IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV 2015-485-876
[2019] NZHC 55

BETWEEN	JOHN HOWARD ROSS FISK AND DAVID JOHN BRIDGEMAN, as liquidators of Ross Asset Management Limited (in liquidation) Plaintiffs
AND	ALISTER STUART HOLDEN AND MURRAY WILLIAM BRIDGE, as trustees of the Bruce Charles Morris Estate First Defendants
AND	ALISTER STUART HOLDEN AND MURRAY WILLIAM BRIDGE, as trustees of a trust for Jonathan Morris Second Defendants
AND	DAVID JOHN CHAPMAN AND MATTHEW UNDERWOOD, as former trustees of the Jonathan Morris Trust Third Defendants
AND	DAVID JOHN CHAPMAN AND KYC TRUSTEES (JMT) LIMITED, as current trustees of the Jonathan Morris Trust Fourth Defendants
AND	JONATHAN MORRIS Fifth Defendant

Hearing: 8–9 October 2018

Counsel: R Pinny and M Colson for Plaintiffs
J Morrison for First and Second Defendants
P S J Withnall for Third, Fourth and Fifth Defendants

Judgment: 4 February 2019

JUDGMENT OF ELLIS J

[1] The late Mr Bruce Morris (Mr Morris) was an investor in Ross Asset Management Limited (RAM). As is by now well known, RAM was essentially a Ponzi scheme. It collapsed in 2012 and liquidators were appointed.[1] The architect of the scheme, Mr David Ross, is now serving a term of imprisonment.

[2] Many RAM investors have lost almost everything. But others, who had the good fortune to have withdrawn their "investments" earlier, received amounts well in excess of their original capital input. RAM was able to fund the payment of such excess amounts principally because of the capital amounts that continued to be deposited into the scheme by later, unwitting, investors.

[3] In 2017, the Supreme Court in *McIntosh v Fisk* confirmed that (in principle)[2] the liquidators have the ability to "claw back" at least some of these excess amounts under the Companies Act 1993 (the CA) and/or the Property Law Act 2007 (the PLA).[3] At that time, the liquidators had some 160 other "claw back" claims pending, including the present. All but ten of those have now been resolved without further judicial intervention.[4]

Background

[4] Mr Morris died in 2005, well before RAM's collapse. His RAM investment formed part of his estate, which was to be divided equally between his three children, each of whom was entitled to distribution of his or her share upon reaching the age of 25.[5] At the time of Mr Morris' death the older two had reached that age but the youngest, Jonathan (Joe), was still a minor.[6]

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1 Ross Asset Management's (RAM) liquidators are the plaintiffs in these proceedings, Messrs Fisk and Bridgman.

2 By which I mean, subject to any available statutory defences.

3 *McIntosh v Fisk* [2017] NZSC 78, [2017] 1 NZLR 863 [*Fisk SC decision*]. In the present case, the liquidators rely only on the Property Law Act 2007 (PLA), because the challenged payment was not made within the "specified period" stipulated in the voidable transaction regime of the Companies Act 1993 (CA).

4 This is the first disputed "claw back" case to have come to the Court since the *Fisk SC decision*.

5 Mr Morris' parents had also been RAM investors.

6 Jonathan (Joe) is the fifth defendant. He did not turn 25 until 2017.

[5] At the time of Mr Morris' death, and subsequently, his RAM portfolios were falsely reported by RAM to have a much higher value than the amounts initially invested. Mr Morris' Executors and Trustees had no reason to disbelieve the reports. Indeed, in July 2006 the original Executors and Trustees wrote to RAM, saying that the Trustees of Mr Morris' estate had resolved:[7]

> That Jonathan's shares (that is, the parcel already held for him separately)[8] and one-third of the other shares be realised, and then re-invested into less volatile stock – (possibly) preferably New Zealand companies.

[6] They went on to explain that:

> We take this step because, as trustees of a minor's estate, we must be risk averse: we would welcome your recommendations as to a suitable mix of shares for Jonathan – to be held in our names as trustees, on his behalf.

[7] The Trustees advised that the remaining two thirds of Mr Morris' shares were to be split equally between Joe's two siblings, who would give their own instructions as to what was to be done with them.

[8] RAM purported to follow these instructions and a new portfolio, known as "Portfolio 969", was created in the name of "Trustees for JC Morris". Of course, the value of the transfers made to Portfolio 969 reflected the wholly fictitious gains made on Mr Morris' original investments, in line with the fictitious reports that had been provided to the Executors and Trustees.

[9] In December 2007, two of the original Executors and Trustees (Messrs Porter and Stewart) retired and were replaced by Mr Bridge. In the interests of clarity, the rest of this judgment will refer to Mr Bridge and Mr Holden (the remaining original Executor and Trustee) simply as "the Executors".[9]

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7 The original Executors and Trustees were John Porter, Arthur Stewart and Alister Holden.

8 As I understand it, this separate parcel of shares was shares Joe had inherited on the death of his grandmother.

9 Messrs Holden and Bridge are named as the first and second defendants in these proceedings. Their role and status in this case will be discussed later in this judgment.

[10] In May 2009, the Executors instructed RAM to divide another RAM portfolio equally between Joe and his siblings. Again, RAM purported to follow those instructions by making the relevant (but fictitious) transfers. In Joe's case, the transfer was made to Portfolio 969.

[11] In September 2009, the Executors instructed RAM to realise the investments in Portfolio 969 and to pay the proceeds into a Westpac online saver account in Joe's name, which the Executors controlled. RAM then paid $329,215.06 into that account. It is not now disputed that this amount was $258,910.73 more than one third of the amounts actually "invested" by Mr Morris in RAM.[10]

[12] Over the next year or so the $329,215.06 was mingled with other distributions made to Joe under his father's will. Some of the money was placed on term deposit and was subsequently transferred back to the online saver account, with the accrued interest. A loan was also made to a third party and later repaid.

[13] In 2010, the relationship between Joe and the Executors broke down. Joe (who was by then 18) eventually issued proceedings against Messrs Bridge and Holden (as Executors of Mr Morris' estate), alleging various breaches of trust. All breaches were denied and the proceedings eventually settled, following a judicial settlement conference. By that time the funds held on trust for Joe by the Executors in the Westpac accounts totalled $729,154.

[14] The settlement was recorded in a Deed of family arrangement dated 12 June 2012 (the Deed). The parties to the Deed were Joe, the Executors and Joe's two siblings (the other beneficiaries of Mr Morris' estate). It relevantly recorded that:

(a) a new Trust was to be settled for Joe's benefit, on the same terms as under Mr Morris' will, with "Joe's share to remain as a contingent interest until Joe reaches the age of 25";[11]

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10 As a result of the *Fisk SC decision*, above n 3, that lesser sum is now the focus of the liquidators' claim.

11 The will also stipulated that if Joe were to die before reaching the age of 25, his share would either (a) be held on trust for any child of his until he or she turned 25 or (b) revert to Joe's brother and sister.

(b) the Executors were to transfer the sum of $2 million to the new Trustees (as explained below, this amount was payable in two tranches, roughly a year apart);

(c) Joe was to discontinue the proceeding against the Executors upon execution of the Deed with no issues as to costs; and

(d) provided the settlement amount was paid in accordance with the Deed, Joe would accept it as full and final settlement of "any claims he may have in the Estate and/or against Woodham[12] and/or the Executors and Trustees, either now or at any time in the future".

[15] As regards the payment of the $2 million settlement figure, the Deed stipulated:

(a) "approximately" $729,154.00[13] was to be settled on the new Trust from the fixed term deposits held on Joe's behalf at Westpac Banking Corporation as soon as the new Trust was established; and

(b) the balance was to be paid (from the sale of a property in Blenheim) on 1 July 2013 (a year later).

[16] The new "Jonathan Morris Trust" was established the following day (13 June 2012). The funds were transferred to the new Trustees (the third defendants, Messrs Chapman and Underwood) in accordance with the settlement.[14] Mr Underwood has since been replaced as trustee by a trustee company. The current trustees (that company and Mr Chapman) are the fourth defendants in these proceedings (the Trustees).

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12 Woodham is a reference to Woodham & Morris Limited, a family company of which Joe's sister was a director. Woodham owned the property the sale of which was to fund the second tranche of the settlement amount payable to Joe under the Deed.

13 This figure represented the amount held on Joe's behalf in the Westpac accounts on 10 May 2012, the date of the Judicial Settlement Conference (JSC).

14 In terms of the first tranche payment, $729,494.87 was paid on 13 June 2012 and $15,096.99 was paid on 14 June 2012. The funds held in the relevant accounts had increased somewhat in the month between the agreement reached at the JSC and the execution of the Deed/settlement of the new Trust.

[17] The present proceedings were issued by the liquidators in 2015 (before Joe turned 25), but lay in abeyance pending resolution of the liquidators' claim in the *McIntosh* proceedings.

The relevant statutory provisions

[18] The liquidators seek an order for compensation under subpt 6 of pt 6 (prejudicial dispositions) of the PLA,[15] in an amount equivalent to the fictitious profits received by the Trustees on Joe's behalf, together with interest at the Judicature Act 1908 rate, running from the date of liquidation.[16]

[19] The relevant statutory provisions are ss 344 – 349 of the PLA.

[20] Section 344 states that the purpose of subpt 6 is:

> … to enable a court to order that property acquired or received under or through certain prejudicial dispositions made by a debtor (or its value) be restored for the benefit of creditors (but without the order having effect so as to increase the value of securities held by creditors over the debtor's property).

[21] Section 346 sets out the dispositions to which subpt 6 applies, namely dispositions of property made after 31 December 2007—

(a) by a debtor who:

(i) was insolvent at the time, or became insolvent as a result, of making the disposition; or

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15 The liquidators have proceeded on the basis that an otherwise available parallel claim under the CA is statute barred.

16 In accordance with the Supreme Court's judgment in *McIntosh* v *Fisk* [2017] NZSC 129. That decision dealt (inter alia) with s 87 of the Judicature Act 1908 (JA). On 1 January 2018, the Interest on Money Claims Act 2016 (IMCA) came into force (subject to various transitional provisions featured in ss 2 and 7 and sch 1). Clause 1 of sch 1 makes clear that proceedings commenced prior to 1 January 2018 are to be governed by the JA, despite the enactment of the IMCA and the repeal of the relevant provision of the JA by s 182(4) of the Senior Courts Act 2016.

(ii) was engaged, or was about to engage, in a business or transaction for which the remaining assets of the debtor were, given the nature of the business or transaction, unreasonably small; or

(iii) intended to incur, or believed, or reasonably should have believed, that the debtor would incur, debts beyond the debtor's ability to pay; and

(b) with intent to prejudice a creditor, or by way of gift, or without receiving reasonably equivalent value in exchange.

[22] Section 345 is an interpretation section, which begins (at subs (1)) by stating:

> (a) a disposition of property prejudices a creditor if it hinders, delays, or defeats the creditor in the exercise of any right of recourse of the creditor in respect of the property; and
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> (b) a disposition of property is not made with intent to prejudice a creditor if it is made with the intention only of preferring one creditor over another; and
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> (c) a disposition of property by way of gift includes a disposition made at an undervalue with the intention of making a gift of the difference between the value of the consideration for the disposition and the value of the property comprised in the disposition; and
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> (d) a debtor must be treated as insolvent if the debtor is unable to pay all his, her, or its debts, as they fall due, from assets other than the property disposed of.

[23] And subs (2) defines:

(a) disposition, as:

(i) a conveyance, transfer, assignment, settlement, delivery, payment, or other alienation of property, whether at law or in equity;

(ii) the creation of a trust;

(iii) the grant or creation, at law or in equity, of a lease, mortgage, charge, servitude, licence, power, or other right, estate, or interest in or over property;

(iv) the release, discharge, surrender, forfeiture, or abandonment, at law or in equity, of a debt, contract, or thing in action, or of a right, power, estate, or interest in or over any property (and for this purpose a debt, or any other right, estate, or interest, must be treated as having been released or surrendered when it has become irrecoverable or unenforceable by action through the lapse of time);

(v) the exercise of a general power of appointment in favour of a person other than the donee of the power;

(vi) a transaction entered into by a person with intent by entering into the transaction to diminish, directly or indirectly, the value of the person's own estate and to increase the value of the estate of another person;

(b) property, as including the proceeds of any property; and

(c) proceeds (in relation to any property), as:

(i) the proceeds of the sale or exchange of the property; and

(ii) if the property is money, other property bought with that money.

[24] Section 348 empowers the Court to set aside a disposition of property if it is satisfied that the disposition is one to which subpt 6 applies and that the applicant has been prejudiced by it.[17] Such an order can require a "person who acquired or received

[17] Section 347 makes it clear (inter alia) that if the debtor is a company in liquidation, then the liquidator may apply for an order under section 348.

property through the disposition to pay, in respect of that property, reasonable compensation to the person (for any applicable purpose) specified in section 350".[18]

[25] The phrase "person who acquired or received property through the disposition" is then defined in subs (4) to mean a person who acquired or received property—

(a) under the disposition; or

(b) through a person who acquired or received property under the disposition.

[26] The power conferred by s 348 is, however, limited by s 349 which states:

> (1) A court must not make an order under section 348 against a person who acquired property in respect of which a court could otherwise make the order and who proves that—
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> (a) the person acquired the property for valuable consideration and in good faith without knowledge of the fact that it had been the subject of a disposition to which this subpart applies; or
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> (b) the person acquired the property through a person who acquired it in the circumstances specified in paragraph (a).
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> (2) A court may decline to make an order under section 348, or may make an order under section 348 with limited effect or subject to any conditions it thinks fit, against a person who received property in respect of which a court could otherwise make the order and who proves that—
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> (a) the person received the property in good faith and without knowledge of the fact that it had been the subject of a disposition to which this subpart applies; and
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> (b) the person's circumstances have so changed since the receipt of the property that it is unjust to order that the property be restored, or reasonable compensation be paid, in either case in part or in full.

[27] The defence relied on in the present case is that contained in s 349(1)(a). I return to that later.

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[18] PLA, s 348(2)(b).

The liquidators' claim

The claim against the first and second defendants

[28] At the time the claim was filed, the liquidators believed that the contested funds had been transferred to the third defendants, but did not know whether some or all of the funds had been distributed to Joe. As well, the liquidators considered that s 347(3) of the PLA required that the Executors (as the persons to whom the challenged disposition was first made) be served with, and named as a party to, the proceedings. They were also unsure whether Messrs Holden and Bridge held an interest in Portfolio 969 in their capacity as trustees of Mr Morris' estate or whether they held the interest directly on trust for Joe. As I understand it, it was for these reasons that the liquidators named Messrs Holden and Bridge as both first defendants (in their capacity as Executors/Trustees of Mr Morris' estate) and as second defendants (in their capacity as Trustees of a separate Trust for Joe).

[29] Accordingly, the first and second defendants filed a statement of defence to the liquidators' claim. In February 2018, they filed a cross-claim against the third, fourth and fifth defendants seeking an indemnity in relation to their costs in the litigation.[19] In June 2018, Mr Bridge also swore an affidavit setting out the history of the matter and annexing a number of relevant documents. He confirmed that:

(a) the account opened by Messrs Bridge and Holden in Joe's name was controlled by them "as executors";[20] and

(b) all the funds held by them as Executors on Joe's behalf (including the RAM investment) were paid by them to the third defendants in accordance with the Deed.

[30] As recorded in a joint memorandum dated 3 September 2018, following the filing of Mr Bridge's affidavit the liquidators and the first and second defendants reached an agreement that:

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19 The cross-claim is considered at the end of this judgment.

20 In their statement of defence Messrs Bridge and Holden denied that they had ever acted other than as Executors and Trustees of Mr Morris' estate (ie they had never acted as Trustees for Joe directly).

(a) the liquidators would not seek any orders against either the first or second defendants; and

(b) costs (as between the liquidators and the first and second defendants) would lie where they fell.

[31] The memorandum also recorded that the liquidators did not propose to discontinue the proceedings against Messrs Bridge and Holden, so that:

(a) the liquidators could rely on Mr Bridge's affidavit at the substantive hearing; and

(b) the first (and second) defendants could pursue their indemnity cross-claim against the remaining defendants.

[32] It was on that basis that the first (and second) defendants participated, in a limited way, at the hearing before me.

The claim against the third, fourth and fifth defendants

[33] The interests of the third, fourth and fifth defendants are closely aligned and Mr Withnall was instructed on each of their behalf. On the understanding that the contested funds have not yet been distributed to Joe, however, it is the fourth defendants (as the present Trustees of the Jonathan Morris Trust) who are the direct focus of the liquidators' claim.

[34] In broad terms, therefore, the liquidators must establish that:

(a) the payment made by RAM to the Executors (first defendants) in 2009 was (to the extent of the putative profits on the amounts originally invested) a prejudicial disposition; and

(b) the Trustees received those putative profits through the Executors.

[35] If both those things are established, then the question of any available defence arises.

[36] I consider each issue, in turn.

The 2009 disposition

[37] Mr Withnall's quite reasonable position was that although, in light of the Supreme Court's decision in *McIntosh*, it was unlikely to be difficult for the liquidators to establish that the 2009 disposition was prejudicial, in terms of the PLA, they should be put to proof on that. So, the liquidators must show that:

(a) there was a disposition of property;

(b) the disposition was made by a debtor;

(c) the debtor was insolvent at the time of the disposition, or became insolvent as a result of making it;

(d) the disposition was made with intent to prejudice a creditor;[21] and

(e) the liquidators were prejudiced by that disposition.

A disposition of property?

[38] The term "disposition" is defined as including a payment. There is no dispute that RAM made a payment to the Executors in 2009. Although the money paid out constituted funds which RAM was holding on trust for other investors, the decision in *McIntosh* makes it clear that such payments are dispositions to which subpt 6 applies. In short, the Court reasoned that:[22]

(a) the definition of "property" in s 4 of the PLA includes "any estate or interest in the property";

[21] Or by way of gift, or without reasonably equivalent value in exchange.
[22] *Fisk SC decision*, above n 3, at [25] – [26].

(b) there was no doubt that RAM had at least legal title to the money paid to Mr McIntosh, which satisfied the requirement that the disposition be of property; and

(c) there was nothing in the definition of "disposition" in s 345(2) of the PLA requiring that the payment must be a payment of money that is both legally and beneficially owned by the payer.

[39] Accordingly, the fact that RAM did not have beneficial title to the money it paid to Mr McIntosh did not mean there was no disposition of property for the purpose of s 345(2). The same conclusion inexorably follows here; the payment made by RAM to the Executors here was therefore a qualifying disposition.

Is RAM a debtor?

[40] Again, in *McIntosh* the Supreme Court had no doubt that RAM was a "debtor" when it made the payment to Mr McIntosh. The Court observed that although the term "debtor" is not defined in the PLA, "creditor" is defined as including a person who is a creditor within the meaning of s 240 of the CA, namely a person who would be entitled to claim in a liquidation under s 303 of the CA that a debt is owing to him or her. In turn, s 303 provides that a claim that may be admitted against the company in liquidation includes "a debt or liability, present or future, certain or contingent, whether it is an ascertained debt or a liability for damages".[23]

[41] In RAM's case, the Court said that it was clear that the investors whose money was misappropriated by RAM had claims against RAM for recovery of those amounts, constituting a debt owed to each investor. On this basis, the payment made by RAM to Mr McIntosh was a payment made by a debtor, as required by s 346(1)(a).[24]

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23 At [27] – [28].

24 In the High Court decision of *Fisk v McIntosh* [2015] NZHC 1403, [2016] NZCCLR 10 at [35], MacKenzie J held that this element did not require that there be a debtor/creditor relationship between the disposer and the recipient of the payment. The focus is on the disposer as a debtor in relation to the insolvency requirement, not on its status with regard to the challenged disposition.

[42] Again, that reasoning applies equally here. The liquidators evidence establishes that:[25]

(a) the Ponzi scheme was well established by 2009;[26]

(b) Mr Ross has subsequently admitted criminal behaviour dating back to June 2000, relating to the misappropriation of investor deposits;

(c) the solvency analysis for the year ended March 2009 (the financial year before the payment to the Executors was made) shows that:

(i) while RAM was reporting to investors that it was holding assets totalling $266,253,295.01 it in fact only held assets totalling $56,958,607.71; and

(ii) RAM had a negative net contributions liability to investors of $102,285,584.59 (that is, investors had made capital contributions to RAM, which exceeded the payments they had received from RAM by that amount).

(d) The position worsened the following year (being the year that payment to the Executors was made). In the year ended March 2010:

(i) RAM was reporting to investors that it was holding assets totalling $353,055,365.32 but in fact it only held assets totalling $53,927,761.69; and

(ii) RAM had a negative net contributions liability to investors of $113,350,340.36.

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25 While the liquidators' evidence on this issue is substantially similar to that which was before the High Court, Court of Appeal and Supreme Court in *McIntosh*, their analysis was updated for the purposes of these proceedings in light of their ongoing investigations and communications with investors. The updated figures showed that the value of the actual assets held by RAM was lower than had been understood in 2014 (when the *McIntosh* evidence was prepared), meaning RAM's financial position was in fact worse than previously believed.

26 The evidence is that the scheme was fully operative by, at least, June 2000, when 60 per cent (by value) of shares reportedly held by RAM for investors was recorded as held by "Bevis Marks", the fictitious broker used by Mr Ross to record fictitious transactions.

[43] Accordingly, at the time the disposition was made, investors would have had claims against RAM for recovery of the capital contributions misappropriated by RAM. RAM is therefore a "debtor" for all present intents and purposes.

Was RAM insolvent at the time the payment to the Executors was made?

[44] Section 345 stipulates that a debtor must be treated as insolvent if the debtor is unable to pay all of its debts, as they fall due, from assets other than the property which is the subject of the disposition. Ms Pinny submitted that, while there are a number of ways RAM's solvency can be analysed, each ultimately leads to the same conclusion: by 2009 (when the payment was made) RAM was hopelessly insolvent.

[45] More particularly, Ms Pinny submitted that RAM's insolvency could be established because:

(a) RAM misapplied trust funds; and/or

(b) RAM relied on misappropriated trust funds to pay its due debts.

[46] As to the first, it is not disputed (and has been admitted by Mr Ross) that RAM misapplied investor assets - both shares and cash - for a prolonged period of time. Going back at least as far as 2000, RAM did not deal with investor assets as promised. It intermingled funds, did not kept separate bank accounts in investors' names and frequently did not purchase the shares it had told investors that it had purchased for them.

[47] In *McIntosh,* the High Court held that:[27]

(a) by virtue of the Ponzi, every investor in RAM had an accrued cause of action against RAM for breach of trust in November 2011 (the date of the challenged payments in that proceeding);

(b) a claim in restitution is a debt;

[27] *Fisk v McIntosh*, above n 25, at [46] – [51].

(c) accordingly, the right of each investor to bring immediate proceedings as soon as the investors' funds were misapplied constituted a debt, in terms of the test for insolvency pursuant to the PLA; and

(d) RAM was unable to meet all of those claims in November 2011.

[48] The Supreme Court later endorsed this analysis.[28]

[49] RAM could not have repaid the misappropriated funds to investors from its available legitimate sources (namely without using investor A's assets to pay the liability owing to investor B) from at least 1 June 2008 onwards, because the actual assets held for investors were less than the actual contributions (capital payments) made by investors. The solvency analysis above at [42(d)] establishes that at the time the payment was made, RAM could not pay the equitable debt it owed to the investors.

[50] Any argument that RAM was not insolvent at the time the payment was made because it was (at that time) paying its due debts must also be rejected. As the majority of the Supreme Court noted in *McIntosh*:[29]

> [31] … In addition, it is clear from the evidence that RAM was insolvent even if the position of investors was put to one side, because its income was substantially less than its outgoings during the relevant period and it was clearly unable to pay its debts in relation to the costs of operating its business from its own resources.

[51] Put briefly, RAM generated no funds or income of its own. Although it was contractually entitled to charge management fees - usually one per cent of the value of the particular portfolio - in practice these fees were rarely, if ever, charged or paid. And while the deduction of management fees was recorded in Investor Quarterly Reports, those reports were largely fictitious.

[52] So, in reality, there was no deduction of fees from investors' assets, nor the physical transfer of funds representing management fees of any significance. Rather, RAM ran one bank account which failed to differentiate between RAM's own income/funds and trust funds.

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28 *Fisk SC decision*, above n 3, at [31].
29 At [31].

[53] By way of example only, in the year ended 31 March 2010 (the financial year in which the payment was made):

(a) RAM was entitled to management fees of $545,643.97;

(b) RAM received no actual management fees; and

(c) RAM's actual operating costs were $1,894,127.38 (being costs such as wages, subscriptions, rent and PAYE).

[54] Regardless of whether the analysis is based on the management fees to which RAM was entitled or the management fees it received, it is plain that the company could not pay its due debts from its own funds. The only way in which RAM could and did pay its due debts was by the misapplication of funds held on trust for its investors. Accordingly, RAM was insolvent at the time the payment was made.

Was the payment was made with intent to prejudice creditors' claims?

[55] I have set out s 345 of the PLA above. Subsection (1)(a) makes it clear that a disposition of property prejudices a creditor if it hinders, delays, or defeats the creditor in the exercise of any right of recourse of the creditor in respect of the property.

[56] The issue of intent in a related context was discussed authoritatively by the Supreme Court in *Regal Castings Ltd v Lightbody* where Blanchard and Wilson JJ said:[30]

> [52] … The existence of any such dishonest intent on the part of the debtor is a question of fact and the onus of proving it is upon the party attacking the transaction.
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> …

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[30] *Regal Castings Ltd v Lightbody* [2008] NZSC 87, [2009] 2 NZLR 433 at [52] and [54]. That case concerned s 60(1) of the Property Law Act 1952 (the predecessor to s 348(1)). Section 60(1) permitted a transaction to be set aside if a debtor entered into it with intent to defraud his or her creditors.

> [54] Whenever the circumstances are such that the debtor must have known that in alienating the property, and thereby hindering, delaying or defeating creditors' recourse to the property, he or she was exposing them to a significantly enhanced risk of not receiving the amounts owing to them, then the debtor must be taken to have intended this consequence, even if it was not actually the debtor's wish to cause them loss…

[57] This reasoning was applied by MacKenzie J in *McIntosh* at first instance when his Honour held:[31]

> [55] I consider that Mr Ross' intent to hinder, delay or defeat RAM's creditors can be readily inferred. In receiving the funds for investment, Mr Ross immediately misapplied those funds in circumstances where repayment could only have been made from the misapplication of investors' funds. He must have known that whenever he made a payment to an investor he was exposing other investors to a significantly enhanced risk of not recovering their funds.

[58] This reasoning was approved on appeal by the Supreme Court:[32]

> [36] … The reality in the present case was that every time a payment was made to an investor of an amount that was greater than the investor's pro rata share of the comingled trust fund, the position of the remaining investors/creditors was worsened. That is the inevitable consequence of the operation of a Ponzi scheme and must have been apparent to Mr Ross, and through him RAM, as the operator of the scheme.

[59] Necessarily, therefore, the requisite intention to hinder, delay or defeat RAM's creditors is also established here.

Conclusion

[60] In light of my conclusions in relation to each of the five prerequisites set out at [37] above, it is clear that the 2009 payment from RAM to the Executors was a prejudicial disposition in terms of the PLA. The question then arising is whether events subsequent to the 2009 payment – and in particular the 2012 settlement – has put the funds out of the liquidators' reach.

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31 *Fisk v McIntosh*, above n 25, at [55].
32 *Fisk SC decision*, above n 3, at [36].

The 2012 settlement

[61] As noted earlier, s 348 empowers the Court to set aside a disposition and to require a "person who acquired or received property through the disposition" to pay reasonable compensation. Such a person is defined in subs (4) as a person who acquired or received property:

(a) under the disposition (here, the Executors); or

(b) through the person who acquired or received property under the disposition.

[62] Mr Withnall submitted that the receipt by the Trustees of the settlement monies in 2012 (and 2013) was not caught by this provision because those monies could not be said to be the same "property" as that which was the subject of the prejudicial disposition in 2009. He emphasised the co-mingling that had occurred over the ensuing three years and said it was impossible now separately to identify the Portfolio 969 funds.

[63] I am unable to agree with that submission. Notwithstanding the undoubted co-mingling, there can be no doubt that the Portfolio 969 funds were not dissipated or paid out between 2009 and 2012. While they may have been combined with other funds, invested, grown and moved in and out of various bank accounts (all of which were controlled by the Executors on Joe's behalf) I agree with Mr Colson that it would run contrary to the important remedial purpose of subpt 6 of pt 6 of the PLA to require some more formal "tracing" process in circumstances such as the present. This purpose is evident (inter alia) from the extended definition of "property" and "proceeds" in subpt 6. As the Law Commission noted in the report that preceded the enactment of the PLA:[33]

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[33] Law Commission *A New Property Law Act* (NZLC R29, 1994) at [317] (emphasis in original). The relevant definitions proposed by the Law Commission in that report were adopted in the new Act.

> 317 … (**Property** for the purposes of the subpart includes the proceeds of the property which was actually transferred: … Indeed, property is defined in such a way … as to enable the proceeds of proceeds to be followed if there are successive conversions of the form of the property. **Proceeds** means the proceeds of the sale or exchange of the property and, if the property or its proceeds is money, includes property bought with that money: …) The property ordered to be restored need not be the same property as was disposed of, though it must be connected with it in this way.

[64] Putting to one side any technical points about how money paid into a bank account is transmogrified into a debt[34] (which does not, in any event, point to a different conclusion) as a matter of common sense the funds transferred by the Executors to the Trustees in 2012 included the funds which constituted or comprised the prejudicial disposition in 2009. In terms of s 348, those funds were therefore received by the Trustees "through" the Executors who, in turn, received the property by way of a prejudicial disposition. The Trustees are prima facie liable to pay reasonable compensation to the liquidators, subject only to any available statutory defence.

Do the Trustees have a defence?

[65] I note at the outset that there was no suggestion that a change of circumstances defence was available.[35] Such a defence (if established) gives the Court a discretion under s 349(2) of the PLA to decline to make an order for compensation or to make a limited or conditional order. Rather, the sole focus of the Trustees' defence was on the application of s 349(1)(a) and (accordingly) whether it could be said that the Trustees acquired the funds for valuable consideration and in good faith without knowledge of the fact that it had been the subject of a prejudicial disposition.

[66] There is no dispute as to the Trustees' good faith and absence of knowledge. Rather, the question is whether Joe's abandonment in 2012 of any present and future claims against the estate and the Executors, in return for $2 million settlement payment, constitutes the requisite "valuable consideration".

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34 See for example the discussion in *Foskett v McKeown* [2001] UKHL 29, [2001] AC 102 at 127-128.

35 I therefore make no comment on the possible argument that Joe settled his claim against the Executors/estate for less than he would have, had he known that he would later lose $258,910 of the settlement sum to the liquidators.

[67] As Mr Colson said, the 2012 settlement related to a dispute between Joe, the Executors, and Joe's brother and sister. The Trustees were not a party to the settlement and, indeed, the relevant Trust did not exist when the Deed was executed. On a technical level, therefore, it is difficult to see how the Trustees could have provided "valuable consideration" for the funds they subsequently received, and to which they still hold legal title.

[68] Contrary to Mr Colson's submission, however, I would not be inclined necessarily to regard that as the end of the matter. If the Trustees received the funds to hold for Joe, even on a contingent basis, as a result of Joe himself providing valuable consideration for those funds (or at least for his beneficial interest in them) then it seems to me to be consistent with the policy underlying the s 349(1)(a) defence to recognise that. If the purpose of s 349(1)(a) is effectively to protect bona fide purchasers for value then it should operate in a realistic way to do so.

[69] In the end, however, it is not necessary for me to reach a concluded view on that issue. That is because I am unable to agree with Mr Withnall that Joe did, in fact, provide valuable consideration for the contested funds.

[70] It is true that under the terms of the settlement Joe gave up both his extant claim against the Executors and any future claims, ostensibly in return for (a beneficial interest in) $2 million. But the terms of the Deed make it quite clear that the discrete first tranche of that sum represented exactly the amount ($729,154.00) that was already held on his behalf (and in which he had an identical beneficial interest) by the Executors.

[71] There is no evidence whatsoever that Joe's beneficial interest in those funds was contingent or had somehow been in jeopardy prior to the settlement and no evidence that he was giving up his litigation rights to protect it.[36] The only uncertainty was whether legal title in the funds would, in due course, vest in him. And whether or not that occurred depended after the settlement, just as it had before, solely on Joe attaining the age of 25.

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36 Joe himself did not swear an affidavit or give evidence in these proceedings.

[72] In short, the settlement effected no substantive change to his pre-existing entitlement to an interest in the $729,154.00. Rather, it seems quite clear that what Joe got in return for foregoing his litigation rights against the Executors and the estate was the later payment of a specified amount of the proceeds from the sale of quite separate property owned by the estate, to be held by the Trustees for Joe's future benefit. Indeed, it can reasonably be inferred that the only reason that the first payment was included in the settlement at all was because Joe no longer wished those funds to be controlled and managed by the Executors but, rather, by the new Trustees.

[73] For the reasons I have already given, the $729,154.00 paid across to the new Trustees as the first tranche of the settlement sum is to be regarded as including within it the funds representing the prejudicial disposition of $258,910.73 made by RAM to the Executors in 2009. And if no valuable consideration was given for the transfer of the full amount then no valuable consideration was given for the lesser sum.

[74] The Trustees' defence under s 349(1)(a) must fail.

Conclusion

[75] For the reasons given, the liquidators' claim against the fourth defendants is made out and no defence has been established. The 2009 disposition, less that portion representing the value given for it by Mr Morris, is set aside.

[76] There was no suggestion that, in the event of setting aside, the amount of compensation payable should not reflect the value of the prejudicial disposition. The liquidators are therefore entitled to an order against the fourth defendant Trustees requiring the payment of compensation in the sum of $258,910.73, accordingly.

Interest

[77] The liquidators claim and, based on *McIntosh*,[37] are entitled to, interest on the compensation amount at the JA rate (five per cent),[38] running from 17 December 2012, which is the date of the liquidators' appointment.

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37 *McIntosh v Fisk,* above n 17.

38 JA, s 87(3) and Judicature (Prescribed Rate of Interest) Order 2011, cl 4.

Costs

[78] Costs (on a 2B basis) should follow the event in the usual way. On the understanding that:

(a) no costs are sought by the liquidators against the first and second defendants; and

(b) the funds have not yet been paid by the fourth defendant to the fifth defendant; and

(c) this order is made against the Trustees (the fourth defendant) only.

[79] The Trustees' reasonably incurred costs are, however, payable out of the Trust funds in the usual way.

[80] A further and more difficult issue arises in relation to the first and second defendants' cross claim.[39] The question now is whether the first defendants (the Executors) should be entitled to an indemnity in respect of the costs they incurred in taking steps in the proceedings, prior to being advised that the plaintiffs would not pursue the claim against them.[40] The Executors rely on both the terms of the Deed and on general equitable principles for their claim. I address each in turn.

A contractual indemnity?

[81] As to the first, reliance was placed on cl 4.3 of the Deed, which relevantly provided:

> The parties have agreed that following the execution of this Deed:
>
> 4.3.1 the Executors and Trustees will settle Joe's claim in the sum of $2,000,000.00 (two million dollars) as a net capital sum with indemnity from and against any further or other claims;

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[39] Although the cross claim was filed by both the first and second defendants, no one has sought to contest the position taken by Messrs Bridge and Holden in their statement of defence that they only ever acted as Trustees and Executors of Mr Morris' estate, not as Trustee of some other Trust of which Joe was a beneficiary. In that sense, the second defendant does not exist.

[40] See the narrative at [28] – [31] above.

[82] The Executors say that the claim against them in this proceeding qualifies as a claim within the contemplation of this sub-clause because:

(a) it was addressed to them as executors/trustees of funds previously held by them for Joe's benefit; and

(b) they had accounted for those funds as required by the Deed.

[83] Because the third and fourth defendants were not a party to the Deed the contractual indemnity is sought to be enforced against Joe only.

An indemnity in equity?

[84] As to the equity-based claim, the Executors rely on general principle, as recently articulated by the Court of Appeal in *Butterfield v Public Trust*:[41]

> [20] It is one of the fundamental rights of an honest express trustee that costs and expenses properly incurred in the administration of the trust are compensable out of the assets of the trust. As Danckwerts J explained in *Re Grimthorpe*:
>
> > It is commonplace that persons who take the onerous and sometimes dangerous duty of being trustees are not expected to do any of the work on their own expense; they are entitled to be indemnified against the costs and expenses which they incur in the course of their office; of course, that necessarily means that such costs and expenses are properly incurred and not improperly incurred. The general rule is quite plain; they are entitled to be paid back all that they have had to pay out.
>
> [21] The proposition is so fundamental that it need not be justified. It is a right, probably proprietary in nature, recognised by equity as an incident of trusteeship. The right is to an indemnity for reasonable costs and expenses incurred in the administration of the trust. That is not the same as an award of indemnity costs in litigation. The entitlement in the first instance is against the trust and its assets. A current trustee may therefore deduct reasonable costs and expenses incurred in the administration of the trust from the trust assets, in exercise of a right of exoneration. *Former trustees may claim such costs and expenses from their successors* or, failing satisfaction, via the court. Exercising its supervisory jurisdiction the court will review costs and expenses incurred to ensure they are both necessarily incurred in the interests of the trust and reasonable in extent. …

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41 *Butterfield v Public Trust* [2017] NZCA 367, [2017] NZAR 1439 at [20] - [21] (citations omitted) (emphasis added).

Discussion

[85] I begin by saying that it seems right in principle that the Executors should not have to bear their own costs in the proceedings. Indisputably they were named as parties only because of (and in relation to) their role as the Executors and Trustees of Mr Morris' estate. Notwithstanding the earlier proceedings commenced by Joe against them, there is nothing before me suggesting they acted improperly in their trustee capacity or in breach of their duties. There is no remaining issue of accounting; the Executors clearly performed their obligations under, and in accordance with, the Deed. The issue is, rather, whether there is a basis in law or in equity for the indemnity they seek.

[86] In terms of the claim based on cl 4.3.1 of the Deed, there are difficulties. I agree with Mr Withnall that the clause is (at best) ambiguous. I do not propose to recite all his submissions to that effect. Suffice it to say that, even on a generous reading, I find it impossible to read the clause in context as doing more than indemnifying the Executors against further claims by Joe. While I agree that such an indemnity makes little sense (in light of Joe's effective promise under the Deed to bring no further claims against them) the suggestion that Joe might have agreed to indemnify them from claims by third parties makes even less sense. Moreover, it seems wholly unreasonable.

[87] In terms of the equitable claim, the proposition that the fourth defendants (the Trustees) are properly be viewed as the Executors' "successors" is, perhaps, debatable. The first defendants were the Executors and Trustees of Mr Morris' estate and (as I understand it) they were later replaced in that role by Joe's siblings. As noted earlier, their own pleading was that (unlike the fourth defendants) they have never been the Trustees of a Trust settled specifically for Joe's benefit.

[88] That said, however, the fourth defendants *are* the successors of the Executors in terms of their guardianship of the funds to which these proceedings relate. The new Trust was established in 2012 solely for the purpose of owning and protecting Joe's interests under his father's estate, and on terms identical to that set out in Mr Morris' will. The better view is, I think, that it is appropriate that the first defendants be

regarded as former trustees of the new Trust and that, as their successors, the fourth defendants should indemnify them for the costs they have reasonably incurred in these proceedings.

[89] If there is any dispute as to the reasonableness of the costs incurred either by the Trustees or the Executors further memoranda will need to be filed.

Rebecca Ellis J