

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

**CIV-2015-404-1833
CIV-2015-404-2869
[2020] NZHC 3410**

BETWEEN FINANCIAL MARKETS AUTHORITY
Applicant

AND PTT LIMITED (IN LIQUIDATION)
First Respondent

MAXWELL FOSTER LIMITED (IN
LIQUIDATION)
Second Respondent

GIBSON MCLEOD LIMITED (IN
LIQUIDATION)
Third Respondent

Continued overleaf

Teleconference: 1 December 2020

Counsel: D R La Hood and R T Manttan for the applicant
D R Kalderimis and M G A Lister for the receivers and liquidators
No appearance for the fifth respondent
L A B Kemp for the sixth respondent

Judgment: 18 December 2020

JUDGMENT OF PALMER J

*This judgment was delivered by me on Friday 18 December 2020 at 3.00pm.
Pursuant to Rule 11.5 of the High Court Rules.*

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Registrar/Deputy Registrar

Counsel/Solicitors:
D R Kalderimis, Barrister, Wellington
Luke Cunningham & Clere, Wellington
Financial Markets Authority, Auckland
Chapman Tripp, Wellington
Kemp Barristers and Solicitors, Kumeu

ALBA INTERNATIONAL LIMITED (IN
LIQUIDATION)
Fourth Respondent

STEVEN ROBERTSON (IN
RECEIVERSHIP)
Fifth Respondent

LISA JANE ROBERTSON (COATES)
Sixth Respondent

STEVEN ROBERTSON and XAVIER
TRUSTEES LIMITED as trustees of the
Steven Robertson Family Trust
Seventh Respondents

Summary

[1] In 2015, receivers were appointed under the Financial Markets Conduct Act 2013 (the Act) over Mr Steven Robertson's companies and Asset Protection Orders (APOs) were made over assets owned by him and his companies. In 2019, he was convicted and sentenced to imprisonment for theft by a person in a special relationship, obtaining by deception and dishonest use of documents. This judgment makes orders for the distribution of the assets to creditors. The receivers and liquidators estimate creditors will likely receive 59.52 cents in the dollar.

What has happened?

Receivership and liquidation

[2] In August 2015, under s 522 of the Act, the High Court appointed Mr David Bridgman and Mr John Fisk as receivers and managers of assets owned by the respondents and made asset protection orders (APOs) over the assets.¹ That Act requires them to act in the best interests of "aggrieved persons", who had paid money into a scheme operated by the first to fifth respondents.

[3] In December 2015 Mrs Lisa Robertson (now Ms Coates) was released from receivership and management but the APOs continued over her assets.² Mr Bridgman and Mr Fisk were appointed liquidators of the first to fourth respondents, (the PTT Group companies). A wide range of assets were realised. In July 2016, the PTT Group companies were released from receivership and the APOs and Mr Bridgman and Mr Fisk resigned as the Group's receivers.

Offending and settlement

[4] On 19 August 2019, Mr Robertson was convicted of 23 charges of theft by a person in a special relationship, 11 charges of obtaining by deception and four charges of dishonest use of a document.³ On 30 October 2019, he was sentenced to six years and eight months' imprisonment with a minimum period of imprisonment of

¹ *Financial Markets Authority v PTT Ltd* CIV-2015-404-1833, 13 August 2015.

² *Financial Markets Authority v PTT Ltd* CIV-2015-404-1833, 10 December 2015.

³ *R v Robertson* [2019] NZHC 2032.

three years and four months' imprisonment.⁴ In support of his sentencing submissions in the High Court, as recorded by the Court, Mr Robertson provided a binding undertaking that he would "in effect, co-operate in those funds [of Mr Robertson and the Steven Robertson Family Trust] being made available to meet the claims of [his] ... creditors".⁵ This resulted in a five per cent discount to his sentence. On 5 June 2020, his appeal to the Court of Appeal against his sentence was dismissed.⁶

[5] Mr Robertson and the trustees of the Steven Robertson Family Trust (the Trust) have executed a confidential settlement with the receivers and liquidators settling all claims between them. So has Ms Coates. Part of the settlements involve Mr Robertson, the Trust and Ms Coates releasing all claims made against the assets subject to the APOs.

Proposed distribution

[6] In September 2020, the receivers and liquidators applied for directions to give effect to a proposed distribution whereby creditors of both the receiverships and liquidations would share equally in the assets as far as possible. This is not straightforward, due to the intermingling of Mr Robertson's affairs with those of the various entities, the potential mismatch between the documentation and the intended relationships between Mr Robertson and his customers, and the likelihood the claims received in the receiverships and liquidations do not accurately reflect the overall likely creditor position.

[7] The application was supported by an affidavit from Mr John Fisk of PwC, one of the receivers and managers of the first to seventh respondents.⁷ He considered the most equitable way to distribute the assets was to effectively pool the assets of all entities and make them available on a pro-rata basis for distribution to all creditors of all the entities.⁸ The receivers and liquidators proposed to accomplish the pooling by the Court directing, in summary:

⁴ *R v Robertson* [2019] NZHC 2773.

⁵ At [26].

⁶ *Robertson v R* [2020] NZCA 218.

⁷ Affidavit of John Fisk, 11 September 2020.

⁸ At [19].

- (a) The APOs are lifted, subject to a sufficient amount being reserved to satisfy creditors of Mr Robertson and the Trust, on a pari-passu basis across the whole pool of unsecured creditors under the receiverships and liquidations.
- (b) The receivers are permitted to transfer the remaining funds in the receivership to the liquidators, less a sum constituting any priority secured amount determined by the Court.
- (c) The assets of the PTT Group companies are pooled.
- (d) The pooled receivership and liquidation assets, less approved costs and expenses, are distributed to the receivership creditors and liquidation creditors.

[8] Mr Fisk estimated the result of the proposed distribution. There were \$1,927,329.09 of total assets available.⁹ There were possible claims of \$5,127,202.69 and \$2,886,352.86 of claims received. There were unpaid administration costs of \$309,614.10. He estimated creditors would likely receive between 31.55 and 56.04 cents in the dollar, depending on whether and how many additional claims are received.

[9] Mr Fisk said the proposed method has the advantage of efficiency and cost-effectiveness. He recognised that some creditors would be individually worse off, and better off if an alternative distribution method was adopted. But he supported the proposal as the fairest and most equitable way of distributing assets between all the creditors and achieving the aim of acting in the best interests of the aggrieved persons.¹⁰

[10] Mr Fisk's evidence was that the alternative was to unwind each of the entities separately and distribute assets amongst the creditors of the respective entities.¹¹ But, given the informal way in which money had passed between entities, this would

⁹ At Appendix 1.

¹⁰ At [23] and [47].

¹¹ At [50].

indirectly make money available from certain entities to pay the creditors of other entities. Some creditors would receive more towards their claims than creditors of other entities. It would also be much more complicated and would incur significant increased costs.

[11] The trustees of the Trust requested that the Court make orders directing the transfer may take place in accordance with, and sanctioning, the relevant deed of settlement. Mr Robertson and Ms Coates were given the opportunity to respond to the proposal but did not do so.

[12] The Financial Markets Authority (FMA) supported the proposed distribution methodology as being in the interests of the aggrieved persons. It supported the application to lift the APOs on the condition that sufficient funds remain with the receivers for distribution to creditors of the receiverships on the basis set out in the applications filed, in order to facilitate the proposed direction.

[13] The liquidators and receivers understood some creditors may wish to be heard on their distribution proposal. So they sought specific service directions on the creditors affected by the proposed distribution.

Specific issues

[14] One of the assets of the Trust was a property in Waimuku. It was subject to a mortgage to ANZ and had caveats registered against it by Mrs Elizabeth Robertson and Mrs Rae Mitchell.

[15] On 10 October 2016 the Court ordered the property to be sold and ANZ was repaid. At the Court's direction, funds were set aside so the claims of Mrs Robertson and Mrs Mitchell could be satisfied if so ordered.¹² The receivers understood the money they advanced Mr Robertson did not qualify them as aggrieved persons.¹³ The receivers have been provided with two separate documents (one unsigned, one undated) said to give rise to the mortgageable interest. The receivers treated the caveators' interests in the same manner as all other creditors. Both of the caveators

¹² Minute No 2, 10 October 2016.

¹³ Affidavit of John Fisk, 11 September 2020, at [34].

were aware of the proposed distribution. Neither of them have filed memoranda with the Court. In Mrs Mitchell's response to the receivers, she asked if a priority pay out could be considered.¹⁴ Mrs Robertson did not oppose the proposed distribution.¹⁵ I agree that Mrs Robertson and Mrs Mitchell should be treated as ordinary creditors.

[16] In his affidavit of 11 September 2020, Mr Fisk also noted that the proposal did not deal with claims they have received from creditors of Harrington Group Ltd, which was liquidated in March 2014 and removed from the companies register in January 2015.¹⁶

Agreement in principle

[17] On 17 September 2020, I agreed in principle with a distribution to creditors proposed by the receivers and liquidators of the first to fourth respondents, without prejudice to the Court's ability to decide otherwise having heard further submissions.¹⁷

[18] I directed that the interlocutory applications and all other documents related to the applications, including that minute, be served, published and notified. I granted leave for the receivers and liquidators to file a further affidavit confirming the ultimate distribution made and to file an application for final ancillary directions. In the meantime, I maintained the APOs on the current terms and conditions pending resolution of the applications.

Responses

[19] The receivers and liquidators have served, published and notified the applications as directed. I received a further affidavit from Mr Fisk dated 29 October 2020. The responses were:

- (a) No creditors indicated they opposed the orders sought.

¹⁴ Email from Rae Mitchell to Marcel Lister, regarding receivership of the Steven Robertson Family Trust, 2 October 2020 (see Affidavit of John Fisk, 29 October 2020, at 20).

¹⁵ Email from Fiona Whytock to Marcel Lister, regarding receivership of the Steven Robertson Family Trust, 3 October 2020 (see Affidavit of John Fisk, 29 October at 24).

¹⁶ Affidavit of John Fisk, 11 September 2020, at [43]-[46].

¹⁷ Minute No 10, 17 September 2020, at [14].

- (b) Mrs Robertson and Mrs Mitchell did not oppose the orders sought.
- (c) One ordinary creditor indicated to the receivers and liquidators he would like to be heard. But he did not notify the Court as he was told he needed to do if he opposed the orders.
- (d) The FMA does not have any matters to raise in response to the proposal.
- (e) Mr Robertson did not respond. At the teleconference of 1 December 2020 Mr Kemp advised that Ms Coates has no submissions to make about the proposed distribution.

[20] On 1 December 2020 I held a teleconference to clarify certain aspects of the proposed distribution. I indicated I was inclined to grant the orders sought but that I would await a final affidavit from Mr Fisk as to the details of the proposed distribution.

Final proposed distribution

[21] I received another affidavit from Mr Fisk dated 11 December 2020. He advises that the liquidators and receivers sought information from creditors in order to confirm and prove a number of claims.¹⁸ A number of creditors confirmed their claims or provided further documentation as requested. Some did not.

[22] Mr Fisk provides an estimated distribution statement detailing the proposed distribution of the assets held by the entities in receivership and liquidation. In summary, the revised distribution is above the highest end of the range anticipated in his September 2020 affidavit. On the basis of the claims received, including an allowance for unconfirmed claims, creditors would likely receive 59.52 cents in the dollar. \$893,569.57 would satisfy the receivership creditors' claims. \$757,141.14 would be distributed on a pooled basis to all liquidation creditors. The receivership and liquidation creditors would be treated on a pari passu basis.

¹⁸ Affidavit of John Fisk, 11 December 2020, at [6].

[23] Mr Fisk states that the receivers and liquidators have not yet received the required supporting documentation in relation to some claims (from the “category 1 creditors”), amounting to \$497,677.59, in respect of which they sought further proof.¹⁹ He considers it is appropriate to allow a further time of four months to allow these creditors to provide the necessary proof.²⁰ If any claims remain unproven, he expects the funds set aside would be distributed on a *pari passu* basis amongst the creditors who have proven their claims. He anticipates a significant portion of these creditors will be likely to prove at least the majority of their claims.

[24] Mr Fisk also states that there are also claims (from the “category 2 creditors”), totalling \$568,871, with which the receivers and liquidators are satisfied but for which the bank account details have not yet been provided.²¹ He considers it is appropriate to make further efforts to locate and contact those creditors. He anticipates a significant portion of these creditors are likely to be located. He considers a period of 12 months will be sufficient to do so. He requests orders reducing the default period under the Unclaimed Money Act 1971 accordingly.²² A similar application was granted in *Re Fisk*.²³ I agree.

[25] On 4 December 2020, a creditor who previously held a caveat over the property, M W Robertson Ltd as trustee of the Kotuku Trust, and Mr Mark Robertson made claims.²⁴ The caveats were removed by my order of 25 January 2017 on the basis sufficient funds from the sale would be held pending further order of the Court.²⁵ The receivers and liquidators are assessing the claims. They consider that, because no one has filed any opposition to the advertised distribution as required, if the claims of MW Robertson Ltd or Mark Robertson are proven and accepted, they should be paid as ordinary creditors. I agree.

[26] Accordingly, the receivers and liquidators propose to set aside sufficient funds to meet the claims of those creditors outlined above whose claims have not been

¹⁹ At [13].

²⁰ At [15].

²¹ At [18].

²² At [20].

²³ *Re Fisk* [2018] NZHC 2007 at [153]-[157].

²⁴ Affidavit of John Fisk, 11 December 2020, at [21] and exhibits JF-1 and JF-2.

²⁵ Minute of 27 January 2017.

proved, for four months, and those who have not provided bank account details, for 12 months. They propose to make an immediate interim distribution to the proven and confirmed creditors and then:

- (a) after the expiry of the four-month period, to distribute the funds remaining unproven to the proven and confirmed creditors; and
- (b) after the expiry of the 12-month period, the funds of those creditors who have not provided bank account details will form unclaimed moneys and will be relinquished in accordance with the Unclaimed Moneys Act 1971 (subject to the reduced timeframe, which I approve).

[27] I consider the proposed orders bring this long-running saga to an end fairly. I consider there are sufficient grounds to make the orders and directions.

Result

[28] I order:

- (a) These proceedings (CIV-2015-404-1833 and CIV-2015-404-2869) are heard together.
- (b) The APOs made on 13 August 2015 (including all variations and extensions made since then), and that still continue, are lifted on the basis the Court directs the receivers:
 - (i) to transfer to the first to fourth respondents in liquidation (the PTT Group companies) all funds and property held by the receivers, less a sum representing the aggregate pari passu share of unsecured creditors of the fifth and seventh respondents; and
 - (ii) to distribute the balance to:
 1. meet the approved costs and expenses of the receiverships;and

2. each unsecured creditor of the receiverships in an amount of their pari passu share.
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- (c) The liquidation of the PTT Group companies (PTT Limited, Maxwell Foster Limited, Gibson McLeod Limited and Alba International Ltd) will proceed together as if they were one company, and the net amount held by the liquidators will be treated as forming one common pool of assets for distribution, available to all creditors of the PTT Group companies.
 - (d) The common pool of assets, after deducting the approved costs and expenses of the liquidators, will be distributed to those proven and confirmed creditors on a pari passu basis.
 - (e) Any of the assets set aside by the receivers and liquidators in respect of the claims by the “category 1 creditors”, as described in the affidavit of John Fisk of 11 December 2020, whose claims remain unproven as at the date four months after the Court’s approved distribution is made, shall be distributed amongst the proven and confirmed creditors on a pari passu basis;
 - (f) Any of the assets set aside by the receivers and liquidators in respect of the claims by the “category 2 creditors”, as described in the affidavit of John Fisk of 11 December 2020, whose claims or details remain unconfirmed as at the date 12 months after the Court’s approved interim distribution is made, shall be relinquished by the receivers and liquidators in accordance with the Unclaimed Money Act 1971, subject to this Court’s direction that the six year period for retaining those assets by the receivers and liquidators be reduced to 12 months.
 - (g) These orders are made subject to the condition that the receivers and liquidators are to provide the court with a satisfactory affidavit setting out the proposed final distribution upon the conclusion of the claims proving process.

(h) The costs of these applications are awarded to the applicants.

Confidentiality

[29] Mr Fisk's affidavits of 29 October and 11 December 2020 contain confidential investor information. The receivers and liquidators request that it not be made available to any third parties other than in accordance with a request under r 11 of the Senior Courts (Access to Court Documents) Rules 2017 and with counsel being given the opportunity to oppose any such request. I so order.

Palmer J