HALIFAX UPDATE: "UNIQUE" JOINT SITTING OF TRANS-TASMAN COURTS

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Australia Restructuring & Insolvency Alert

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A joint hearing between the Federal Court of Australia (FCA) and the High Court of NZ (NZHC) has broken new ground. In proceedings brought by the liquidators of Halifax Investment Services Pty Ltd (In Liquidation) (Halifax Australia) and Halifax New Zealand Limited (In Liquidation) (Halifax NZ), in the FCA and the NZHC respectively, the Courts delivered on 19 May 2021, contemporaneous judgments and made consistent orders after sitting together in a final hearing in December 2020.

Each Court delivered separate judgments after deliberating together about the principal issues before each of the Courts for resolution *(Kelly (Liquidator), in the matter of Halifax Investment Services Pty Ltd (in liquidation) v Loo* [2021] FCA 531; *In the matter of Halifax New Zealand Limited (in liquidation)* [2021] NZHC 1113).

Background

In November 2018, Halifax Australia and Halifax NZ were placed into administration, and subsequently liquidation in March 2019. The liquidators considered that client funds held on trust by each entity had been commingled and proceedings were commenced independently in each jurisdiction seeking judicial advice and/or directions as to the management and distribution of client funds.

Classic Candidate for Cross-Border Cooperation

In *Kelly, in the matter of Halifax Investment Services Pty Ltd (In Liquidation) (No 5)*[1] Justice Gleeson (then in the FCA) accepted that, as the FCA's exercise of jurisdiction in New Zealand may be affected by a lack of recognition by the NZHC, the FCA could request that the NZHC hear the proposed New Zealand proceedings concurrently with the Australian proceedings, at least to the extent that any pooling order made will require recognition in New Zealand.

Justice Gleeson expressed the view that this was a "classic candidate" for cross-border co-operation between courts to facilitate the fair and efficient administration of the winding up of Halifax Australia (and Halifax NZ). Her Honour was of the view that this would protect the interests of all relevant persons, particularly the investor clients of Halifax Australia and Halifax NZ who may have claims against the funds held by Halifax Australia. The FCA had no difficulty with the proposition that it and NZHC "should endeavour to cooperate to the extent possible to promote the objectives of the liquidations of Halifax AU and Halifax NZ" or "that such cooperation could include a concurrent hearing … if the NZHC were amenable."[2]

Joint Sitting

In December 2019, the FCA and the NZHC held an historic joint case management hearing via audio-visual link. During that case management hearing, the Courts considered whether a Letter of Request should be issued by the FCA to the NZHC pursuant to section 581(4) of the *Corporations Act 2001* (Cth), seeking that the NZHC act in

aid of and auxiliary to the FCA. At the conclusion of the joint case management hearing, both courts agreed to jointly conduct the hearings to determine the applications in both sets of proceedings.

The Courts initially contemplated a physical joint sitting, however, as a result of the COVID-19 pandemic, this was not ultimately feasible and the joint sitting took place via audio-visual link (with counsel physically present in each Court).[3] Witnesses were sworn or affirmed in both proceedings, and both the FCA and NZHC received the same submissions and heard the same evidence. No objection was taken by any party to the approach taken by the Courts.

Similarly, no objection was taken to deliberation between the Courts. Justice Venning of the NZHC stated in his reasons that he and Markovic J "…agreed on the principal issues raised in the two sets of proceedings."[4]

Judgments

The substantive hearing was heard by Justice Markovic in the FCA (Justice Gleeson having been appointed to the High Court) and Justice Venning (former Chief Judge) in the NZHC.

Justice Markovic expressed the view that "…it is not appropriate that the two Courts adopt or deliver one set of reasons. Unlike an appellate court, this Court and the High Court NZ are each exercising their own jurisdiction, according to the applicable legislative framework and law. It is necessary for each Court to reach its own conclusions and to express its reasons for doing so."[5]

Conclusion

This is the first time any Australian or New Zealand court has sat jointly with a court from another country. It follows the joint sitting of the Full Federal Court of Australia in *Westpac Banking Corporation v Lenthall* (2019) 265 FCR 21 with the New South Wales Court of Appeal in *BMW Australia Ltd v Brewster* (2019) 343 FLR 176). Apart from a joint sitting between In *Re Nortel Networks Inc* 737 F 3d 265 (3rd Cir, 2013) and *Re Nortel Networks Corp* (2013) ONSC 1757, in respect of which a Canadian court and a United States court conducted a joint trial by audio-visual link, it is a first at least in the common law world. The joint hearing and parallel judgments provide a precedent for cross-border cooperation between courts in jurisdictions around the globe.

More specifically, these cases illustrate the extent to which judges from different jurisdictions are capable of facilitating concurrent insolvent administrations to achieve fair and efficient outcomes for the benefit of creditors and other stakeholders alike.

FOOTNOTES

[1] [2019] FCA 1341

[2] [2019] FCA 1341 at [59]

[3] [2021] NZHC 1113 at [8]

[4] [2021] NZHC 1113 at [9]

[5] [2021] FCA 531 at [30]

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