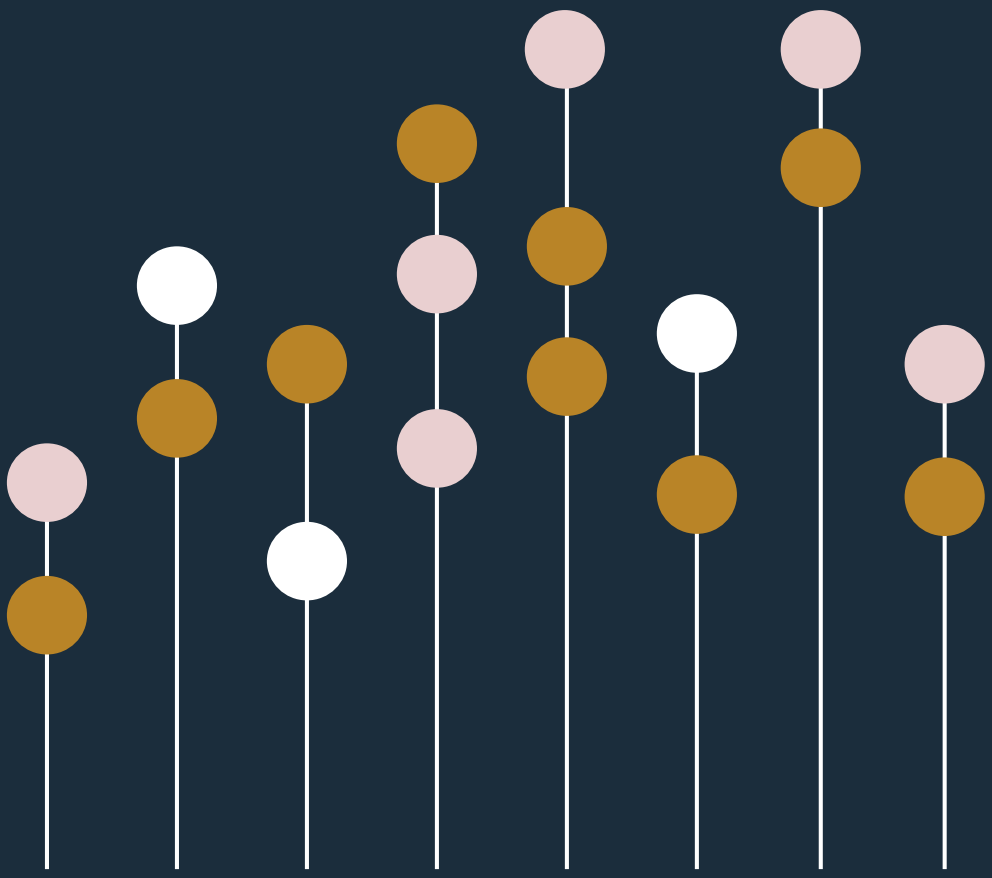
Insolvency and restructuring newsletter.

April 2026



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Kia ora tātou

The second major worldwide economic shock in half a decade: too soon?

Global economic conditions have been significantly affected by ongoing geopolitical conflicts and associated trade and sanctions uncertainty. At the beginning of WW1 in 1914 there was a belief that 'it will all be over by Christmas'. The President of the USA announced recently that the USA could finish its war with Iran within two to three weeks. Regardless of the length of the conflict the economic impact of it will be felt for a considerable time to come. The now partial closure of the Strait of Hormuz and the threatened closure of the Bab el-Mandeb Strait between the Red Sea and the Indian Ocean have had an immediate and negative impact on global fuel supplies and prices, supply chains and the world economy.

Relatedly, the Bank of England has warned about risks in the near $2t private credit market being exacerbated by the conflict. There is a possible impact on life insurers that have invested almost half the funds in this market. Investor redemptions are reported to be on the rise.

Locally, inflation is expected to spike, albeit that the RBNZ has not increased the OCR (yet). ASB's economist predicts that the economic recovery will be delayed until 2027. The March ANZ business confidence survey reported plunging business confidence as firms processed the shock of the Iran conflict and soaring fuel costs. BNZ's Mike Jones warns of a stagflationary-type-shock, involving high inflation, high unemployment and stagnant economic growth.

New Zealand sources over 80% of its refined fuel imports from Singapore and South Korea. South Korea, in turn, sources much of its crude supplies from the Middle East. It remains to be seen how the security of the country's fuel supplies (in particular, Jet A1 and diesel) may be affected by the triggering of force majeure clauses in supply contracts. Airlines and transport companies will undoubtedly be affected. Air NZ was already struggling and is now forecasting losses of $500m over the next two years. Flights domestically and internationally have been cancelled.

On the plus side, new EV sales are reported as having skyrocketed since the start of the conflict, increasing 278% year on year.

As some of the world's insolvency professionals gather in London for the annual INSOL conference a guaranteed topic for discussion will be how this dramatic change in the economic outlook will drive an increase in insolvencies and restructurings. Unfortunately, there is certain to be an increase in business failures in New Zealand arising as a result of the conflict.

Scott Barker on behalf of the Buddle Findlay insolvency and restructuring team.

UK Court appoints conflict liquidators: says liquidators were 'marking their own homework'

Sophie Parker

In *Rawbank SA v Banfield & Ors (Re Travelex Bank Notes Ltd)* [2025] EWHC 3054 (Ch) the UK High Court confirmed the statutory power to appoint additional liquidators, particularly in relation to findings of bias, conflict and preference.

Background

Rawbank SA, the largest bank in the Democratic Republic of Congo, was a customer of Travelex Bank Notes Limited (**Travelex**).

In March 2020, unaware of Travelex's financial difficulty, Rawbank SA placed banknote orders totalling over USD60m. Later that day, those funds were 'swept' into Travelex Limited's (a parent company) account as part of 'routine' cash pooling. Shortly after, Travelex made a significant payment to an anonymous creditor. Travelex failed to deliver the banknotes and refused to issue a refund, claiming restructuring rendered it unable to pay creditors. Rawbank SA obtained summary judgment against Travelex for USD60,072,000.

In July 2020, Travelex entered administration, with three PwC partners (**Respondents**) appointed as joint administrators, despite two of those three having previously been engaged in advisory work for the Travelex Group.

Decision

The Court held that there was a strong *prima facie* preference case regarding payments to the anonymous creditor.

Further, it confirmed the courts' power to appoint conflict liquidators under the UK Insolvency Act 1986 in certain circumstances. While the Respondents argued they had sought legal advice regarding the administration, the Court nonetheless held there was clearly actual, or at least perceived, conflict, reasoning the Respondents were effectively "*marking their own homework*" without independent oversight, and a fair-minded and informed observer would conclude they had, or at least had potential for, bias. The Court therefore ordered the appointment of two partners from Grant Thornton as conflict liquidators.

The Court disregarded other creditors' opposing views on the appointment of additional liquidators. While these views generally carry significant weight, the creditors were closely associated with Travelex and therefore not independent.

The Australian Federal Court took a similar approach in *Korda, in the matter of Ten Network Holdings Ltd (Administrators Appointed) (Receivers and Managers Appointed)* [2017] FCA 914. In that case an independent liquidator was appointed to review over $1m in pre-appointment fees that had been charged by the incumbent liquidators.

Takeaways

In New Zealand, while the threshold for intervention is high, impartiality is a well-established ground for the court to invoke its supervisory powers under sections 284 and 286 of the Companies Act 1993 (see our June 2025 update, where we reported on the judgment in *Arena Alceon NZ Credit Partners, LLC v Grant*, which related to liquidators' conduct). The *Rawbank* decision highlights that undertaking pre-appointment advisory work risks creating a conflict down the line, and provision of external legal advice may be insufficient to claim independence.

Further, the opposing views of a majority of creditors can be disregarded by the court when such creditors cannot be viewed as independent.

See a copy of the judgment here.

New South Wales Supreme Court reaffirms principles for terminating a DOCA

Harrison Nixon

Mercon Group Pty Ltd (**Mercon**), an Australian building contractor subject to a deed of company arrangement (**DOCA**) due to insolvency issues, faced a claim by the Owners Corporation for one of its developments. The Owners Corporation as creditors sought orders to set aside the resolution executing the DOCA, and set aside or terminate the DOCA (**Orders**) based on Mercon's Administrators' conduct. The Owners Corporation instead wanted Mercon to be wound up, and liquidators to be appointed.

Misleading information

The Administrators recommended that the DOCA would provide better returns for creditors than liquidation. However, the Owners Corporation alleged the Administrators included "false and misleading" information and "omitted material information".

Section 445D(1) of the Corporations Act 2001 (Cth) (**Act**) allows a DOCA to be terminated if one of the listed circumstances is met. The Court confirmed that a two-stage enquiry, which objectively considers all relevant circumstances, is required: first, whether a ground has been established and, if so, whether to exercise the discretion to terminate the DOCA.

The Court rejected the deficiencies alleged by the Owners Corporation. Among the rejected arguments was an allegation that the Administrators' calculated date of insolvency was misleading - the Court found that the Administrators' assessment was an opinion only, and the Owners Corporation had failed to both lead expert evidence and to cross-examine one of the Administrators on the issue. Further, unreasonable director-related transactions were not required to be considered on a transaction-by-transaction basis, and the Administrators had nevertheless flagged certain transactions.

DOCA abuses Part 5.3A of the Act

Section 447A gives the Court wide discretion, including to terminate an administration and wind up a company, if it is in the interests of all creditors and the public to do so (yet the public interest may override the creditors' interest).

It may be appropriate to exercise this power when a DOCA is unlikely to restore a company's financial health, quarantines third parties from recovery, and offers little upside for creditors. It may also be appropriate when misconduct should be investigated by a liquidator.

In this case, the Court declined to exercise this power, as it deemed Mercon's purpose for executing the DOCA was not to frustrate the Owners Corporation's claim, and that any potential claims available from a liquidation were speculative. A public interest argument was also rejected.

Unfair prejudice, discrimination and injustice

When assessing whether a DOCA is oppressive, unfairly prejudicial or discriminatory, the Court will consider all creditors, the company and the public, as well as whether the DOCA denies proper scrutiny of a company's transactions (which would ordinarily be conducted by a liquidator). The comparable position of creditors under a DOCA versus a liquidation is also considered, but can be ignored.

Here, the estimated return under the DOCA was likely to be higher than projected, and the Administrators' estimated return for unrelated creditors in liquidation was nil. A potential insurance policy covering the alleged defects in the development (which may be pursued by a liquidator) was insufficient grounds to terminate the DOCA on the basis it is oppressive or unfairly prejudicial.

See our December 2025 update, where we reported on the judgment of *Rahman v Shephard*, which concerned a challenge to a DOCA in New Zealand.

A judgment is pending from our Court of Appeal, on which we will report once it has been delivered.

See a copy of the article here and a copy of the judgment here.

'Just and equitable' ground for winding-up – when equity may intervene to constrain the exercise of legal rights

Eilís Donnelly

In *Aquapoint LP (in Official Liquidation) v Xiaohu Fan* [2025] UKPC 56, the Judicial Committee of the Privy Council considered the breadth of the courts' scope to wind up companies on the just and equitable ground.

The Privy Council dismissed Aquapoint LP's (**Aquapoint**) appeal against an order to wind up the Cayman Islands exempted limited partnership on the 'just and equitable' ground. The decision confirms that, even when robust contractual powers and entire agreement clauses exist, equity may intervene when personal assurances and reliance make it unconscionable to insist on strict legal rights.

Background

Aquapoint was an exempted limited partnership that had one general partner, GenScript Corporation (**GenScript**), and three limited partners which included Dr Xiaohu Fan (**Dr Fan**). Aquapoint was formed to hold approximately 15% of the shares in Legend Biotech Corporation (**Legend Cayman**), a company formed by GenScript and incorporated in the Cayman Islands. Legend Cayman was established in preparation for an initial public offering (**IPO**) and listing of shares on the NASDAQ stock exchange, which occurred in 2020. Dr Fan had a 65% interest as a limited partner in Aquapoint, which was equivalent to approximately 10% of Legend Cayman's share capital.

Dr Fan agreed to terminate an earlier agreement and become a limited partner in Aquapoint in reliance on GenScript's assurances that he would be able to withdraw his interest in Aquapoint six months after the IPO.

When Dr Fan sought to withdraw his interest in Aquapoint, six months after the IPO, GenScript exercised its power as a general partner to refuse to consent to Dr Fan's withdrawal and relied on its strict legal rights. Dr Fan petitioned to wind up Aquapoint on the ground that it was just and equitable to do so, which was upheld by the Grand Court and Court of Appeal in the Cayman Islands. Aquapoint appealed to the Privy Council.

Decision

The Privy Council reaffirmed that the circumstances in which equity will intervene under the 'just and equitable' jurisdiction are not limited to any particular categories or forms of corporate relationships, such as a partnership or 'quasi-partnership'.

The key inquiry is whether there are considerations "of a personal character arising between one individual and another" which may engage equitable principles. The court's task is a close, fact sensitive inquiry into whether, in the particular relationship and context, equity constrains the exercise of legal rights.

In most commercial arrangements, when the parties have carefully negotiated governing provisions, those arrangements will be exhaustive of the parties' rights and expectations. However, the Privy Council rejected the proposition that such provisions always oust equitable intervention. Whether equity applies must be determined on the facts of each case. When the parties entered a contract on a specific shared factual or assurance based basis (here, the assurances of the general partner that Dr Fan could withdraw his interest in Aquapoint), it may be inconsistent with conscience for one party to invoke the contract to defeat those assurances.

The Privy Council also noted that winding-up is a remedy of last resort. When reasonable alternative remedies exist, winding-up will generally be refused. In this case, no alternative relief was available, and winding-up was the only effective remedy.

Key takeaway

This decision confirms the broad scope of the 'just and equitable' jurisdiction. When personal assurances and the parties' relationship create expectations that underpin participation in a venture, courts may restrain the enforcement of discretions or consent rights – even when the contract includes an entire agreement clause – if, on the facts, it would be unjust to do otherwise.

See a copy of the judgment here.

Energy and insolvency: when decommissioning liabilities fall due

Beth Fitchett

In *TAQA Bratani Ltd & Ors v Fujairah Oil and Gas UK LLC & Ors* [2025] EWCA Civ 1669, the UK Court of Appeal considered the correct approach for identifying a "transaction" for the purposes of transactions at an undervalue under section 238 of the Insolvency Act 1986 (**IA**). Transactions that qualify under section 238 can be set aside. The case also considered the scope of the statutory defence under section 238(5) of the IA.

The first defendant, RockRose UKCS8 LLC (**RockRose**) operated the Brae complex oil and gas development and held interests in the North Sea oil and gas fields. It faced mounting decommissioning liabilities under two Decommissioning Security Agreements and a fractious joint venture relationship with the first and second claimants. This led RockRose's ultimate owner Mr Mazzagatti to arrange for its sale to a wholly state-owned UAE entity, Fujairah International Oil & Gas Corporation (**FIOG**) for USD1. Immediately before completion of the sale, and within the specified time of its insolvency, it declared a dividend of USD84.7m in favour of its parent, extinguishing an inter-company receivable owed to it. Mr Mazzagatti's view was that he was "*selling a valuable asset from which FIOGC could hope to make good profits and he saw no reason why he should effectively gift it an additional USD84m*". Also on the same day, RockRose's parent wrote off USD53.7m owed to it by another group company relating to a pension buy-out payment.

While it was common ground that there was a transaction at an undervalue, it was disputed whether the relevant transaction was the dividend alone, in which case the amount of the undervalue was the full amount of the dividend, or whether the transaction included the pension buy-out as consideration, such that the amount of the undervalue would only amount to USD31m. The Court of Appeal, overturning the High Court, preferred the former.

On its proper construction, section 238 requires the transaction to be "entered into" by the company. In other words, the company must be a party to the transaction. The only transaction to which RockRose was a party was the dividend – it was not a party to the agreement for its sale, that being between its parent and FIOGC. Nor was there anything to suggest that the pension buy-out was consideration for the dividend – it was an afterthought.

The defence of good faith in section 238(5) also failed. In the circumstances, there were no reasonable grounds for believing that the dividend would benefit RockRose. The dividend was not required as part of its sale, and plainly the dividend was in favour of its parent alone.

We may see an increase in cases such as this, where an oil and gas company becomes insolvent due to being unable to meet its significant decommissioning liabilities. In fact, Buddle Findlay has recently acted for the liquidators in relation to an unsecured creditor claim by the Crown regarding decommissioning costs in the liquidation of Tamarind Taranaki Ltd, which operated the Tui oil field off the coast of Taranaki.

See a copy of the judgment here.

Special Administration and the Limits of Close-Out: Conway, Wright & Hudson v Plass, Alpha Development Europe Ltd & Ors

Marin Kittaka

In July 2025, Argentex LLP, a foreign exchange firm, was placed into special administration. This judgment concerns whether the Joint Special Administrators (**JAs**) were entitled, under the contractual terms governing Argentex's relationships with its customers, to trigger close-out provisions against those who were "out of the money" (**OTM**).

Background

Argentex was authorised by the Financial Conduct Authority as both an Electronic Money Institution and a MiFID investment firm, offering spot, forward and option foreign exchange contracts. It did not hold capital to take market risk and instead backed off each customer contract with a hedging contract with counterparty banks. Following the announcement of US tariff policies in April 2025, the US dollar weakened sharply, exposing Argentex to substantial margin calls. However, a number of customers, including the retailer Seasalt, had negotiated "zero margin" contracts under which Argentex had expressly agreed to forgo any right to demand margin payments. This resulted in a net outflow of £17.5m between 2 and 22 April 2025, and Argentex was placed into special administration on 21 July 2025.

After concluding that a sale of the contracts purchased by customers (collectively referred to as Trading Book) was not possible, the JAs sought to close out OTM customer contracts before their maturity dates, arguing this would allow Argentex to avoid performing its obligations and instead enforce debts owed by those customers.

The Issue

The JAs relied on two contractual provisions:

- Clause 13.2(h) of Argentex's general terms and conditions, permitting close-out where Argentex "reasonably considers it necessary for its own protection"; and
- Clause 11.4(c) of the MiFID Terms, permitting close-out where Argentex considered it necessary to protect its interests in its "absolute discretion",

(together, the **Clauses**).

The Decision

Insolvency and Companies Court Judge Agnello KC rejected the JAs' argument. The contracts expressly provided for termination on the grounds of customer insolvency but contained no equivalent provision addressing Argentex's own insolvency. A reasonable person would not have understood the Clauses to entitle Argentex to terminate for its own economic interests as this would defeat the very certainty customers had bargained for.

Judge Agnello KC further held that customers would have expected Argentex to have adequately hedged its risk. The failure of those arrangements was a consequence of Argentex's own commercial decisions and not an external event capable of bringing the Clauses into play.

See a copy of the judgment here.

Best Price or Bust: A Cautionary Tale for Lenders in JV Deadlock

Shereen Lee

The High Court found a mortgagee's private sale of a joint venture asset to a director-controlled Special Purpose Vehicle at an undervalue breached its duty and amounted to dishonest assistance, and ordered an account of £309,437.80.

Background

The Conditioning House Limited (**Company**) was a joint venture vehicle owned by Priestley Homes Limited (controlled by Mr Nathan Priestley) and Muniment Limited (controlled by Mr Trevor Walker). In December 2017, the Company borrowed £900,000 from JBG Enterprises Ltd (**JBGE**), secured by a legal charge over a building earmarked for redevelopment into residential units (**Property**). The relationship between the JV partners soured and the Company eventually collapsed in late 2018. On 20 March 2019, JBGE exercised its power of sale and sold the Property for £1m to Bradford Lofts Limited (**BLL**), a special purpose vehicle ultimately controlled by Mr Priestley.

The Company alleged that Mr Priestley breached his directors' duties when he conspired and dishonestly assisted BLL to purchase the Property, and that JBGE breached its mortgagee duties by selling the Property at an undervalue.

Absence of independent valuation and advice resulted in breach of mortgagee duties

The High Court held that JBGE did not breach its duties of good faith or proper purpose because one of its motives of repossession of the Property was for the repayment of the loan. However, JBGE breached its duty to take reasonable care to obtain the best price reasonably obtainable for the Property when it did not obtain independent valuation advice or openly market the Property for sale. It was "wholly unreasonable" for JBGE to proceed with the sale of the Property for £1m in reliance on a borrower-procured, confidential valuation report.

The Court found that Mr Priestley breached his statutory directors' duties because he did not in good faith believe that he was acting in the best interests of the Company when he facilitated the purchase of the Property from JBGE to BLL. In fact, he intended to take the Company's assets under his control at an undervalue. The Court held that JBGE dishonestly assisted Mr Priestley's breaches of director duties by enabling the sale of the Property to one of two joint venturers to get around a company deadlock. Notably, JBGE ignored legal advice to obtain an independent valuation of the Property, and misled its solicitor about having contacted Mr Walker about the sale.

Key takeaways

This case reiterates the importance of obtaining independent valuation advice and ensuring proper exposure to the market in order to discharge the duty to take reasonable care to obtain the best price reasonably obtainable at the time. Notably, the Court accepted that mortgagees may have mixed motives when exercising their power of sale, as long as one of the motives is recovery of the loan. A mortgagee may act both to recover its debt and to assist a client but must still comply with its equitable duties.

See a copy of the judgment here.

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