FEDERAL COURT OF AUSTRALIA

Kelly, in the matter of Halifax Investment Services Pty Ltd (in liquidation) (No 6) [2019] FCA 2111

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| File number: |  |
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| Judge: | **GLEESON J** |
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| Date of judgment: | 6 November 2019 |
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| Date of publication of reasons: | 13 December 2019 |
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| Catchwords: | **CORPORATIONS** – application for directions and judicial advice – where company funds and trust funds are co-mingled – whether liquidators are justified in using trust and comingled funds to pay their remuneration for the administration and liquidation – application allowed |
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| Legislation: | *Corporations Act 2001* (Cth) Sch 2 ss 60-5(1), 60-10(1), 60-12, 90-15  *Trustee Act 1925* (NSW) ss 63, 81 |
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| Cases cited: | *13 Coromandel Place Pty Ltd v CL Custodians Pty Ltd (in liq)* [1999] FCA 144; (1999) 30 ACSR 377  *Australian Securities and Investments Commission v Rowena Nominees Pty Ltd* [2003] WASC 112; (2003) 45 ACSR 424  *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth* [2019] HCA 20; (2019) 368 ALR 390  *In the matter of AAA Financial Intelligence Ltd (in liquidation) ACN 093 616 445* [2014] NSWSC 1004  *In the matter of Primespace Property Investment Limited (in liquidation)* [2016] NSWSC 1821  *Re GB Nathan & Co Pty Ltd (in liq)* (1991) 24 NSWLR 674  *Re Greater West Insurance Brokers Pty Ltd* [2001] NSWSC 825; (2001) 39 ACSR 301  *Re Suco Gold Pty Ltd* (1993) 33 SASR 99 |
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| Date of hearing: | 6 November 2019 |
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| Registry: | New South Wales |
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| Division: | General Division |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | Corporations and Corporate Insolvency |
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| Category: | Catchwords |
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| Number of paragraphs: | 62 |
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| Counsel for the Plaintiffs: | A Leopold SC with E Holmes and J Burnett |
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| Solicitor for the Plaintiffs: | K&L Gates |

ORDERS

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|  | | NSD 2191 of 2018 |
| IN THE MATTER OF HALIFAX INVESTMENT SERVICES PTY LTD (IN LIQUIDATION) (ACN 096 980 522) | | |
|  | MORGAN JOHN KELLY AND PHILIP ALEXANDER QUINLAN AS JOINT AND SEVERAL LIQUIDATORS OF HALIFAX INVESTMENT SERVICES PTY LTD (IN LIQUIDATION) (ACN 096 980 522)  First and Second Plaintiffs  HALIFAX INVESTMENT SERVICES PTY LTD (IN LIQUIDATION) (ACN 096 980 522)  Third Plaintiff | |

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| JUDGE: | GLEESON J |
| DATE OF ORDER: | 6 November 2019 |

THE COURT ORDERS THAT:

1. Subject to orders 2 to 4 below, pursuant to s 90-15 of the *Insolvency Practice Schedule (Corporations)*, being Schedule 2 to the *Corporations Act 2001* (Cth) (**Act**) and/or s 63 and s 81 of the *Trustee Act 1925* (NSW), the first and second plaintiffs are justified in using and applying the funds held in the accounts set out in the schedule to the orders made on 22 August 2019 and marked “Annexure B” to pay their remuneration, whether as administrators or as liquidators, and expenses of the administration or the liquidation.
2. Until further order, the remuneration referred to in order 1 is to be determined by the Court.
3. The remuneration of the liquidators as administrators of the company be fixed in the amount of $1,700,889.00*.*
4. The remuneration of the liquidators for the period 20 March 2019 to 31 August 2019 be fixed in the amount of $1,096,380.50*.*

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

GLEESON J:

1. On 7 November 2019, I made an order pursuant to s 90-15 of the *Insolvency Practice Schedule (Corporations)* (**IPS**), being Schedule 2 to the *Corporations Act 2001* (Cth) (**Act**) and/or s 63 and s 81 of the *Trustee Act 1925* (NSW) to the effect that the first and second plaintiffs (**liquidators**) are justified in using the funds in specified accounts to pay their remuneration and expenses, with the amount of such remuneration to be determined by the Court. The order covers the liquidators’ remuneration and expenses for the administration of the third plaintiff (**Halifax AU**) as well as the liquidation.
2. I also fixed the liquidators’ remuneration for the administration in the sum of $1,700,889.00 and the liquidators’ remuneration for the liquidation for the period 30 March 2019 to 31 August 2019 in the sum of $1,096,380.50.
3. My detailed reasons for making the orders follow.

# Liquidators’ application

1. The liquidators’ application for the orders was made pursuant to para 16 and para 17 of the interlocutory process filed 3 July 2019.
2. The application was supported by the following evidence and submissions:
3. affidavits of the first plaintiff (**Mr Kelly**) affirmed 26 June 2019, 27 September 2019 and 5 November 2019;
4. exhibit “MJK-2” to Mr Kelly’s 27 September 2019 affidavit;
5. an affidavit of Jason Charles Opperman, solicitor, sworn 4 November 2019;
6. evidence given orally by Mr Kelly on 6 November 2019;
7. submissions entitled “Liquidators’ submissions re source of funds for remuneration and disbursements” dated 1 October 2019;
8. submissions entitled “Supplementary submissions – remuneration and disbursements”; and
9. oral submissions made by Mr Leopold SC, senior counsel for the liquidators, on 7 November 2019.

# Legal framework

## Payment of remuneration from trust assets

1. In *Quinlan, in the matter of Halifax Investment Services Pty Ltd (Administrators Appointed) (No 3)* [2019] FCA 124 at [56], I cited the following relevant principles in relation to the use of trust funds to pay the expenses of a winding up (stated by Brereton J (as his Honour then was) in *In the matter of AAA Financial Intelligence Ltd (in liquidation) ACN 093 616 445* [2014] NSWSC 1004 at [13]):

(1) Where the company is trustee of a trading trust and has no other activities, the liquidators are entitled to be paid their costs and expenses, whether for administering the trust assets or for “general liquidation work”, out of the trust assets: *Re Suco Gold Pty Ltd* (1993) 33 SASR 99; 7 ACLR 873; *Grime Carter & Co Pty Ltd v Whytes Furniture (Dubbo) Pty Ltd* [1983] 1 NSWLR 158; *Re French Caledonia Travel Service Pty Ltd (in liq)* [2003] NSWSC 1008; (2003) 59 NSWLR 361; *Bastion v Gideon Investments Pty Ltd (in liq)* (2000) 35 ACSR 466 at 480 [70]; *In the matter of North Food Catering Pty Ltd* [2014] NSWSC 77 .

(2) Where the company does not act solely as trustee, costs and expenses referable to work done in relation to trust assets which may nonetheless be considered as having been done for the purpose of winding up the company ought ordinarily be borne primarily by the (non-trust) property of the company, to the extent that the assets permit: *Re GB Nathan & Co Pty Ltd (in liq)* (1991) 24 NSWLR 674 at 685-689; *Re Greater West Insurance Brokers Pty Ltd* [2001] NSWSC 825; (2001) 39 ACSR 301; *French Caledonia* at [209].

(3) At least where the non-trust assets do not permit that course, and perhaps even when they do, a liquidator is entitled to be indemnified out of trust assets for his costs and expenses, but only to the extent that they are referable to administering the trust assets: *13 Coromandel Place Pty Ltd v CL Custodians Pty Ltd (in liq)* (1999) 30 ACSR 377 at 385; *French Caledonia* at [211], [213]. This is pursuant to the court’s equitable jurisdiction to allow a trustee remuneration costs and expenses out of trust assets, which extends to a person such as a liquidator who is, for practical purposes, controlling a trustee: *Berkeley Applegate (Investment Consultants) Ltd; Harris v Conway* [1989] Ch 32 at 50–51; *Re Application of Sutherland* [2004] NSWSC 798; (2004) 50 ACSR 297; *Trio Capital Ltd (Admin App) v ACT Superannuation Management Pty Ltd* [2010] NSWSC 941; (2010) 79 ACSR 425; *In re MF Global Australia Ltd (in liq) (No 2)* [2012] NSWSC 1426, [55]; *Alphena Pty Ltd (in liq) v PS Securities Pty Ltd atf Joseph Family Trust* [2013] NSWSC 447; (2013) 94 ACSR 160.

(4) In principle, where the liquidator does work which would entitle him both to remuneration as liquidator by the company, and recovery from the trust assets, there are two funds liable and there should be contribution between them. However, where there are no assets of the company available, it is unnecessary to consider the question of contribution. If a liquidator has done work which is attributable equally to the winding up of the company and the administration of trust assets, and there are no assets of the company at all to meet his expenses in doing so, the expenses are payable solely from the trust assets: *French Caledonia* at [212].

(5) Where the liquidator is administering, through the company of which he/she is liquidator, more than one trust, the liquidator is not entitled to charge the beneficiaries of one trust with the costs and expenses incurred in relation to the other, although where allocation is not possible a pari passu allocation may be permitted: *Re Suco Gold* at 882–3; *13 Coromandel* at 386.

1. In *13 Coromandel Place Pty Ltd v CL Custodians Pty Ltd (in liq)* [1999] FCA 144; (1999) 30 ACSR 377 (***13 Coromandel Place***)at [33]-[35], in relation to a corporate trustee, Finkelstein J had distinguished between “general liquidation” activities and activities comprising “identifying or attempting to identify trust assets; recovering or attempting to recover trust assets; realising or attempting to realise trust assets; protecting or attempting to protect trust assets; distributing trust assets to the persons beneficially entitled to them”. As to the former, his Honour said at [35]:

The position is a little more involved as regards work done and expenses incurred in what may be described as general liquidation matters. If that work is unrelated to the beneficiaries and their claims it is difficult to see how the cost could be charged against their assets. In the case of a company that has carried on the business of trustee it might be that much of the work involved in the liquidation is chargeable against trust assets if it can be shown that the liquidation is necessary for the proper administration of the trust. But it is unlikely that this will be so where the company did not act solely as trustee or at least did not act in that capacity to a significant extent. In that event, the liquidator will be required to estimate those of his costs that are attributable to the administration of trust property and only those costs will be charged against the trust assets.

1. Earlier, in *Re GB Nathan & Co Pty Ltd (in liq)* (1991) 24 NSWLR 674at 688, McLelland J had expressed the view that the distinction between work done and expenses incurred by the liquidator in the winding up, on the one hand, and work done and expenses incurred in administering property held by the company as trustee, on the other hand, may not be easily drawn. In *Re Greater West Insurance Brokers Pty Ltd* [2001] NSWSC 825; (2001) 39 ACSR 301 (***Greater West****)* at [20], Young CJ in Eq suggested that it is often impossible to make such a segregation.
2. In *Australian Securities and Investments Commission v Rowena Nominees Pty Ltd* [2003] WASC 112; (2003) 45 ACSR 424, Pullin J considered whether the liquidator could deduct his remuneration costs and expenses from trust monies if those related to general administration work concerning the winding up of the company as well as those related to the administration of the trusts. The company, Rowena Nominees, was a finance broker. After referring to *13 Coromandel* and *Greater West,* at [94] his Honour concluded that the whole of the costs of the liquidator of Rowena should be charged on the trust assets because “the trust creditors will have personal claims against Rowena … as well as claims as beneficiaries to the trust property. That being so, the general administration associated with winding up Rowena will concern creditors and this includes trust creditors”.
3. In *In the matter of Primespace Property Investment Limited (in liquidation)* [2016] NSWSC 1821 (***Primespace***), Black J accepted that work done in both the administration and liquidation of a company was properly paid out of trust assets, even though the company did not act solely as a trustee and responsible entity and carried on business in its own right as project manager of a joint venture. At [18], his Honour was satisfied that the work done could not be funded from assets presently available to the company in its own right and that remuneration for the relevant work was properly paid out of trust assets.
4. In *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth* [2019] HCA 20; (2019) 368 ALR 390 at [41], Kiefel CJ, Keane and Edelman JJ noted, with apparent approval, the conclusion in *Re Suco Gold Pty Ltd* (1993) 33 SASR 99:

[S]ince the power of exoneration could be used, in each case, to pay the creditors of each of the two trusts of which the company was trustee, and since the liquidator’s remuneration and the costs and expenses of winding up were to be given priority over those unsecured creditors, the liquidator was entitled to have recourse to the property of each trust for that remuneration and those costs, so far as they were incurred in relation to each trust.

## Determination of quantum of remuneration

1. By s 60-5(1) of the IPS, an external administrator of a company is entitled to receive remuneration for necessary work properly performed by the external administrator in relation to the external administration, in accordance with the remuneration determinations (if any) for the external administrator.
2. Section 60-10(1) of the IPS provides:

(1) A determination, specifying remuneration that an external administrator of a company (other than an external administrator in a members’ voluntary winding up) is entitled to receive for necessary work properly performed by the external administrator in relation to the external administration, may be made:

(a) by resolution of the creditors; or

(b) if there is a committee of inspection and a determination is not made under paragraph (a)—by the committee of inspection; or

(c) if a determination is not made under paragraph (a) or (b)—by the Court.

Note: For determinations made by the Court, see also section 60‑12 (matters to which the Court must have regard).

1. Section 60-12 of the IPS sets out the matters to which the Court must have regard in making a remuneration determination under s 60-10(1)(c), including relevantly:

(a) the extent to which the work by the external administrator was necessary and properly performed;

(b) the extent to which the work likely to be performed by the external administrator is likely to be necessary and properly performed;

(c) the period during which the work was, or is likely to be, performed by the external administrator;

(d) the quality of the work performed, or likely to be performed, by the external administrator;

(e) the complexity (or otherwise) of the work performed, or likely to be performed, by the external administrator;

(f) the extent (if any) to which the external administrator was, or is likely to be, required to deal with extraordinary issues;

(g) the extent (if any) to which the external administrator was, or is likely to be, required to accept a higher level of risk or responsibility than is usually the case;

(h) the value and nature of any property dealt with, or likely to be dealt with, by the external administrator

(i) the number, attributes and conduct, or the likely number, attributes and conduct, of the creditors;

(j) if the remuneration is worked out wholly or partly on a time-cost basis – the time properly taken, or likely to be properly taken, by the external administrator in performing the works; and

(m) any other relevant matters.

1. In *Primespace,* at [29]-[30], Black J set out the principles applicable to the assessment of the amount of an administrator’s or liquidator’s remuneration as follows:

[A]n administrator or liquidator is entitled to reasonable remuneration for his or her services; [they] bear the onus of establishing that the amount of remuneration they seek is fair and reasonable; and that, in determining their reasonable remuneration from the trust funds, the Court should have regard, by analogy, with the factors specified in, relevantly, ss 449E, 473(10) and 504(2) of the Corporations Act: *Re AAA Financial Intelligence Ltd (in liq) (No 2)* [2014] NSWSC 1270 at [26]; *Re Independent Contractor Services (Aust) Pty Ltd (in liq) (No 2)* … at [32]. … the court must bring an independent mind to bear on the question whether the remuneration sought is fair and reasonable; … the liquidators must lead evidence in sufficient detail that the court can determine that question; and … the court will generally need to be provided with an account in itemised form, setting out at least the details of the work done, the persons who did the work; the time taken to perform the work; the remuneration claimed and, to the extent relevant, the expenses incurred by the liquidator: *Venetian Nominees Pty Ltd v Conlan* (1998) 20 WAR 96 at 102–103.

The ARITA Code of Professional Practice for Insolvency Practitioners (3rd ed, 2014) (“ARITA Code”) includes several principles relevant to the remuneration of insolvency practitioners. Principle 10 provides that a practitioner is entitled to claim remuneration and disbursements in respect of necessary work, properly performed in an administration, and explains those concepts. Principle 11 deals with disclosure of remuneration and the ARITA Code identifies several possible bases of calculation of remuneration, namely time-based charging; prospective fee approval, subject to a cap to a nominated limit; and a fixed fee or a “percentage of a particular factor”, usually assets disclosed or assets realised. Principle 12 provides that a practitioner is only entitled to draw remuneration once it is approved and according to the terms of the approval.

# Background facts

1. Background facts concerning Halifax AU are set out in earlier judgments in this proceeding: *Quinlan, in the matter of Halifax Investment Services Pty Ltd (Administrators Appointed) (No* *2)* [2018] FCA 2115, *Quinlan, in the matter of Halifax Investment Services Pty Ltd (Administrators Appointed) (No 3)* [2019] FCA 124 (***Halifax (No 3)***) and *Kelly, in the matter of Halifax Investment Services Pty Ltd (in liquidation) (No 5)* [2019] FCA 1341 (***Halifax (No 5)***).
2. Together, Halifax AU and Halifax New Zealand Limited (**Halifax NZ**) have 12,559 investor clients: *Halifax (No 5)* at [6].
3. The administration and liquidation of Halifax AU has occurred in conjunction with the administration and liquidation of Halifax NZ due to a significant cross-over of investors between the two entities: *Halifax (No 5)* at [8].
4. The liquidators have identified 61 accounts held in the name of Halifax AU with a balance of AU$147,810,754.04 as at 23 November 2018 and 14 accounts held in the name of Halifax NZ with a balance of NZ$51,671,556.36 as at 27 November 2018: *Halifax (No 5)* at [19] and [20].
5. The liquidators’ examinations indicate that 98% of funds held on trust by the Halifax Group are affected by commingling, with this commingling being across all platforms and between Halifax AU and Halifax NZ: *Halifax (No 5)* at [22].
6. In January 2019, the second plaintiff (**Mr Quinlan**) gave evidence that, as at 22 January 2019, the equity position of Halifax AU and Halifax NZ viewed together was:
7. assets available to investors of approximately $192,000,000;
8. amounts owing to investors of approximately $211,700,000; and
9. deficiency of assets of approximately $19,700,000.
10. Thus, the client investors are unsecured creditors in the liquidation as well as beneficiaries of trust property held by Halifax AU.
11. In September 2019, Mr Kelly also gave evidence that, as at 31 August 2019:

… Halifax AU held the following assets:

(a) total funds on deposit in Halifax AU’s accounts that were described and/or designated as Australian Statutory Accounts or are held in other bank accounts controlled by the Liquidators of AU$7,315,558.83; and

(b) total amounts held by third parties on behalf of Halifax AU as deposits or unrealised investments of AU$167,376,021.48 with AU$158,300,675.79 of that amount being the value of stock positions held.

… Halifax NZ held the following assets:

(a) total funds on deposit in Halifax NZ’s accounts that were held and/or designated as statutory trust accounts or are held in other bank accounts controlled by the Liquidators of NZ$2,123,269.53; and

(b) total amounts held by third parties on behalf of Halifax NZ as deposits or unrealised investments of NZ$54,010,512.97 with NZ$29,481,790.00 of that amount being the value of stock positions held.

1. In January 2019, Mr Quinlan identified the following creditors of Halifax AU, apart from the investor creditors:
2. Trade creditors estimated at $631,375.
3. Broker creditors estimated at $294,031.61.
4. Employee creditors estimated at $177,817.26.
5. The director, Jeffrey Worboys, and the previous director, Matthew Barnett in respect of pay in lieu of notice of $263,221.15.
6. The landlord of the premises from which the company operates its headquarters.
7. Holders of possible security interests over computer equipment and three motor vehicles: *Halifax (No 3)* at [13].
8. Thus, the claims of the investor clients as unsecured creditors substantially exceed the total claims of other creditors.
9. Mr Kelly’s evidence was that there are no debtors and there are no separately identifiable company assets other than minor operational assets such as office equipment which continues to be used by the business.

# Payment of remuneration from trust funds

1. On 22 August 2019, I made an order that the liquidators would be justified in using and applying the funds held in 13 identified accounts to pay identified ongoing trading and administration expenses of Halifax AU and any further reasonable and necessary trading expenses incurred by Halifax AU: *Halifax (No 5)*, especially at [93]-[95].
2. The accounts are considered by the liquidators to contain commingled trust funds to which investors in both Halifax AU and its related entity Halifax NZ are beneficially entitled. In some cases, the accounts may also contain company funds belonging to both Halifax AU and Halifax NZ.
3. The liquidators sought to apply funds from the same commingled trust funds in payment of their remuneration on the following bases:
4. Halifax AU has no separately identifiable company assets, other than minor company assets of no more than $10,000 in value such as office equipment, which continues to be used by the business; and
5. all of the work undertaken by the liquidators, during the administration and in the liquidation, can properly be considered to be necessary for the purpose of administering the trusts pursuant to which Halifax AU holds the commingled trust funds.
6. I accepted that Halifax AU has no separately identifiable company assets from which the remuneration of the liquidators might be paid.
7. The liquidators submitted that Halifax AU had no function other than as trustee, and its only substantive activities were as trustee of investor funds. I am doubtful that this is an accurate summary of the position: in my view, the evidence suggests that Halifax AU carried on a business in its own right, as a financial services provider, to a multiplicity of investors.
8. However, on any view Halifax AU acted as a trustee to a very significant extent. In his November 2019 affidavit, Mr Kelly clarified his view, which I accepted, that the activities of Halifax AU were all concerned with the administration of client moneys and the management of client moneys, that is trades placed by investors and interest accrued on funds held on trust for investors of Halifax AU and Halifax NZ, subject only to the following two possible qualifications:
9. To the extent that Halifax AU took a position, in effect as the counterparty, in respect of investments by its investors/beneficiaries in the MT4 or MT5 trading platforms, particularly where it did not hedge those investments and stood to make either a profit or a loss on transactions by its investors, this could be characterised as an activity in which Halifax AU was acting in its own right if it is not to be regarded as part of its fee-making activity as trustee.
10. When investors invested on the basis of a margin loan, Halifax AU charged to the investor an interest rate which was slightly higher than the interest rate charged to Halifax AU by its “liquidity supplier” or by Interactive Brokers. In that way, Halifax AU made a profit on the transaction. Mr Kelly is not clear whether this is to be regarded as Halifax AU having conducted business in its own right or whether the margin retained by Halifax AU is a fee earned by Halifax AU in the course of providing its services as trustee, as with any fee earned by a trustee in the nature of a commission on the amounts invested by the investors/beneficiaries.
11. Further, I accepted that all of the work undertaken by the liquidators, during the administration and in the liquidation, can properly be considered to relate to the trusts pursuant to which Halifax AU holds the commingled trust funds.
12. The work undertaken in the course of the administration and the liquidation to 31 August 2019 has been overwhelmingly directed to preserving investor funds and determining how they may be returned to investors. As there is a deficiency in the trust funds and the investors are unsecured creditors of Halifax AU, I accepted that any general liquidation work also relates the trusts.
13. Accordingly, I accepted that the liquidators were entitled to apply funds from the commingled trust funds identified above in payment of their remuneration in such amounts as may be determined by the Court.

# Quantum of remuneration

1. The liquidators had not been paid any remuneration or any amount on account of expenses (principally debts to solicitors and counsel) in respect of work performed, either as administrators or liquidators of the company.
2. Mr Kelly’s September 2019 affidavit describes in significant detail the work for which the liquidators seek remuneration. The affidavit also sets out the process undertaken to ensure that the amounts claimed are for work that was “proper and necessary”. The figures are net of write‑offs which followed a review to ensure that the amounts claimed were proper and necessary.
3. At the second meeting of creditors on 20 March 2019, the following resolution was passed:

That the Creditors have no objection to the remuneration of the Administrators, as set out in the Remuneration Proposal dated 12 March 2019, for the period from 23 November 2018 to 28 February 2019 be fixed in the amount of $1,444,681.50 plus applicable GST.

1. Further, on 20 September 2019, the liquidators held a meeting of the Committee of Inspection, at which consideration was given to the liquidators’ report on remuneration and internal disbursements dated 18 September 2019 in respect of remuneration for the period 1 March 2019 to 31 August 2019.
2. The following resolutions were passed at that meeting:

1. That the Committee of Inspection has no objection to the remuneration of the Administrators, as set out in the Remuneration Request dated 18 September 2019, for the period from 1 March 2019 to 19 March 2019 in the amount of $272,766.50 plus any applicable GST.

…

4. That the Committee of Inspection has no objection to the remuneration of the Liquidators, as set out in the Remuneration Request dated 18 September 2019, for the period from 20 March 2019 to 16 June 2019 in the amount of $658,782.00 plus any applicable GST.

…

6. That the Committee of Inspection has no objection to the remuneration of the Liquidators, as set out in the Remuneration Request dated 18 September 2019, for the period from 17 June 2019 to 31 August 2019 in the amount of $437,598.50 plus any applicable GST.

1. These resolutions are relevant to the reasonableness of the remuneration amounts sought.

## Administration work

1. The work for which the liquidators sought remuneration in their capacity as administrators, undertaken during the period 23 November 2018 to 19 March 2019, is detailed at paras 66-146 of Mr Kelly’s September 2019 affidavit. The claim comprises original work in progress of $1,862,265.00 less write-offs totalling $161,376.00.
2. The evidence included a work in progress spreadsheet for the administration period, itemising work totalling 3,162 hours.
3. In addition, there is:
4. a remuneration proposal report for the amount of $1,444,681.50 dated 12 March 2019; and
5. a remuneration report dated 18 September 2019 which covers the period 1 to 19 March 2019, the subject of the resolution passed by the Committee of Inspection set out above.
6. The remuneration proposal report includes a declaration by Mr Kelly and the other administrators that they have undertaken a proper assessment of the remuneration claim in accordance with the Act, the Australian Restructuring Insolvency & Turnaround Association Code of Professional Practice (**Code**) and applicable professional standards. The report states that the administrators were satisfied that the remuneration claimed was in respect of necessary work, properly performed, or to be properly performed, in the conduct of the administration.
7. The remuneration report similarly includes a declaration by the liquidators that they have undertaken a proper assessment of the claim for the period 1 to 19 March 2019 in accordance with the Act, the Code and applicable professional standards. The report states that the liquidators were satisfied that the remuneration claimed was in respect of necessary work, properly performed in the conduct of the administration.
8. Based on Mr Kelly’s affidavit evidence supplemented by his oral evidence, the administration work may be summarised as follows:
9. Investigative work: related to determining the date of Halifax AU’s insolvency; preparation and investigation into the flow of client moneys, tracing funds into investor accounts, investigations into the potential antecedent transactions which may be recoverable by a liquidator and investigations into potential advisor negligence and director misconduct. The work was primarily directed at understanding how Halifax AU held client monies and whether the client moneys could be identified as belonging to a particular individual investor, as well as identifying potential future recoveries available in a liquidation.
10. Investors and creditors: work directed at communicating with investors regarding client moneys and responding to queries raised by investors regarding client moneys, including in relation to requests for account statements, assisting with completion of proofs of debt and proxies in preparation for the first and second meetings of creditors and providing advice on the administration process.
11. Operations: work relating to continuing the operation of, and maintaining access to, the trading platforms for the primary purpose of preserving investor positions on the trading platform.
12. Assets: work directed at identifying and securing the client moneys and seeking the return of client moneys held by third parties.
13. Employees: managing and dealing with employees who were employed in connection with operating the trading platforms, and otherwise terminating the employment of certain employees.
14. Administration: responding to enquiries from investors, considering whether a deed of company arrangement would be feasible and managing the progress of the administration.

## Liquidation work

1. The work for which the liquidators sought remuneration in their capacity as liquidators, undertaken during the period 20 March 2019 to 31 August 2019, is detailed at paras 147-193 of Mr Kelly’s September 2019 affidavit. The claim comprises original work in progress of $1,248,404.50 less write-offs totalling $152,024.00.
2. The evidence included a work in progress spreadsheet for the liquidation work, itemising work totalling 2,011.3 hours.
3. The remuneration report referred to above addresses the remuneration claimed.
4. The remuneration report includes declarations by the liquidators that they have undertaken a proper assessment of the claims for the periods 20 March 2019 to 16 June 2019 and 17 June 2019 to 31 August 2019 in accordance with the Act, the Code and applicable professional standards. The report states that the liquidators were satisfied that the remuneration claimed was in respect of necessary work, properly performed, or to be properly performed, in the conduct of the liquidation.
5. Based on Mr Kelly’s affidavit evidence supplemented by his oral evidence, the liquidation work may be summarised as follows:
6. Investigative work: related to tracing funds, investigations into potential antecedent transactions and filing the interlocutory process in this proceeding on 3 June 2019 in relation to the client moneys. This work was primarily directed at understanding how Halifax AU held client moneys and whether the client moneys could be identified as belonging to a particular individual investor.
7. Investors and creditors: work directed to responding to investors’ queries regarding the client moneys and keeping the investors informed as to the status of the client moneys.
8. Operations: this work continued to concern the operation of, and maintaining access to, the trading platforms for the primary purpose of preserving investor positions on the trading platform.
9. Assets: work directed to seeking the return of funds held by merchant facility providers and notifying Halifax AU’s insurer of claims in relation to the client moneys.
10. Employees: managing and dealing with employees who were employed in connection with operating the trading platforms, and dealing with former employees in respect of their entitlements.
11. Administration: work directed to identifying and preserving the client moneys and monitoring the progress of the liquidation.
12. As to s 60-12(a) of IPS, based on Mr Kelly’s evidence and the absence of any objection from either the creditors or the Committee of Inspection, I accept that the whole of the work by the liquidators, as administrators and then as liquidators, for which remuneration is sought, was necessary and properly performed.
13. I relied upon Mr Kelly’s view that the amounts claimed are proper and that the work for which remuneration is claimed was necessary. From Mr Kelly’s September 2019 affidavit, I do not detect any basis for thinking that I should not rely on Mr Kelly’s view in this respect.
14. As to s 60-12(c), the periods during which the relevant work was performed are set out above.
15. As to s 60-12(d), I have no reason to doubt the quality of the work for which remuneration is claimed. To the extent that I have seen that work, in the evidence that has been provided to the Court for the various applications made in the proceeding, the work appears to have been careful, thorough and generally of a high quality.
16. As to s 60-12(e) and (f), I consider the work performed to have been very complex involving, as it does, very large sums of money, multiple bank accounts, commingled trust funds and a large number of investors. The requirement to determine entitlements to commingled trust funds held by two related entities in different jurisdictions is arguably a requirement to deal with an extraordinary issue.
17. As to s 60-12(g), I consider that the liquidators have been required to accept a higher level of risk or responsibility than is usually the case, by virtue of the need to deal with trust assets.
18. As to s 60-12(h), the value and nature of the property dealt with by the liquidators is identified above.
19. As to s 60-12(i), the number of creditors is identified above. The evidence does not reveal the attributes of creditors but it is reasonable to assume, having regard to their large number, that they will include a fairly wide range of financial circumstances.
20. As to s 60-12(j), the time taken in performing the relevant works is set out above. Based on Mr Kelly’s evidence and the lack of objection to the amounts claimed, I am satisfied that the time taken has been properly taken in performing the work the subject of the remuneration claims.

# Conclusion

1. For these reasons, I made orders in accordance with the orders sought.

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| I certify that the preceding sixty-two (62) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Gleeson. |

Associate:

Dated: 13 December 2019