W receives a much higher overall recovery, simply due to an accident of timing: he/she withdrew funds from RAM before its collapse.

6.6 However, this is not a novel distinction which arises only in a Ponzi scheme. In a liquidation of an insolvent company generally, there will invariably be creditors who were fortunate enough to be paid prior to the collapse of a debtor company, which ultimately means (assuming the creditor can establish a value defence) they will recover a greater proportion of their debt than those who were not paid pre-liquidation. There is no compelling policy reason to try to treat the liquidation of a Ponzi differently.

6.7 Additionally, the perceived "fairness" is not universal. It only applies to persons who have a claim in the liquidation (being Shortfall Investors). These models would have no ability to clawback capital payments (or indeed payments of fictitious profits) from Overpaid Investors, despite them receiving an overall rate of recovery on their RAM investment of at least 100%.

6.8 In *McIntosh v Fisk*, the Supreme Court held that an investor would have a "value" defence to a claim to clawback pre-liquidation payments up to the value of their capital contributions to RAM (and subject to establishing the good faith and without knowledge elements of the defence).[90] The impact of this decision is that the Liquidators could not successfully challenge pre-liquidation withdrawals up to the level of the investor's capital contributions, unless the investor knew, or ought to have known, at the time of receipt that something was amiss at RAM.

6.9 In contrast, the Alternative Model and Rising Tide Model would allow the Liquidators to take into account any pre-liquidation withdrawals when determining whether the Investor is eligible for a distribution and if so, the quantum of that distribution. They would achieve de facto what the Supreme Court has denied de jure.

6.10 For example, an Investor who received pre-liquidation payments from RAM totalling 105% of their capital contribution would be treated in a different way to an Investor who received pre-liquidation payments from RAM totalling 95% of their capital contribution. The former's pre-liquidation payments up to the level of their capital contributions are

90 *McIntosh v Fisk* [2017] NZSC 78; [2017] 1 NZLR 863 at [136].

(subject to good faith and knowledge) unimpeachable. The latter's pre-liquidation payments can be effectively set-off against any distribution they would otherwise be entitled to receive in the liquidation.

6.11 This approach is also inconsistent with the fundamental premise of the calculation of creditors' claims in liquidations. As explained at paragraphs 5.2 to 5.5 above it is inconsistent with:

(a) the usual approach of valuing "claims" as at the date of the liquidation; and

(b) the overarching premise in a liquidation that all creditors share equally in the remaining assets.

6.12 Finally, the reality of a Ponzi (and indeed any insolvent liquidation) is that there is simply not enough money to pay all claims. Accordingly, a model which increases the distribution for some investors, invariably takes those amounts redistributed from other investors.

6.13 The Second Fisk Affidavit provides a comparison of the impact of the Net Contributions Model and the Alternative Model on the investor pool as a whole. As this illustrates (and comparing both models as adjusted for CPI):[91]

(a) 247 Investors will be worse off under the Alternative Model, compared with the Net Contributions Model. The average negative impact for these investors is $24,230.86.

(b) Of these 247 investors, 205 Investors who would receive a distribution in the liquidation under the Net Contributions Model will not receive any distribution under the Alternative Model.

(c) In contrast, 392 Investors will be better off under the Alternative Model than under the Net Contributions Model. The average positive impact for these investors is $15,267.91.

[91] Second Fisk Affidavit, para 45.

(d) There are some significant outliers:[92]

(i) 89 Investors will be between $10,001 and $50,000 worse off under the Alternative Model.

(ii) 18 Investors will be between $50,001 and $100,000 worse off under the Alternative Model.

(iii) Nine Investors will be between $100,001 and $500,000 worse off under the Alternative Model.

(iv) One Investor (Mr Fehsenfeld) will be $788,279.64 worse off under the Alternative Model. Under the Alternative Model, Mr Fehsenfeld is not eligible for any distribution.

6.14 On the other hand:[93]

(a) 145 Investors will be between $10,001 and $50,000 better off under the Alternative Model.

(b) 18 Investors will be between $50,001 and $100,000 better off under the Alternative Model.

(c) Four Investors will be between $100,001 and $500,000 better off under the Alternative Model.

6.15 Because these issues are not novel to Ponzi schemes, adopting the Alternative Model could introduce a level of uncertainty into company liquidations. This would be at odds with the approach the Courts have taken to insolvency law generally – see for example *Fortex* and *Strategic Finance* referred to at paragraph 5.63 above. It would also give rise to an issue as to when a failed company has become a Ponzi. This could be a difficult issue.

6.16 Finally, the Net Contributions Model is consistent with the approach the Court has taken in respect of liquidations of other Ponzi operators. See

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92 Second Fisk Affidavit, para 45.

93 Second Fisk Affidavit, para 45.

for example, *Re International Investment Unit Trust*, *Arena* and *Re Waipawa*.[94]

6.17 In particular, in *Arena* the Alternative Model was proposed as a model for distribution. The Court rejected that model in favour of the Net Contributions Model noting (amongst other matters) that the Alternative Model:[95]

(a) had an apparent "equity" at first blush, but that impression was not supported upon further analysis of the model, given the large negative impact it had on a smaller group of investors;

(b) inherently required a different treatment of pre-liquidation returns of capital across categories of investors and was inconsistent with the law's present treatment of such payments;

(c) led to disparate treatment of pre-liquidation capital payments between Shortfall Investors and Overpaid Investors which could not be easily reconciled with the overarching apparent intention of the model, being the recovery and redistribution of pre-liquidation capital returns; and

(d) was inconsistent with the law as it relates to the calculation of creditors' claims in the liquidation, being the amount creditors could have sued for as at the date of the liquidation.

6.18 Accordingly, the Liquidators submit that in all the circumstances, the Net Contributions Model is the most appropriate – and indeed the fairest – model.

6.19 If the Court were minded to order either of the Alternative Model or the Rising Tide Model, the question then becomes which model to order. They will, ultimately, produce the same result for Investors.[96] However,

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94 *Re International Investment Unit Trust* [2005] 1 NZLR 270 (HC); *Graham & Jackson v Arena Capital Limited (in liquidation)* [2017] NZHC 973; *Re Waipawa Finance Company Limited (in liq)* [2011] NZCCLR 14 (HC).

95 *Graham & Jackson v Arena Capital Limited (in liquidation)* [2017] NZHC 973 at [34] – [40].

96 Second Fisk Affidavit, paras 20 and 24.

there are two key differences between the two models: transparency for Investors and cost.

6.20 The Alternative Model can be more readily explained to Investors and Investors will be able to cross-check the Liquidators' calculations. Once the Liquidators provide to an Investor their transaction summary (i.e. a list of contributions to RAM and withdrawals from RAM, as adjusted for CPI if so ordered), the "Maximum Distribution Rate" and the funds available for distribution, an Investor can calculate their own distribution. This will provide them with greater visibility and understanding of the distribution process. Due to the number of calculations which go into each iteration of the Rising Tide Model, it will be impossible (or at least very difficult, time consuming and costly) to walk an Investor through their specific calculation for their distribution.

6.21 This is apparent from the Second Fisk Affidavit. The Rising Tide Model needed to be explained by reference to a simplified example, rather than the actual anonymised Investors A to E, who were used to explain the Net Contributions Model and the Alternative Model. The process simply has too many calculations within each iteration and too many iterations, to concisely explain for Investors A to E.[97]

6.22 This lack of visibility of the distributions process is expected to cause frustration and confusion for Investors.[98]

7. Consumer Price Index adjustment

7.1 Ponzi schemes can collapse quickly. The issue of an adjustment for inflation or time value of money or otherwise may not normally arise as such an adjustment would generally have an insignificant impact on investor claims.

7.2 The position is starkly different in the case of RAM. RAM had been accepting investor deposits since the early 1990s and was in likelihood a Ponzi from that time.[99] The issue in this part of the Application is

[97] Second Fisk Affidavit, para 26.

[98] Second Fisk Affidavit, para 26.

[99] First Fisk Affidavit, paras 3.1 and 3.17.

whether an adjustment should be made to reflect that, for example, $1,000 invested in 1995 is not the same as $1,000 invested in 2011.

7.3 The Liquidators consider it is appropriate to make such an adjustment and therefore propose to adjust Investors' contributions and withdrawals for CPI up to the date of the liquidation for the purpose of calculating each Investors' claim in the liquidation.

7.4 The impact of such an adjustment will be material – particularly for early Investors who did not withdraw a significant portion of their capital contributions prior to RAM's collapse.

7.5 By way of illustration, consider Investors F and G (real, but anonymised, RAM Investors) in the Second Fisk Affidavit:[100]

(a) Investor F contributed $3,117,047.06 to RAM, almost all of which was contributed between November 2000 and May 2001. Once those contributions are adjusted for CPI, the value of his/her contributions is $4,186,463.93.

(b) That is, Investor F's contributions of approximately $3 million in 2000 and 2001 are equivalent to an investor contributing $4 million in 2012.

(c) Similarly, Investor G contributed $313,935.35 to RAM in a single contribution in 2001. Once this contribution is adjusted for CPI, the value of Investor G's contributions is $417,714.98. Investor G's deposit of $300,000 in 2001 is equivalent to an investor depositing $400,000 in 2012.

7.6 The Liquidators consider that such an adjustment is appropriate in order to treat Investors equally.

7.7 Such an adjustment can make a significant difference to these early Investors. In particular, the effect of an adjustment is as follows:[101]

(a) $623,689.92 of funds are redistributed between Investors.

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[100] Second Fisk Affidavit, paras 40 – 42.

[101] Second Fisk Affidavit, paras 36 – 37.

(b) 188 Investors will be positively affected by such an adjustment, with the average positive impact being $3,317.50.

(c) 15 Investors are better off by between $10,001 and $50,000, and one investor is better off by $61,036.17.

7.8 Applying this to Investors F and G:[102]

(a) Investor F would receive a distribution of $227,802.51 under the Net Contributions Model if a CPI adjustment is applied; his/her distribution reduces to $172,918.63 if an adjustment is not applied.

(b) Investor G would receive a distribution of $58,642.62 under the Net Contributions Model if a CPI adjustment is applied; and $51,848.18 if the adjustment is not applied.

7.9 Of course, the funds available in the liquidation are limited and therefore the Liquidators acknowledge that the increased distribution for these early Investors is at the expense of later Investors.

7.10 This Court has previously adopted a similar adjustment in *Re Waipawa.*[103]

7.11 *Re Waipawa* involved a Ponzi scheme which operated for over 20 years. The Court was required to determine the most equitable way in which to distribute the funds to investors, pursuant to the Securities Act 1978. It held that the funds were to be distributed on a *pari passu* basis, adopting a constant dollar approach.[104]

7.12 The Court in *Re Waipawa* acknowledged that the pool of funds for distribution was limited and that any adjustment in favour of a particular class of investor would inevitably have an effect on the other investors.

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[102] Second Fisk Affidavit, para 39.

[103] *Re Waipawa Finance Company Limited (in liq)* [2011] NZCCLR 14 (HC).

[104] At [57] – [60].

Despite this, it considered that a constant dollar adjustment was required in order to treat early and late investors equally.[105]

7.13 The Court in *Waipawa* quoted from the submissions of the United States Securities Exchange Commission (**SEC**) in a submission to Congress on compensation in the Madoff Ponzi scheme, in support of a proposal to convert each dollar invested into a "time equivalent or constant dollar". The Court quoted the following passage:[106]

> The constant-dollar approach is rooted in the classic economic concept of the time value of money and will result in greater fairness across different generations of Madoff investors – in effect, treating early investors and later investors alike in terms of the real economic value of their investments.

7.14 The Court then held:[107]

> The inequality this approach is designed to "cure" is the assumption that $100 invested in 1987 is the same "value" as $100 invested in 2007. Given the effects of inflation over time then that cannot be so. In this sense, therefore, such an adjustment to the $100 invested, depending on the timing of the investment, does reduce the unfairness of a *pari passu* scheme.

7.15 The Court rejected the suggestion that the constant dollar approach "rewarded" early investors at the expense of later investors, noting that the intention of such an approach was to equalise the position as between early and later investors rather than reward risk.[108]

7.16 Counsel assisting the Court has correctly stated that in *In re Bernard L Madoff Investment Securities* (***Madoff***),[109] the United States Court of Appeals ultimately ordered that for the purpose of distributing the assets in the Madoff Ponzi, no adjustment to investor contributions and

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105 At [55] – [57].

106 *Re Waipawa* at [40]. However, the SEC made a similar argument before the Second Circuit United States Courts of Appeals in *In re Bernard L Madoff Investment Securities LLC* 779 F 3d 74 (2d Cir 2015) which was rejected as being "novel, inconsistent with its positions in other cases, and ultimately unpersuasive" at 83.

107 *Re Waipawa* at [44].

108 *Re Waipawa* at [55].

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

withdrawals should be made for inflation, time value of money or the like. (The SEC in that case supported an adjustment for inflation on the basis quoted in paragraph 7.13 above.)

7.17 The Second Circuit Court of Appeals ultimately found that the terms of the Securities Investor Protection Act (**SIPA**) did not permit any inflation or interest adjustment to “net equity” claims (i.e. the net contributions balance) for customer property.[110]

7.18 It is apparent that the Second Circuit Court of Appeals’ decision is based predominantly on the specific terms of SIPA. In particular it held:[111]

(a) SIPA was designed to return customer property to customers, based on their “net equities” being the sum which would have been owing by the debtor to a customer if the debtor had liquidated, by sale or purchase on the filing date, all securities positions of the customer, minus the indebtedness of the customer to the debtor on the filing date.

(b) SIPA’s definition of net equity does not mention the possibility of an inflation adjustment. This is despite the fact that other (unrelated) provisions of SIPA do mention such a possibility.

(c) This silence of SIPA on an inflation adjustment to net equity was not surprising. SIPA’s purpose was to remedy broker dealer insolvencies by promptly returning customer property to customers, avoiding customer assets being tied up during a liquidation. It was not necessarily established to remedy broker-dealer fraud.

(d) SIPA’s specific purpose is a theme repeated throughout the Court’s judgment. In particular, the Court emphasised that SIPA’s role was limited to defending investors from a broker-dealer’s failure to perform its custodial role, but does not otherwise shield investors from loss. It simply restores them to

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[110] *Madoff* at 83.

[111] *Madoff* at 77 – 80.

their position but for the liquidation. It does not provide for any compensation for lost use of securities or cash while the liquidation is pending.

(e) The Court considered that to allow for a CPI adjustment would shift the focus of SIPA from the proportional distribution of customer property actually held by the broker to the restoration to customers of the value of the property that they originally invested.

7.19 The US Courts have not applied the *Madoff* decision to liquidations outside of SIPA. See for example *SEC v Amerindo Investment Advisors Inc*[112] where the Court found that a CPI adjustment could be applied to claims in a liquidation under the Securities Act 1933 and the Securities Exchange Act 1934 and that the *Madoff* decision above did not apply as it was not a liquidation under SIPA. (Although, the liquidators in that case had already recovered sufficient funds to pay the full value of claims on a net contribution basis; the issue was whether to distribute additional funds on a pro rata basis or based on a CPI adjustment.)

7.20 The Liquidators intend to expand on these submissions in reply, following the submissions of counsel assisting the court on this issue.

[112] *SEC v Amerindo Investment Advisors Inc* USDC SDNY, 14 July 2017.

8. Conclusion

8.1 There is a significant disparity between the claims of Investors and the assets available for distribution. In such circumstances, perfect justice simply cannot be achieved. The directions sought by the Liquidators produce the least unfair result for Investors and Creditors, while enabling a difficult and lengthy liquidation to be concluded in the most efficient manner.

M G Colson / R L Pinny
Counsel for the Applicant Liquidators

18 May 2018

Schedule One: Orders sought

1. The Liquidators are seeking the orders set out below (change from Application is in red).

2. That the assets of Ross Asset Management Limited (in liquidation) (**RAM**) and Dagger Nominees Limited (in liquidation) (**Dagger**) be pooled for the purposes of the liquidation and the liquidations of these two companies proceed as if they were one company (the **pooling order**).

3. That all recovered assets of RAM and Dagger, after costs, be treated as forming one common pool of assets for distribution, available to both the general unsecured creditors of RAM and Dagger (the **Creditors**) and investors in RAM at the time of its liquidation (the **Investors**).

4. That the common pool of assets be distributed on the following basis:

    (a) there will be no tracing of particular Investors' assets;

    (b) any Investor who received payments from RAM (adjusted for the Consumer Price Index (**CPI**) with a reference date of 17 December 2012, being the date of liquidation) which exceeded their contributions to RAM (adjusted for CPI with a reference date of 17 December 2012) is not entitled to any distribution in the liquidation of any of the companies comprising the Ross Group;

    (c) that in respect of any purported transfers between investment portfolios purportedly held by Investors:

        (i) such purported transfers be recognised by the Liquidators only to the extent of any positive net contributions balance in respect of the transferring portfolio at the date of transfer;

        (ii) contributions balances be calculated by deducting from any contributions made by an Investor to RAM any payments made by RAM to that Investor (both contributions and payments being adjusted for CPI with a reference date of 17 December 2012 being the date of liquidation);

(d) if because of extraordinary circumstances the direction on inter-portfolio transfers at paragraph (c) above is unjust or ineffective in relation to a specific portfolio or portfolios then:

(i) the Liquidators may apply a reasonable and logical alternative methodology; but

(ii) where such an alternative methodology is adopted:

(A) the Liquidators will write to the Investor (by email, if an email address is held, failing which by post) detailing:

- why the Liquidators consider the usual approach to inter-portfolio transfers is unjust or ineffective;

- the Liquidators alternative methodology applied; and

- the Investors' right to apply to challenge the method as per (B) below; and

(B) leave is granted to the affected Investors to apply to the Court within this proceeding if they wish to challenge the Liquidators' decision in respect of that particular purported inter-portfolio transfer within one calendar month of receiving the Liquidators' notice as per order XX(d)(ii)(A) above; and

5. As to the appropriate method of distribution of those pooled assets to all Creditors and Investors, being the Net Contributions Model (as described in the affidavit of John Howard Ross Fisk sworn 11 December 2017) or the Alternative Model (as described in the affidavit of John Howard Ross Fisk filed with this application) or the Rising Tide Model as described in the article attached to the memorandum of counsel assisting the court dated 16 March 2018.

6. That the Liquidators are entitled to deduct their costs and expenses in the liquidation from the common pool of assets;

7. That for the purpose of a claim form for Investors who are entitled to receive a distribution in the liquidation of RAM and Dagger:

(a) the Liquidators will provide to each such Investor a statement:

(i) summarising their transactions with RAM; and

(ii) stating their claim in the liquidation based on the distribution model determined by this Court as applicable;

(the **Transaction Summary**); and

(b) once the Investor signs the Transaction Summary, the signed Transaction Summary is deemed to be the requisite claim form for the purpose of the Companies Act Liquidation Regulations 1994 (the **Liquidation Regulations**) and section 304 of the Companies Act 1993;

(c) if the Investor wishes to object to the Transaction Summary, they must do so in writing, detailing the grounds for the objection, no later than:

(i) 20 working days after the Transaction Summary was sent to them, if it was sent by email;

(ii) 25 working days after the Transaction Summary was sent to the Investor, if it was sent by post to an address in New Zealand; and

(iii) 40 working days after the Transaction Summary was sent to the Investor, if it was sent by post to an address outside of New Zealand;

(d) the Liquidator must make a decision in relation to a written objection within 20 working days and this decision is deemed to be the admission or rejection of the claim (in whole or in part) for the purposes of section 284 of the Companies Act 1993;

8. That where:

(a) an Investor has not signed the Transaction Summary for a period of six months after it was issued by the Liquidators and has not provided a written objection in accordance with paragraph 7(c) above; or

(b) the Liquidators have been unable to locate an Investor for the purpose of providing the Transaction Summary;

that Investor's distribution (as set out in the Transaction Summary) shall be:

(c) deemed to be Unclaimed Money for the purpose of the Unclaimed Money Act 1971; and

(d) paid to the Commissioner of Inland Revenue in accordance with section 4(3) of the Unclaimed Money Act 1971;

9. That leave to apply for further directions is reserved.

Schedule Two: Orders relating to the appropriate pool of assets

1. This schedule addresses two orders sought:

   (a) that the assets of RAM and Dagger be pooled and the liquidation of the two companies proceed as if they are one company; and

   (b) that there should be only one pool of assets for distribution for both general unsecured Creditors and Investors in RAM, rather than two pools of assets.

Legal principles behind pooling

2. Section 271(1)(b) of the CA provides that on the application of a liquidator, the court, if satisfied that it is just and equitable to do so, may order that where two or more related companies are in liquidation, the liquidations in respect of each company must proceed together as if they were one company to the extent that the court so orders and subject to such terms and conditions as the court imposes.

3. Section 2(3) of the CA provides that a company is related to another company if:

   (a) the other company is its holding company or subsidiary;

   (b) more than half of the issued shares of the company, other than shares that carry no right to participate beyond a specified amount in a distribution of either profits or capital, are held by the other company (whether directly or indirectly, but other than in a fiduciary capacity); or

   (c) more than half of the issued shares, other than shares that carry no right to participate beyond a specified amount in a distribution of either profits or capital, are held by members of the other (whether directly or indirectly, but other than in a fiduciary capacity); or

(d) the business of the companies have been so carried on that the separate business of each company, or a substantial part of it, is not readily identifiable; or

(e) there is another company to which both companies are related.

4. In this Application, the Liquidators rely on (d) above, that the businesses of RAM and Dagger were so carried on that the separate business of each company, or a substantial part of it, is not readily identifiable.

5. Section 272(2) of the CA provides that when deciding whether it is just and equitable to make an order under s 271(1)(b), the Court must have regard to the following matters:

(a) the extent to which any of the companies took part in the management of any of the other companies;

(b) the conduct of any of the companies towards the creditors of any of the other companies;

(c) the extent to which the circumstances that gave rise to the liquidation of any of the companies are attributable to the actions of any of the other companies;

(d) the extent to which the businesses of the companies have been combined; and

(e) such other matters as the court thinks fit.

6. Pooling orders cut across the fundamental principles of the CA, by diluting the separate legal personality of each entity concerned. However, the pooling order exception is intended to give the Court the broadest discretion to effect a result which accords with the common notions of fairness in all the circumstances, bearing in mind the cardinal

principle underlying in solvency administration – that there should be equality among creditors of the same standing.[113]

7. The Court of Appeal recently held that s 271 required the Court to balance two policy considerations:[114]

(a) The first is respect for the separate corporate identity of the companies in liquidation. Inherent in this rationale is that the companies concerned will be separate commercial entities.

(b) The second is avoiding the mischief that can result from an overly strict application of separate corporate identity. In particular, where the company is a mere façade, the “corporate veil” does not shield that façade from the operators of the business which is carried on in its name.

Application to the facts

8. Dagger and RAM were related companies for the purpose of s 271(1)(b) of the CA. In particular, and for the reasons detailed below, the businesses of the companies were so carried on that the separate business of each company, or a substantial part of it, is not readily identifiable (as per s 2(3)(d) of the CA):

(a) David Ross had effective control of both of RAM and Dagger. He was the sole director of both RAM and Dagger.[115] He also held 100% of the shares in Dagger and 50% of the shares in RAM (with the remaining 50% were owned by his wife, Mrs Jillian Ross).[116]

(b) Mr Ross had sole responsibility for the operations of RAM and Dagger, including all decisions on funds management, research

[113] See *Re Home Loans Fund (NZ) Limited* (1983) 1 NZCLC 95,073 at 98,583-98, 584 quoted in *Re Dalhoff and King Holdings Limited (in liquidation)* [1991] 2 NZLR 296 (HC) at 308.

[114] *Steel & Tube Holdings Limited v Lewis Holdings Limited* [2016] NZCA 366, (2016) 11 NZCLC 98-045 at [27].

[115] First Fisk Affidavit, paras 3.1 and 3.18.

[116] First Fisk Affidavit, exhibits page 25.

and investment. He was supported by two administrative assistants who were employed by RAM.[117]

(c) RAM's and Dagger's operations were inextricably intertwined. RAM marketed itself as offering investments services to clients. Dagger was the nominee company which would legally own the investments for RAM's clients, while RAM would manage those investments. That is, Dagger's sole business was to hold investments as nominee, for RAM's investment operations.[118]

(d) RAM investors typically entered into a Management Agreement with both RAM and Dagger. This Management Agreement, and their dealings with RAM and Dagger lead investors to believe that:[119]

    (i) If they transferred money or shares to RAM, this was in turn transferred to Dagger.

    (ii) Dagger would then hold those shares and cash as trustee on the investors' behalf.

    (iii) Any cash withdrawals would be paid to investors by RAM, following the sale of shares held for that investor by Dagger.

(e) In fact, RAM and Dagger did not operate in this way. Generally, shares and cash were not transferred to Dagger to be held separately on trust for investors. Instead, investor assets became part of an intermingled pool of shares and cash held by RAM, Dagger and other related entities. From that pool, the operating expenses of RAM, personal drawings by David Ross and payments to investors and share purchases were met.[120]

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[117] First Fisk Affidavit, para 3.1.

[118] First Fisk Affidavit, paras 3.3 – 3.4, 3.18.

[119] First Fisk Affidavit, paras 3.2 – 3.4.

[120] First Fisk Affidavit, para 3.9.

(f) Mr Ross and RAM’s two administrative assistants effectively treated Dagger as if it were simply a division of RAM. When instructions were given by them in respect of Dagger, these instructions were simply effected through RAM. Dagger had no employees of its own, nor its own letterhead. Dagger had no trade creditors in its own name.[121] It was effectively a puppet of RAM’s, devoid of capacity to conduct its own affairs.[122]

(g) The only expenses Dagger incurred were broker fees and bank account fees in respect of bank account and broker accounts held in its own name.[123]

(h) While Dagger did have bank accounts in its own name, the funds in those accounts generally comprised the sale of shares, which were then paid into RAM’s 00 Account to become part of the intermingled pool of assets applied for a number of purposes, including payment of RAM’s operating expenses. Significant amounts of funds were transferred from Dagger’s bank accounts to RAM’s bank accounts, with amounts in recent years being:[124]

  (i) in the financial year to 31 March 2011: $2,381,609.73;

  (ii) in the financial year to 31 March 2012: $5,849,069.17; and

  (iii) in the financial year to 6 November 2012: $2,511,950.64.

(i) These figures can be contrasted with the Investor withdrawals from RAM for each of those years. In particular, Investor withdrawals were:[125]

  (i) in the financial year to 31 March 2011: $38,258,320.88;

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[121] First Fisk Affidavit, para 3.18.

[122] See *Steel & Tube Holdings Limited v Lewis Holdings Limited* [2016] NZCA 366 for a similar example of a “puppet company”, where pooling orders were granted.

[123] First Fisk Affidavit, paras 3.18, 3.21 and 7.2.

[124] First Fisk Affidavit, paras 3.19 – 3.20.

[125] First Fisk Affidavit, exhibits page 110.

(ii) in the financial year to 31 March 2012: $27,254,224.68;; and

(iii) in the financial year to 6 November 2012: $16,043,354.52.

(j) Despite the terms of the Management Agreement providing that any shares held for investors were to be held by Dagger, shares purchased were ultimately held by RAM also.[126]

9. Applying these factors to the mandatory considerations in s 272(2) of the CA:

(a) *the extent to which any of the companies took part in the management of any of the other companies:*

With the exception of the express terms of the Management Agreements (which were ignored by RAM and Dagger), Dagger effectively operated as simply another facet of RAM.

(b) *the conduct of any of the companies towards the creditors of any of the other companies:*

RAM's approach to treating Dagger as an extension of itself extended into Dagger's finances. As outlined above, funds were transferred from Dagger's accounts to RAM's 00 account, to be applied to a range of expenditure, including RAM's operating costs.

Additionally, it is likely that the apparent involvement of Dagger in RAM's operations gave Investors some sense of security for their investments. The Management Agreement specifically provided that it was Dagger's role in RAM's operations, to hold cash and investments separately for Investors – to avoid intermingling of investors' cash and shares. RAM Investors are now creditors of RAM because, amongst other reasons, Dagger did not comply with its obligations under the Management Agreement.

[126] First Fisk Affidavit, para 3.9.

(c) *the extent to which the circumstances that gave rise to the liquidation of any of the companies are attributable to the actions of any of the other companies:*

RAM's operations as a Ponzi is the reason both companies are in liquidation. As Dagger was effectively run as a facet of RAM, Daggers' liquidation can be entirely attributed to the actions of RAM. In *Re Dalhoff* it was held when granting a pooling order "as a matter of fact…the companies stood or fell together…the failure of one involved the failure of others."[127] This is equally apparent from the way in which RAM and Dagger operated.

The core features of the Ponzi, being the misappropriation of Investor funds upon deposit into RAM's accounts, the intermingling of Investor funds in RAM's accounts, the fictitious reporting of investments and profits to Investors and the payments made to Investors which were not the proceeds of shares held for those Investors were all carried out by RAM.

(d) *the extent to which the businesses of the companies have been combined:*

As above, Dagger was effectively run as simply another facet of RAM.

(e) *such other matters as the court thinks fit:*

There are two other relevant matters for the Court to consider:

(i) No party is adversely affected by the order sought.

(ii) It would be impossible for the liquidations to proceed separately.

These points are explained further below.

[127] *Re Dalhoff and King Holdings Limited (in liquidation)* [1991] 2 NZLR 296 (HC) at 305.

No party adversely affected by the orders

10. Significantly:[128]

    (a) counsel assisting the Court supports the pooling orders sought; and

    (b) no Investor or Creditor has indicated any opposition to the Liquidators or counsel assisting the Court to the pooling orders sought.

11. Dagger has no creditors of its own (save for Investors). Accordingly, no party will be adversely affected by the orders sought. The practical impact of these orders is to make $1,130,208.61 available for Investors (and, subject to the submissions below, Creditors also).

It would be impossible for the liquidations to proceed separately

12. The Liquidators currently hold funds totalling $1,130,208.61 on behalf of Dagger. This is primarily the proceeds of sale of shares held by Dagger at the time of its receivership. The Liquidators consider that these shares were almost certainly purchased using Investors' misappropriated funds.[129]

13. As Dagger was a party to the Management Agreement with Investors, Investors will have claims against Dagger for, at least, a breach of the terms of the Management Agreements. However, the Liquidators consider that it would be impossible to divide Investor claims between RAM and Dagger.[130] This would involve attempting to trace Investors' deposits and share transfers through RAM and Dagger. For the reasons outlined at paragraphs 4 to 14 of Schedule Three, this simply cannot be done. Even if it could be done (which is not accepted), such a task would be very time-consuming, expensive and fraught with uncertainty. Given the current expected dividend of 14 cents in the $, it

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[128] See Memorandum of counsel assisting the Court, para 37(a) and Joint memorandum of counsel for the Applicants and counsel assisting the court in advance of conference on 9 April 2018, dated 6 April 2018 at paras 20 – 21.

[129] First Fisk Affidavit, paras 6.15 and 7.2(h).

[130] First Fisk Affidavit, para 7.2(g).

cannot be in the interests of Creditors and Investors to require the Liquidators to pursue such a fraught (and expensive) exercise.[131]

Are the orders just and equitable?

14. The ultimate question for this Court on this application is whether, in all the circumstances, it is just and equitable to grant the pooling orders sought.

15. As the Court held in *Dalhoff*:[132]

> To separate [the companies] now would be to belatedly recognise a legal separation which has never in fact operated. It would be to prefer some creditors over others and to do so fortuitously since there does not seem to have been any principle on which the activities of the company were divided … Justice and equity are terms which would normally involve equality of treatments taking into account all the surrounding circumstances.

16. Although authorities on pooling orders will generally be very fact specific, there is one decision which has similar characteristics to this. In *Re Pacifica Syndicates (NZ) Limited (in liquidation),*[133] the Court considered an application for a pooling order under the former s 315B of the CA 1955. The Court summarised the background to the application as:[134]

> Thanks to the scandalous mismanagement of the affairs of two companies, the liquidator was faced with a tangled web of inter-related transactions, and substantial claims by members of the public whose investments in the companies' projects had been misapplied and lost.

17. The companies' operations involved the application of investors' money into the purchase of exotic cattle – in one scheme by Pacific Syndicates as trustee for the investors and in the other by the investors

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[131] For Courts granting pooling orders based on similar practical concerns about the forensic accounting required to separate the companies' affairs, see, for example, *Re Dalhoff and King Holdings Limited (in liquidation)* [1991] 2 NZLR 296 (HC).

[132] *Re Dalhoff* at 309.

[133] *Re Pacifica Syndicates (NZ) Limited (in liquidation)* (1989) 4 NZCLC 64,757 (HC).

[134] At 64,758.

themselves. The liquidator sought an order pooling the assets of both companies in the liquidations.

18. Hardie Boys J held:[135]

> There are a number of reasons for making an order in the present case. First, there is the pooling of investors' funds in the one account. Secondly, there is the complex and possibly arguable situation of inter-company debt. Thirdly, and related to it, is the intertwined liability of the companies to investors in the cattle schemes, and the fact that they at the liquidator's invitation proved against Continental Cattle, but not against Pacific Syndicates. Fourthly, there is the impossibility of dividing the Cattle Syndicates fund between the two companies. …Sixthly, the investigating accountant has expressed the view that it would be equitable to allocate any final dividend pro rata between all creditors of both companies. If the liquidator were permitted to do this, this protracted liquidation would be brought to a prompt conclusion without further expenditure on what are likely to be futile accounting and legal exercises.

19. Each of those reasons is present in this case. Accordingly, the Court should adopt the same approach.

20. In any event, even if the liquidations were to progress separately (and leaving to one side the practical difficulties discussed above), the ultimate result would be that either:

    (a) the only claims in Dagger's liquidation would be claims by Investors, meaning the funds are returned to Investors anyway; or

    (b) if Investors did not have claims against Dagger (but only had claims against RAM) then the monies held by Dagger would be distributed to its shareholder – being the bankrupt estate of Mr David Ross. RAM is the largest creditor in the bankruptcy, so any distribution from Dagger's liquidation to the bankrupt estate would be returned to RAM by the Official Assignee. Accordingly, the funds will ultimately be returned to RAM, for the benefit of Investors, albeit it in a more indirect route.

[135] At 64,767 – 64,768.

21. In summary:

(a) It is consistent with the overarching principle of equality of treatment of similarly affected creditors that the assets of Dagger be made available to all affected Investors (and Creditors).

(b) If the liquidations are required to proceed separately, the Liquidators will need to incur further and significant time and cost on the (likely impossible) task of separating the companies' affairs. That is in no-one's interests.

One pool or two pools

22. The second order is that there be one common pool of assets for both Investors and Creditors.

23. As is detailed in the Second Fisk Affidavit, there will be some assets which are clearly assets derived from the funds deposited by Investors and misappropriated by RAM. These assets will therefore be held by the Liquidators on trust for the Investors. An obvious example of this is the proceeds of the sale of shares purchased with misappropriated trust funds. There will also be assets which are derived from the company's other sources of funds which are not able to be traced back to the Investors' deposits. These assets will be company assets. Again, an obvious example is the management fees paid to the Liquidators on shares subject to proprietary claims. There are also some assets for which it is not clear into which pool they fall.

24. Ordinarily, if there are two classes of assets the orthodox approach would be to have separate pools of assets, one containing trust assets available to Investors and the other consisting of general assets available to Creditors. However, in this case, the exercise of creating two separate pools of assets for distribution would cause unnecessary cost to the ultimate disadvantage of Investors.

25. Even if tracing could occur for transactions after March 2006,[136] given the extensive time over which RAM operated and the volume of

[136] This would simply be impossible prior to March 2006 due to the inadequacies of RAM's records; see First Fisk Affidavit, para 9.8.

reported transactions, the cost involved in such an exercise would be wholly disproportionate. The Creditors (i.e. non-Investor creditors) in RAM's liquidation total 26 with claims totalling less than $70,000.[137] That is a fraction of the total claim value – assuming an overall distributions rate of 14.04 cents in the $, the return to Creditors from the $17,500,000 available for distribution is less than $10,000 (or 0.0006%). This means the likely cost of categorising the assets and maintaining two separate pools vastly outweigh any benefit to Investors and Creditors.[138]

26. A similar approach was adopted by the Court in *Arena* where similar practical issues arose. The Court found that it was in the investors' financial interests that there be one common pool of assets and that this approach was the most cost-efficient and pragmatic model to adopt.[139]

27. No objection has been taken to this approach by any Investor or Creditor. Counsel assisting the court supports this approach, subject to the issue outlined in paragraph 2.4 above.

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137 First Fisk Affidavit, para 1.5(b).

138 First Fisk Affidavit, paras 8.6 – 8.10.

139 *Graham & Jackson v Arena Capital Limited (in liquidation)* [2017] NZHC 973 at [15].

Schedule Three: Common features of the Distributions Models

1. The three distribution models are put forward on the basis of the following common features:

   (a) There would be no tracing of particular Investor assets.

   (b) Investor claims would be calculated based on contributions made to RAM (cash or transfer of shares) less payments made by RAM. That is, claims would not take into account any purported "profits" earned on any Investor's purported RAM investment.

   (c) Only Shortfall Investors would receive a distribution in RAM's liquidation – Overpaid Investors would not receive any distribution.

   The reasons for these features are explained below.

2. The Liquidators also seek that the Court confirm its approach to dealing with inter-portfolio transfers or purported transfers of value. That approach is explained below. It is proposed that approach would be applied in any of the three distribution models.

3. Each of these proposed orders are supported by counsel assisting the court.[140]

No tracing

4. The Liquidators accept that the starting point for distribution of a mixed fund is that where tracing can be done, there should be tracing.[141] Accordingly, where Investors have been able to trace into shareholdings held by RAM or Dagger as at the date of their receiverships, the Liquidators have sought and obtained court orders allowing them to transfer those shares or pay the proceeds of the sale of those shares to the investors who could establish a proprietary claim.

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[140] Memorandum of counsel assisting the Court, para 37(c).

[141] *Re Waipawa Finance Company Limited (in liq)* [2011] NZCCLR 14 (HC) at [14].

However, those instances have been relatively few in number. For the reasons detailed below, RAM's operations mean tracing is either impossible or unreliable, fraught and likely to be very time consuming. The Court have long recognised that where tracing required an enormous effort for unreliable results, justice will require pooling.[142]

5. The starting point for distribution of a mixed fund is *Clayton's Case* which involves a "first in, first out" (FIFO) method of distribution.[143] However, although this is widely recognised to be the correct starting point, it has been the subject of adverse comment for a long time.[144] The Courts have in recent times emphasised that this approach has fallen into disfavour, noting that it may be departed from even by a "slight counterweight".[145]

6. Historically, the Courts have sought to distinguish *Clayton's Case* based on one of two grounds:

   (a) The first is that as *Clayton's Case* is a presumed intention, it must give way to a contrary intention or circumstances which point to a contrary conclusion.[146]

   (b) Second, where it is not practical to trace investors' funds or where such an exercise will involve enormous effort unlikely to produce a reliable result, the application of the rule should be rejected and the Court should give such directions as are necessary to do substantial justice between the parties.[147]

7. In the case of RAM, *Clayton's Case* can be distinguished based on either ground.

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142 *Re Registered Securities Limited (in liquidation)* [1991] 1 NZLR 545 (CA) at 555.

143 *Devaynes v Noble* (1816) 1 Mer 572, 35 ER 781 (Ch) (***Clayton's Case***).

144 For a discussion of the earlier criticisms of *Clayton's Case* see *Re International Investment Unit Trust* [2005] 1 NZLR 270 (HC) at [50] – [57].

145 *Re International Investment Unit Trust* at [57]; *Vero Liability Insurance Limited v Heartland Bank Limited* [2015] NZCA 288 at [100], *Graham & Jackson v Arena Capital Limited (in liquidation)* [2017] NZHC 973 at [17].

146 *Re Registered Securities Limited (in liquidation)* at 553.

147 *Re Registered Securities Limited (in liquidation)* at 555, *Graham & Jackson v Arena Capital Limited (in liquidation)* [2016] NZHC 194 at [48] and *Graham & Jackson v Arena Capital Limited (in liquidation)* [2017] NZHC 973 at [17].

8. Investors had expected their investments (deposits and shares) to be held on trust, separately from that of other RAM investors and applied so as to yield returns. They did not expect their funds to be pooled or withdrawn to satisfy the repayment demands of other investors or drawings of Mr Ross or to pay RAM's operational expenses. Their presumed intention, if they had known their investments were to be pooled, must have been to share losses equally. It would be inconsistent with that common intention to apply a FIFO analysis. Such an approach invariably favours later investors over earlier investors, which cannot have been the presumed intention.

9. The Court in *Barlow Clowes* distinguished *Clayton's Case* for a similar reason stating:[148]

> The investors did not expect that their money would be kept in a bank account or used for the purchase of a yacht, or of anything other than gilts…
> As soon as the money of two or more investors was mixed together it became part of a common fund that was diminished only when it was used other than for the purchase of gilts. Such investors cannot be presumed to have intended that losses incurred would be borne other than rateably. All the money was paid into a fund, which already was, or which became, depleted. When paid into the fund it ceased to be earmarked or identifiable as the money of individual investors. They did not expect to incur any loss, but when they found that they had done so they would have had no reason to expect that they would be repaid other than pari passu with other investors whose money was held in the same way.

10. Similarly, in *Re Waipawa* the Court held that *Clayton's Case* should not be applied, as it could not have been investors' intentions that the latest investors be paid in full, at the expense of earlier investors.[149]

11. Additionally, it is simply not practical to trace Investors' funds, as required for a FIFO analysis. In particular:

    (a) RAM's inadequate records mean tracing simply cannot be done prior to March 2006.

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[148] *Barlow Clowes International Limited (in liq) v Vaughan* [1992] 4 All ER (CA) at 46.

[149] *Re Waipawa* at [23].

(b) To do so after March 2006:

(i) would be a very complex, time consuming and expensive task. Given the limited funds available, it is not in the Investors' and Creditors' interests to carry out such an exercise. Nor is it consistent with the ultimate purpose to distribute the funds in a reasonable and efficient manner; and

(ii) would also, in effect, treat transactions between the early 1990s to March 2006 in a different manner to those after March 2006, where there is no valid basis for such a distinction amongst Investors.

12. As is detailed in the First Fisk Affidavit, tracing on a FIFO basis simply cannot be done prior to March 2006. This is because:[150]

(a) The Liquidators only hold RAM's bank statements for its main account, the 00 Account from March 2006. They also hold limited statements from various brokers used by RAM and, in the case of some brokers, no statements at all.

(b) RAM's earliest computer records are from June 2000. Prior to that date, the Liquidators would be reliant on incomplete hardcopy records only.

(c) RAM's records simply cannot be relied upon as being accurate. Many of the transactions recorded on the RAM Investor Database were fictitious, meaning tracing using RAM's records is unlikely to be accurate.

Notably of the over 860 Investors at RAM's receivership, 463 of those Investors first invested with RAM prior to March 2006.[151] Accordingly, it would be impossible to trace the investments of at least 54% of affected Investors.

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[150] First Fisk Affidavit paras 4.12 – 4.14.

[151] First Fisk Affidavit, para 9.8(a).

13. While third party records (and in particular RAM's bank statements) are available from March 2006, attempting to trace Investors' funds would be a hugely complex, time consuming and costly task.

(a) A key feature of RAM's operation is the volume of transactions. There was a large number of transactions occurring through RAM's 00 Account at any time. This is particularly so at the beginning or end of the month. The First Fisk Affidavit gives two example days: 2 July 2007 and 30 June 2010. On each of these days there were 55 transactions through the 00 Account.[152] This snapshot gives an indication of the volume of transactions that would be required to be "traced" through RAM's 00 Account and beyond. There would also invariably be difficulties and disputes regarding which Investors' deposits into the intermingled pool could be traced to a particular purchase of shares, which were funded from the intermingled "pool" of funds.

(b) Additionally, it was not uncommon for a broker, under RAM's instruction, to purchase shares using the proceeds of the sale of shares it had previously acquired on RAM's behalf, meaning those proceeds were not ultimately paid into any bank account of RAM. The Liquidators do not have full broker statements to track all of these transactions.[153]

14. Accordingly, any tracing exercise post March 2006 would be incomplete, uncertain, fraught with disputes, time consuming and expensive. In a liquidation where the current dividend is only 14 cents in the $, it is not in the Investors' interests to engage in such an exercise, nor is it consistent with the overarching duty to distribute assets in a reasonable and efficient manner.

Contribution basis

15. The Liquidators propose that distribution will be based on an Investors' contributions to RAM and pre-liquidation payments from RAM. This means:

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[152] First Fisk Affidavit, para 4.19.

[153] First Fisk Affidavit, para 9.8.

(c) no purported "profits" would be taken into account when calculating Investors' claims; and

(d) Overpaid Investors would not receive any distribution in the liquidation.

16. In all the circumstances, the Liquidators consider this is the fairest approach to distribution. They recognise that Overpaid Investors may still have claims against RAM arising from the misappropriation of their investments, which would mean they were still a creditor of RAM. However, there is ultimately only a very limited pool of assets to distribute amongst significant claims. Shortfall Investors will recover only a fraction of their net contribution which was misappropriated by RAM.

17. Recognising claims in respect of "fictitious profits", lost opportunity or the like would ultimately diminish the pool of assets for those who will not recover their capital contributions in full. It is also consistent with the approach taken by the Supreme Court in *McIntosh v Fisk*, which held that payments of "fictitious profits" could be clawed back, subject to available defences.[154]

18. As detailed at paragraphs 4.6 (c) and (d) above, to require the Liquidators to consider claims other than simply on a net contribution balance basis (e.g. claims for damages or purported profits) will be time consuming and complex. The Liquidators consider that it will result in a distributions process which is time consuming and fraught. It will add further complexity, increase investor confusion about their expectations in the distributions process and in turn will increase the costs of the liquidation. It will also have an immediate effect on the interim distribution proposed.

[154] See *McIntosh v Fisk* [2017] NZSC 78.

Inter-portfolio transfers

19. RAM permitted Investors to transfer "value" from their RAM investment portfolio to another Investor's RAM investment portfolio. For example:[155]

    (a) A jointly held portfolio might be split into individual portfolios, with one investor retaining the original portfolio and half the value being transferred to establish a new portfolio in the name of the other investor.

    (b) A parent might "transfer" a specified amount or specified shareholdings (which did not in fact exist) to establish a RAM portfolio in their child's name.

    (c) An investor might "transfer" a specified amount or specified shareholdings (which did not in fact exist) to establish a portfolio in the name of a related trust.

20. However, as RAM was operating a Ponzi scheme, the reported transfers were almost inevitably a fiction as the assets "transferred" did not exist; or existed only in part.

21. The Liquidators' general approach to inter-portfolio transfers in the context of assessing clawback claims has been to recognise the transfer as a transfer of value only to the extent of any positive net contributions balance in the transferring portfolio's account.

22. That is:[156]

    (a) where the transferring portfolio already had a negative net contributions balance at the time of transfer (i.e. the transferring investor had already been paid by RAM more than they had contributed) the Liquidators have not recognised any transfer on the basis that the transferring portfolio had no "value" to transfer;

[155] First Fisk Affidavit, para 10.1.

[156] First Fisk Affidavit, para 10.4.

(b) otherwise the Liquidators have recognised the transfer as a valid transfer of value only up to the value of the positive net contributions balance existing at the time of the transfer.

23. There have been (a very limited number of) exceptions to the Liquidators' general approach where the particular circumstances meant that the Liquidators considered a different approach was required to achieve the fairest result. An example of such a situation is given at para 10.6 of the First Fisk Affidavit.

24. The Liquidators seek an order confirming that their general approach to inter-portfolio transfers is correct when calculating Investor claims for the purpose of distribution, but with a carve out that where they consider their general approach would lead to a result which is unjust or ineffective as applied to a particular portfolio or portfolios, that:[157]

(a) the Liquidators may apply a reasonable and logical alternative methodology; but

(b) where such an alternative methodology is adopted, leave is granted to the affected Investors to apply to the Court within this proceeding if they wish to challenge the Liquidators' decision in respect of that particular purported inter-portfolio transfer

25. No Investor has raised any objection to this proposed direction. Counsel assisting the court supports this proposed direction, save that Mr Chisnall proposed that an order should address service on the affected investors with a clearly set out timetable to file any challenge.[158]

26. In light of Mr Chisnall's comments, the Liquidators propose that the order provide for the following additional details:

(a) where Liquidators have adopted an alternative methodology to the treatment of inter-portfolio transfers, the Liquidators will write

[157] First Fisk Affidavit, para 10.8.

[158] Memorandum of counsel assisting the Court, para 37(c)(iv).

to the Investor (by email, if an email address is held, failing which by post) detailing:

(i) why the Liquidators consider the usual approach to inter-portfolio transfers is unjust or ineffective;

(ii) the Liquidators alternative methodology applied; and

(iii) the Investors’ right to apply to challenge the method.

Schedule Four: Ancillary orders

1. This application seeks three ancillary orders, as follows:

   (a) confirmation that the Liquidators are entitled to deduct their costs and expenses in the liquidation from the common pool of assets;

   (b) orders sought to streamline the process for lodging a claim form in the liquidation of RAM and Dagger; and

   (c) orders as to how to manage distributions where the entitled Investor cannot be contacted to arrange payment of their distribution.

Costs

2. The Liquidators seek orders regarding the deduction of their costs and expenses in the liquidation from the common pool of assets.

3. The original liquidation orders set the Liquidators' remuneration. Liquidation costs (largely liquidators' fees and legal fees) have been regularly reported to the Liquidation Committee and to investors generally (by virtue of the liquidators' reports). They have been paid on a monthly basis from the funds held by the Liquidators.

4. Section 278 of the CA provides that the expenses and remuneration of the liquidator are payable out of the assets of the company. Assets held on trust for Investors are not the assets of the company.

5. The Court however has an inherent jurisdiction to allow payment of expenses to liquidators out of trust assets to meet the costs of trust administration. *Re Ararimu Holdings* summarised the principles applying to that jurisdiction as follows:[159]

   (a) The priority of the CA is such that that the liquidators' costs are to be met out of the whole of the assets of the company first, and those costs will include the remuneration for the whole of the liquidators' services in winding up the affairs of the company

[159] *Re Ararimu Holdings Limited* [1989] 3 NZLR 487 at 504.

whether relating to the company's own property or in relation to the trust property held or administered by it.

(b) In the event of a deficiency, then in the exercise of the Court's inherent jurisdiction to protect trust property, the liquidator may be remunerated out of the "trust" property to the extent to which their services related to the preservation and proper disposal thereof but not further.

(c) Such remuneration should be borne pro rata by all investors who had money or investments in the hands of the company at the commencement of the winding up.

6. If the Court orders that there should be one pool of trust and company assets, the principles in *Ararimu* will not be able to be readily applied. Accordingly, the Court's inherent jurisdiction should be exercised to allow payment of the Liquidators' expenses out of the common pool. Such an order is consistent with the approach the Court has taken in similar instances of liquidators' costs in relation to a Ponzi operator which involves trust and company assets – see for example, *Arena*, *Re International Investment Unit Trust (in stat man)* and *Re Waipawa*.

7. However, if the Court adopts the "two pools" approach, then on the basis of *Ararimu* the costs of the liquidation should be deemed to have paid from the company assets first with any shortfall to come from the trust assets. There would be no shortfall if, as above, the proceeds of clawback claims are held to be company assets and not trust assets.

Claim forms

8. The Liquidators seek orders intended to streamline the claim form process.

9. The Liquidators expect that the standard claim form as prescribed by the Companies Act Liquidation Regulations will be problematic.

10. The quantum of each Investors' claim will depend on three factors:

(a) their transactions with RAM (contributions and payments);

(b) which distributions model this Court orders will apply; and

(c) the effect of a CPI adjustment (if so ordered by this Court) on Investors' claims.

11. Most Investors will only know their transactions with RAM (at best). They will not be able to carry out their own CPI adjustment (and in any event, this would need to be checked by the Liquidators to ensure calculations were consistent for all Investors). Even if a CPI adjustment is not ordered, Investors may well be unable to carry out their own distributions calculation. (They certainly will not have sufficient information to be able to calculate their own distribution under the Rising Tide Model).

12. The Liquidators will need to explain the effect of the Court's orders in this application to Investors. Accordingly, sending Investors a blank claim form to fill out will invariably cause confusion and be time intensive for the Liquidators as they, and PwC staff, need to instruct Investors individually on how to fill out the claim form and then check all these forms. This process will be costly.[160]

13. The Liquidators' proposed process will significantly expedite the distribution process. It provides that:[161]

(a) the Liquidators will write to Investors entitled to a distribution summarising their transactions with RAM (contributions to RAM and payments from RAM, as adjusted for CPI if so ordered) and stating their claim in the liquidation based on the model proposed by this Court (the **Transaction Summary**);

(b) the Investor can then accept the Transaction Summary by signing it and returning it to the Liquidators, at which time it is deemed to be the requisite claim form for the purpose of section 304 of the CA and the Liquidation Regulations;

[160] First Fisk Affidavit, paras 11.18 and 11.19.

[161] First Fisk Affidavit, para 11.20.

(c) alternatively, the Investor can object to the Transaction Summary in writing, detailing the grounds for the objection within:

(i) 20 working days after the Transaction Summary was sent to them, if sent by email; or

(ii) 30 working days after the Transaction Summary was sent to them, if sent by post to a New Zealand address; or

(iii) 40 working days after the Transaction Summary was sent to them, if sent by post to an address outside of New Zealand.

(d) If the Investor objects, the Liquidator must make a decision in relation to a written objection within 20 working days and this decision is deemed to be the admission or rejection of the claim (in whole or in part) for the purpose of section 284 of the CA.

(e) The Investor can then challenge the Liquidators' decision in the usual way.

14. The Liquidators consider this to be the most efficient, expeditious and cost-effective way to receive claim forms from Investors,[162] while still providing the Liquidators with the usual protections within a liquidation and preserving the right for Investors to challenge the Liquidators' assessment of their claim and resulting distribution.

Distributions not claimed

15. Given the significant number of Investors and Creditors in the Ross Group liquidations (59 for whom the Liquidators do not have any contact details) the Liquidators are conscious that there may be some Investors who cannot be located to be provided with a Transaction Summary or their distribution. The Liquidators therefore seek orders which would enable them to wind up the liquidation promptly, without needing to incur significant cost attempting to locate these Investors.[163]

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[162] First Fisk Affidavit, para 11.20.

[163] First Fisk Affidavit, paras 11.13 and 11.21.

16. Unclaimed monies in a liquidation are dealt with at s 316 of the CA. Section 316(1) provides that:

> Money representing unclaimed assets of a company standing to the credit of a liquidator shall, after completion of the liquidation, be paid to Public Trust.

17. This section gives rise to two issues:

    (a) First, whether it applies to assets held by the Liquidators on trust for Investors.

    (b) Second, whether the Liquidators are required to try to trace or otherwise locate Investors for payment.

18. The Liquidators submit that in the absence of a court order, s 316 does not apply to assets held by the Liquidators on trust. This is because s 316 expressly refers to "unclaimed assets of a company". Trust assets are not assets of a company and are therefore not available in the liquidation to creditors.

19. This means, *prima facie*, unclaimed distributions for Investors – either from the "trust pool" or the common pool of assets – will not fall within s 316 above and must fall under the Unclaimed Money Act 1971.

20. The position under the Unclaimed Money Act 1971 is that the Liquidators would be required to retain the distribution for either:

    (a) six years, following the date on which the money became payable;[164] or

    (b) as RAM has ceased to carry on business, for a period of at least six months following the cessation of its business.[165]

21. The Liquidators therefore seek to clarify the position on unclaimed distributions in RAM's liquidation. They seek a direction that where an Investor has not signed the Transaction Summary within six months

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[164] Unclaimed Money Act 1971, s 4(1)(e).

[165] Unclaimed Money Act 1971, s 4(3).

after it was issued (and has not provided a written objection to the Transaction Summary) or where the Investor cannot be located to be provided with a Transaction Summary, their distribution be treated as unclaimed monies and paid to the Commissioner of Inland Revenue, pursuant to section 4(3) of the Unclaimed Money Act 1971.

22. Alternatively, the Court could order that section 316 of the CA will apply to any distribution otherwise payable to an Investor, where the Investor has not signed the Transaction Summary within six months after it was issued (and has not provided a written objection to the Transaction Summary) or where the Investor cannot be located to be provided with a Transaction Summary. From the Liquidators' perspective, either order achieves the same result.

23. The orders sought are just and equitable. The liquidation of RAM has been the subject of significant media coverage over the previous six years. Therefore, for those Investors for whom the Liquidators currently do not have any contact details, it cannot be assumed that such details will be located in the near future.

24. If the orders sought are not granted, there is a risk that a very small number of Investors who cannot be located may prevent the liquidation of the Ross Group being concluded promptly and efficiently.