# Insolvency & restructuring newsletter.

Spring • 2021

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Kia ora tātou

The New Zealand economy has weathered the COVID-19 pandemic better than many commentators predicted in April last year, in part due to the significant economic stimulus from the government, coupled with record high house prices and rock bottom interest rates. This is reflected in RITANZ's latest formal insolvency statistics, which show record low liquidation application numbers for September 2021 compared to the three previous years. There are some early warning signs on the horizon, however, we may start to see a rise in the number of formal insolvency appointments over the coming twelve months. Those warning signs include rising interest rates, high business debt levels, lessening government business support, and the ongoing impacts of Covid lockdowns on consumer behaviour. Adding to this, New Zealand households debt to income ratios have increased to levels not seen since before the GFC.

With that short forecast in mind, we hope you enjoy this edition of our Insolvency and Restructuring newsletter. You may notice one or two themes this quarter, with many judgments touching on matters relating to insolvency practitioner conduct, as well as issues involving the insolvency of corporate or statutory trusts.

Bridie McKinnon looks at the recent High Court decision in *McVeigh v Decmil Australia Pty Ltd* against the background of recent law reforms targeting insolvency practitioner regulation. Honor Kelly summarises the Supreme Court of New South Wales' treatment of cashflow solvency for future debts in the Arrium decisions, and looks at issues of double recovery. Michael Smol considers the rule against double proof in the English Court of Appeal's decision in *Lehman Brothers Holdings Scottish LP 3 v Lehman Brothers Holdings Plc & Ors*. The Court of Appeal in that case considered the rule against double proof when a surety gives up a right of indemnity from the principal debtor. Luke Kibblewhite summarises the conduct of liquidators in litigation, including as to liquidators' remuneration and trustee's rights of indemnity from trust assets. Brooke Marriner summarises the Court of Appeal's consideration of the date for determining claims in the Halifax liquidation. She also looks at the UK Court of Appeal's decision in *Al Jaber v Mitchell* in which the Court considered the interesting question of whether the immunity from suit available to witnesses in court proceedings applies to statements made in the course of examination by a liquidator under the UK equivalent of s266 Companies Act. Finally, we look at the case of the Australian Sawmilling Company, a decision of the Victorian Supreme Court in which the Court upheld the court at first instance' decision to set aside a disclaimer of onerous property, resulting in the liquidator being liable for environmental clean up costs.

We hope you enjoy this edition of our Insolvency and Restructuring newsletter. If we can provide further information on any matters considered, please contact one of our team.

Ngā mihi

**Bridie McKinnon, Editor, on behalf of the Buddle Findlay I&R team**

# Contents

# Insolvency practitioner independence back in the spotlight

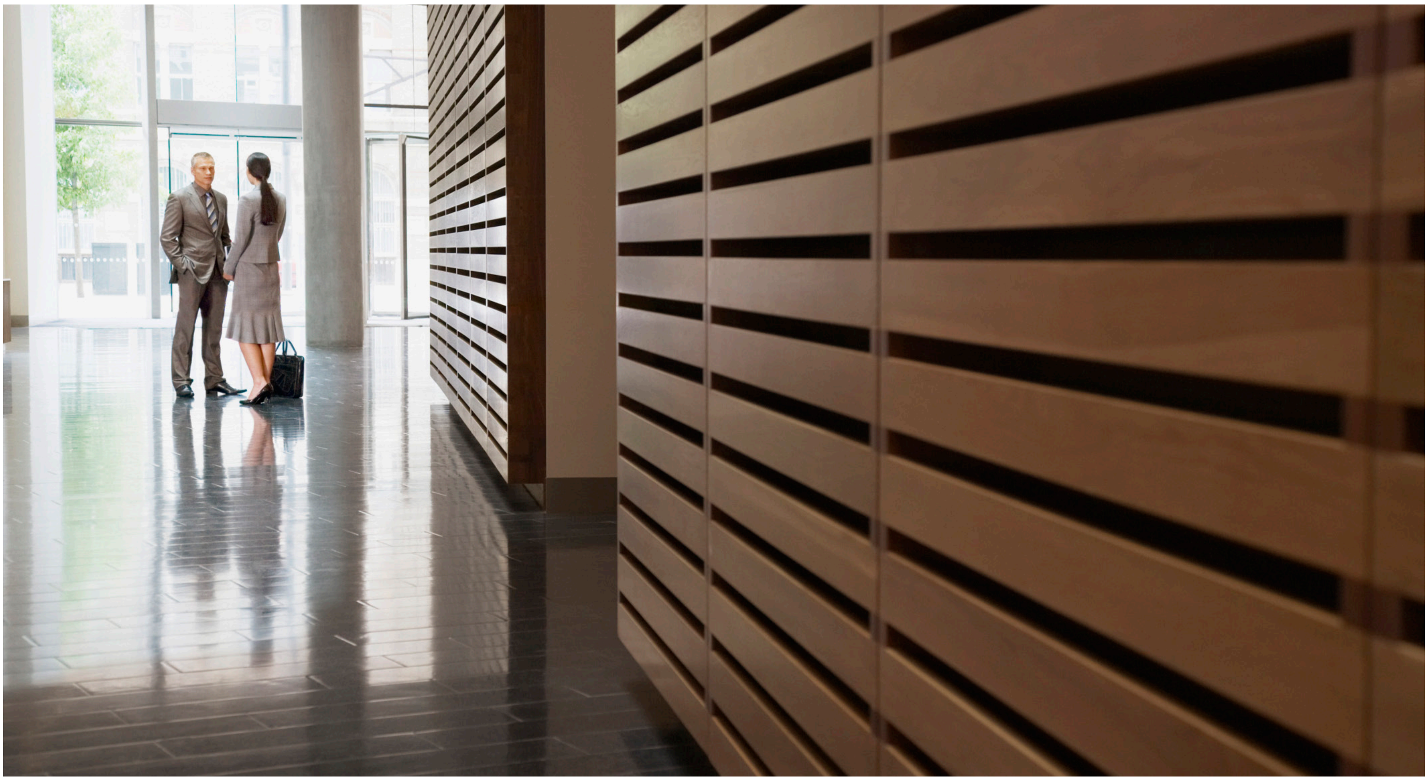
Author: Bridie McKinnon

On 21 October 2021, a Private Member's Bill was drawn from the ballot that put insolvency practitioner independence back in the spotlight. This article considers the draft bill in the context of changes to the independence provisions in the Companies Act 1993, and discusses the recent High Court decision in *McVeigh v Decmil Australia Pty Ltd* [2021] NZHC 2929.

Recent changes to insolvency practitioner regulation have increased awareness of issues of independence and conflict of interest. The Insolvency Practitioners Regulation (Amendments) Act 2019 (IPRA) introduced changes to the Companies Act 1993, including a new requirement to provide an interests statement disclosing "any circumstance, relationship, or other fact that creates, or could reasonably be perceived as creating, a conflict of interest for the insolvency practitioner in relation to the independence of the insolvency practitioner's role as the liquidator, including anything that would, but for a court order to the contrary, have disqualified the person (i) from being appointed ... as liquidator" (s255A Companies Act).

Insolvency practitioners have been calling for changes to the independence provisions of the Companies Act for some time, with particular criticism of the "continuing business relationship" test in the old s280(1)(cb) Companies Act. S280(1)(cb) was introduced in 2007, and was problematic for its inclusion of "secured creditors" (ie an insolvency practitioner was prohibited without Court approval from acting as liquidator or administrator where their firm had a continuing business relationship with secured creditors of the insolvent company). The IPRA repealed s280(1)(cb), but also s280(ca), which prohibited practitioners from being appointed as liquidators or administrators if they had provided professional services to the company in the two years prior to appointment. This was a particular issue for investigating accountants, many of whom developed a detailed understanding of the business because of their prior work. S280(1)(ca) is now also repealed, and consequently Court consent is not required for the appointment of liquidators who had previously been engaged to investigate or advise on the solvency of the company or monitor its affairs.

The NZ Regulatory Board of NZICA has further updated the NZ Insolvency Engagement Standard (IES) to reflect the new NZ insolvency practitioners' regime and changes made to the NZ Code of Ethics. In particular, on the issue of independence, the Standard includes new requirements and guidance material to assist practitioners with issues of independence, and appointments when threats to independence cannot be eliminated.



And now National MP Barbara Kuriger's private member's bill titled "Financial Professional Services Trading Advice Transparency" Bill has been drawn from the ballot. The Bill aims to "prevent financial advisers who recommend that a third party take over the management or disposal of a business or its assets from performing such a function themselves". It is aimed at preventing those who recommend receivership, liquidation or voluntary administration from taking on those particular roles themselves (or via their firms). The rationale for the proposed prohibition is said to be that there is an inherent conflict of interest for those recommending a particular option, given they may stand to benefit through fees from the appointment if that recommended option is pursued. Given the very comprehensive review into insolvency practitioner regulation from 2016, culminating in the IPRA in 2019, it is difficult to see the need for yet further regulation in this area. The differing nature of appointment processes is also ignored in the Bill. Receiverships, for example, are for the most part borne out of a contract between a borrower and a secured creditor who determines whether to appoint a receiver, and if so who to appoint. Liquidators often advise on business viability prior to appointment, however, they remain subject to the supervision of the Court, and are now required to comply with the rules pursuant to the Insolvency Practitioner Licencing regime. Finally, it is difficult to understand why insolvency practitioners, in particular, ought to be singled out given the inherent conflict that is alleged is something that exists in all sectors and industries. If any practitioners would like to make specific comment on the Bill, they can register their comments with MBIE[1].

Against this backdrop of regulation and reform is the recent High Court decision in *McVeigh v Decmil Australia*, a decision of Duffy J in which the judge was asked to consider an application by the liquidator of Decmil Construction NZ Ltd (in liquidation)[2] (Decmil), Mr McVeigh[3], for appointment as receiver of a trust fund holding retentions for the purposes of the Construction Contracts Act 2002. Unlike in *Bennett v Ebert Construction Ltd* [2018] NZHC 2934, there were at least two subcontractors who opposed the appointment of Mr McVeigh on the ground that there was a perceived conflict of interest if Mr McVeigh were to hold the role of both receiver of the retention funds, and liquidator.

Mr McVeigh reached a commercial settlement with related parties in the Decmil Group, the consequence of which was that substantial funds were provided by Decmil Group and Decmil Australia Pty Ltd (DAP) to Decmil to replenish trust funds for retention creditors. The Court was not made aware of any legal reason why DAP would have chosen to pay Decmil for the retention creditors' claims. If the transfer had not been made, however, directors of Decmil (who were the same as directors of DAP) may have been exposed to claims of failing to comply with the requirements of the Construction Contracts Act, among other things. Retention creditors claimed these arrangements created a potential conflict of interest because DAP replenished a fund Mr McVeigh then wrongly diminished, and because DAP had agreed to pay additional costs towards administering the retention fund in circumstances in which, if Mr McVeigh found that creditor claims were less than the value sought, a portion of the claim reverted to DAP. Essentially, the retention creditors were alleging that there was an impression that DAP was funding Mr McVeigh in return for a favourable review of retention claims, or that Mr McVeigh was effectively beholden to DAP. The Court agreed, recording "The greatest concern I have regarding the appointment of Mr McVeigh as receiver arise from his depletion of the fund prior to the consent order. This is something that Mr McVeigh has not directly addressed in his submissions." The Court, quoting from Allan J *in Mason v Lewis* noted that a liquidator and a receiver of a retention trust fund "must both be in fact and appear to be independent and impartial, and must avoid appearing to act as a mouthpiece of a particular creditor." The Court ultimately concluded that it was not satisfied that Mr McVeigh was someone who was independent or impartial, and appointed an alternative receiver in the circumstances.

Whilst Duffy J's judgment doesn't turn on any of the new provisions, it is encouraging to see the Court will continue to look closely at allegations of conflicts of interest affecting insolvency practitioners. Such scrutiny can only strengthen the public's perception of the profession. As to the IPRA regime itself, the Court of Appeal's decision to uphold the judgment of the High Court in the case of *Kamal v RITANZ* [2021] NZCA 514 is demonstrable evidence that the regime is fulfilling its purpose of promoting quality, expertise, and integrity in the profession of insolvency practitioners.

[1] Contact us | Ministry of Business, Innovation & Employment (mbie.govt.nz).

[2] Buddle Findlay acted for the Department of Corrections in a dispute with Decmil, which has now settled.

[3] A Western Australian based practitioner.

# Court of Appeal upholds High Court's decision in Halifax liquidation

**Author: Brooke Marriner**

The Court of Appeal has delivered its judgment in the Halifax liquidation proceedings (*Loo v Quinlan* [2021] NZCA 561), clarifying an important jurisdictional issue in cross-border insolvency appeals, as well as tackling the valuation date for valuation of investor claims when investors had been allowed to maintain open trading positions post the date of administration. We reported on the first instance High Court decision here.

Although the Court noted that the Insolvency (Cross-border) Act 2006 did not confer jurisdiction on the Court of Appeal, it considered that it did have jurisdiction to hear an appeal against a High Court judgment (s56 Senior Courts Act), and, at the request of the parties, considered it had jurisdiction to hear the appeal in conjunction with the Full Court of the Federal Court of Australia under its inherent powers to regulate the conduct of proceedings before it.

In the High Court, Venning J held that the date of valuation of investor-beneficiary contributions was to be the date of administration, notwithstanding the fact that some investors maintained open trading positions after that date. The benefit of increases in value of the fund would therefore be shared by all customer-beneficiaries after that date. The appellant, who was one of the investors with funds in the deficient mixed fund, argued that a later date for valuation purposes should be chosen, using a methodology that took into account the choice that had been given to investor-beneficiaries of whether or not to close out their nominal positions, given adverse market conditions.

The Court held that the date of the liquidators' appointment was a principled date that offered a reasonable proxy for the amount each investor had contributed to the fund on the date it was created. The investor-beneficiaries did not have a proprietary claim; they had an equitable charge over the mixed fund. Any increases to the value of a jointly owned fund are for the benefit of all owners of the undifferentiated fund. Likewise, any loss in value would have been borne by all of the investor-beneficiaries. At the time of the election, there had been no representation by the liquidators that any increases (or decreases) would belong to those investors who decided not to close out. The Court of Appeal dismissed the appeal.

A copy of the Court of Appeal decision can be found here.

# NSW Supreme Court exercises caution in solvency assessment, reiterates the importance of the contract in proving negligent misrepresentation

**Author: Honor Kelly**

In a substantial recent decision, the Supreme Court of New South Wales in *Anchorage Capital Master Offshore Ltd v Sparkes* (No 3); *Bank of Communications Co Ltd v Sparkes* (No 2) [2021] NSWSC 1025 clarified the caution required when assessing solvency against future liabilities, and reiterated the difficulty in finding a duty of care (negligent misrepresentation) between commercially sophisticated parties.

The Court considered two key issues:

- The materiality of significant future liabilities in assessing solvency
- Whether directors or officers signing drawdown statements owe a duty of care to lenders.

This decision covers two proceedings that arose from the collapse of Arrium Limited, an Australian listed company, and its broader corporate group. Arrium was a mining and steel company, with around 8,000 employees. The first set of plaintiffs were financiers that lent money to Arrium, and the second group financiers who took assignments of debts from banks that had lent money to Arrium. The judgment is lengthy, and considers a complex set of issues. The principles discussed below are summarised for the purposes of this update.

## The materiality of significant future liability in assessing solvency

A particularly significant allegation was that the Arrium Group as a whole was insolvent in January/February 2016, when various drawdown notices were submitted and loans advanced, on the basis that Arrium would be unable to repay the approximately $871m in debt that would mature in July 2017 (18 or more months later).

The plaintiffs argued that Arrium would be unable to repay these debts when they eventually matured because the "only way" the Arrium Group would be able to repay that debt was through a sale of its mining consumables business (the "jewel in its crown") and it was "apparent", by 7 January 2016, that the group could not obtain a price for that business that would be sufficient to enable it both to repay that debt and continue as a viable remainder.

The Court considered that at the time of the drawdowns, Arrium had at least 16 months to deal with the debts that would mature in July 2017, and had net assets of $2.3b. It was no answer to say it was 'apparent' that Arrium could not obtain a price for the business at that time because the question must be asked when the debt does in fact mature. While the test of solvency is a "forward looking" exercise in prediction, the Court will normally not look too far into the future because "there are so many unknowns or contingencies in predicting the future".

The key takeaways are:

- Assessing whether a company can pay a debt in the future involves a prediction requiring a "high degree of certainty" based upon what was "known or knowable" at the relevant time
- The Court should avoid looking too far into the future when determining insolvency because there are so many uncertainties in the future.

### Duty of care to lenders when signing drawdown statements

The plaintiffs alleged a number of different parties owed them a duty of care, including that Arrium's employees owed them a duty when signing the various drawdown and rollover notices. The notices were required as part of a contractual mechanism whereby Arrium borrowers were required to make representations to lenders. Arrium employees were required to sign the notices in order to bind Arrium.

The Court considered employee signatories did not owe lenders a duty of care. The notices, when construed properly, were obviously referring to the Arrium borrowers making the representations, and not the signatories. It could not be said that either the signatories realised the lenders would be relying on their personal knowledge, nor would it have been reasonable for the lenders to rely on the signatories in light of the contractual background. A commercially sophisticated observer, such as the lenders, would be capable of understanding what had been negotiated under the contract. Moreover, under the contract, lenders were entitled to a contractual remedy against Arrium if the representations were breached.

The key takeaways are:

- Primacy will always be given to any relevant contract, particularly when the parties are commercially sophisticated and able to look after their own interests
- Courts will be very hesitant to overlay existing obligations with new ones.

The decision can be found here.

## Appropriate recipient of a remedy for breach of directors' duties is the company

**Author: Michael Smol**

In *Banks v Farmer* [2021] NZHC 1922, Moore J rejected a claim made against the directors of the failed Mako Networks Holdings Limited (Mako) by Mr Banks, an investor in the company. Mr Banks as investor alleged breaches of various directors' duties, among other things.

In his directors' duties claim, Mr Banks relied on s301(1)(c) of the Companies Act 1993, which allows the Court to order various parties related to a company in liquidation (including a director) to pay or transfer money or property to an applicant creditor. He claimed that the section entitled him to seek personal compensation for any losses arising out of the alleged breach by the defendants of their directors' duties.

Moore J held that relief under s301(1)(c) was unavailable as Mako was no longer in liquidation. He also held that the section was not applicable to breaches of directors' duties. In doing so, he noted that directors' duties are owed to the company, and not specific creditors, meaning that only companies can receive a remedy for these breaches. While a creditor can receive compensation directly under s301(1)(c) when a director has misappropriated specific funds or property to which the creditor has an entitlement, this does not extend to breaches of directors' duties, which harm the company generally.

His Honour also refused to distinguish a breach of section 136 (relating to the incurring of obligations by a company) from breaches of other directors' duties. Though that duty might relate to specific obligations to creditors, it is owed to the company generally.

The decision can be accessed here.

# Does witness immunity apply in liquidator's examinations? UK Court of Appeal says yes

**Author: Brooke Marriner**

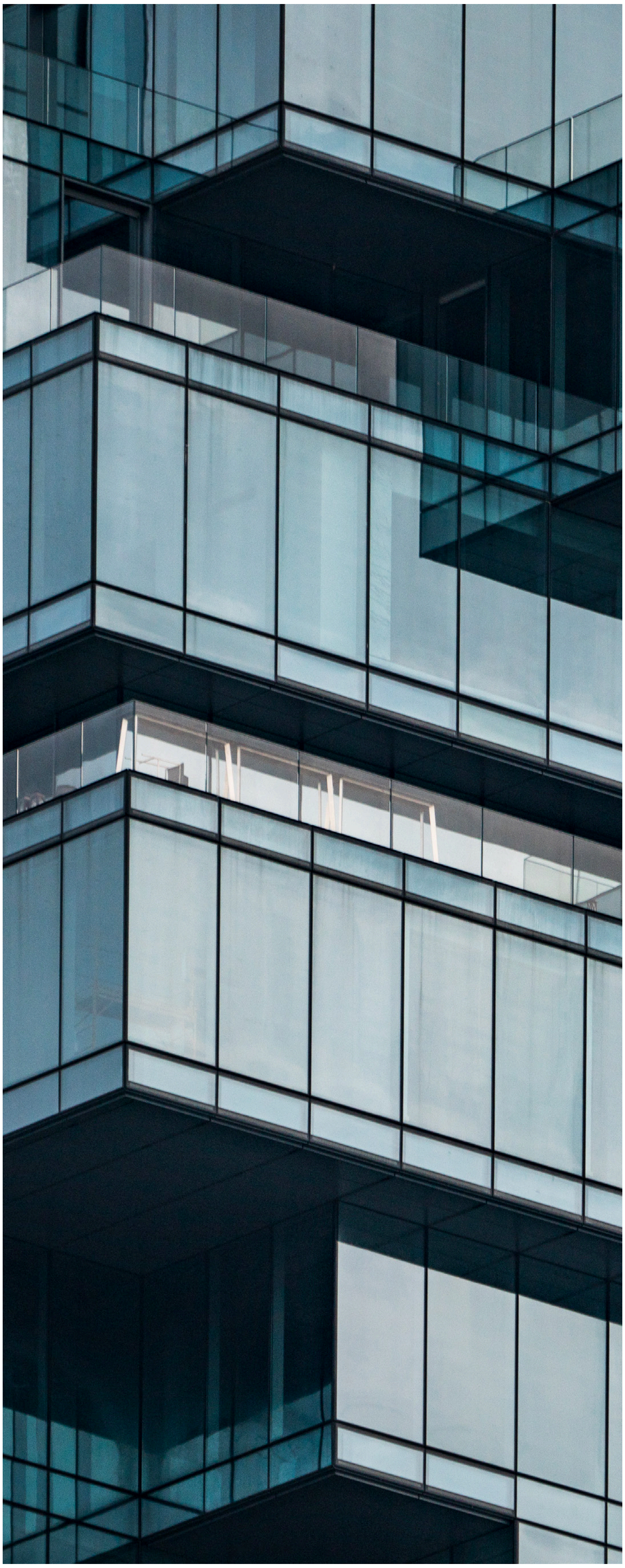
The Court of Appeal (UK) has recently decided an appeal regarding whether witness immunity in judicial proceedings applies to statements made during a private liquidator's examination conducted under s236 of the Insolvency Act 1986. That section (like s266 of New Zealand's Companies Act 1993) empowers a court, on application from the liquidator, to order a person to be examined on oath or affirmation.

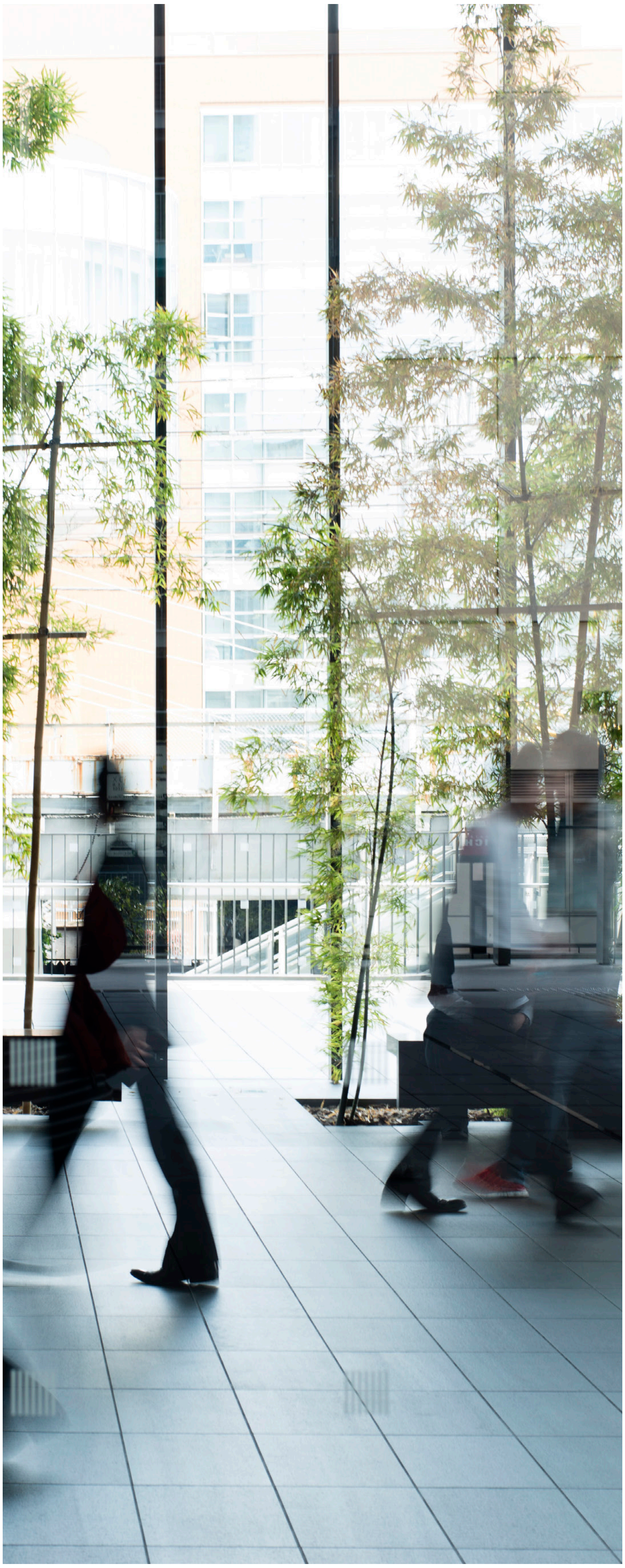
The case concerned an allegation by the respondent liquidators that they had a cause of action in respect of answers given by a former director during the liquidator's examination. The issue was whether a liquidator's examination was a court proceeding. If it was, the claims would be barred in accordance with common law witness immunity providing that no witness may be liable for evidence given in court proceedings.

At first instance, the High Court held that it was not sufficiently similar because a liquidator's examination was procedurally distinct from a civil proceeding. On appeal, the Court of Appeal held that the wider context meant that a liquidator's examination might be considered a judicial proceeding despite the procedural differences: the examination process is peculiar to itself, and it is overly simplistic to compare it with other legal processes. As the process is supervised by the court and involves a procedural power used by liquidators in their capacity as officers of the court, witness immunity applied.

This is the first time that witness immunity has been considered in the context of liquidators' examinations, and although it is unlikely to arise frequently, the decision provides a helpful indication of what the likely approach in New Zealand would be.

The full judgment is available here.





# High Court grants liquidators' ability to examine company director

**Author: Harriet France**

Liquidators have far-reaching powers under the Companies Act 1993 (CA) to request that directors and shareholders assist in matters relating to the company's liquidation. These powers are particularly useful when a director/shareholder is not cooperating with the liquidators.

Eversons International Ltd (in liq) (Eversons) went into liquidation owing the IRD unpaid taxes in excess of $3.7m. Financial records showed Eversons' only significant "assets" as overseas investments with an estimated value of $6.5m.

The liquidators made requests for further information and ultimately exercised their powers under s261/6 of the CA to obtain assistance from Eversons' sole director and shareholder, Mr Stewart. The liquidators applied to the High Court for orders under s266 that Mr Stewart be examined before the Court and compelled to produce Everson's records.

The courts have jurisdiction to grant an order under s266 provided that:

- The person the liquidator is applying to examine falls within the ambit of s261(2), in that they must be a director, former director, shareholder or company employee
- The examinable matters relate only to the affairs of the company
- The High Court concluded that it did have jurisdiction and granted the orders sought as it was satisfied that
- Mr Stewart had not previously cooperated with the liquidators' requests, making the orders necessary
- As the transactions had occurred in 2014, further delay could prejudice the liquidators' ability to locate, realise and distribute the overseas assets
- The liquidators agreed to provide an undertaking that they would not rely on the record of examination in other proceedings as an acknowledgement for the purposes of s47 of the Limitation Act.

This decision sets out useful guidance on the Court's inquiry, being:

1. Whether it has jurisdiction to grant an order under s266 and
2. How it should exercise its discretion.

The decision can be accessed here.

# Another reminder that creditor-avoiding distributions will be clawed back

**Author: George Taylor**

In *Arnerich v DHC Assets Ltd* [2021] NZCA 225 the Court of Appeal found the director of Vaco Investments (in liq) (Vaco), Mr Arnerich, to be in breach of s131 of the Companies Act 1993 (CA) and upheld a claim for money to be repaid under s301.

Vaco (as sole corporate trustee) acquired property on behalf of the Vaco Trust (Trust) and carried out development in that capacity.  Pursuant to this structure, DHC Assets Ltd (DHC) claimed that it was owed $1,088,156 plus interest arising out of a construction contract to design and build a commercial building in Auckland.

DHC was awarded $367,768 in an adjudication under the Construction Contracts Act 2002.  However, neither Vaco nor the Trust had any remaining assets to pay this debt.

This is because Mr Arnerich caused Vaco to distribute the Trust's remaining funds for the benefit of its beneficiaries (himself and his family).  This meant that Vaco was in no position to service contingent claims by DHC.

On this basis, DHC brought proceedings under s301 of the CA, and alleged that Mr Arnerich had breached his director's duty to act in the best interest of Vaco, as required by s131. The Court upheld the claim.

In doing so, the Court observed that Mr Arnerich "had an obvious conflict of interest in making these decisions [to distribute funds]", and "no rational director could have considered that it was in Vaco's best interests to make those distributions and risk having insufficient trust funds in hand to meet DHC's claims if successful".

The Court of Appeal remitted the matter back to the High Court to determine the full amount that Vaco owes to DHC and to make any further order for compensation to be paid by Mr Arnerich to DHC.  They noted this reconsideration is consistent with the approach in Debut Homes, where leave was granted to the liquidators to re-apply to the High Court for an increase in compensation in certain circumstances.

The decision can be accessed here.

# Enforcement of third party debt orders: *Ross Leasing Ltd v Nile Air; International Air Transport Association* [2021] EWHC 2201

Author: Honor Kelly

In *Ross Leasing Ltd v Nile Air; International Air Transport Association* [2021] EWHC 2201, the English High Court declined to make an interim third party debt order final when, pursuant to an exclusive jurisdiction clause, the majority of the debt was situated in a different jurisdiction, and there was a real and substantive risk the third party may be called upon to pay the debt twice.

Ross Leasing, an aircraft leasing company obtained summary judgment against Nile Air, an Egyptian airline. No part of the judgment debt had been paid. The International Air Transport Association (IATA) owed money to Nile Air. The IATA was an association formed under Canadian law, with a UK establishment and a registered office in England. The claimant applied for a third party order against IATA.

The Court refused the application. While accepting the IATA was within jurisdiction, the debt was not. The prima facie position is that a debt is situated in the country where a debtor resides, and the country of the debtor's resident was normally the place where the creditor could enforce payment. However, this presumption is open to displacement if it can be demonstrated that the relevant debt was recoverable or enforceable in a jurisdiction other than the debtor's residence, such as where there was a jurisdiction clause in favour of a foreign state. Here, the rules governing the IATA conferred exclusive jurisdiction on the courts in Quebec.

As it would be very unusual for the Quebec Court to recognise an order of the English Court that had discharged a debt within its jurisdiction, there was a real and substantive risk IATA might be called upon to pay the debt twice. This meant the order ought to be declined.

# Reflective loss principle revisited

**Author: Elizabeth Everingham**

The Privy Council in *Primeo Fund (in Liquidation) v Bank of Bermuda (Cayman) Ltd (Cayman Islands)* [2021] UKPC 22 has provided further clarification on the reflective loss rule following *Sevilleja v Marex Financial Ltd* [2020] UKSC 31 (see our previous article here). The appellant Primeo was a Cayman Islands investment fund that invested in Bernard Madoff's Ponzi scheme. When Madoff's scheme was revealed as a fraud, Primeo's liquidators claimed against its professional service providers (fund custodian and administrator) for losses in its investments.

The Court of Appeal found that the loss claimed was not recoverable under the reflective loss rule. Primeo successfully appealed.

The Privy Council referred to the situations set out in *Marex*:

1. Claims brought by a shareholder in respect of loss suffered in the form of a diminution in share value and when the company has a cause of action against the same wrongdoer and are therefore barred under the reflective loss rule
2. Cases when the shareholders have a separate and distinct claim in a different capacity which can therefore be heard.

It held that Primeo's claim fell within the second category and was not barred by the reflective loss principle. The losses suffered by Primeo were in a personal capacity and before it was a shareholder of the two feeder funds to Madoff's main fund. The appropriate time to apply the reflective loss rule is at the time of loss, and not when the claim is commenced.

The Privy Council also reiterated that the principle only applied when it is the same wrong-doer against the shareholder and the company. If there are different wrongdoers, the shareholders' loss will be separately and distinct from the company's loss. However, the Court will be careful to prevent double recovery.

The decision can be found here.

# Liquidation proceedings are not to be initiated for genuinely disputed debt

**Author: Zar Sinclair**

The judgment in Grand Court of the Cayman Islands in *Re Grand State Investments Limited* 28 April 2021, FSD 11/2021 (Cayman Islands) is a reminder for creditors to confirm their entitlement to be paid before presenting a winding-up petition, as the Court is prepared to strike out or stay a petition if the debt owing is genuinely disputed on substantial grounds or can be resolved in arbitration.

In this case the Court struck out a winding-up petition presented by a shareholder seeking to redeem the cost of their shares against Grand State Investments Limited. The Court confirmed that winding-up petitions based upon a bona fide disputed debt will be struck out, affirming that parties cannot use winding-up as a threat against a company to force payment when there is genuine dispute.

Notably, the Court held that if the petition had not been struck out, it would have been stayed in favour of arbitration. The parties were subject to a shareholder agreement, which provided that disputes were to be resolved by arbitration in Hong Kong. The Court found that if a winding-up petition is based on a disputed debt, and that debt is within the scope of an agreement to arbitrate, then it will be appropriate to stay that petition. The Court explained that the starting point for its decision was respecting the parties' autonomy to choose their own dispute resolution mechanism. In this case, it was also relevant that arbitration had already commenced, that the dispute was governed by Hong Kong law and that key witnesses spoke little English. Given these factors, the Court was satisfied that the Hong Kong arbitrators were the appropriate body to hear the dispute. We have previously reported on the interplay between arbitration and liquidation proceedings here and here.

# Court of Appeal refuses to discount costs awarded to liquidators despite criticisms

**Author: Luke Kibblewhite**

In *Little v NZ Natural Therapy Limited (in liquidation)* [2021] NZCA 461, the appellant, John Little unsuccessfully appealed the 2B costs awarded against him by the High Court in favour of the liquidators of NZ Natural Therapy Limited (Company), of which he had been a director.

The decision confirms that the approach the Court will take to costs awards in proceedings brought by liquidators on behalf of companies in liquidation is no different to that it would take in other civil proceedings.  In upholding the High Court's decision to award 2B costs of $151,245.50 to the liquidators, the Court of Appeal found that Mr Little's conduct, including unreasonable denials of liability for amounts owed to the company, and his failures as a director to keep proper business records, contributed to the number of steps the liquidators were required to take in the proceeding.  In the circumstances, he was not entitled to a discount in costs.

However, the Court also made observations that were critical of the steps taken by the liquidators and the amounts claimed.  In particular, it observed:

- Generally, liquidators should not pursue claims when the money claimed is not needed to satisfy creditor's claims, but will instead be returned to shareholders and to satisfy the liquidators' own remuneration.  In this context, the Court was concerned that the amounts initially claimed by the liquidators were unusually high compared to the amounts needed to satisfy creditors' claims
- If the company in liquidation is a corporate trustee, the liquidators should only be interested in the assets of the trust to the extent that the company has a right to be indemnified from those assets as trustee.

This issue has been the subject of judicial criticism in the past, including by the Court of Appeal.

A copy of the judgment may be found here.

# UK Court refuses to recognise Singapore scheme moratorium, citing *The Rule in Gibbs*

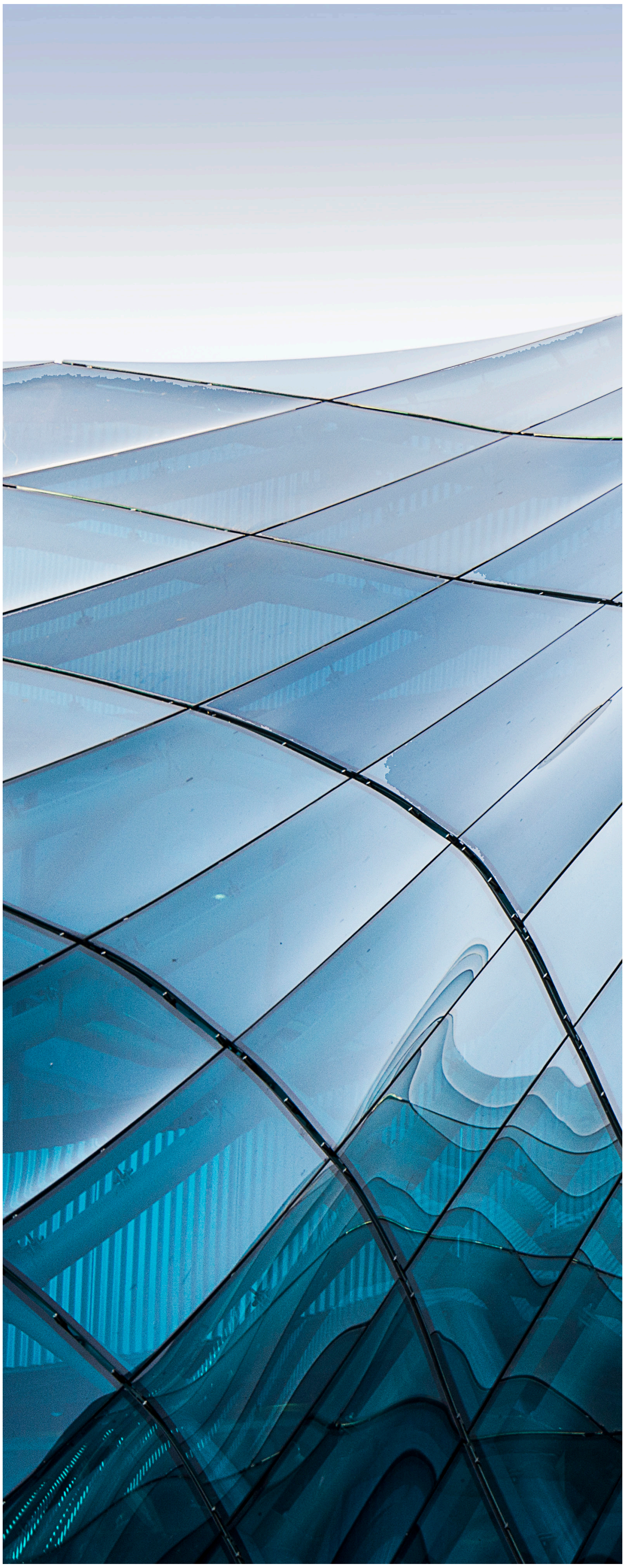
**Author: Zar Sinclair**

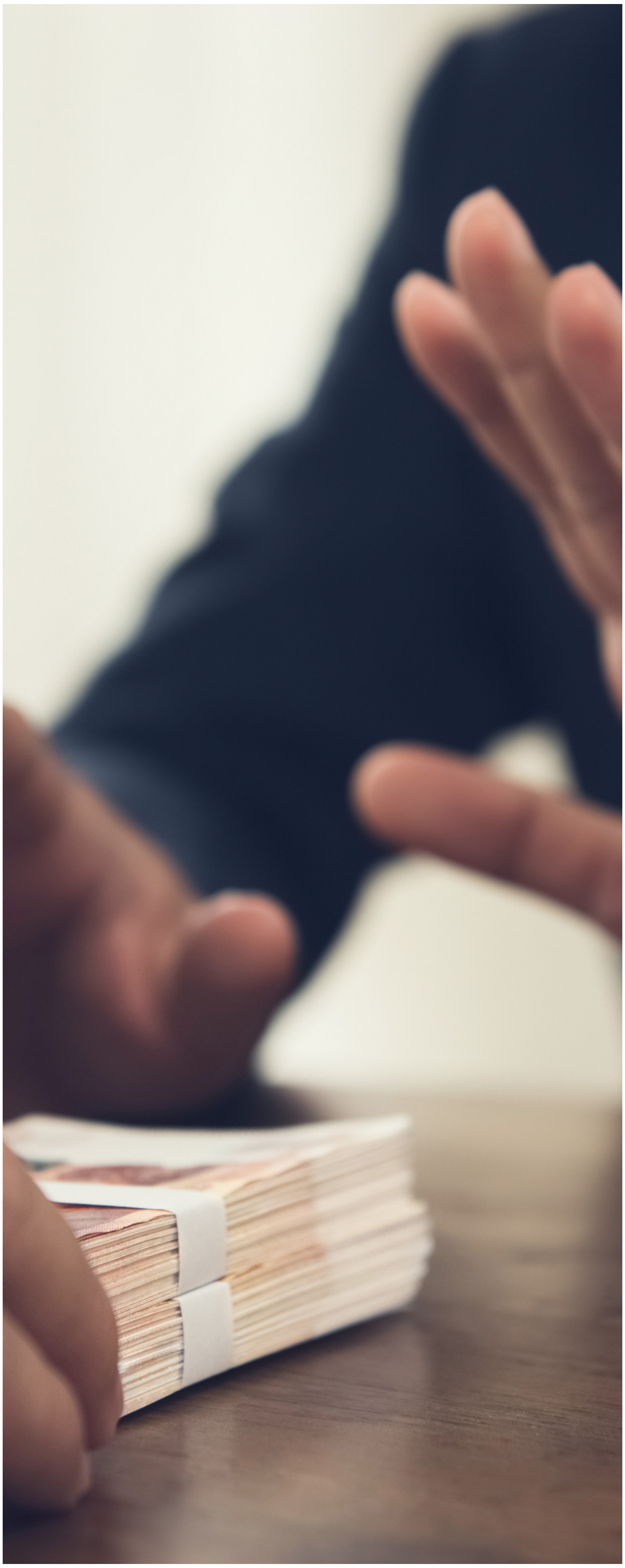
A judgment in Scotland's Outer House of the Court of Session in *Chang Chin Fei Cosco Shipping (Qidong) Offshore Ltd* [2021] CSOH 94 extended the application of *The Rule in Gibbs,* refusing to recognise a temporary moratorium granted by the Singapore Court. The Rule in Gibbs essentially prevents foreign insolvency proceedings from compromising English law debts.

In May 2021 the Singapore Court granted moratorium orders in favour of Prosafe Rigs Pte Ltd and Prosafe SE (Companies) under Singapore's Insolvency Restructuring and Dissolution Act 2018. The orders effectively allowed the Companies to delay payment of their debt until January 2022. It is important to note that the moratorium did not seek to compromise or restructure the debts, but to delay the deadline for payment. In this case, the companies issued petitions in the Scottish Court seeking recognition of the moratorium in the UK. The petitions were opposed by Cosco Shipping (Qidong) Offshore Ltd (Cosco), a creditor of the Companies.

The Court considered it was not required to recognise the moratorium under UNICITRAL Model Law. Citing Snowden J in *NordicTrust*, the Court concluded that a stay that is intended to operate upon recognition of a foreign proceeding under the Model Law is not intended to prevent persons outside that foreign proceeding from pursuing their claims. The Court found that this principle extended to the moratorim and refused the petitions on the grounds that the company debt was governed by English law and stood outside the Singapore insolvency schemes. The Court concluded that it would be wrong in principle to use powers contained in the Model Law to circumvent the English law rights of English creditors. The rule continues to apply in NZ having been considered and applied by the Privy Council In 1937 in *Mayor, Councillors and Burgesses of the Borough of Mount Albert V Australasian Temperance and General Mutual Life Assurance Society, Limited* [1937] NZPC 3.

The decision can be found here.





# The rule against double proof considered

**Author: Michael Smol**

The English Court of Appeal has developed the rule against double proof in insolvency, to accommodate situations where a surety has given up its right to be indemnified from a principal debtor.

*Lehman Brothers Holdings Scottish LP 3 v Lehman Brothers Holdings Plc & Ors* [2021] EWCA Civ 1523 concerned, among other things, the extent to which Lehman Brothers Holdings Inc (LBHI) could prove for a debt in the administration of Lehman Brothers Holdings plc (PLC). This issue was complicated by the fact that:

- LBHI had previously guaranteed PLC's indebtedness, and had made a payment in that capacity towards the debt
- LBHI had been assigned the debt by the original creditor, and in the process had contractually released its right as surety to be indemnified by PLC.

The Court was required to consider the impact of LBHI's payment as a surety on its ability to prove for the debt as a creditor. In his judgment, Lord Justice Lewison considered the application of the rule against double proof in insolvency, which prevents a surety from proving in the insolvency of a principal debtor where the creditor has not had its guaranteed debt fully repaid. Underlying this rule is the rationale that multiple parties cannot prove in relation to the same debt, and that the creditor's claim against the principal debtor's estate takes precedence. Instead, the creditor should prove for the full amount of the debt (regardless of any payments from the surety), and then pay any excess to the surety.

However, His Honour held that the double proof rule did not apply in the circumstances. As LBHI had released its right to an indemnity from PLC, it had no basis to prove in the company's insolvency (in its capacity as a guarantor), and therefore there was no possibility that multiple parties might prove in relation to the same debt. Accordingly, His Honour found that LBHI (as creditor) was not entitled to prove for the entirety of the debt in PLC's insolvency, and instead was required to give a credit equivalent to the payment it had previously made as surety to reduce the debt.

# Disclaimer set aside - Liquidators liable for environmental clean-up costs

**Author: Brooke Marriner**

The Victorian Supreme Court of Appeal has upheld a first instance decision, determining that the liquidator of a sawmill company was liable for environmental clean-up costs.

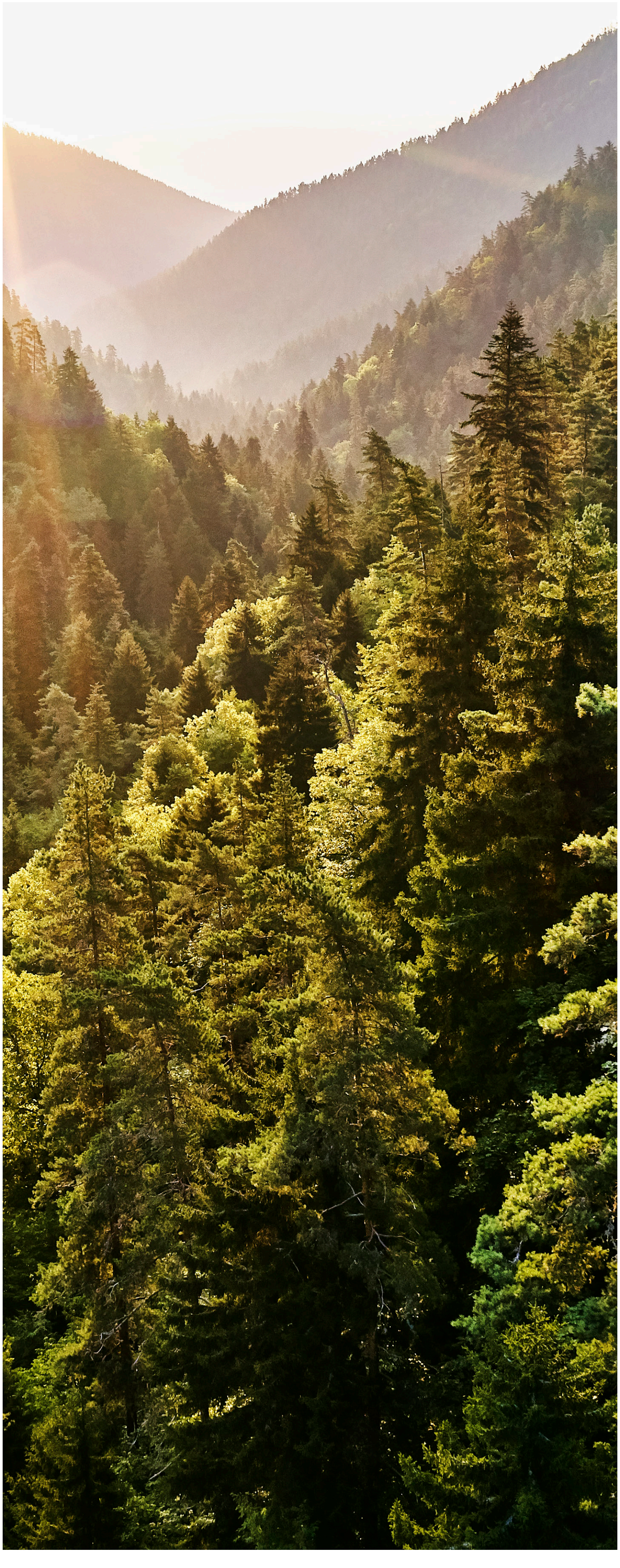
The Australian Sawmilling Company Pty Ltd was the owner of land which presented ongoing pollution risks due to waste generated by a former licensee. The liquidators, on notice of the risks before they were appointed, obtained from the company's sole shareholder an unlimited indemnity for environmental liabilities as a condition of their appointment. The Environment Protection Authority (EPA) notified the liquidators that it was exercising its power to enter the land to conduct a clean-up, and the liquidators then disclaimed the land as onerous property. The EPA successfully applied to the Victorian Supreme Court to have the disclaimer set aside.

Under the Corporations Act 2001, the Court could set aside the disclaimer, if to allow the disclaimer to remain would cause persons with an interest in the property to suffer prejudice grossly out of proportion to the prejudice caused to the company's creditors by setting aside the disclaimer.

The EPA had an "interest in the property" pursuant to its statutory power to recover any reasonable costs incurred by it from an "occupier" (or person with sufficient control) of the relevant premises. In its analysis, the Court compared the role of a liquidator with a director. It concluded that a liquidator had more direct control of company property than a director: the core function of a liquidator was to collect, apply and distribute company property, whereas a director was more concerned with control of the company's business. There was no reason that a liquidator should not fall within the concept of someone in control of the premises, and in the facts of this case the liquidators had physical and legal control over the land. The Court held that the EPA could accordingly seek to recover its costs from the liquidators.

Regarding prejudice, the Court held that there would be prejudice to two parties if the disclaimer was not set aside:

1. To the state of Victoria (because any debts recovered were to be paid into the Consolidated Fund) and
2. To the EPA (which had already incurred clean-up costs).



It was inconceivable to think that the EPA would not seek to recover its costs. Further, the liquidators had asked for, and had the benefit of, an indemnity specifically for environmental liabilities. The liquidators were the means of accessing the indemnity, and the benefit of it would be lost if the disclaimer was not set aside.

It is unclear whether the EPA would have sought to make the liquidators personally liable if the liquidators did not have the benefit of an indemnity, but the decision nonetheless broadens the potential scope for liquidators' liability in Australia. Although founded on a different statutory scheme to New Zealand's, the Supreme Court of Appeal's decision demonstrates ongoing tensions between disclaimer and a company's environmental obligations which are of particular relevance in New Zealand. One of our previous insights on the topic can be found here. We note that there is a general power to seek review of a liquidator’s decision under s284 of the Companies Act, which might potentially be used to challenge a disclaimer, albeit we are unaware of any application being taken in similar circumstances in New Zealand to date.

The first instance decision can be found here, and the Victorian Supreme Court of Appeal decision can be found here.

# Buddle Findlay national insolvency & restructuring team

David
Perry
**Partner, Auckland**

DDI • 64 9 358 702
M • 64 21 632 268
david.perry
@buddlefindlay.com

Scott
Barker
**Partner, Wellington**

DDI • 64 4 498 7349
M • 64 21 822 929
scott.barker
@buddlefindlay.com

Scott
Abel
**Partner, Auckland**

DDI • 64 9 357 9387
M • 64 21 229 1488
scott.abel
@buddlefindlay.com

David
Broadmore
**Partner, Auckland**

DDI • 64 9 358 7010
M • 64 21 0227 2994
david.broadmore
@buddlefindlay.com

**Jan**
**Etwell**
**Partner, Christchurch**

DDI • 64 3 371 3514
M • 64 21 655 604
jan.etwell
@buddlefindlay.com

**Kelly**
**Paterson**
**Partner, Christchurch**

DDI • 64 3 371 3547
M • 64 21 891 028
kelly.paterson
@buddlefindlay.com

**Seb**
**Bisley**
Partner, Wellington

DDI • 64 4 462 0839
M • 64 21 844 428
sebastian.bisley
@buddlefindlay.com

**Willie**
**Palmer**
Partner, Christchurch

DDI • 64 3 371 3502
M • 64 21 377 961
willie.palmer
@buddlefindlay.com

Bridie
McKinnon
Special Counsel,
Christchurch

DDI • 64 3 371 3563
M • 64 21 0252 8460
bridie.mckinnon
@buddlefindlay.com

Myles
O'Brien
**Special Counsel,**
**Auckland**

DDI • 64 9 357 9855
M • 64 21 224 9855
myles.obrien
@buddlefindlay.com

Peter
Niven
Special Counsel,
Wellington
DDI • 64 4 462 0434
M • 64 21 827 208
peter.niven
@buddlefindlay.com

Jane
Maltby
Senior Associate,
Wellington
DDI • 64 4 462 0845
M • 64 27 406 5505
jane.maltby
@buddlefindlay.com

Luke
Sizer
Senior Associate,
Auckland
DDI • 64 9 363 1036
M • 64 27 297 0374
luke.sizer
@buddlefindlay.com

Matthew
Triggs
Senior Associate,
Auckland
DDI • 64 9 357 9399
M • 64 21 160 0071
matthew.triggs
@buddlefindlay.com

**Band 1 Ranking**
Restructuring/Insolvency
Chambers Asia-Pacific

**Tier 1 Ranking**
Restructuring/Insolvency
Legal 500 Asia-Pacific

**Tier 1 Ranking**
Restructuring/Insolvency
IFLR1000

**AUCKLAND**
HSBC Tower, 188 Quay Street, PO Box 1433
Auckland 1140, New Zealand
DX • CP24024 P • 64 9 358 2555

**WELLINGTON**
Aon Centre, 1 Willis Street, PO Box 2694
Wellington 6140, New Zealand
DX • SP20201 P • 64 4 499 4242

**CHRISTCHURCH**
83 Victoria Street, PO Box 322
Christchurch 8140, New Zealand
DX • WX11135 P • 64 3 379 1747

buddlefindlay.com