BUDDLE FINDLAY

Legal update on insolvency law – August 2018

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Creditors' compromise Part 1: the New Zealand Supreme Court view

In a judgment of the Supreme Court of New Zealand (released 11 days prior to the decision in *Lehman Brothers* referred to below), the Supreme Court considered a compromise proposal by Trends under Part 14, section 230 Companies Act 1993 (read our previous updates on the Court of Appeal and High Court decisions). A compromise under Part 14 does not require Court approval once it has been approved by the required majority of creditors at a vote. Rather, under section 232, a creditor may apply to the court for a declaration that the compromise does not apply to a particular creditor or class of creditor if there has been unfair prejudice or material irregularity in obtaining the approval. A number of creditors had challenged the proposal by Trends, including Callaghan Innovation, the second largest of Trends' creditors affected by the compromise. Heath J found there had been unfair prejudice in the grouping of arms' length creditors with insider creditors for voting purposes and set the compromise aside. The Court of Appeal agreed that there had been unfair prejudice, and also found there was material irregularity because of the inadequate provision of information to creditors. Trends appealed.

The appeal by Trends turned on the approach to be taken to the classification of creditors. The Trends proposal had just one class of creditors, regardless of whether those creditors had any association with the company. Furthermore, under the proposal, those with smaller debts would be favoured over those with larger debts. The challenging parties voted against the proposal but it was nevertheless approved by the required majority (being a majority in number and 75 percent in value). The vote only passed the value threshold because the creditors who were associated with the company and who voted in favour of the proposal held approximately 74% of the total debt owed by Trends. The majority (William Young, Glazebrook and O'Regan JJ) commented that differential treatment of creditors is not necessarily unfair. "But differential treatment between creditors in the same class will almost inevitably raise concerns as to classification…"

In the case of Trends, the majority ultimately found that the compromise was objectionable because the arm's-length creditors were bound by a decision made by those on "the other side of the bargain". This was contrary to the policy objectives of Part 14. In addition, and also objectionable, was the fact that creditors being offered a minimal return on their investment were treated for voting purposes as part of the same class as creditors who were offered substantially better returns under the compromise.

Elias CJ and Ellen France J also dismissed the appeal, but for slightly different reasons. They considered that classes should be constituted based upon legal rights, and the inclusion of those with materially different legal rights in the same class is a "material irregularity" under s232(3)(b).

The minority also noted that when there could be possible claims in a liquidation against the directors of a company, that raised questions of conflict of interest in the promotion of a compromise by those directors to avert liquidation.

Seb Bisley and Ollie Gascoigne of Buddle Findlay acted for the successful respondents in the High Court, Court of Appeal and Supreme Court.

See the decision here.

Creditors' compromise Part 2: the view of the High Court of England and Wales

The High Court in England was asked to consider sanctioning a scheme of arrangement between Lehman Brothers International (Europe) (in administration) (LBIE) and certain of its creditors pursuant to Part 26 Companies Act 2006 (the equivalent of Part 15 Companies Act 1993). This case was one of a number of proceedings involving the Lehman Brothers administration, many of which cases have reached the Supreme Court (see our earlier reports on September 2017, June 2017, June 2014, March 2014, December 2012 and March 2012). The administrators have already made four dividends to creditors representing 100p in the pound but there remains approximately £6.6b in liquid assets left in the estate. The purpose of the scheme is to compromise various complex legal proceedings in order to facilitate the distribution of the surplus funds to LBIE's estate, and bring the administration to an end. If the Court did not sanction the scheme, the administrators considered that litigation among the

company's creditors could continue for years.

The Court confirmed the three stage test to be considered when deciding whether to sanction a scheme of arrangement. The Court must consider:

- Whether the provisions of the relevant statute have been complied with
- Whether the creditors were fairly represented by those who attended the meeting, and whether the majority are acting bona fide and not coercing the minority in any way in order
- That the arrangement is such that a reasonable creditor might reasonably approve. If the answer to this last question is yes, the scheme is said to be "fair", even though the Court retains the ultimate discretion to approve the scheme.

The Court considered that the classes were properly constituted, those members were fairly represented, and there was no evidence of coercion. Finally, the Court, adopting a common sense approach, found the benefits to the scheme to be considerable and obvious, and found there was no reason not to sanction the scheme.

See the decision here.

CBL Insurance placed into interim liquidation

The High Court placed CBL Insurance Ltd (CBLI) into interim liquidation on the application of the Reserve Bank of New Zealand in February 2018. CBLI is a licensed insurer and as such is subject to the Insurance (Prudential Supervision) Act 2010. Courtney J did not issue a full judgment recording the reasons for her decision because of the extensive confidentiality orders required in the circumstances. She did, however, record that she was satisfied that the statutory criteria were met for the appointment of interim liquidators. Under section 151 Insurance (Prudential Supervision) Act 2010, the High Court may appoint liquidators to a licensed insurance company if the Court is satisfied that:

- The insurer is unable to pay its debts
- The insurer is failing to maintain a solvency margin
- The insurer has persistently or seriously failed to comply with any direction imposed by or under the Act or the regulations
- It is just and equitable that the insurer by put into liquidation.

The hearing date of the Reserve Bank's application for the liquidation of CBLI is yet to be allocated. Buddle Findlay acts for the Reserve Bank in relation to the application. The application is opposed.

Disclosure obligations for listed entities in voluntary administration

Financial Markets Authority v Jackson & Gibson as voluntary administrators of CBL Corporation Limited [2018] NZHC 2052

In a subsequent case involving the collapse of CBL Group, the High Court has considered a listed company's obligations to report to NZX and the Financial Markets Authority while in administration. Entities listed on the NZX and/or the NZDX have continuous disclosure obligations under the Financial Markets Conduct Act 2013 (FMCA) and NZX Listing Rules. The key question was whether those obligations continue to apply when a listed entity is placed into voluntary administration. The FMA sought clarification from the High Court as to whether the obligations continued in administration. The High Court has recently held they do not. Rather, the reporting obligations of administrators under Part 15A of the Companies Act 1993 apply.

The Court considered that the purpose of the FMCA disclosure rules is premised on the existence of an active market. Voluntary administration prohibits an active market or trading of the entity's shares, and so those rules should not apply. The Court also considered that there were practical and policy reasons for not requiring FMCA disclosure, particularly the limited powers and narrow focus of administrators. The decision is likely to have broader application.

The decision can be found here.

Ross Asset Management – the final chapter?

In what is likely to be the final chapter in the Ross Asset Management (RAM) liquidation, assuming no appeal is filed, the High Court has considered an application for directions by the liquidators of Ross Asset Management concerning how best to distribute recovered funds. David Ross operated RAM as a Ponzi scheme for decades until the fraud was uncovered in 2012 and the company went into liquidation. Mr Ross is currently serving a ten year plus term of imprisonment for his role as architect of the scheme. Claims in the liquidation total $125m against recoveries of approximately $18.5m.

The key issue for the Court concerned the method of distribution in this case to the approximately 860 investors. Those investors fall into two categories: those who contributed less to the scheme than they withdrew, and those who contributed more to the scheme than they withdrew. Those who had contributed less to the scheme than they had received were precluded from participating in any distribution. For those remaining investors, the High Court endorsed the 'constant dollar' approach, which is to say that the Court approved of the liquidators adjusting the value of investments and withdrawals by reference to the consumer price index to reflect inflation. The Court also endorsed the 'net contribution model' described as "identifying each investor's capital investment in the scheme (ignoring fictitious returns), deducting the amount of any withdrawals by that investor and thereby identifying the investor's net loss". This model was endorsed for both company assets (necessarily subject to the Companies Act liquidation regime) and for trust assets (to which the Companies Act has no direct application). The alternative model, put forward by the Court appointed amicus, and supported by one of the scheme's investors, was referred to as the 'alternative distribution model'. The alternative model involved calculating the amount of each investor's withdrawal as a percentage of the investor's investment.

The models, while both seeking to achieve fairness to investors, would have resulted in different outcomes. Under the alternative distribution model, the number of investors eligible for a distribution would reduce from 639 to 418, in effect, increasing the likely distribution from 11 cents in the dollar to approximately 18 cents in the dollar. Only those investors who made no withdrawals prior to RAM's collapse and liquidation would receive the full 18 cent distribution. The Court decided that, by a narrow margin, the net contribution model should be adopted for both company and trust assets but in so doing, expressly rejected the argument that the Companies Act, and the principles that apply to the distribution of company assets must necessarily dictate the distribution of trust assets. Associate Judge Johnstone specifically noted that "insolvency law principles are not necessarily appropriate for application to Ponzi schemes". Nevertheless, he was influenced by, among other things, the dicta from the Supreme Court in *Fisk v McIntosh* (see our earlier update here) that indicated the Supreme Court had proceeded on the assumption that a net contribution model would govern the distributions of all assets. In the end, he was attracted to the model that would benefit the greater number of claimants.

The full decision is available here.

Operation of s179 Property Law Act 2007 substantially clarified

AFI Management Pty Limited v Lepionka & Company Investments Limited [2017] NZHC 3116

Section 179 Property Law Act 2007 (PLA) allows a mortgagee to elect to adopt an existing agreement for sale and purchase in respect of mortgaged property, provided that the mortgagee is entitled to exercise a power of sale at the time of adoption.

In a December 2017 judgment arising from a Hawkes Bay property development dispute, the High Court has substantially clarified the position for mortgagees in respect of the operation and application of section 179.

In particular the High Court held that adoption of an existing agreement for sale and purchase by a mortgagee under section 179:

- Will only be effective as from the date that effective written notice of the adoption is actually served on the purchaser
- Does not render the mortgagee liable for the mortgagor's/vendor's obligations under the agreement for sale and purchase
- Will constitute consent by the mortgagee for the purposes of section 105 of the Land Transfer Act such that the mortgagee is bound to the estate or interest of the purchaser in the mortgaged property created by the relevant adopted agreement
- Is an exercise by the mortgagee of its power of sale and accordingly subject to the s176 PLA duty to obtain the best price reasonably obtainable at the time of sale
- Extinguishes a mortgagor's right to redeem under section 97 of the PLA, as from the date that effective adoption notice is served.

See the full judgment here.

Mortgagee's statutory and equitable obligations on sale considered by the Court of Appeal

In another case considering a mortgagee's equitable and statutory duties, the Court of Appeal recently considered a vendor mortgagee's duties on mortgagee sale, including the treatment of a forfeited deposit under a previous failed mortgagee sale in the decision of *Coumat Ltd v Whitford Properties Ltd*.

The subject property was originally owned by Whitford Properties Limited (now in receivership and liquidation) (WPL) and originally subject to a mortgage in favour of ANZ as mortgagee. WPL was incorporated by Mr Bruce and Mr Allen and the subject property was purchased with the intention of subdividing it for residential purposes. WPL fell into arrears with its mortgage repayments. The Bank, as mortgagee, attempted a mortgagee sale, but that sale didn't complete when the purchaser, Mr Allen, failed to settle.

The deposit for the failed tender, funded by a Mr Hayhow, was forfeited to the Bank, which applied the deposit monies to WPL's indebtedness. A guarantor of the obligations of WPL to the bank, Mr Bruce, later acquired the mortgage by operation of section 102 of the Property Law Act 2007. Mr Bruce then carried out a mortgagee sale of the property to Coumat Limited (Coumat) as purchaser. Coumat was Mr Hayhow's company. Coumat didn't pay the whole purchase price for the property to Mr Bruce in cash, but rather Mr Hayhow's payment of the forfeit deposit to Mr Allen, and his forgiveness of a personal debt owing to him by Mr Bruce were treated as contributing to the purchase price. When WPL went into liquidation, the liquidator pursued a claim against Mr Bruce for breaching his duty to account to WPL for the proceeds of sale, and against Mr Hayhow and Coumat for dishonest assistance in breach of trust.

The Court held that section 185 Property Law Act required the Bank to account to WPL (as in fact it did) for the forfeited deposit, irrespective of who funded that deposit because section 185 is directed at proceeds "arising from the sale by a mortgagee of mortgage property". It did not matter that the sale didn't proceed to settlement. The Bank, in accepting the deposit in the name of Mr Allen as purchaser (and not on trust for Mr Hawhow) was under no obligation to return the deposit to either Mr Hayhow or Mr Allen when the purchase did not proceed. Mr Hayhow was then mistaken that he should be able to recover the deposit, not from Mr Allen, to whom he had loaned the money, but from WPL as a credit to the fair market value of the property then purchased by his company, Coumat. It followed that Mr Bruce had breached his mortgagee duty to account for the surplus proceeds from the mortgagee sale, insofar as he accepted a credit of funds owing from third parties as the deposit for the purchase of the property, which credit he did not make available to WPL.

See the full judgment here.

Admissions by bankrupt not binding on Official Assignee

An application by New Zealand Life Care Limited (Life Care) for an order reversing the decision of the Official Assignee to reject its claim for $4.9m in the bankruptcy of Mr Harman was dismissed by the High Court in *New Zealand Life Care Ltd v Official Assignee* [2018] NZHC 17. Life Care said that Mr Harman had guaranteed loans from Life Care to his companies, but accepted that it did not have a written guarantee signed by Mr Harman. Instead it relied on Mr Harman's admission of the guarantee in affidavits made after his adjudication.

The Court found that, on the balance of probabilities, Mr Harman gave an oral guarantee to Life Care in 2005, but that it was unenforceable. For a claim to be recognised in bankruptcy it must be a provable and enforceable debt. Oral guarantees are not enforceable and cannot be claimed in bankruptcy.

Life Care submitted that because Mr Harman admitted to the giving of the guarantee in the affidavits, the guarantee was enforceable and therefore provable in his bankruptcy, replying upon *Lucas v Dixon,* an English Court of Appeal decision from 1889. The Court held that the statements by Mr Harman as to the liabilities he had incurred were relevant but not determinative. Here, the party opposing the claim was the Official Assignee, not the bankrupt. Statements by a bankrupt as to debts incurred were not admissions binding on the Official Assignee.

See the judgment here.

Challenging an administrators' resolution to auction causes of action

Meem SL Limited was an unsuccessful start-up company in the United Kingdom. The board resolved to put the company into administration and sell the business to a company owned by the directors.

The applicant shareholders wished to claim on the company's behalf, alleging the directors conspired to dispose of assets for less than real value. The administrators resolved to auction the claim. The applicants argued the auction would cause them unfair harm. The bidders would be the impecunious first applicant, the only person having sufficient knowledge to bring the claim, and the managing director, who would acquire the claim to quash it.

Regarding unfair harm under the Insolvency Act 1986, the Judge held the harm must be unjustifiable by reference to creditor interests or the administration's objective. The Judge noted claims are difficult to value and auction may be a reasonable mode of sale. Public interest in preventing defendants stifling claims by purchase was a relevant albeit marginal factor.

Because the first applicant potentially lacked funds to pursue the claim, the auction offered immediate certainty of a fixed price, and the second applicant had substantial means to bid competitively, the Judge dismissed the application.

See the decision in - *Re Meem SL Limited (In Administration) [2017] EWHC 2688 (Ch)*

Voluntary insolvent liquidations given common law recognition in Hong Kong

Re The Joint Liquidators of Supreme Tycoon Limited (in liquidation in the British Virgin Islands) (08/02/2018, HCMP833/2017), [2018] HKCFI 277

The Hong Kong Court of First Instance considered whether an insolvent liquidation, commenced by the shareholder of a company registered in the British Virgin Islands, was eligible for common law recognition in Hong Kong.

The East Caribbean Supreme Court ordered the winding up of China Culture Media International Holdings Limited, the sole shareholder of Supreme Tycoon Limited (STL). One of the liquidators of China Culture, acting on behalf of the company, passed a shareholder's resolution for the voluntary winding up of STL. To obtain further information as to the company records and affairs, the liquidators sought recognition of the liquidation in Hong Kong.

The Court did not follow the Privy Council's obiter comments in *Singularis Holdings Limited v PricewaterhouseCoopers* that a court should not assist in foreign voluntary winding up proceedings, which the Board commented, were essentially private arrangements. In the case of Supreme Tycoon, the insolvency process was for the collective benefit of STL's creditors, which the Court considered was fundamental for cross-border assistance in insolvency proceedings. The process was an insolvent liquidation, although it was voluntary in the sense that it was commenced by shareholders' resolution. The Court considered that the question of whether the liquidators were court-appointed or not was irrelevant. For these reasons the Court held that the BVI liquidation should be given common law recognition.

A copy of the decision can be found here.

"Pay now, argue later": Court of Appeal refuses to set aside statutory demand

The Hobson Apartments suffer from water tightness issues. Unusually for a unit development, the top floor apartment on level 12 owned by the appellant Manchester Securities, owned the exterior of its unit including the roof of the building rather than the Body Corporate. Severe water damage was identified in October 2009. Following a series of High Court decisions and one Court of Appeal decision, Manchester Securities was required to contribute certain amounts to the Body Corporate for repair costs.

The Body Corporate served two statutory demands on Manchester. The first statutory demand related to levies, and also included the amounts formally ordered by the High Court to be paid as a consequence of the amended scheme. The High Court refused to set aside one of the demands. Manchester appealed arguing a right to set-off, and the existence of a bona fide dispute The Court of Appeal confirmed that "statutory demands can legitimately be used to recover a debt even where liquidation is not in prospect". It determined that Manchester's application to set aside the statutory demand for at least one aspect of the demand was an attempt to re-litigate matters already decided by the High Court in earlier proceedings and held that despite an arguable set-off, the presence of arbitration clauses and a bona fide dispute, the High Court's decision not to set aside the statutory demand should stand. The Court of Appeal endorsed the respondent's view that in the circumstances of this case, it was appropriate to "pay now, argue later."

See the Court of Appeal decision here.

Statutory demand set aside in Moffat Road Ltd v North Harbour Motors Ltd

North Harbour Motors Limited (in liquidation) (North Harbour) issued a statutory demand against Moffat Road Limited (Moffat) in respect of two separate $30,000 deposits paid by North Harbour to Moffat on the purchase of two properties pursuant to agreements for sale and purchase dated 6 July 2015 (the Agreements).

On 18 September 2015, Moffat was specifically incorporated to develop the properties. North Harbour and Moffat entered into a heads of agreement expressing the terms relating to the development of the properties. On the same day, North Harbour entered into a nomination deed where North Harbour assigned the benefit of the Agreements to Moffat (Nomination Deed). The Nomination Deed provided that Moffat would be deemed to be the purchaser under the Agreements and would duly complete the purchase of the properties.

The liquidator of North Harbour argued that North Harbour had obtained no benefit for the payment of the deposits. Moffat therefore has been unjustly enriched. Moffat argued any obligation to repay must exist at the time the money is paid or given. Here, Moffat was not incorporated until after the deposit was paid. Further, there was no express provision referring to the deposits in the Nomination Deed.

The High Court set aside the statutory demand relying on the interpretation of the wording of the Heads of Agreements and the Nomination Deed. The Court held the Nomination Deed did not expressly mention the refund of the deposits and one would expect a businessman not to overlook such as sum. Further, the Nomination Deed looked forward referring to 'price owing' therefore only included the balance of the purchase price that remained unpaid.

A copy of the decision can be found here.

Assignment of debt and security interest without consent deemed invalid

FTG Securities Limited involved an application by FTG Securities Limited (FTG) for declarations as to the interpretation of a Deed of Priority. The Deed of Priority was entered into by Canterbury Finance Limited (CFL) and a bank with respect to the security interests in Tuam Ventures Limited (in Rec and in Liq) (TVL). Declaratory relief was sought against the bank and the receivers of TVL. An issue raised by way of an affirmative defence was whether the assignment of TVL's debt and securities to FTG is valid from a technical legal perspective and therefore whether FTG was properly a party to the Deed of Priority (as second charge holder) and able to enforce it against the bank.

That issue required consideration of the validity of two purported assignments of the debt and security interests in TVL. The Deed of Priority contained a clause that prevented either CFL or the bank from transferring or assigning any interest in their securities to any person unless that person entered into a deed or contract in a form approved by the other Secured Party (with such approval not being arbitrarily or unreasonably withheld or delayed) by which that person agrees to be bound by the Deed of Priority. The bank's approval to the assignments had not been sought at the relevant times.

Gendall J found that FTG did not obtain a valid statutory assignment of the debt and securities in TVL or the rights and obligations under the Deed of Priority because the bank's approval had not been sought. This invalidated the purported assignments. It followed that FTG is unable to enforce the Deed of Priority and has no standing to seek declarations in respect of that Deed.

The judgment is interim only and the parties are invited to make further applications as to what should occur next.

Conditions imposed on discharge of bankruptcy

Mr Hampton was adjudicated bankrupt five years previously. Following his public examination and the filing of the Official Assignee's report, the Official Assignee and Commissioner of Inland Revenue (a creditor) accepted Mr Hampton should be discharged, but sought the imposition of conditions.

Venning J reviewed Mr Hampton's actions before and during bankruptcy, including his history of default in relation to tax obligations, his late filing of the statement of affairs required under the Act, and his conduct in relation to a property in which he had an interest (leading to a reduction in moneys available for creditors). He found there was a real concern as to Mr Hampton's ability to comply with commercial obligations resting with a person who is self-employed, holds a directorship or management role in a company, or otherwise deals with members of the commercial community. As a consequence, he ordered Mr Hampton's discharge subject to supervision for four years.

The decision can be found here.

High Court considers bankrupt's application to carry on business while still bankrupt

In *Lafferty v Official Assignee* Gordon J considered Mr Lafferty's appeal of two decisions of the Official Assignee to refuse Mr Lafferty's applications under section 62(1)(a) of the Insolvency Act 1967 to enter or carry on business while bankrupt.

Gordon J dismissed the appeal on the basis that Mr Lafferty could not show that the Official Assignee had made an error of law, failed to take into account relevant considerations or was manifestly wrong in exercising its discretion under regulation 34 of the Insolvency Regulations 1970.

Mr Lafferty's ability to provide further information alongside his application form was sufficient to satisfy his right to be heard. The fact of Mr Lafferty having served a prison sentence and his successful battle with drug addiction were relevant considerations, but Gordon J considered that the Official Assignee was entitled to take the view that the 2.5 years since his last offence was too short a period to demonstrate genuine change. Finally, the decision was not manifestly wrong as Mr Lafferty had an extensive criminal history of behaving fraudulently in conducting precisely the kinds of businesses that he applied to run.

The decision can be found here.

High Court upholds Tax Commissioner's wide discretionary decision making powers

On various occasions during the periods 2012 to 2018, Shane Warner Builders Limited (SWBL) regularly failed to pay GST and PAYE to the Commissioner of Inland Revenue.

In January 2018 the Commissioner filed an application to put SWBL into liquidation. The proceeding was adjourned in March 2018 whilst the Commissioner and Applicant engaged in negotiations for relief which ultimately failed due to SWBL's history of failures to pay tax arrears and failing to provide substantive supporting evidence regarding the source of funds required to settle current tax arrears.

SWBL filed an application for an interim order to stay the application for liquidation on the basis that the Commissioner erred in assessing SWBL's proposal for tax relief. After considering various case law, the High Court accepted that a Commissioner has broad discretionary decision making powers under the Tax Administration Act 1994 and further that courts would be slow to interfere with these powers. Decided case law showed that a compromise was more likely to be accepted if it could be shown that a higher net recovery would be achieved than by winding up the taxpayer. However, after the Court considered SWBL's history, it was satisfied that a higher return would not be achieved in this instance, and that the Commissioner had acted fairly in considering and declining SWBL's proposals for tax relief.

The application for interim relief was accordingly declined.

A copy of the decision can be found here.

Update on Insolvency Practitioners Bill

The Insolvency Practitioners Bill, which was first introduced to Parliament in 2010 by then Commerce Minister Simon Power, has been picked up by the new Commerce and Consumer Affairs Minister Kris Faafoi. The Minister has released a Supplementary Order Paper, containing amendments to the Bill. Included in those amendments is a system of registration of insolvency practitioners with an accredited body under a new, stand-alone Act. This replaces the previous negative licensing regime originally proposed in the Bill whereby the Registrar of Companies was to be given the power to prohibit individuals from providing insolvency services. Other amendments include granting the Court the power to make orders compensating parties for losses suffered as a consequence of an insolvency practitioner's failure to comply with the law, and extending the circumstances in which an insolvency practitioner will be disqualified from acting in relation to an insolvency engagement by reason of the practitioner's prior association with the company.

Submissions on the Insolvency Practitioners Bill and Supplementary Order Paper are sought from interested parties by Friday, 24 August 2018. You can find a copy of the Bill and Supplementary Order Paper, as well as information on making a submission to the Committee of the House here.

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