BUDDLE FINDLAY

Joint Court hearing in Halifax liquidation a first for New Zealand

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The High Court has released its judgment in *Re Halifax NZ Limited (In liq)* [2021] NZHC 113, involving a unique contemporaneous sitting of the High Court of New Zealand and Federal Court of Australia.

The proceedings involved applications for directions in relation to the liquidation of Halifax New Zealand Ltd (Halifax NZ) and Halifax Investment Services Pty Ltd (Halifax Australia). The proceedings in the High Court of New Zealand and the Federal Court of Australia were heard together, with Australian counsel appearing physically in Australia before Justice Markovich and by VMR in New Zealand before Justice Venning and vice versa for New Zealand counsel. The Federal Court and the New Zealand High Court issued simultaneous decisions, and agreed on the issues raised in the proceedings but arrived at their respective decisions separately, applying their respective laws.

Background

Halifax Australia and Halifax NZ provided investment broking services and a trading platform via which customers could trade in securities. Halifax AU held an Australian Financial Services Licence while Halifax NZ was a licensed derivatives issuer and an introducing agent to Halifax Australia. Halifax's clients could trade in investments traded on a regulated stock exchange or OTC financial products not listed on a regulated stock exchange.

Halifax Australia and NZ were required to hold client funds on trust in accordance with the Corporations Act 2001, Financial Markets Conduct Act, Financial Advisers Act and pursuant to contract. Nonetheless, evidence of the two companies' financial dealings demonstrated that there had been significant mixing of Halifax NZ funds and Halifax Australia funds across the various accounts maintained by the two companies, and client funds had not been directly allocated to particular investments. Instead, Halifax NZ and Australia allocated funds in bulk to the various trading platforms according to the amount of money necessary to satisfy investments on those platforms from time to time.

Halifax Australia entered into administration on 23 November 2018, and liquidation on 20 March 2019. Halifax New Zealand followed soon after.

The concurrent applications were filed to deal with how to distribute the proceeds to investors given the shortfall and the intermingling of funds. Representative counsel were appointed to speak to the interests of particular classes of creditors.

Deficient mixed fund

As at 31 July 2020, there was a shortfall of just over AUD53m between the amount that should have been held on trust for Halifax's clients and the value of assets actually held on trust. The majority of the respondents characterised the combined assets of Halifax NZ and Halifax Australia as a deficient mixed fund, but several investor groups made claims to specific assets. One respondent group, the Whitehead Interests, argued that their holdings were separately identifiable and traceable.

The Court found that, as a matter of fact, this was not the case. Client funds were commingled through the various accounts operated by Halifax NZ and Australia. The origin of the funds used to purchase a particular client's investments could not be identified by reference to the platform on which that client traded, and the Whitehead Interests shares were purchased using funds that passed through a tainted pool of funds.

Severing investments from the deficient mixed fund

With the exception of category 4 investors, who were arguing that all clients ought to share in the deficiency, the challenge for each of the representative investor classes was to satisfy the Court that their particular investment was severable from the mixed fund and they were therefore not subject to the common misfortune of sharing in the deficient mixed fund.

For the most part, the Court found that investors ought to share *pari passu* in any distribution because they had invested through a deficient mixed fund.

Two categories of investor were able to demonstrate that their investments were severable from the mixed fund.

1. Category 3 shareholders transferred their shares direct from another stockbroker, and no trading in those shares took place. Because no money from the deficient mixed fund was used to acquire the shares, their interest was severable.
2. Category 5 investors either transferred shares or purchased shares before Halifax NZ's funds were mixed with the deficient Australian fund. For those who could identify the fact that the relevant purchase took place before the admixture of funds on 1 July 2013, their interest was also severable.

Following the reasoning of Clifford J in *Priest v Ross Asset Management Ltd,* Venning J considered that a trust could be declared over the investments of those investors in Category 3, notwithstanding they were in a fungible pool of assets and some of those assets within the pool belonging to other investors may have been purchased from the deficient mixed fund. The important point was that the Category 3 clients' shares were purchased separately, and not using funds from the deficient mixed funds.

Take home points

This case is important as it represents the first case to be heard concurrently in New Zealand and Australia, although both Courts reached their own independent decisions. Venning J recorded at [9] "All parties agreed that the Federal Court and the HCNZ could discuss issues during deliberations. Markovic J and I have settled and are agreed on the principal issues raised in the two sets of proceedings. But the ultimate decision in each proceeding and the reasons for decision in relation to those issues are each Court's own"."

It demonstrates the willingness on the part of the New Zealand and Australian courts to adopt a collaborative approach to dealing with complex cross border insolvencies.

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