Insolvency and restructuring newsletter.

August 2025

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Contents

Kia ora tātou

Welcome to the latest edition of Buddle Findlay's insolvency update. It comes against the background of an economy that remains under stress. Unemployment is the highest it has been since the depths of Covid-19, and many businesses are struggling with tax payments. There is more than NZ$1.4b owed to the IRD in unpaid GST and PAYE from the 2025 tax year, and that's just a small part of the approximately NZ$8b the IRD is now chasing. In these circumstances, it comes as no surprise that monthly liquidations remain elevated - there were 1,296 liquidations in the six months ending June 2025, compared with 1,132 in the previous year.

The IRD's collection push, rising unemployment and weak economic sentiment suggest continued pressure across both corporate and personal sectors. In addition, the long period of higher interest rates has likely caused shrinking cash buffers for businesses and increased credit dependence. As a result, we are expecting more turbulence for the remainder of this year and beyond.

The economic challenges for New Zealand, and other jurisdictions, have led to a significant number of recent judgments on insolvency issues. Our update covers the most significant judgments from New Zealand and around the world. Topics from the New Zealand courts range from a successful claim by creditors under s 301 of the Companies Act, to shareholders challenging the voluntary administration of a company that had some cashflow difficulties but a strong asset base.

Looking further afield, we discuss the 'no worse off' test for Restructuring Plans in the UK, which are similar to New Zealand schemes of arrangement. We highlight the British Virgin Islands decision reaffirming the principle that once a company is insolvent or bordering on insolvency, the directors' fiduciary duty to act in the best interests of the company extends to include the interests of the company's creditors. We also cover the English High Court winding up a company for balance sheet insolvency, and then making an adverse costs order against the directors who controlled the company's defence of the application.

We trust that this update provides valuable insights in advance of an anticipated steady stream of issues arising in this busy area.

David Broadmore, on behalf of the Buddle Findlay insolvency and restructuring team.

English High Court winds up company based on balance sheet insolvency and resulting directors' costs exposure

Ethan Lee

Two recent English High Court judgments involving MPB Developments Ltd ([2025] EWHC 198 (Ch); [2025] EWHC 1291 (Ch)) provide valuable insight for parties involved in insolvency litigation. Both decisions are highly relevant for New Zealand practitioners, as our court tends to also favour commercial realism when deciding insolvency disputes.

Balance sheet insolvency

The first judgment addressed a petition to wind-up MPB Developments Limited (**Company**), commenced by its creditors (who were also effectively the Company's majority shareholders) based on an unsecured loan (**Loan**). The Loan was not due for repayment for another six years after the petition was filed.

The petition was advanced on the just and equitable ground, asserting balance sheet insolvency. The company's directors opposed liquidation, arguing that their business plans would eventually enable repayment of the Loan.

The Court found that winding-up was inevitable, noting that:

- The business plans (prepared only after the petition was threatened) were "highly speculative and wildly optimistic", outdated
- In light of uncontradicted expert evidence from the creditor, the Company's assets were worth only a fraction of its debt exposure.

The Court summarised the key principles for assessing balance sheet insolvency:

- The burden lies on the party asserting insolvency
- The more distant the prospective liabilities, the harder it will be to establish that the company cannot reasonably be expected to meet them
- Only the present assets are relevant – not hypothetical future assets – unless there is a present right to acquire those future assets
- The focus is on "commercial value" of assets and liabilities, not simply book value
- The test is not to be applied "mechanistically but must be applied in a way that has regard to commercial reality".

Directors' costs exposure

Following the winding-up order, the Court addressed the creditors' application for orders holding the directors (who were also 50% shareholders) personally liable for costs.

Adopting the 'non-party' costs framework, the Court asked two questions:

- Were the directors the real parties in interest (in the sense that they would personally benefit from resisting liquidation)
- Was there impropriety or some other reason warranting a costs order?

The Court found both tests were satisfied. The directors resisted the petition (on behalf of the Company) in reliance on speculative plans and persisted with the defence long after it lacked merit. The Court noted that the directors drew substantial salaries from the company and should pay both the petitioners' and the Company's costs, given the control they held and the benefit they were receiving in resisting the petition.

New Zealand position

In *RBNZ v CBL Insurance Ltd* [2019] NZHC 737, the Court found that balance sheet insolvency (including contingent and prospective liabilities) can justify liquidation on "just and equitable" grounds. There, as in MPB Developments, the Court was willing to look at substance over form, focusing on commercial substance rather than technical or accounting labels.

Similarly, in *David Browne Contractors Ltd v Petterson* [2017] NZSC 116), the Court found that a company should have treated a prospective claim against it, which were of "sufficient certainty as to both liability and quantum", as "due debt" for the purposes of s 292(2)(a) of the Companies Act 1993. It followed that the impugned transactions, which the companies entered into (with its related entities) when it had notice of the prospective claim, were voidable by the liquidator.

In New Zealand, shareholders can be held personally liable for the successful party's costs after resisting liquidation on weak grounds (*Jenkins v Supscaf Ltd* [2006] 3 NZLR 265). While the legal mechanics differ, the theme is consistent: responsibility follows real control and risk-taking in insolvency litigation.

Key takeaway

The two MPB Developments decisions reinforce the need for hard-nosed realism in insolvency disputes, both as to the practical and commercial assessment of a company's true financial position, and as to the personal cost risks faced by directors and controllers who resist the inevitable. Finally, balance sheet insolvency can be relied upon as a ground for liquidation on the just and equitable ground.

See a copy of the decisions here and here.

Body Corporate 125491 v Waterloo Impasse Ltd: Court grants conditional stay of liquidation proceedings recognising potential Quistclose trust over remediation fund?

Zar Sinclair

In *Body Corporate 125491 v Waterloo Impasse Ltd* [2025] NZHC 725 the Court exercised its discretion to grant a conditional stay of liquidation proceedings, finding that it was arguable that a Quistclose Trust could arise between a body corporate and unit owner in in respect of a specific remediation fund.

This case concerned an application by Body Corporate 125491 (**BC**) to liquidate Waterloo Impasse Limited (**WIL**).

Background

WIL purchased Unit 14 in 2023. However, Unit 14 has been uninhabitable since 2019 due to flooding which WIL alleges was caused by the BC's failure to repair and maintain the building.

In March 2021, the BC approved remediation works to the building of around NZ$8m to be paid by unit owners in instalments. In late 2021, the BC collected the first instalment (**First Instalment**) from unit holders and obtained a building consent for the remediation works.

There were a series of delays to the remediation works, and the projected costs of the work increased to NZ$15.5m. The BC and unit owners were unable to agree on the increased costs which stalled remediation works indefinitely. In December 2023, the building consent for the works lapsed.

In February 2024, WIL stopped paying its ordinary levies and wrote to the Administrator of the BC to request a refund of the levies it had paid since January 2021. This was denied, and in March 2024 the BC issued a statutory demand to WIL for its unpaid ordinary levies of NZ$7,779.46. WIL did not pay the outstanding levies, and the BC commenced liquidation proceedings against WIL.

Liquidation proceedings

In the liquidation proceedings, WIL argued that:

- The BC held the First Instalment in a Quistclose Trust for its unit holders on the basis that the funds were raised and held for a specific purpose which had failed
- That it should be entitled to set off its interest from the First Instalment against the amount it owed in levies.

The BC argued that there was no trust because (among other reasons) the Unit Titles Act 2010 (**UTA 2010**) had its own regime for the return of money which militates the imposition of equity and fiduciary duty.

Findings

The Court considered that while a Quistclose Trust usually arises in relation to loans, its operation is not "so confined" and could apply to payments made into a fund. The Court also considered that the UTA 2010 is not expressed in a way to exclude all other rights and obligations.

The Court noted that even if it has erred, there are other reasons in support of a stay, including that WIL may have valid arguments that the levies are not payable based on whether Unit 14 is uninhabitable (where the BC's liability would outweigh WIL's). It is significant that issues with the levies were raised prior to the issue of a statutory demand.

The Court exercised its residual discretion to grant a stay of the liquidation proceedings with the following conditions:

- The shareholder of WIL must continue to deposit money to the trust account to cover ordinary levies
- WIL must file and serve proceedings by 30 May 2025 to determine the position of the ordinary levies and remedial funds.

Comment

While Quistclose Trusts typically arise in the context of loans for a specific purpose, it may also be recognised in circumstances when funds are paid for a specific purpose and that purpose fails (see: *Dines Construction Limited v Perry Dines Corporation* (1989) 4 NZCLC 65,298 in relation to a share allotment). Even when the statutory grounds for liquidation are met, the Court has a residual discretion to stay or decline to order liquidation in exceptional circumstances. In this case, the complexity of the dispute, potential set-off and quantum of WIL's claim against the BC justified a stay of the proceedings.

See a copy of the decision here.

British Virgin Islands Court of Appeal affirms directors' fiduciary duty to creditors in insolvency and imposes personal liability for preferential payments

Jacey McGrath

A recent British Virgin Islands case will be of interest to company directors and their advisors. In *Byers v Chen* the Eastern Caribbean Supreme Court in the Court of Appeal ordered the sole director (**Ms Chen**) of an insolvent company, Pioneer Freight Futures Limited (**PFF**), to pay the company's liquidators US$13m – the amount she had authorised PFF to repay to a creditor for loan advances at a time when PFF was commercially insolvent – together with interest. We previously reported on the related Privy Council decision here.

The Court of Appeal reaffirmed the principle from *West Mercia Safetywear Ltd* (in liq) v Dodd & Anor [1988] BCLC 250 (***West Mercia***) that, once a company is insolvent or bordering on insolvency, the directors' fiduciary duty to act in the best interests of the company extends to include the interests of the company's creditors as a whole. This extension of duty is not a new or separate duty to creditors, but rather a modification of the existing fiduciary duty to the company. It recognises that, in insolvency, the company's assets are held for the benefit of creditors, and any diminution in the pool of assets available for distribution to creditors is a loss to the company.

Any payment made by directors in breach of the rule in *West Mercia* negatively affects the interests of the general body of creditors and the interests of the company. Directors who act contrary to this rule will be liable to pay damages to the company equal to the loss suffered. In this case, those damages were the US$13m repaid for loan advances to the company, plus interest.

The Court of Appeal confirmed that whether the director obtained a benefit is not a precondition for liability under the rule in *West Mercia*. The focus is on the loss to the company (ie the creditors), not on whether the director was enriched. It also does not matter that the loan repayment was "balance sheet neutral"; if directors could avoid liability on this basis, the protection offered by the rule in West Mercia would be illusory.

The Court cited with approval the provisional views of Lord Reed in *BTI 2014 LLC v Sequana SA and others* [2024] AC 211 and the dissenting reasoning of Lord Sales in *Stanford International Bank Ltd v HSBC Bank plc* [2022] UKSC 34, [2023] 2 All ER 447 to support this approach. The Court distinguished the Stanford decision, which concerned a bank's duty of care (the "*Quincecare*" duty) instead of a director's duty and therefore does not apply to breaches of the rule in *West Mercia*.

The Court further applied the "*West Mercia Proviso*", which provides that, in distributing the company's assets, any dividend attributable to the repaid debt is to be recouped to the director rather than being paid to the company. This ensures the director is not unjustly penalised by being required to pay more than the net loss suffered by the company's creditors.

The case is the latest in a series of judgments recognising that directors are obliged to consider creditors' interests from (and now slightly before) the point of insolvency. Preferential payments to creditors, even if they do not reduce the company's net assets, can expose directors to personal liability. The case follows the United Kingdom Supreme Court's decision in Sequana SA and the New Zealand Supreme Court's decision in *Yan v Mainzeal Property Construction Ltd (in liq)* [2023] 1 NZLR 296, [2023] NZSC 113 which we previously reported on here and here. These cases all illustrate the increasing emphasis on creditor protection in company law.

See a copy of the decision here.

Body Corporate *172108 v Cummins* – delay of bankruptcy order refused

Ben Allen

Background

The High Court decision in *Body Corporate 172108 v Cummins* [2025] NZHC 1681 is the latest in a long-running dispute over the remediation costs in respect of the Hobson Apartments in Auckland. On 30 May 2025, the Court ordered the bankruptcy of Robert James Cummins under the Insolvency Act 2006 but delayed the order's effect until 24 June 2025 to allow Mr Cummins a final chance to pay the outstanding judgment debt.

Mr Cummins did not pay, and as of 24 June 2025, has been adjudicated bankrupt. He appealed and sought urgent interim relief to delay the bankruptcy order pending his application for suspension of adjudication, but this was unsuccessful.

Arguments and the Court's approach

Mr Cummins argued that bankruptcy would immediately disqualify him as director of Flat Bush Finance Limited (**FBFL**), a company involved in related litigation and holding a mortgage over a unit in the Hobson Apartments building. He claimed his ongoing involvement was essential, especially with a key hearing scheduled for July 2025, and that finding a replacement director would be difficult and costly.

The Court applied established principles for stays and suspensions, noting that the usual consequences of bankruptcy – such as director disqualification – are not enough to justify suspending an adjudication order. Additional, compelling factors must be shown to establish irreversible prejudice or unfairness.

Decision and key takeaways

Associate Judge Skelton declined the application for urgent interim relief. The Court found Mr Cummins could still pursue his appeal as a bankrupt and that further delay would prejudice the Body Corporate and other unit owners. The Court also noted that Mr Cummins had ample time to arrange a replacement director and that his sons, as shareholders, could step in. No exceptional circumstances were identified to justify suspending the bankruptcy order.

This decision reinforces the high threshold for obtaining a stay or suspension of bankruptcy adjudication pending appeal. The ordinary consequences of bankruptcy, including inconvenience to related entities, will not suffice. The interests of creditors and the need for finality in insolvency proceedings remain paramount, especially where there is a history of delay.

See a copy of the decision here.

Batley v MacDonald: directors held personally liable for reckless trading and preferential payments under Companies Act

Mace Gorringe

The trustees of the Batley Family Trust and the V P & N Singh Family Trust (**Trusts**) successfully sued director John Stewart MacDonald under s 301 of the Companies Act 1993, for breach of his duties under ss 135 (reckless trading) and 136 (duty in relation to obligations) following the liquidation of his construction company. Mr MacDonald, a former national president of the Master Builders Association, had spent the Trusts' deposits while the company was insolvent, including renovating his own home and on racehorses.

Mr MacDonald clearly breached his duty under s 135, allowing the business to be carried on in a manner likely to create a substantial risk of serious loss to creditors. The Court found "there was real dishonesty"[1] and "It is impossible that Mr MacDonald did not know that the company was in a dire financial position".[2]

On s 136 it found the "classic example of robbing Peter to pay Paul"[3] with "no reasonable basis for Mr MacDonald to assume that [the company] could meet its obligations under the contracts with the [Trusts] or trade its way out of debt".[4]

Of more interest is the fact that the Trusts brought the claims directly against Mr MacDonald under s 301(1)(c) (as opposed to the claims being brought by its liquidators for the company's general body of creditors). This follows a similar decision last year in *Boaden v Mahoney* (copy of judgment here)[5] and dicta from the Supreme Court in *Yan v Mainzeal Property and Construction Ltd* (in liq).[6]

The Court in Batley said "... 301(1) clearly permits a creditor to bring an application" and "This issue is easily disposed of in favour of the plaintiffs".

Such unqualified statements may be unhelpful, given the wider public policy issues at the end of a company's life. Enforcement of directors' duties is, obviously, one important policy goal. However, a more fundamental objective in the context of a collective insolvency process is to ensure the pari passu treatment of creditors and, in doing so, to avoid a disorderly 'race to the courthouse' (which recognition of direct claims under s 301(1)(c) arguably encourages). Schedule 7 to the Companies Act 1993 already confers a priority to creditors who fund realisations of the company's assets (and a recovery for a duty owed to the company should be asset of the company available to its creditors).

Section 301 offers discretionary relief. We hope, when the Court decides to exercise its discretion in future, it gives fuller consideration to the wider purposes of the legislation and recognises the need for a cohesive regime overall. At a minimum, liquidators could be offered an opportunity to join proceedings.[7] The High Court rules allow for such an approach.[8] Perhaps this was raised in the *Boaden and Batley* proceedings, but it is not evident from the judgments.

See a copy of the decision here.

[1] Batley v MacDonald [2025] NZHC 974 [28 April 2025] at para [138]
[2] Ibid at para [141]
[3] Ibid at para [151]
[4] Ibid at para [158]
[5] Boaden v Mahoney [2024] NZHC 2783 [26 September 2024]
[6] Yan v Mainzeal Property and Construction Ltd (in liq) [2023] NZSC 113, [2023] 1 NZLR 296
[7] We note the Australian regime expressly deals with the interaction between creditors' and liquidators' claims (see for example Corporations Act 2001 (Cth), ss 588R to 588U)
[8] High Court Rules 2016, r 10.12

Guidance on the operation of the voluntary administration regime: the tale of one taxi company's 'bitter and apparently intractable' dispute

Sanne Vitalis

Rahman v Shephard [2025] NZHC 1452 arises out of the apparent demise of the well-known Wellington Taxi co-operative: Wellington Combined Taxis Limited (**WCT**).

WCT and its related entities, were placed into voluntary administration in September 2024 amid ongoing shareholder disputes and financial distress. In this case we see the High Court provided significant guidance on the operation of the voluntary administration regime under Part 15A of the Companies Act 1993 in a context where a company has persistent cashflow difficulties but a strong asset base.

Voluntary administration and shareholder protest

Following, Covid-19 and the rise of ride-share WTC suffered significant downturn in custom and suffered substantial financial loss as a result.

In 2024, the Board resolved to place WTC in voluntary administration. An extremely controversial decision among shareholders who felt the directors were more concerned for their own personal financial positions than the interests of the company.

The administrators sought directions on the conduct of administration and a novel direction: that resolutions at the watershed meeting will not bind the company unless they were approved by WTC's creditors and its shareholders.

Mr Rahman and three other shareholders applied for the termination of the administration and failing that, their own set of directions for the watershed meeting.

WCT's directors were granted leave to intervene in both applications as interested parties (their submissions were not materially different to the administrators).

Court finds administration should not be terminated

The Court reaffirmed that voluntary administration may be commenced not only where a company is insolvent, but also where it "may in the future become insolvent".[9] The threshold is intentionally low to allow for early intervention, even where creditors are not at immediate risk.

The applicants argued WCT was not insolvent, citing a strong balance sheet and the availability of new finance.

The Court, applying both the cashflow and balance sheet limbs of the solvency test[10], found that while WCT satisfied the balance sheet limb, it was unable to satisfy the cashflow limb due to ongoing cashflow issues and an inability to pay debts as they fell due. In doing so, the Court adopted a broad, pragmatic approach to solvency, consistent with New Zealand and Australian authorities.[11] As a result the application to terminate the administration was dismissed.

The Court exercised its general power under s 239ADO to tailor the administration process to reflect the unique circumstances of WCT (asset-rich, but cash-poor, and with creditors who were not at risk of non-payment).[12]

Watershed meeting directions: driver-shareholders are not creditors for voting purposes

The Court ordered that no deed of company arrangement (**DOCA**) could be put to creditors unless it had first received majority shareholder approval, effectively "de-powering" creditors in this context.

The Court rejected the argument that driver-shareholders should be treated as creditors for voting purposes, as their pre-administration debts had been paid in full.[13]

Existing shareholder proxies, provided they had not been revoked and the shareholder did not attend in person, were held to be valid for the watershed meeting.

The watershed meetings of WCT and its subsidiaries were to be held as a single meeting and the convening period for the watershed meeting was extended.

We understand that this decision has been appealed.

See a copy of the decision here.

[9] Section 239A, Companies Act 1993
[10] Companies Act 1993; s 4; Madsen-Ries v Cooper [2020] NZSC 100
[11] Citing Keybridge Capital Ltd (No 2) [2025] NSWSC 354; David Browne Contractors v Petterson [2017] NZSC 116; Blanchett v Joinery Direct Ltd HC Hamilton CIV-29007-419-1690, 23 December 2008 at [27](f)
[12] Companies Act 1993, s 239ADO.
[13] Citing Gibson v Solid Energy New Zealand Ltd [2016] NZHC 2939.

High Court strikes out negligence claim against Financial Markets Authority, emphasising public interest and limiting regulatory liability

Hemi Daly

In *Lindeman Investment Ltd v Financial Markets Authority* [2025] NZHC 1909, the High Court struck out a negligence claim against the Financial Markets Authority (**FMA**) brought by Lindeman Investment Ltd (**Lindeman**) in relation to the collapse of the Du Val Property Group (**Du Val**). The Court found that the FMA did not owe a duty of care to investors in the Du Val Mortgage Fund, on the grounds that the FMA was not sufficiently proximate to the investors, and that imposition of a duty would have a significant chilling effect on the FMA in carrying out its functions.

Background

Lindeman, a wholesale investor in the Du Val Mortgage Fund, alleged that the FMA owed it (and other investors) common law and/or implied statutory duties of care in the exercise of its regulatory functions under the Financial Markets Authority Act 2011 (**FMAA**) and the Financial Markets Conduct Act 2013 (**FMCA**).

Lindeman claimed the FMA breached those duties by "effectively approving" an "Equity Swap" (whereby investors' units were converted into shares in a new Du Val company) and/or failing to warn investors that the marketing of the Equity Swap was misleading and/or otherwise illegal; and Du Val was insolvent.

The FMA applied to strike out the claim on the basis that no such duties exist.

Analysis

The Court adopted the orthodox two-stage approach to novel negligence claims: first, considering foreseeability and proximity; and second, whether a duty of care should be imposed in light of broader policy considerations.

The Court considered it unlikely that the foreseeability requirement would be established, considering it unlikely Lindeman would have been able to take advantage of the option to reverse the Equity Swap in the context. However, given the strike-out context, the Court did not linger on this point.

Turning to proximity, Lindeman relied on the FMA's statutory objectives and its engagement with Du Val over the Equity Swap. The Court found these arguments unpersuasive: first, the FMA did not have "direct involvement" with the affairs of the investors. Its public statements were made to the market generally, not to Lindeman specifically. Second, it considered the FMA's statutory functions were directed to the public interest and the integrity of the market, not to the protection of individual investors.

Finally, the Court found that policy considerations ruled out the imposition of a duty on the FMA. Recognising such a duty would create perverse incentives for the FMA to avoid involvement in the affairs of troubled issuers and behave in a risk-averse manner were it to become involved. This would have a "seriously inhibiting effect" on the FMA's carrying out its functions. The Court considered that recognising a duty would expose the FMA to indeterminate liability from innumerable investors. Additionally, imposing a duty in the circumstances would be to effectively create an insurance scheme for investors at the taxpayer's expense.

Result

This decision demonstrates the Court's stance towards prioritising the public interest focus of the FMA's mandate and limiting the FMA's exposure to liability from the exercise of its functions.

See a copy of the decision here.

UK restructuring plans v schemes of arrangement

Scott Barker

Since 2020 companies in the UK that have encountered or are likely to encounter financial difficulty have had a new formal restructuring option under Part 26A of the Companies Act 2006 (**the Act**). These are known as restructuring plans (**RP**). While they have a number of similarities to schemes of arrangement under Part 26 of the Act (similar to Part 15 of the New Zealand Companies Act 1993), there are certain important differences. These include that classes of creditors or members with no economic interest in the company are excluded, only 75% by value is required to approve a RP, so no requirement for approval by a majority in number and cross-class cram down is available. Dissenting classes of creditors can have a RP imposed on them if the Court is satisfied that they are no worse off than the relevant alternative (likely, liquidation).

RPs have been subjected to judicial challenges recently with the England and Wales Court of Appeal (**EWCA**) issuing two judgments this year. In the first, involving a RP for Thames Water, there was a dispute between senior and junior creditor regarding control rights, information rights, and fairness of treatment. Among other issues the Court stated that a plan's fairness must be assessed not only by reference to creditor votes but also by the Court's independent judgement, especially when dissenting (even "out of the money") creditors raise legitimate concerns.

In the more recent judgment in *Saipem SPA & Ors v Petrofac Ltd & Anor* [2025] EWCA Civ 821, the Court was asked to consider the "no worse off" test. The Court noted "while there are some differences between the new Part 26A and existing Part 26 (for example the ability to bind dissenting classes of creditors and members), the overall commonality between the two Parts is expected to enable the courts to draw on the existing body of Part 26 case law where appropriate."

The Court held that the "no worse off" test is primarily concerned with the financial value of the rights of the creditor against the plan company, not with indirect or competitive advantages a creditor might gain if the company were liquidated. The Court overturned the sanction of the plan because the allocation of the benefits of the restructuring was not fair. Specifically: the providers of new money were to receive a disproportionately large share of the equity in the restructured group (over two-thirds of the value preserved or generated by the restructuring), far in excess of the amount they were investing. Fair allocation is a central consideration, especially when cross-class cram down is used.

The Court observed "the proper use of the cross-class cram down power is to enable a plan to be sanctioned against the opposition of those unreasonably holding out for a better deal..." and "was not designed as a tool to enable assenting classes to appropriate to themselves an inequitable share of the benefits of the restructuring".

As we prepare to publish, a further detailed judgment rejecting a RP was released (*Re Waldorf Production UK Plc* [2025] EWHC 2181), with the Plan company seeking leave to appeal directly to the UK Supreme Court.

Given the crossover in law relating to schemes of arrangement and RPs, this developing body of case law will be of interest to those considering using schemes for creditors' compromises.

See a copy of the decision here.

Equitable accounting and marshalling in insolvency: key insights from recent English and New Zealand High Court decisions on property development security and creditor rights

Andrijana Milosavljevic

The recent decision of the English High Court in *Brooke Homes (Bicester) Limited v Portfolio Property Partners Limited (In Administration) & Ors* [2025] EWHC 1305 (Ch) provides important guidance on the application of equitable accounting and the doctrine of marshalling in the context of insolvency and complex property development structures.

The case arose following the sale of development land by Desiman, the first-ranking secured creditor, in circumstances in which Brooke Homes, a judgment creditor with subordinate security, sought both an equitable account and the benefit of marshalling. The key issues before the Court included whether Desiman, as mortgagee in possession, was required to account for more than the £40m sale price, including non-monetary benefits such as the construction of a "Spine Road" extension and alleged undervaluation ("price chip") in the sale to Cala, the scope of liabilities secured in favour of Desiman and the proper deduction of costs and expenses from sale proceeds, and the application of marshalling, permitting Brooke Homes, as a junior creditor, to benefit from securities held by Desiman.

As the Court noted: "The fundamental underlying principle [for an equitable accounting] is that "whatever the mortgagee has received from the mortgaged property is charged against him" on the account. This is a strict duty in equity, that in exercising his powers the mortgagee cannot make a personal profit or reap any personal advantage beyond what is due under the mortgage".

The Court held that Desiman was required to account for non-monetary benefits derived from the sale, specifically the value attributable to the Spine Road extension, which was held to be a benefit "by and out of" the mortgaged property and thus subject to equitable accounting. The doctrine of marshalling was recognised as potentially applicable, allowing Brooke Homes to benefit from Desiman's wider security package, but only to the extent that this did not prejudice Desiman's interests. The Court ordered further accounts and enquiries, including a surcharge for the Spine Road benefit, and emphasised the need for fairness as between creditors.

A similar theme emerges from the New Zealand High Court authority of *National Bank of New Zealand Ltd v Caldesia Promotions Ltd & Anor* [1996] 3 NZLR 467 (HC), which concerned competing claims by secured creditors over two blocks of land. The National Bank, as junior creditor, held an unregistered mortgage over one block, while Jenkins Roberts & Associates Ltd (**JRA**) held first registered mortgages over both blocks and a second mortgage over the second block. Upon default, JRA realised both blocks, applying the proceeds in a manner that left the National Bank with no recovery. The issues for determination included whether JRA was required to apportion the surplus from the sale of both blocks in accordance with the equitable doctrine of marshalling; whether marshalling applied to land registered under the Land Transfer Act 1952 and whether it was displaced by the statutory priority regime; and whether JRA could consolidate or "tack" its mortgages to defeat the junior creditor.

The Court held that the doctrine of marshalling by apportionment applied, requiring the surplus to be apportioned between the two blocks according to their value, to prevent the arbitrary exercise of the senior creditor's rights from defeating the junior creditor. Marshalling was found to operate outside the statutory priority regime and not to interfere with the rights of third parties or the indefeasibility of title under the Land Transfer Act. Consolidation or tacking of mortgages was not permitted under New Zealand law (Property Law Act 1952, s 85), reinforcing the equitable application of marshalling.

Both *Brooke Homes and Caldesia Promotions* reaffirm the enduring relevance of the doctrine of marshalling as an equitable tool to ensure fairness between competing creditors when a senior creditor holds multiple securities. The UK decision demonstrates the modern application of equitable accounting and marshalling, including the treatment of non-monetary benefits and the prevention of unjust enrichment of the senior creditor at the expense of the junior. The New Zealand decision provides a clear statement of the marshalling principle, confirming its application even within a statutory land registration system and rejecting attempts to circumvent it through consolidation or tacking. Both judgments emphasise that marshalling does not disturb the senior creditor's rights but ensures that junior creditors are not unfairly prejudiced by the order in which securities are realised. For New Zealand practitioners, *Caldesia Promotions* is particularly instructive, confirming that marshalling applies to land under the Land Transfer Act and operates alongside, rather than in conflict with, statutory priorities.

See a copy of the decisions are here and here.

Winding-up application reliant on supporting creditor's statutory demand permitted

AI generated summary

This Supreme Court of Victoria decision in *ML & NB Pty Ltd* [2025] VSC 444 (23 July 2025) concerns an application by FlexiCommercial Pty Ltd (**Plaintiff**) to amend its winding up application against ML & NB Pty Ltd (**Defendant**). Initially, the Plaintiff relied on its own statutory demand — but due to possible procedural defects in service, sought to rely instead on an earlier statutory demand properly served by supporting creditor BP Australia Pty Ltd, which had obtained judgment against the defendant.

The key legal question was whether the Plaintiff could base its winding up application on another creditor's (BP Australia's) statutory demand to establish the statutory presumption of insolvency under the Corporations Act 2001 (Cth), s 459C, and whether defects in the original process could be cured by amendment under s 467(3) and relevant procedural rules.

The Plaintiff argued that the legislative framework allows such amendments and that no substantial injustice would be caused to the Defendant. The Defendant contended that this was improper and prejudicial.

The Court held that the legislative scheme focuses on the company's solvency, not strict technicalities of procedure, and that statutory demands do not need to be issued by the applicant only. The application's defect could be cured, and the amendment did not cause material prejudice to the defendant.

The following were key outcomes:

- The Plaintiff was permitted to amend the originating process to rely upon BP Australia's statutory demand
- The Defendant may pursue any available application to challenge BP Australia's demand if it wishes
- The parties are to amend their evidence and opposition grounds as necessary in light of the amendment.

Key issues or matters discussed:

- Whether a plaintiff in winding up proceedings can rely on another creditor's statutory demand to invoke the presumption of insolvency
- The ability to amend the originating process to cure defects or irregularities (under s 467 and Court Rules)
- The legislative purpose behind the winding up regime: prioritising substance (insolvency) over form (procedural defects)
- Protection for defendants to ensure no substantial injustice is caused by permitting amendments
- Precedents considering the collective nature of insolvency proceedings and flexibility for procedural amendment
- The importance of accurately proving service of statutory demands to ground the statutory presumption.

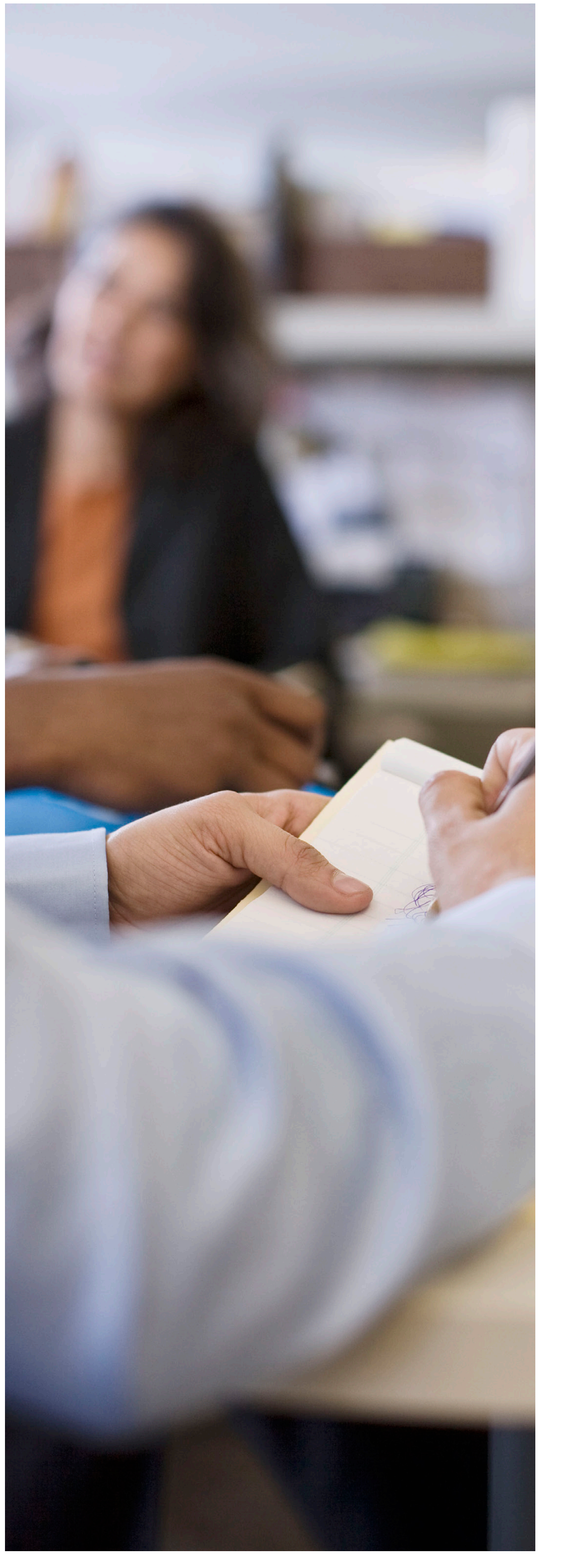
Legal/confidential issues:

- Compliance with statutory requirements for service of statutory demands is critical; errors can jeopardise presumption of insolvency but may be curable if not causing substantial injustice
- Winding up proceedings are serious: parties must give accurate evidence and attention to statutory steps to avoid abuse or injustice
- If procedural defects do not cause substantial injustice to the defendant, courts are unlikely to dismiss applications on those grounds alone.

See a copy of the decision here

Arena Alceon NZ Credit Partners, LLC v Grant [2025] NZHC 1360 (28 May 2025) – Appeals

In our June newsletter we reported on this judgment in which an application was made to remove liquidators based on alleged statutory and code of conduct breaches. We understand that both plaintiffs and defendants have appealed Associate Judge Lester's decision. Given the long lead times for Court of Appeal hearings and delivery of judgments the outcome is unlikely to be known until 2027 at the earliest.



Buddle Findlay national insolvency and restructuring team

Bridie McKinnon
Partner, Wellington
DDI • 64 3 371 3563
M • 64 21 0252 8460
bridie.mckinnon@buddlefindlay.com

David Broadmore
Partner, Auckland
DDI • 64 9 358 7010
M • 64 21 0227 2994
david.broadmore@buddlefindlay.com

David Perry
Consultant, Auckland
DDI • 64 9 358 7020
M • 64 21 632 268
david.perry@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

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

Scott Abel
Partner, Auckland
DDI • 64 9 357 9387
M • 64 21 229 1488
scott.abel@buddlefindlay.com

Scott Barker
Partner, Wellington
DDI • 64 4 498 7349
M • 64 21 822 929
scott.barker@buddlefindlay.com

Willie Palmer
Partner, Christchurch
DDI • 64 3 371 3502
M • 64 21 377 961
willie.palmer@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

Mace Gorringe
Senior Associate, Auckland
DDI • 64 9 363 0697
M • 64 22 162 9532
mace.gorringe@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

BUDDLE FINDLAY

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
The Regent, 33 Cathedral Square, PO Box 322
Christchurch 8011, New Zealand
DX • WX11135 P • 64 3 379 1747

buddlefindlay.com