Insolvency and restructuring newsletter.

March • 2023

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Contents

Kia ora tatou

Our last newsletter commented on high inflation, dwindling business confidence and international supply chain issues. Those factors continue to influence the economic outlook, with some businesses unable to survive the strengthening head winds impacting the economy. The consumer price index increased 7.2 percent in the 12 months to December 2022, remaining stubbornly high despite significant movements in the official cash rate to 4.5%, up significantly from the 0.25% it was sitting at in October 2021. ANZ's economic forecast warns that a "policy induced recession is looming". Westpac, among other banks, have indicated more pain for mortgage holders in the coming year.

Over the past six months, we have seen a steady trickle of insolvencies and appointments across a variety of sectors, including the liquidation of Redcurrent in the retail sector, the voluntary administration of Ruapehu Alpine Lifts, and a number of insolvencies in the building and construction sector. Auckland, Northland, Gisborne and Hawke's Bay have seen unprecedented weather impacts, and Cyclone Gabrielle has brought widespread flooding and damage to the majority of the North Island. These events will have flow on impacts for business, but we are yet to see the size and scale of Central Government's response which will be relevant to assessing the extent of the impact. Whatever the response, it is likely to have an impact on inflation. Our thoughts are with those most severely affected by the severe weather.

We open our newsletter with an update on the recent High Court of Australia's treatment of statutory set-off in relation to a voidable preference claim. The High Court of Australia's decision in *Metal Manufacturers Pty Ltd v Morton* [2023] HCA 1 provides useful clarity on this issue, and is likely to be persuasive in the New Zealand context.

The newsletter also includes useful case notes on issues including the Construction Contracts Act payment claim and payment schedule regime in a disputed debt situation, the controversial Quincecare duty of care, and what rights replacement liquidators have to the files of their predecessor liquidators.

We hope you enjoy the first edition of our newsletter for 2023. Please get in touch if we can provide more information.

Ngā mihi nui

Bridie McKinnon, on behalf of the Buddle Findlay insolvency and restructuring team.

High Court of Australia considers whether set off applies to voidable preference claims

Bridie McKinnon

In *Metal Manufacturers Pty Ltd v Morton* [2023] HCA 1 the High Court of Australia considered whether statutory set off is available to a person or entity facing a voidable preference claim. In a comprehensive analysis, the High Court of Australia considered the statutory scheme, the purpose of liquidation, the effect of the set off provisions and the effect of the voidable preference provisions, before turning to the facts of the case, and the Court's decision.

Metal Manufacturers received A$190,000 in two separate payments by MJ Woodman Electrical Contractors Pty Ltd (**MJ Woodman**) prior to MJ Woodman's liquidation. The liquidators of MJ Woodman sought to recover those payments from Metal Manufacturers as both were made during the 'relation back' period. It was accepted that Metal Manufacturers was owed over A$190,000 by MJ Woodman in a separate debt which arose pre-liquidation. Metal Manufacturers argued it had a right to set off its potential liability to repay the alleged unfair preferences against the separate debt owing to it.

The High Court of Australia held that there was no mutuality between the parties, because, among other things, immediately before the commencement of the winding up there was nothing to set off as between Metal Manufacturers and MJ Woodman – Metal Manufacturers owed nothing to MJ Woodman. The liability to repay arose on the event of liquidation. As a consequence, there was no mutual dealing and set off could not apply. The Court considered that permitting set off by a preferred creditor would undermine the purpose of the recovery of unfair preferences, which was said to be the restoration to the pool of distributable assets payments made under voidable transactions. Allowing set off in the circumstances would leave the pool diminished.

In New Zealand, the Supreme Court in *Trans Otway v Shepherd* [2006] 2 NZLR 289 considered that insolvency set off could form a defence to a voidable preference claim. However, the Court's comments in that case were obiter and not binding. Our view is that the position taken in Australia is likely to be influential when a New Zealand Court is faced with a similar claim, and tasked with interpreting the statutory scheme of the Companies Act 1993.

You can read the decision here.

A reminder for contractors that the Construction Contracts Act 2002 requires strict compliance

Alec Duncan

The Court of Appeal in *Demasol Ltd v South Pacific Industrial Ltd* [2022] NZCA 480 has reaffirmed the principle underlying the Construction Contracts Act 2002 (**CCA**) that parties are to 'pay first and argue later'.

The case concerned a contract between South Pacific Industrial Limited (**South Pacific**) and Demasol Limited (**Demasol**), under which South Pacific would pay Demasol $100,000 for asbestos removal during the demolition of a decommissioned gas facility in Auckland, exclusive of any asbestos that its inspection did not detect. In the case, South Pacific was the head contractor for the demolition. The work took longer than expected, and Demasol issued payment claims for the quoted and additional works (under section 20 of the CCA). South Pacific did not issue a payment schedule in response (as required by section 21). Instead, it wrote to Demasol rejecting the claimed variations and asserting a counterclaim for non-performance. Demasol served a statutory demand on South Pacific for the amounts set out in the payment claims.

South Pacific applied to set aside the statutory demand on the basis that it had raised a substantial dispute as to the amount it owed Demasol (a ground to set a statutory demand aside under the Companies Act 1993). The Court of Appeal, overruling the High Court, held that there could be no substantial dispute about the debt because South Pacific had failed to issue a payment schedule in response to Demasol's payment claim. Consequently, sections 22 and 23 of the CCA deemed the amount claimed to be a debt due and owing to Demasol, regardless of South Pacific's arguments that the payment claims lacked merit. If South Pacific had issued a valid payment schedule, a substantial dispute would have existed which would have justified setting aside the statutory demand.

The case is a salutary reminder to those undertaking construction works that the contractor claims must be disputed in a manner that strictly complies with the CCA or be promptly paid.

See the Court's decision here.

UKSC on Ponzi schemes, the Quincecare duty, and loss

Luke Sizer

The United Kingdom Supreme Court recently considered whether a bank could be liable to its customer under the '*Quincecare*' duty for making a payment that discharges a valid debt, in *Stanford International Bank Ltd v HSBC Bank PLC* [2022] UKSC 34.

At issue in the case was the *Quincecare* duty (first established in *Barclays Bank PLC v Quincecare Ltd* [1992] 4 All ER 363), which requires a bank to refuse to comply with a payment instruction given by the person mandated by the customer to give such an instruction when the bank is on notice that the instruction may be part of a fraud on the customer, unless and until the bank's inquiries satisfy it that the instruction is validly authorised by the customer.

Here, the liquidators of Stanford International Bank Ltd (**SIB**) claimed that HSBC Bank PLC (**HSBC**) had breached its *Quincecare* duty by making payments from SIB accounts to certain SIB customers, in circumstances where SIB was run as a ponzi scheme (a fact that the liquidators alleged HSBC was aware of). HSBC applied for summary judgment and strike out of the claim, on the basis that even if HSBC did owe SIB the *Quincecare* duty, and it was breached, SIB suffered no loss because those payments discharged valid debts.

A majority of the Court held that SIB suffered no loss. It noted that, while HSBC's actions had the effect of repaying SIB's customers at differing rates to the pari passu rates they would have been paid in SIB's liquidation, this was neutral to SIB, in that its balance sheet position was the same in either circumstance.

Lord Sales, in a dissent, considered that SIB did suffer a loss as a result of the payments. He said that the company would otherwise have access to more funds in liquidation, which could have allowed it to pursue possible claims against third parties if necessary. In any event, given SIB's proximity to insolvency, His Honour considered that the funds should have been retained to allow for payment to the general creditors.

Although the existence of the *Quincecare* duty was expressly not at issue, Lord Leggatt, in a concurring judgment with the majority, said that the *Quincecare* duty was not "intuitively obvious." That may signal a movement against the duty, especially important given the UKSC granted leave to hear an appeal to *Philipp v Barclays Bank UK PLC* [2022] EWCA, which also concerned the *Quincecare* duty, heard in early February 2023 and which is now pending the Court's decision *(Philipp (Respondent) v Barclays Bank UK PLC)*.

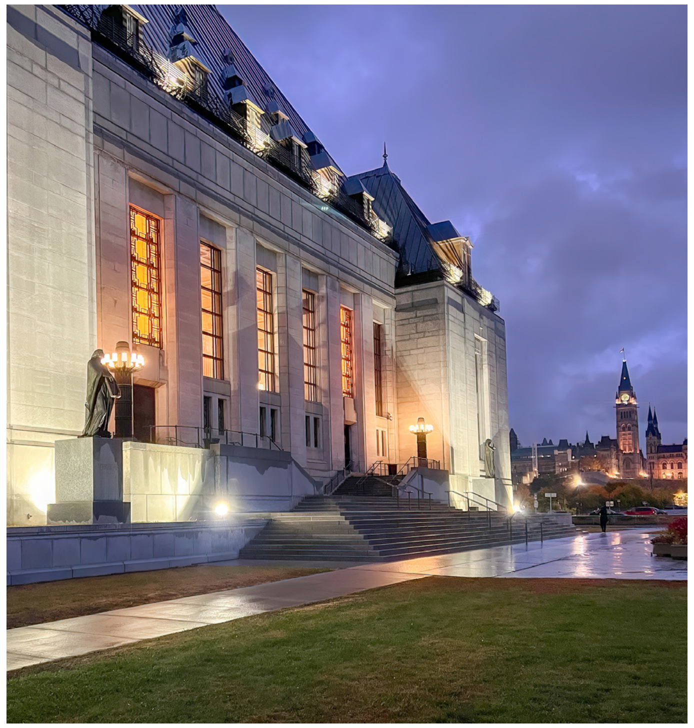
See the Court's decision here.

Supreme Court of Canada finds insolvency rendered arbitration agreement inoperable

Honor Kelly

The Supreme Court of Canada in *Peace River Hydro Partners v Petrowest Corporation* [2022] SCC 41 has held that insolvency proceedings may render an arbitration agreement inoperative or incapable of being performed. The decision adds to the evolving debate about the appropriate balance between the collective interests represented in insolvency proceedings and the typically bilateral interests represented in arbitration.

The case concerned the commencement of arbitration in the context of the construction of a hydroelectric dam by Peace River Hydro Partners (**Peace River**). One of the project's subcontractors, Petrowest Corporation (**Petrowest**), had encountered financial difficulties, and had been placed into receivership. Petrowest's receiver filed a claim against Peace River to recover funds for work that Petrowest had allegedly completed. In response, Peace River served a notice of arbitration and applied for a stay of the civil proceeding. Both British Columbia's Supreme Court and Court of Appeal refused to stay the civil proceeding.



The Supreme Court agreed with this outcome, finding that the stay of proceedings should be refused, and that the arbitration agreement was inoperable. The majority of the Court justified this finding on the basis that enforcing the agreement would compromise the orderly and efficient resolution of the receivership. By contrast, the minority considered that the receiver had the power to disclaim the arbitration agreement, which he did by filing his claim in Court.

The Court applied a two-part framework to determine whether a court proceeding should be stayed in favour of arbitration, analysing (a) the technical pre-requisites for a mandatory stay of court proceedings (for instance, that an arbitration agreement exists and the proceedings fall within the scope of the arbitration agreement) and (b) the statutory exceptions to a mandatory stay of court proceedings (which include whether the arbitration agreement is void, inoperative, or incapable of being performed).

In determining whether an arbitration agreement is 'inoperative' under the second part of the above framework, the Court held that the following non-exhaustive factors were relevant:

- The effect of arbitration on the integrity of the insolvency proceedings. Party autonomy and freedom of contract must be balanced with the need for an orderly and equitable distribution of assets
- The relative prejudice to the parties from the referral dispute to arbitration
- The urgency of resolving the dispute.

Taking these factors into account, the Court considered that granting a stay of proceedings would result in a complex arbitral process, which would need to be funded by Petrowest to the detriment of its creditors. In the circumstances, a stay should be declined. However, the Court took care to emphasise that courts should generally hold parties to their agreements to arbitrate even when one of them has become insolvent, since to do otherwise would "threaten the important public policy served by enforcing arbitration agreements and ... also jeopardize the public interest in the expeditious, efficient, and economical clean up of the aftermath of a financial collapse."

See the Court's decision here.

For other discussion of the interplay between arbitration and insolvency, see our September 2020 edition of this newsletter.

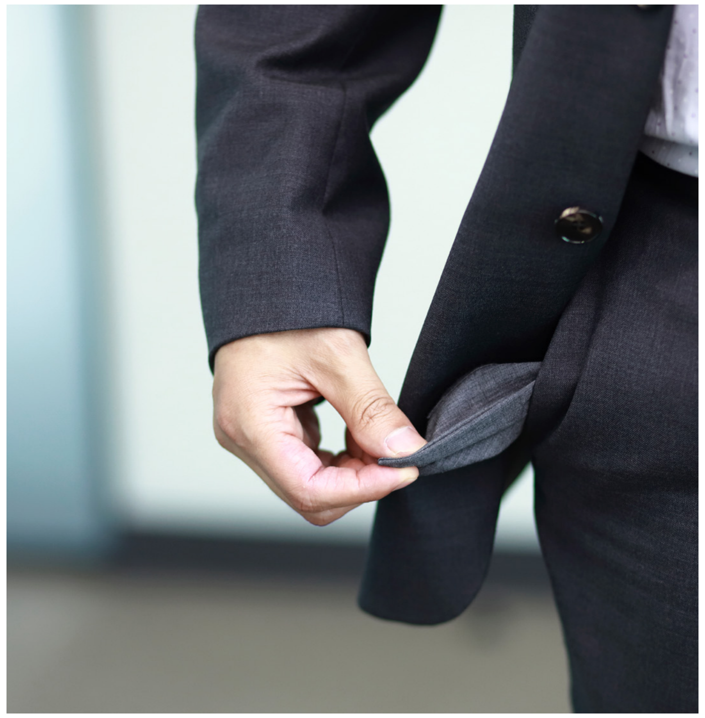
Broad general security agreement gives assignee standing to sue

Hugo Snell

In *Premier Legal Finance Limited Partnership v Morrison Kent* [2022] NZHC 1798, the High Court considered whether an assignee of a general security agreement (**GSA**) had standing to pursue a bankrupt's solicitors for alleged breaches of duty.

The bankrupt in this case was Mr Mark Ensom, who had been represented by Morrison Kent (**MK**) in relation to a failed commercial property development. MK had allegedly owed and breached duties of care to Mr Ensom. Mr Ensom was adjudicated bankrupt, following which a GSA in relation to debts owed to him was assigned to Premier Legal Finance Limited Partnership (**Premier**). Premier relied on the GSA to assert that it had acquired Mr Ensom's claim against MK.

MK applied for strike out of Premier's claim against it, and for summary judgment, on the basis that the Official Assignee (**OA**), to whom all Mr Ensom's property (including rights of litigation / causes in action) had vested in upon his adjudication in accordance with section 101 of the Insolvency Act 2006 (Act), had disclaimed any litigation rights Mr Ensom may have had to sue MK. MK claimed that, without vesting orders obtained by Mr Ensom or Premier, Premier's claim would be an abuse of process, because a bare cause of action (such as Mr Ensom's claim) cannot be assigned in New Zealand unless the assignee has a genuine commercial interest in the subject matter of the claim (which MK claimed Premier did not).



In dismissing MK's application, the Court found it reasonably arguable that:

1. The security interests at issue, namely Mr Ensom's cause of action against MK, did not vest in the OA. Bankruptcy law operates to preserve the favoured position of secured creditors, which is supported by section 243 of the Act (which allows a secured creditor to realise property subject to charge, or value that property and prove for the balance as an unsecured creditor, or surrender the charge). Further, the GSA had a broad definition of secured property. It also provided that any security interests created were not affected by Mr Ensom's insolvency and that Premier continued to have the same rights against Mr Ensom or such other person who held Mr Ensom's rights
2. Consistent with the statutory bankruptcy regime, Premier as the secured creditor could exercise its rights over Mr Ensom's property (including his claim against MK) independently of and in priority over the OA's rights over the property
3. Premier's security interest in the chose of action was expressly provided for in the GSA (a right to bring an action in Mr Ensom's name "or in its own name") and recovering the secured debt was a valid commercial interest. It was not a prohibited assignment of a bare cause of action
4. There was a breach of MK's alleged duty of care and loss caused by that breach.

See the Court's decision here.

High Court declines access to liquidator's legal advice

Sam Summerfield

In *Katoria Trustee Ltd v Toon* [2022] NZHC 3037, the High Court considered whether a creditor has a right to inspect legal advice obtained by a liquidator, when the purpose of that inspection is to determine if the creditor has a claim against the author of that advice on the basis that it has been negligently drafted.

The applicant, a creditor of Investacorp Holdings Limited (in liquidation) (**Investacorp**), sought an order for inspection of legal advice the first respondent obtained in her capacity as liquidator of Investacorp. The applicant argued that it wanted to see the advice to determine whether to make a claim against the author for providing allegedly erroneous legal advice to the first respondent, resulting in loss to Investacorp and its shareholders.

The application was made under sections 256 (allowing a creditor request access to liquidation records) and 284 (empowering the Court to make orders regarding the liquidation) of the Companies Act 1993 (**Act**). The basis upon which the Court will allow a creditor or shareholder to inspect accounts and records under section 256 was discussed by the Court of Appeal in *Levin v Lawrence* [2013] NZCA 394. In *Levin*, the Court held that there "must be some good reason for the Court to order inspection in circumstances where the statutory scheme does not ordinarily permit it."

It provided the following guidance:

1. A mere suspicion by a creditor that a liquidator has not undertaken their statutory duties properly is not sufficient
2. It is not permissible for a creditor or shareholder to apply merely to embark on a fishing expedition in the hope that something turns up
3. At a minimum, the applicant must put forward some persuasive, tangible or concrete reasons why inspection should be required.

The applicant argued it had provided a good reason for inspecting the legal advice, namely, to ascertain whether a claim may be made against the author of the legal advice. It submitted that there had been a substantial diminution of the company's assets resulting from the costs of the liquidators' "unnecessary investigation" of matters settled by the shareholders and directors, with the production of the legal advice essential to determining whether there was a viable claim against the legal adviser.

Relying on *Levin*, the High Court was not satisfied that the applicant had a good reason for obtaining legal advice if its sole reason was to determine whether to take legal action against the legal advisor. The Court considering that such a reason was a misuse of the section 286 procedure. This is the latest in a series of decisions involving the liquidator and shareholder. Those cases have been reported on in our previous publications.

See the Court's decision here.

High Court grants new liquidator access to former liquidator's legal advice

Aylish Waldron

The High Court recently confirmed in *Whitley v Meredith Connell* [2022] NZHC 2994 that a liquidator may obtain orders for production of legal advice received by the former liquidator.

The case concerned an application by Kevin Whitley, the liquidator of Property Ventures Ltd and several subsidiaries (**PVL Companies**), for the provision of documents prepared by Meredith Connell (**MC**) for Robert Walker, his predecessor. The application was made under sections 261 and 266 of the Companies Act 1993 (**Act**), which permit a liquidator to (among other things) seek orders from the Court requiring certain persons (including former solicitors of the company in liquidation) to produce documents relating to the business or affairs of the company which are in their possession or control.

MC claimed that the documents they held belonged to Mr Walker, and not the PVL Companies, and that it therefore could not be required to produce these documents under section 266(2) of the Act.

The Court analysed to whom the legal advice belonged. In determining to whom each of the documents belonged the Court considered whether they came into existence in the course of and for the purposes of Mr Walker's agency as a liquidator of the PVL Companies, or for some other purpose. Those files which came into existence as a result of Mr Walker's performance of his liquidator duties belonged to PVL Companies. The Court ordered that those files should be made available to Mr Whitley.

See the Court's decision here.

Victorian Supreme Court rules on duty to obtain best price in mortgagee sale following Covid-19 lockdown

George Taylor

In *Manda Capital Holdings Pty Ltd v PEC Portfolio Springvale Pty Ltd* [2022] VSC 281, the Victorian Supreme Court considered the legislative duty for a mortgagee to sell a mortgaged property for the best obtainable price in the context of Melbourne's Covid-19 restrictions.

Manda Capital Holdings (**Manda**) advanced A$6.39m to PEC Portfolio Springvale (**PEC**), which was secured by a mortgage over a property in Melbourne. PEC defaulted upon the loan, and Manda exercised its right to sell the property.

The sale process occurred in the weeks following the conclusion of Melbourne's extensive Covid-19 lockdown (though other restrictions were still in place), and featured a four-week expression of interest campaign, during which it was marketed as being a mortgagee sale. The property was ultimately sold for A$7m, leaving a shortfall of A$974,000, which Manda commenced proceedings to recover.

PEC (and the guarantor) filed a counterclaim, alleging Manda had breached its duty to obtain the best price reasonably obtainable in the mortgagee sale. As required by section 420A of the Australian Corporations Act 2011, a mortgagee must take reasonable care to sell a mortgaged property for not less than its market value (if the property has a market value), and otherwise for the best price that is reasonably obtainable in the circumstances of the sale.

PEC argued that the sales campaign was too short and that in a Covid-19 lockdown environment an extended campaign was required. It also argued that by advertising that the sale was a mortgagee sale, this implied that the property will be sold to the highest bidder on the day "without due regard to the best obtainable price".

The Court dismissed the counterclaim. Based on an assessment of various aspects of the sale process it concluded that the agents engaged by Manda were "highly experienced" and that the campaign attracted significant interest. It further found that the sale price of A$7m exceeded a market value assessment. The Court did not agree that advertising the fact of a mortgagee sale was detrimental to the process, noting that such advertising has its commercial benefits, in that it is a signal to purchasers they will not be wasting their time with a market testing vendor.

See the Court's decision here.

A reminder to parties opposing liquidation

Brooke Marriner

In *Island Grace (Fiji) Ltd (in rec and liq) v Satori Holdings Ltd (In interim liquidation)* [2022] NZHC 219, the High Court determined an application for liquidation of Satori Holdings Ltd (**Satori**). The case involved the defendant company being placed in interim liquidation and an order dispensing with the advertising requirements set out in the Companies Act 1993. The judgment also provides helpful reminders for parties opposing a court-ordered liquidation:

- Filing a statement of defence is necessary if a party (in this case, the shareholder) wishes to take procedural steps that are only open to defendants
- Where a company is prima facie insolvent, evidence of solvency is required
- If a party wishes to point to potential legal claims as assets of the company, the Court will require evidence to support that contention. Even then, those opposing liquidation should consider that a liquidator, rather than the company, might be best placed to make those assessments.

Factual background

The defendant was one of four parties to an unincorporated joint venture (**JV**) that operated a resort in Fiji. The JV assets were held by Island Grace (Fiji) Ltd (**IGFL**) as corporate trustee. The JV made a series of ten capital calls, six of which Satori failed to meet.

Satori disputed the consequence of its failure to meet the capital calls and referred the dispute to be finally determined by an expert under the JV agreement. The determination was that Satori's failure to pay the capital calls was an outstanding debt owed by Satori to IGFL and a costs order in favour of one of the JV parties.

On 21 December 2021, the directors of IGFL appointed administrators. Receivers were appointed by two separate appointments on 23 December 2021 and 16 February 2022. The receivers engaged a specialist sales agent to market the resort for sale internationally, and on 2 May 2022 the resort was sold.

In June 2022, interim liquidators were appointed to Satori on application by IGFL because of a concern that the sole director of Satori was dissipating company assets.

Standing

Satori did not oppose the liquidation proceedings. Rather, its sole director and shareholder filed a notice of appearance opposing liquidation and protesting jurisdiction, in his capacity of shareholder. He had also filed interlocutory applications to set aside the appointment of interim liquidators, restrain advertising and stay proceedings, and made applications under Rule 9.75 of the High Court Rules to examine the liquidator of the plaintiff and to obtain documents from the manager of the resort, without leave of the court.

IGFL's position was that the shareholder did not have standing to oppose the liquidation. This was because a contributory of a company must establish that the company is solvent before it has a legitimate interest in the relief sought and is entitled to oppose an application for liquidation.

The High Court confined its analysis to interpreting the relevant High Court Rules. The contributory was not a defendant, having not filed a statement of defence. High Court Rule 5.49, in respect of protest to jurisdiction, applied only to defendants and the contributory was therefore not within the category of persons who may protest the jurisdiction of the Court. The Court declined the contributory special leave to file a statement of defence out of time and to apply for orders staying proceedings, restraining advertising and rescinding the appointment of interim liquidators, because the contributory had not established an arguable basis that Satori was not liable for its debts, or established solvency.

Liquidation

IGFL sought an order for liquidation on the just and equitable ground relying on evidence of insolvency.

The contributory argued that:

- The resort was sold at an under-value, and others had acted in breach of the good faith obligations under the JV agreement. As a result, Satori had claims against both the receivers (which were on foot in Fiji) and the JV parties which would result in IGFL being a debtor to Satori
- The expert had left some issues undetermined, and the determination could not be regarded as final and binding
- The JV's sole business operations were based in Fiji, and it is the Fijian courts that have jurisdiction over the business operations and assets held in Fiji.

The High Court found that Satori had provided no evidence to support those claims against the receivers / JV parties. Even if there were merit to those claims and a proper basis for bringing them, then the liquidators were best placed to make that assessment. It also found that the determination was final and binding insofar as it concluded that the capital calls were a debt owing to IGFL.

The claim that the High Court lacked jurisdiction was without merit: Satori is a New Zealand incorporated company under the Companies Act 1993, and this application was made pursuant to that Act. In doing so, the Court observed that Satori's only asset is its right to be indemnified from the assets of a foreign trust registered in New Zealand. The right of indemnification was a New Zealand asset, and Satori's creditors have a right to be subrogated to that indemnity. The debts arose under a JV agreement containing a New Zealand law and New Zealand forum clause.

The Court concluded that Satori was deeply insolvent, and Satori had produced no evidence establishing solvency. It had been insolvent since July 2020 (when it stopped meeting capital calls) but continued to incur obligations, in addition to concerns that the contributory was dissipating the assets of the company. The Court found that there was accordingly a proper basis for an investigation by the liquidators into the company's affairs. Those circumstances, in addition to cash-flow and balance-sheet insolvency, justified a liquidation order on just and equitable grounds.

The High Court declined the contributory's applications, made an order for liquidation, and dispensed with any requirement for advertising.

Key takeaways

The High Court's judgment is significant for several reasons:

1. Although the Court left open the question of a shareholder's standing in a liquidation proceeding, it is a reminder that filing a statement of defence is an important step if one wishes to oppose liquidation on substantive grounds, as opposed to appearing in support of or opposition to liquidation as an additional party to the main plaintiff and defendant
2. When a company is prima facie insolvent, evidence of solvency will be required to avoid liquidation
3. The Court has jurisdiction to (and may) dispense with the advertising requirements set out in the Companies Act 1993 in appropriate cases.

Buddle Findlay acted for the successful plaintiff in this proceeding.

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