

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

**CIV 2012-485-2314
[2012] NZHC 2925**

UNDER Financial Advisers Act 2008 and Parts 7
and 32 of the High Court Rules 2009

BETWEEN FINANCIAL MARKETS AUTHORITY
Plaintiff

AND DAVID ROBERT GILMOUR ROSS
First Defendant

AND ROSS ASSET MANAGEMENT LIMITED
Second Defendant

AND DAGGER NOMINEES LIMITED
Third Defendant

AND BEVIS MARKS CORPORATION
LIMITED
Fourth Defendant

AND MERCURY ASSET MANAGEMENT
LIMITED
Fifth Defendant

AND ROSS INVESTMENT MANAGEMENT
LIMITED
Sixth Defendant

AND ROSS UNIT TRUSTS MANAGEMENT
LIMITED
Seventh Defendant

AND UNITED ASSET MANAGEMENT
LIMITED
Eighth Defendant

AND MCINTOSH ASSET MANAGEMENT
LIMITED
Ninth Defendant

AND TRUSTEES OF THE CHAPMAN ROSS
TRUST
Tenth Defendant

AND

TRUSTEES OF THE WOBURN ROSS
TRUST
Eleventh Defendant

Hearing: 6 November 2012

Counsel: H Rennie QC and R Johnson for the plaintiff
V Heine and B Orr for the first to third, tenth and eleventh defendants

Judgment: 6 November 2012

JUDGMENT OF MALLON J

[1] I refer to the interim orders made by the High Court on 2 November 2012 freezing the assets of the defendants in this proceeding and making associated orders. These orders were made on an interlocutory application made late on 2 November 2012 and which at that time were served on a Pickwick basis on counsel for some of the defendants. The application is now before me for consideration.

[2] The application seeks the appointment of receivers to manage the business of Mr Ross (the first defendant) and his associated companies (the second to eleventh defendants) (which I refer to the as the “Ross entities”). The application is made under sections 137F and 137G of the Financial Advisers Act 2008.

[3] The background to the application is set out in detail in the affidavits that have been filed and which counsel have summarised this morning in this hearing. David Ross has conducted a financial investment service through a number of companies which are named in the application before me. Each of those companies are relevant persons. They are subject to an investigation under section 137F(1)(a) of the Financial Advisers Act.

[4] This has arisen as a result of a serious concern about dysfunction and adequacy of the management of the business. Those concerns include a failure to make decisions, a failure to implement requests from investors for payment and inadequacies of records. Investors in or through these entities were requesting that

their securities be realised and paid out. On some occasions money was paid out but, as at Friday last week, up to 27 people had complained to the Authority that they had not been paid out in accordance with their instructions. The specific detail of three of these matters are set out in the affidavit material before me.

[5] The investment business involves approximately 900 investors. The balance of the accounts of those investors totals more than \$430 million. The total funds involved is not yet known. The Ross entities at present have no remaining staff as they have resigned. Mr Ross is presently unable to provide counsel with any instructions.

[6] The Authority has conducted some preliminary work under the control of Mr Fisk, an accountant. The investigations show that there are trading records in Australia, North America, United Kingdom, New Zealand and elsewhere, and that the matter is complex. At this stage it is not possible to know whether there are incomplete trades or calls or whether there are other prudent steps that need to be taken, although it is anticipated that there are such steps that need to be taken to preserve the assets. It is also known that the lodgement for tax returns of the Ross entities are two years in arrears. Otherwise, the Authority says that there is a vacuum as to the position and that action is required at this stage for the preservation of assets.

[7] Mr Ross is not in a position to deal with these matters and it is for that reason that the Authority seeks the appointment of experienced people to deal with the matters that he is presently unable to deal with. The people to be appointed are experienced accountants. They do not have all the necessary skills in financial markets and related advice and so also seek the appointment of experienced brokers. The information before me satisfies me that the accountants and the brokers that are proposed to be appointed have no conflicts and are suitable to undertake this role.

[8] Mr Rennie QC has taken me through each of the orders that are sought. Counsel for the first, second, third, tenth and eleventh defendants advised that the orders sought by the Authority were not opposed, the position being taken that they abided the Court's orders on the application and are cooperating with the

investigation. Counsel for those defendants does not have instructions in respect of the other defendants. I am satisfied that it is appropriate and essential to make the orders at this stage and that the orders are proportionate to the situation as it is presently known to exist.

[9] Accordingly, there are orders made in terms of the draft orders before me with the variations discussed with (and not opposed by) counsel at this hearing. The variations are as follows:

- (a) after order 3 and before order 4, there is a further order that the first, second, third, tenth and eleventh defendants may be paid their legal costs reasonably incurred in relation to the Authority's investigation or consequential proceeding. Those costs in respect of the first, second and third defendants are to be paid from the assets of David Robert Gilmour Ross or any such other property as the Court may order. The tenth and eleventh defendants' costs are to be paid out of the assets of those respective trusts or such other property as the Court may order;
- (b) the order at 3(a) should refer to "Authorised Financial Adviser" rather than "Registered Financial Adviser";
- (c) counsel's name is to be deleted from the order at 4.1;
- (d) 5.1 is to be amended from "amended by the Court" so as to read "until amended or rescinded by the Court".

[10] This hearing was in chambers. However, after hearing from counsel about the presence of a number of parties and representatives of the media, I ruled that they could remain and they would be subject to any confidentiality orders that I made. As matters have transpired, this hearing has not referred to any confidential matters. My judgment will be available, as will the detail of the orders that I have made. But I note that at this stage the Court file remains confidential and is not to be searched without further order of the Court on notice as is recorded in the orders that I have made.

[11] It is possible that the Authority may seek further orders in light of the report which it is to file with the Court. The proceeding is adjourned nominally to the duty Judge at 10 am on 13 November 2012. However counsel for the Authority will file a memorandum with the Court before then as to a suitable date for any next steps that may need to be taken.

Mallon J