IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2015-404-1500
[2017] NZHC 973

BETWEEN	GRANT ROBERT GRAHAM AND NEALE JACKSON AS LIQUIDATORS OF THE DEFENDANT COMPANY Plaintiffs
AND	ARENA CAPITAL LIMITED (IN LIQUIDATION) Defendant

Hearing: 9 May 2017

Appearances: M G Colson for the Plaintiffs
No appearance for the Defendant

Date: 12 May 2017

JUDGMENT OF MANDER J

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[1] The liquidators of Arena Capital Ltd (in liq) (Arena) have applied for directions under the Companies Act 1993 in relation to the distribution of assets in the liquidation.[1]

[2] The liquidators seek directions that Arena's assets be treated as forming one common pool of assets for distribution available to both Arena's general unsecured creditors and its investors. Further, that the common pool of assets be distributed on a pro rata, *pari passu* basis according to a particular distribution methodology.

[3] There was no opposition raised by investors to the proposed pooling of assets, nor to their distribution on a pro rata, *pari passu* basis. However, I have been appraised of opposition from a small number of investors to the proposed method of distribution and an alternative suggested approach which is contended to be more equitable.

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[1] Companies Act 1993, ss 253 and 284(1)(a).

Background

[4] Arena marketed itself as offering services to clients as a foreign exchange trader. It received deposits from clients for the purpose of investment, however, the company did not conduct any foreign exchange trading, nor any other form of investment activity.

[5] In May 2015, as a result of investigations by the Financial Markets Authority into the activities of Arena, asset preservation orders were made over Arena's assets. The liquidators were appointed in July 2015 to recover assets and distribute available funds to Arena's investors and creditors.

[6] The liquidators established that, since May 2014, 1036 investors deposited funds into Arena's bank account on the understanding that they would receive a return from foreign exchange trading. Some profits were paid out to investors, however, those returns were fictitious. Moneys were disbursed to clients to maintain the façade of an active foreign exchange trading operation and were paid from deposits made by other investors. In essence, Arena operated as a ponzi scheme, paying out a fictitious "profits" and/or capital from funds deposited by other investors.

[7] Net claims outstanding to investors amount to $6.729 million, however, total funds available to both investors and creditors amount to only $2.308 million. There will be a significant shortfall. In contrast to the 926 investors who have claims against Arena there are three general unsecured creditors whose total claims amount to only $23,639.17.

The application

[8] The directions sought by the liquidators are considered by them to be the most cost effective, pragmatic and fair way of distributing to creditors and investors Arena's available assets. They submit the directions they seek are consistent with the discharge of their principal duty as a liquidator to realise and distribute assets to

Arena's creditors and distribute any surplus assets in a reasonable and efficient manner.[2]

[9] The issues for determination on the liquidators' application are as follows:

(a) Whether there should be one common pool of assets available for distribution to both investors and general unsecured creditors.

(b) Whether the assets should be distributed on a pro rata, *pari passu* basis amongst investors and general unsecured creditors, or whether there should be some element of tracing.

(c) The appropriate methodology to be applied to calculate distributions to investors, and the mechanics of the distribution.

(d) Whether the liquidators be allowed to deduct the costs and expenses incurred in relation to the recovery and distribution of assets from the common pool of assets (if such is ordered).

Common pool of assets

[10] The liquidators request that recovered assets of Arena be treated as forming one common pool available for distribution to both general unsecured creditors and investors alike. Mr Neale Jackson, one of Arena's liquidators, has affirmed that he considers the most pragmatic and economically efficient approach to the distribution of Arena's assets is for there to be one common pool for distribution to both investors and creditors.

[11] The liquidators have acknowledged there is a statutory trust over funds deposited by investors with Arena.[3] There are therefore trust assets held by the liquidators derived from the funds deposited by the investors. However, there may also possibly be general assets derived from the company's other sources of funds which are not able to be traced back to the investors' deposits.

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2 Companies Act 1993, s 253.

3 *Graham v Arena Capital Ltd (in liq)* [2016] NZHC 194 at [13].

[12] Ordinarily, if there are two classes of assets the orthodox approach would be to have separate pools of assets, one containing trust assets available to investors and the other consisting of general assets available to creditors.[4] However, the exercise of creating two separate pools of assets for distribution would cause unnecessary cost to the ultimate disadvantage of investors.

[13] The categorisation of recovered assets and costs as between the "trust" and "general assets" pools would require the liquidators to determine the nature and extent of the trust assets, the allocation and prioritisation of investors' claims against those assets together with costs associated with the receivership and liquidation, and the manner of distribution of the particular trust assets in which particular investors have been identified as having an interest. Decisions regarding those issues would involve additional analysis and evidence, and likely require further directions from the Court, all of which would result in expense and delay to the cost of both investors and creditors. It is estimated the total cost of establishing two pools by having to categorise the assets as between them and to undertake a tracing exercise would be at least $100,000.

[14] Unsecured creditor claims total only $23,639.17. It follows that there would be a disproportionate cost of maintaining two pools which would exceed the approximate $8,000 distribution to general creditors if there were only the one pool based on an expected distribution of approximately 34 cents in the dollar. Preliminary analysis undertaken by the liquidators comparing a "two pools of assets" approach to distribution as opposed to a "common pool" method indicates that unsecured creditors would receive no distribution at all, and the approximate loss of $110,000 available for distribution to investors.

[15] No investor or creditor has raised any objection to the "one common pool" approach. I am satisfied that it is in the investors' financial interests that there be only one common pool of assets, and that such an approach is the most cost-efficient and pragmatic model to adopt. I direct that all recovered assets of Arena, after costs,

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4 *Re Aramiru Holdings Ltd* [1989] 3 NZLR 487 (HC); *Re Waipawa Finance Co Ltd (in liq)* [2011] NZCCLR 14 (HC); *Insolvency Law and Practice* (online looseleaf ed, Thompson Reuters) at [CA248.01(2)].

be treated as forming one common pool of assets for distribution available to both general unsecured creditors and investors alike.

Pro rata, *pari passu* distribution

[16] The liquidators seek a second order that the assets in the one common pool be distributed on a pro rata, *pari passu* net contribution basis. The traditional starting point for apportioning the value of a mixed trust fund amongst innocent contributors is *Clayton's Case*,[5] which involves a "first in, first out" (FIFO) method of distribution. This approach is to be contrasted with a *pari passu* approach which does not discriminate on the basis of the timing of the investments and seeks to make a distribution apportioned equally, or on a pro rata basis between all investors.

[17] As I observed in my earlier judgment in this proceeding, the traditional approach to the allocation of trust assets held in a mixed fund, as recognised in *Clayton's Case*, has largely fallen into disfavour.[6] Recent authority has recognised the rule in *Clayton's Case* would not ordinarily withstand scrutiny, and that it may be departed from even by a "slight counterweight".[7] Where it is not practical to trace investors' moneys or when such an exercise will involve enormous effort unlikely to produce a reliable result, the application of the rule should be rejected.[8] As noted in *Eaton v LDC Finance Ltd (in rec)*, the correct approach in equity is to select the rules which will achieve equity as between the beneficiaries depending on the context.[9] As between innocent beneficiaries a division of assets based on the contribution of each investor is to be viewed as the only "rational mode of distribution" in order to achieve substantial justice between the parties.[10]

[18] I accept that a FIFO approach would cause an injustice to later investors inconsistent with the presumed intention of investors, all of whom have shared the same misfortune. The investment activity which the company purported to facilitate

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5 *Devaynes v Noble* (1816) 35 ER 781 (Ch) [*Clayton's Case*].
6 *Graham v Arena Capital Ltd (in liq),* above n 3, at [61].
7 *Re Registered Securities Ltd (in liq)* [1991] 1 NZLR 545 (CA) at 553; *Vero Liability Insurance Ltd v Heartland Bank Ltd* [2015] NZCA 288 at [100], citing *Russell-Cooke Trust Co v Prentis* [2002] EWHC 2227, [2003] 2 All ER 478 (Ch) at [55].
8 *Re Registered Securities Ltd (in liq)*, above n 7, at 558.
9 *Eaton v LDC Finance Ltd (in rec)* [2012] NZHC 1105 at [59]-[61].
10 *Re Registered Securities Ltd (in liq)*, above n 7, at 558.

was a fraud. The investors' deposits were not used for the purpose for which they were provided, and all investors shared that common misfortune. From that common failure it is not possible to discern or presume the investors' intention to be that the latest investors be advantaged in preference to earlier investors.[11] All the investors deposited their money in Arena's one primary bank account for the purpose of foreign exchange trading with the intention of generating profit. Over that period, just over one year, the deposits were in many cases misappropriated and diverted to pay out fictional "profits" to other investors, in addition to purchasing assets such as cars and houses for the principals of Arena and their associates.

[19] The situation is similar to that dealt with by this Court in *Re Waipawa Finance Co Ltd (in liq)*. In that case the parties acknowledged it was not practical to trace funds held by the liquidators to individual investors. The dissipation of investors' money had occurred to satisfy repayment demands from other investors, and to fund the lifestyle and business losses of one of the company's principals. In those circumstances, Ronald Young J held that it could not have been the investors' intention that the latest investors be paid in full. In any event, he concluded such a distribution would be substantially unjust and would unfairly advantage later investors.[12]

[20] More recently, Clifford J in *Priest v Ross Asset Management Ltd (in liq)*, after citing a number of cases where *pari passu* distribution had been directed on the basis of fairness to all investors and/or on the presumed intention of the investors, observed that this method of distribution was a pragmatic and fair way to share common misfortune.[13] Once the rule in *Clayton's Case* is displaced, a *pari passu* approach is to be adopted.[14]

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11 *Graham v Arena Capital Ltd (in liq)*, above n 3, at [68]; see also *Re Waipawa Finance Co Ltd (in liq)*, above n 4, at [23].

12 *Re Waipawa Finance Co Ltd (in liq)*, above n 4, at [23].

13 *Priest v Ross Asset Management Ltd (in liq)* [2016] NZHC 1803, (2016) NZCLC 98-046 at [105]-[107]; *Re International Investment Unit Trust (in stat man)* [2005] 1 NZLR 270 (HC) at [55]-[56].

14 See generally *Re Registered Securities Ltd (in liq)*, above n 7; *Re Waipawa Finance Co Ltd (in liq)*, above n 4; *Finnigan v Yuan Fu Capital Markets Ltd (in liq)* [2013] NZHC 2899; *Donald v Investors in the Williams Guarantee Ltd Participatory Scheme* HC Palmerston North M46/01, 17 June 2003; *Secureland Mortgage Investments Ltd (in liq) (No 2)* (1988) 4 NZCLC 64,266 (HC); *McKenzie v Alexander Associates Ltd (No 1)* (1991) 5 NZCLC 67,030 (HC); *McKenzie v Alexander Associates Ltd (No 2)* (1991) 5 NZCLC 67,046 (HC); *McKenzie v Alexander Associates Ltd (No 3)* HC Wellington M188/88, 10 December 1991; *Re Aramiru Holdings Ltd*,

[21] While in the present case it may theoretically be possible to undertake a FIFO tracing exercise for the purpose of distributing Arena's assets amongst investors, it is neither pragmatic nor cost-efficient to undertake such an exercise. Mr Jackson has affirmed that, because of the relatively large number of small deposits by investors, tracing all investors' funds within the company bank accounts and into various property and other assets purchased on a FIFO basis would require a lengthy and costly exercise which would inevitably give rise to difficult issues.

[22] Mr Jackson refers to the need when undertaking such a process not only to attribute deposits to individual investors for the purpose of a FIFO analysis, but also to allocate the company's disbursements among those investors having an interest in the funds at the time the particular cost was paid by the company. In the absence of general company funds, disbursements were typically paid out of deposits Arena received from investors. Mr Jackson referred to difficulties already being encountered by the liquidators in their "claw back" analysis to recover "fictional profits" paid to investors in being able to match investors with deposits or payments. His evidence was that undertaking a tracing exercise would take considerable time, delay distribution to investors, and create additional cost. Because of the relatively modest contributions made by most investors the cost of such a tracing exercise would be disproportionate in comparison to the majority of the amounts to be distributed, and would unnecessarily erode available funds.

[23] The only arguable potential basis for some form of specific tracing is limited to the major assets purchased with Arena's funds which have now been recovered and sold, and in particular the property situated in Coatesville. The possibility of tracing claims on a reliable basis was referred to in my earlier judgment in respect of this matter.[15] However, because of the practical difficulties involved in a tracing exercise and the rationale for departing from the rule in *Clayton's Case,* I consider individual tracing would be neither appropriate nor economic.

[24] The major asset recovered by the liquidators is the Coatesville property which was purchased for $1,180,000 by a party associated with one of the principals

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above n 4, and *Re International Investment Unit Trust (in stat man)*, above n 13.

15 *Graham v Arena Capital Ltd (in liq),* above n 3, at [64]-[65], citing *McKenzie v Alexander Associates Ltd (No 2)*, above n 14.

of Arena solely using moneys sourced from the company. Part of the purchase price was withdrawn from Arena's bank account in February and April 2015 (two instalments of $59,000) and the balance ($1,065,802) was withdrawn on 15 May, the same day the account was frozen. That property was transferred back into Arena's name in February 2016 and sold by the liquidators in May.

[25] The liquidators acknowledge that should the disbursements from Arena's bank account for the purchase of the property be able to be traced to particular investors' deposits it is theoretically possible to conclude that those investors have an entitlement to funds recouped from the sale of the property. However, that would require an analysis of Arena's bank account at the time of the disbursements, and tracing the bank balances back through all parties' interests. It would be necessary to establish at the time of each of the three payments made towards the Coatesville property what each investor had contributed to the bank account, taking into account all deposits and withdrawals from the bank account up until that particular point in time.

[26] The liquidators also consider that difficulties arise from the fact the vast majority of the existing funds used to purchase the Coatesville property were withdrawn from Arena's bank account on the last day of Arena's operations, which would mean that transactions may need to be traced back a long way in order to identify specific investors' interests with any assurance. The liquidators consider this would be an extensive and costly exercise which would not, overall, be in the interests of all investors and creditors. Coupled with those practical considerations is the undisputed acknowledgement that a *pari passu* distribution is appropriate in the circumstances of this case, with all investors having an interest in the proceeds from the recovery of the Coatesville property which is the largest asset.

[27] As I have already observed, any other approach would be inconsistent with investors' presumed intentions that the deposits made to Arena's bank account form part of a common fund. This is apparent from the documentation entered into between Arena and investors which is consistent with a debtor/creditor relationship and which uses such terms as "guarantor" and "client". The documentation records that the client will "deposit" the sum to the "assigned bank account", and there is no

indication the deposited funds were to be held separately or on trust. Rather, the deposit is referred to as an "investment". Finally, as observed by Mr Jackson and to which I have already referred, all investors were sold the same scheme which operated over a relatively short period of 12 months before Arena's assets were frozen in May 2015.

[28] I accept the liquidators' submission that there is an inherent arbitrariness in repaying investors on any basis other than "like-for-like", as they each bore the same degree of risk. There was no requirement for investor funds to be held separately, with investors depositing their investment moneys to Arena's bank account. The deposit was clearly an investment, with the investors sharing a common intention to invest on an unsecured basis as part of a fund. Investor funds were mingled in one bank account with no specific restrictions on how the funds were to be used or treated. In the event, no foreign exchange trading or investments ever took place with Arena operating simply as a ponzi scheme.

[29] Taking all these considerations into account, I accept, regardless of whether the relationship between Arena and its investors is properly characterised as being based on trust or contract, that a pro rata, *pari passu* distribution would provide the most cost-effective, timely and efficient method of distribution, and is one which would result in the fairest outcome. As a result, I direct that a common pool of assets be distributed on a pro rata, *pari passu* basis amongst the general unsecured creditors and investors in Arena.

Distribution methodology

[30] The liquidators proposed a "net contribution" basis for calculating distributions to investors, being the amount in total paid by the relevant investor to Arena, less the amount in total paid out by Arena to that investor. This calculation would be undertaken as at the date of liquidation.

[31] One investor, supported by at least two others, has raised a concern with the fairness of that distribution methodology. The liquidators, in accordance with their obligations to the Court, have brought that investor's position, together with the alternative method proposed, to my attention. A document prepared by the investor,

entitled "Investor Statement for Submission to Court", was placed before me. The investor advises that the "one common pool of assets" approach for unsecured creditors and investors is not opposed. However, a distribution on a "net contribution of assets" basis is challenged, and an alternative which is submitted to be a more equitable approach, is proposed.

[32] The investor submitted that the "net contribution of assets" method favours those investors who have already received a partial return of moneys. This is illustrated by reference to a hypothetical example:

(a) Clients 1 and 2 both deposit $5,000 with Arena.

(b) Client 1 is paid out $2,000 during the 12 month period Arena is in business.

(c) Client 2 is paid out nothing.

(d) Assuming a distribution rate to client investors of 34 cents in the dollar, under the proposed "net contribution" calculation of entitlements as at the date of liquidation, the distribution will be as follows:

(i) Client 1's claim in the liquidation is $3,000 (being the $5,000 deposited less the $2,000 paid by Arena). At a rate of 0.34, the distribution to client 1 is $1,020.

(ii) Client 2's claim in the liquidation is $5,000 (being the $5,000 deposited with no withdrawals). At a rate of 0.34, the distribution is $1,700.

(e) Overall, when referenced to the original $5,000 deposited with Arena, the result is:

(i) Client 1 receives back $2,000 + $1,020 = $3,020.

(ii) Client 2 receives back $1,700.

[33] The investor submitted the net distribution method favours those investors who have already received a partial return of moneys and who most likely entered the scheme at an earlier date. It discriminates against those investors who most likely entered the scheme later and who received no return on their investment. The investor suggests a more equitable approach would take into account any sums already paid out by Arena to investors prior to the date of liquidation. This would have the advantage of ensuring that those who withdrew some but not all their funds from Arena prior to the liquidation do not ultimately receive more overall than investors who did not withdraw any funds. This, it is submitted, would be a fairer result across the investor pool.

[34] Mr Jackson has analysed the proposed alternative methodology to assess the likely impact on investors. The essential difference between the proposed "net contribution" methodology and the alternative proposal is that whatever an investor received from Arena pre-liquidation is to be deducted from their entitlement on a net contribution basis. Mr Jackson applied the alternative proposal to assess its impact on the position of investors. That analysis demonstrated that the alternative proposal will deduct $135,436.79 from 27 investors and redistribute it across 892 investors, including the three unsecured trade creditors. At first blush that may be considered a positive impact improving the position of the vast majority of investors, however, further analysis of the nature of that impact does not support the equity of that approach. The alternative proposal would have a large negative impact on the smaller group of investors. One investor would be $48,595 worse off, whereas most investors would receive a very modest benefit from the alternative proposal, averaging $152 to the positive, with the largest single positive impact for one investor being approximately $6,600.

[35] Additionally, the alternative proposal cannot easily be reconciled with the intended approach regarding the recovery and redistribution of pre-liquidation capital returns. Thirty investors have no claims in the liquidation because they received back the same amount they deposited with Arena. There are a further 94 investors who are "net winners", being investors who received back from Arena not

only the money they paid in but "fictitious profits" which the company in reality never earned. As reviewed later in this judgment, the 30 investors who prior to liquidation received back their deposits cannot as a matter of law be required to account for those sums.[16]

[36] The liquidators are seeking to claw back the "fictitious profits" from the 94 "net winners", or obtain their agreement to reimburse the company for the "fictitious profits" they received. However, on the current state of the law, as with the 30 "neutral" investors who received back their deposits, there is no basis upon which the liquidators can pursue those "net winners" beyond recovery of the so-called "fictitious profits". The adoption of the alternative proposal would inherently require a different treatment of pre-liquidation returns of capital across categories of investors, and is inconsistent with the law's present treatment of such payments.

[37] A practical matter identified by Mr Jackson is that the alternative proposal would require the prescribed form for unsecured creditors claims to be amended and reissued to investors to include a declaration of the total capital contributed in addition to the debt outstanding at the date of liquidation. Approximately 630 investors have already filed unsecured creditor claim forms solely on the basis of the debt outstanding as at the date of liquidation. Necessarily, therefore, there will be further cost and delay implications should the alternative proposal be adopted, although Mr Jackson estimates the expense would be lower than the approximate $135,000 benefit, under the alternative proposal, to the identified 892 investors. Mr Jackson's estimate of the administrative cost, however, takes no account of the expense of defending any potential challenge by the 27 investors negatively impacted by the alternative proposal, nor the propriety of the liquidators taking an approach which would likely be considered inconsistent with the current state of the law.

[38] The unilateral taking into account by the liquidators of pre-liquidation payments required of the alternative proposal is inconsistent with the present mechanisms available under the voidable transactions regime provided by the Companies Act 1993, and the fraudulent dispositions regime set out in the Property

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16 *McIntosh v Fisk* [2016] NZCA 74, [2016] 2 NZLR 783.

Law Act 2007.[17] Those statutory procedures provide a process to challenge the legitimacy of pre-liquidation payments, enabling liquidators to retrieve payments made by a company to supplement the pool of funds available for distribution. Both regimes recognise defences of change of financial position and the provision of value or valuable consideration in return for the impugned payments. The alternative proposal ignores such procedures by automatically requiring pre-liquidation payments to be taken into account without regard to such potential defences that are otherwise available as a matter of law.

[39] The Court of Appeal, in *McIntosh v Fisk*, has recently reconfirmed the different status of particular types of pre-liquidation payments.[18] Because an investor who prior to liquidation had recovered his initial investment provided value for that investment, he was entitled to keep the repayment. However, the fictitious profit component of the balance of moneys received prior to liquidation for which no value had been provided, but which had been paid as a result of fabricated or non-existent securities, was able to be retrieved by the liquidators. It is difficult to reconcile the alternative proposal, which would allow liquidators to set off earlier capital repayments against any distribution in the liquidation, with the status afforded to those pre-liquidation payments, as confirmed by the Court of Appeal.

[40] The alternative proposal is also inconsistent with the law as it relates to creditors' claims in liquidations whereby claims are calculated as at the date of liquidation. Any such claim is ascertained as at the date and time of the commencement of the liquidation, and all creditors go into the liquidation proving the sums for which they could have sued as at that date.[19] While it may be suggested that the funds were held in trust by Arena, there appears to be no practical reason for investors to be treated differently from general unsecured creditors who may have previously received payments from the company.

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[17] Companies Act 1993, s 292; Property Law Act 2007, ss 345-348.

[18] *McIntosh v Fisk*, above n 16.

[19] Companies Act 1993, ss 303 and 306; Companies Act 1993 Liquidation Regulations 1994, reg 6 and form 1; *Stotter v Equiticorp Australia Ltd (in liq)* [2002] 2 NZLR 686 (HC) at [46] and [58].

[41] In *Re International Investment Unit Trust (in stat man)*,[20] the proposed net contribution method was approved by this Court in very similar circumstances to the present case. A company which housed a ponzi scheme was placed into statutory management. The issue before the Court was whether the distribution of assets should be made on a FIFO basis according to *Clayton's Case*, or on a *pari passu* basis. The assets of the company were limited to bank accounts with a small number of other assets owned or held by the company's principal or his family and associates. Statutory managers called for proofs of debt from all investors. These were subsequently accepted on the basis investors were entitled to claim the difference between the amount they had deposited with the company and the amount they received back prior to liquidation, whether by way of what was described as "interest" or capital repayments; in effect, the "net contribution" method.

[42] In holding that the rule in *Clayton's Case* would likely result in injustice, Williams J observed that no method of distribution would provide perfect justice for all investors, and that to meet their common misfortune it was necessary to seek the least unfair result.[21] The *pari passu* method was approved as being the least unjust to the body of investors with the company's assets to be calculated and distributed on a net contribution basis. That is what is presently proposed by the liquidators in this case.

[43] I am satisfied the distribution methodology proposed by the liquidators on a "net contribution" basis provides the fairest means of distribution consistent with current New Zealand law. Accordingly, the distribution on a pro rata, *pari passu* basis from the common pool of assets shall be calculated on a "net contribution" basis (ie, the amount in total paid by the relevant investor to Arena less the amount in total paid out by Arena to that investor).

Liquidators' costs and expenses

[44] The liquidators seek an order confirming they may deduct their costs and expenses incurred in recovering and distributing the assets to investors and creditors from the common pool. Ordinarily, in the liquidation of a company s 278 of the

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[20] *Re International Investment Unit Trust (in stat man),* above n 13.
[21] At [73].

Companies Act 1993 will apply to allow the liquidators' expenses and remuneration to be paid out of the "assets of the company". As already observed, where funds or assets are held on trust for investors they are not "assets of the company".

[45] This same issue was raised before Gendall J when Arena was placed into liquidation. At that stage the relationship of the investors with Arena as creditors or beneficiaries had not been determined. However, because of that uncertainty the liquidators obtained an order from this Court allowing them to deduct their fees on a monthly basis subject to the Court's overall jurisdiction, whether under the Companies Act 1993, or the Court's inherent jurisdiction.[22]

[46] Liquidators' costs attributable to matters affecting or administering trust assets can be met out of those trust assets.[23] In circumstances similar to the present case, orders were made in *Re International Investment Unit Trust (in stat man)* and *Waipawa Finance Co Ltd (in liq)*.[24] In the absence of making an order permitting the liquidators to deduct costs from the common pool it would be necessary for the costs incurred in recovering and distributing assets to be allocated as between the general pool of assets and a separate trust pool. For the reasons already canvassed that is a course to be avoided and would be a source of further expense.

[47] I accept that in the circumstances the order sought by the liquidators is appropriate. There will be an order confirming that the liquidators are entitled to deduct the costs and expenses incurred in relation to the recovery and distribution of assets, including in relation to this application, from the common pool of assets.

Proof of debt

[48] Finally, the liquidators seek an order that they shall be entitled to proceed on the basis that both general unsecured creditors and investors of Arena are required to lodge a claim in substantively the same form as that provided in the schedule to the Companies Act 1993 Liquidation Regulations 1994 (the Regulations). Further, that

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22 *Graham v Arena Capital Ltd (in rec)* [2015] NZHC 1719 at [28]-[29]; Companies Act 1993, s 284.

23 *Re Aramiru Holdings Ltd*, above n 4, at 504-505; *McKenzie v Alexander Associates Ltd (No 1)*, above n 14.

24 *Re International Investment Unit Trust (in stat man)*, above n 13; *Waipawa Finance Co Ltd (in liq)*, above n 4.

the provisions of those regulations together with ss 302 and 304 of the Companies Act 1993 shall apply to the proofs of debt required to be lodged by the unsecured creditors and investors of Arena.

[49] The purpose of seeking that order is to provide the liquidators with the usual protections in a liquidation, and to allow for the orderly administration of creditors' and investors' claims which accords with well-established statutory procedures provided for the purpose of assessing claims to a company's assets.

[50] Mr Jackson has advised of the process adopted whereby unsecured creditors and investors can request to lodge claims essentially in form 1 of the schedule to the Regulations. While investors are distinguishable from creditors and arguably not entitled to lodge a "proof of debt" claim form, the lodging of a claim in that way provides the means to ensure there is an orderly and comprehensive review and understanding of persons who may claim against Arena's assets. The liquidators wrote to investors and creditors at the end of March asking them to complete and return a claim form by the beginning of this month.

[51] I am satisfied the process adopted is appropriate, and that the liquidators are entitled to proceed on the basis outlined, whereby creditors and investors are required to lodge a claim in substantially the same form as that required under the Companies legislation.

Orders

[52] For the reasons set out in this judgment, I make the following orders:

(a) all recovered assets of Arena, after costs, be treated as forming one common pool of assets for distribution available to both general unsecured creditors of Arena and investors in Arena;

(b) the common pool of assets be distributed on a pro rata, *pari passu* basis amongst the general unsecured creditors of Arena and investors in Arena;

(c) further to order (b) the common pool of assets shall be distributed on a pro rata, *pari passu* basis:

(i) regardless of whether the relationship between Arena and its investors is properly characterised as being based on trust or contract or some other form of legal relationship;

(ii) in respect of investors, shall be calculated according to a "net contribution" basis (ie, the amount in total paid by the relevant investor to Arena less the amount in total paid out by Arena to that investor); and

(iii) the liquidators shall be entitled to proceed on the basis that both general unsecured creditors and investors of Arena must lodge a claim (in respect of investors, on a "net contribution" basis) in substantively the same form as that in form 1 of the Schedule to the Regulations; and the Regulations and ss 302 and 304 of the Companies Act 1993 shall apply to such unsecured creditors, investors, and proofs of debt.

(d) the liquidators are entitled to deduct the costs and expenses incurred in relation to the recovery and distribution of assets, and of this application, from the common pool of assets;

(e) Leave to apply for further directions is reserved.

Solicitors:
Bell Gully, Wellington