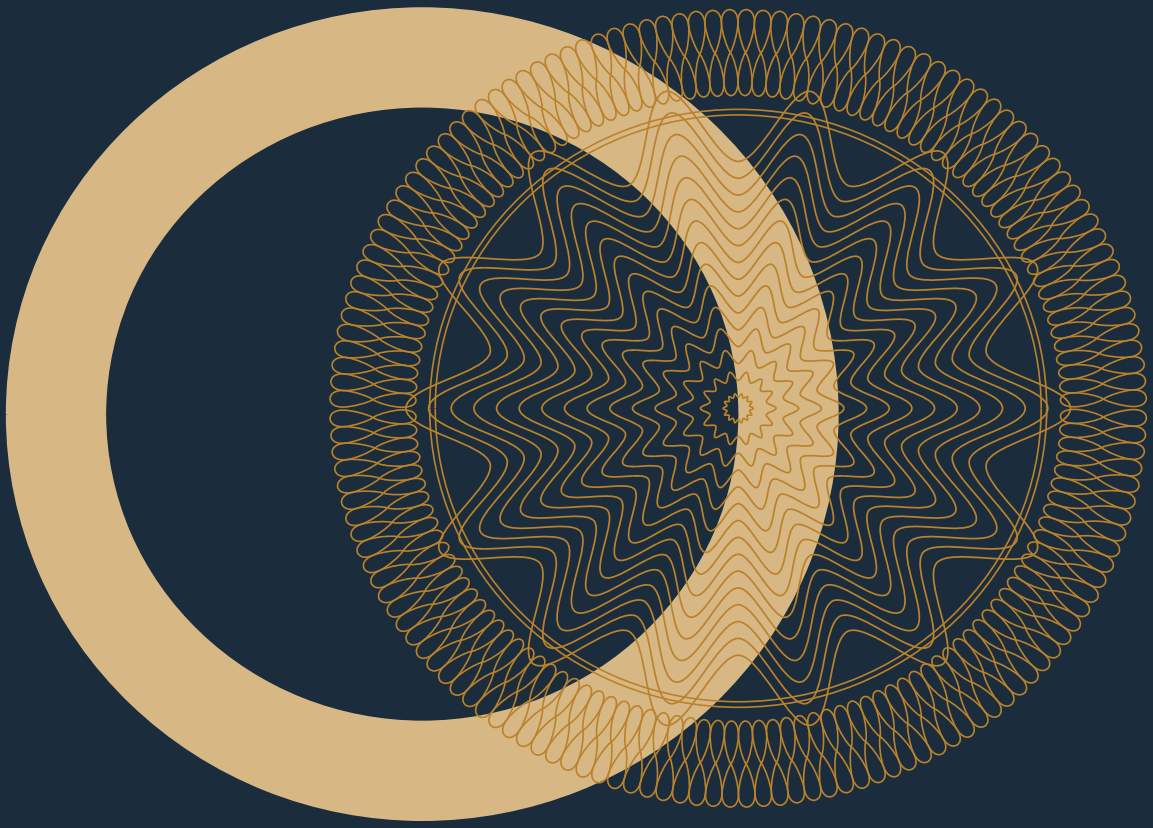
Insolvency and restructuring newsletter.

December 2025



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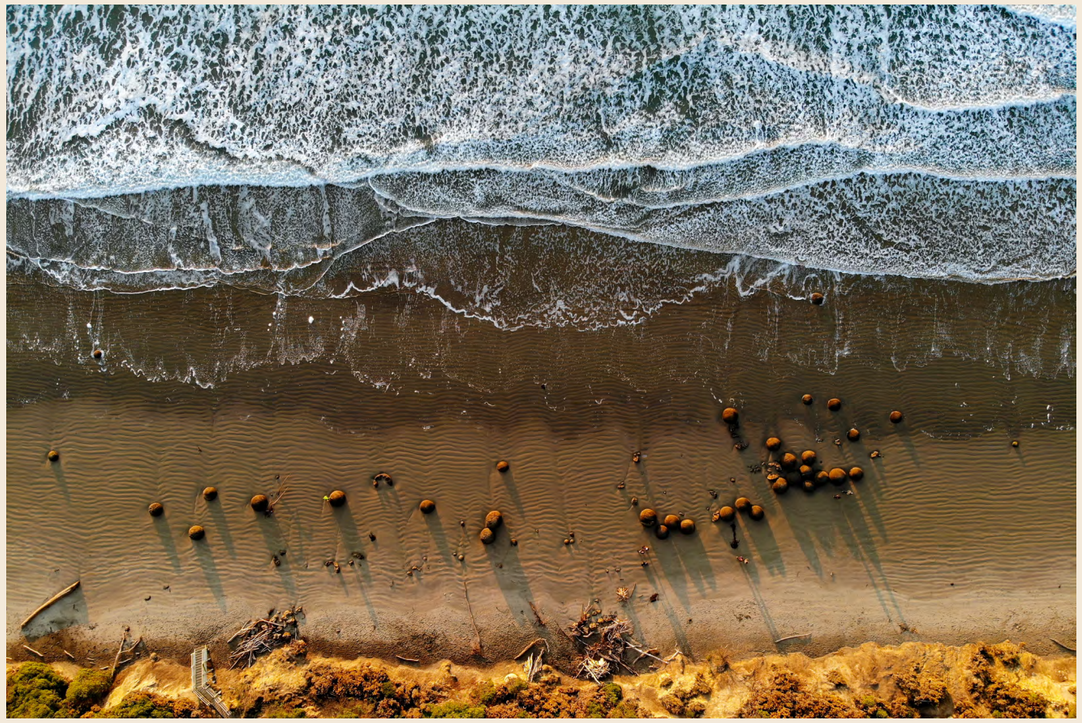

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Kia ora tātou

Welcome to the final edition of Buddle Findlay's insolvency and restructuring update for 2025. As we head towards the silly season and a well-deserved break for many, it's an opportunity to reflect on what has been a very busy year in the insolvency and restructuring space.

There is no doubt that 2025 has delivered significant challenges for many businesses, and this is reflected in the statistics published by the New Zealand Companies Office. As at 31 October 2025, 2,278 companies had been placed in liquidation this year. This is an increase of around 200 on the same time last year (2,065). The number of company liquidations has steadily increased from the post-Covid lows of 2020 and 2021 (1,217 and 1,196 respectively as at 31 October). Company receiverships and voluntary administrations have followed a similar trend, although numbers are slightly down on the same time last year. The statistics reflect the financial pressures that many sectors have felt over the past two years. As reported recently by the Reserve Bank:

- Financial stability risks remain higher than in recent years due to global uncertainty and underperformance in parts of the New Zealand economy
- Soft demand and reduced profitability are contributing to financial stress in many sectors, especially those reliant on discretionary consumer spending
- Subdued discretionary spending by households has affected sales for many sectors. Business financial data show that sales in the construction, manufacturing, retail and wholesale trade sectors have been weak over the past two years
- Pandemic-era savings buffers have largely been depleted, particularly for smaller firms. Business failures are increasing as financial pressures accumulate.

The Reserve Bank offers a light at the end of the tunnel for many businesses, suggesting that conditions are expected to improve gradually, as profitability and debt-servicing capacity recover with strengthening demand.

2025 has also brought many interesting case law developments both in New Zealand and around the world. Our final edition of the year offers an update on a proceeding that has featured in two of our earlier updates this year – in our June update we reported on the judgment in *Arena Alceon NZ Credit Partners, LLC v Grant* which related to liquidators' conduct. In our August update we reported that the decision has been appealed. This month we report on the costs decision from the High Court.

We also report on a recent High Court decision reversing a decision made by liquidators to apply retentions held on statutory trust under the Construction Contracts Act 2002 to the liquidators' fees and remuneration. The High Court emphasised the importance of liquidators distinguishing between trust assets and general company assets, and the importance of liquidators applying to the Court for directions in complex cases.

Looking overseas, we provide a summary of an Australian decision in which the New South Wales Court considered the interesting issue of "shadow" directors – a person that exercises ultimate managerial control over a company despite never having been formally appointed, and may be held personally liable for insolvent trading.

We hope you enjoy our final update for the year. No doubt many retailers and hospitality businesses will be awaiting the pre-Christmas spending boom.

We wish you a safe Christmas break.

Kelly Paterson, on behalf of the Buddle Findlay insolvency and restructuring team.

Litigation funding, liquidator priority, section 284 limits and section 301 time bars

Andrijana Milosavljevic and Bridie McKinnon

100 Investments v Walker is a recent substantial and carefully reasoned judgment of the High Court that clarifies how litigation funding arrangements, liquidator priority and settlement mechanics operate in practice. Set against the complex liquidation of Property Ventures Limited (**PVL**), it offers practical guidance on the supervisory role of section 284 of the Companies Act 1993 (**Act**), timing rules that apply to section 301 claims under the Limitation Act 2010, and the importance of clear documentation over informal understandings (among many other things) — all useful lessons for insolvency practitioners and stakeholders alike.

Background

PVL was a property investment and development company that conducted each project through a separate subsidiary, with group-wide guarantees and overlapping security. Following the group's collapse in 2009–2012, its liquidator, Robert Walker, brought claims against PVL's directors, auditors (PwC), and against a valuer who was said to have overstated asset values. Mr Walker initially approached the creditors of PVL and asked for an indication as to whether any of them would be willing to fund the litigation, but none were interested. Finally, the claims were funded by a litigation funder, SPF No.10 Ltd (**SPF**), part of the LPF Group Ltd (**LPF**), under a Services Deed. SPF also acquired Allied Farmers Investments Ltd's first ranking security over PVL's assets (**Allied GSA**), which later framed how settlement proceeds were allocated under a distribution agreement.

As a result of the litigation, settlements totalling $38.98m were reached. PwC's contribution was $33.8m, the directors $3m and the valuer $2.18m. Distributions were agreed in an August 2017 distribution agreement (**DA**), which reflected SPF's senior security position. No distributions were made to "ordinary" unsecured creditors, save for distributions to the liquidators for their fees.

In September 2021, Mr Walker was replaced as liquidator of PVL by John Whitley.

Two consolidated proceedings followed

Two sets of proceedings were brought against Mr Walker personally, LPF and others and later consolidated:

- Entities associated with David Henderson, PVL's director (the **100 Parties**) claimed they had first ranking security interests (by assignment) over certain PVL subsidiaries and sought a share of settlement proceeds. They pleaded among other things, conversion, money had and received, breach of fiduciary duty (against Mr Walker), knowing receipt (against SPF/LPF), and, in the alternative, sought compensation under section 301 of the Act in their capacity as creditors.

- PVL's replacement liquidator, Mr Whitley, with PVL and a suite of subsidiaries as plaintiffs, challenged the Services Deed and the DA. They sought directions under section 284 of the Act that the Services Deed and DA were not binding (or that specified payments were unreasonable "Project Costs" that should be repaid). Further, they sought compensation from Mr Walker under section 301 of the Act for alleged breaches of fiduciary and statutory duties. Finally, they brought claims against SPF/LPF for knowing receipt, undue influence and breach of contract.

The decision

The Court's 217 page judgment is summarised for the purpose of this update but is available in full here.

1. **Entry into the Services Deed and the DA was proper**: Mr Walker was not under a duty to seek court approval under section 284 of the Act for either the Services Deed or the DA. Both were commercial decisions squarely within his powers as liquidator. The Court rejected the fiduciary and statutory duty challenges, finding that there had been a robust, advised negotiation and a rational compromise of contested entitlements. Specifically, undue influence was not made out: SPF exerted the type of pressure typical of commercial bargaining, and at all times Mr Walker's will remained his own.

2. **Liquidator priority**: The Court reaffirmed the long-standing principle that a liquidator may recoup reasonable costs and remuneration in priority to secured creditors, from funds realised in preserving and realising assets.

   The Court took note of the fact that Mr Walker under-charged SPF for significant litigation work. Approximately $1.8m of his $4.08m invoicing represented uncharged litigation effort tied to the fund's realisation and was recoverable in priority. Likewise, the Court found the "Project Costs" and funder returns were proper in this case. The $30.6m recoverable by SPF as Project Costs and a "Services Fee" were costs reasonably incurred to realise the proceeds. Those legitimately included the face value of security for costs (bank bonds) and the purchase prices associated with acquiring the Allied GSA (as expressly provided in the DA). The Court also found that reasonableness was to be assessed when obligations were undertaken, not with hindsight post-success.

3. **Secured status not proved; modest allocation if it were**: The 100 Parties failed to prove valid assignments of debts and securities. In particular, chains of title were incomplete, some loan terms restricted assignment, and the 100 Parties relied upon hearsay evidence. But even if the 100 Parties were secured, only a modest share of the PwC settlement belonged to the targeted subsidiaries based on contribution and merits. The Court indicated this proportion would be approximately 4% ($1.352m), which would then be subject to the liquidator's priority recoupment (about 83%), leaving roughly $230,000 net to the 100 Parties if their security had been found to be valid.

4. **Section 284 of the Act is not a shortcut to substantive relief**: The Court emphasised that section 284(1)(a) is supervisory and protective, not a vehicle to secure substantive orders against third parties when ordinary causes of action are unproven. While section 284(1)(b) can reverse a liquidator's act and affect third-party rights, it is discretionary and reserved for fraud, bad faith or unreasonableness, none of which were established in the present case.

5. **Limitation for section 301 claims starts with the first liquidator**: Unsurprisingly, the Court found that, for the purposes of the Limitation Act 2010, the six-year clock for section 301 claims runs from the date of appointment of the first liquidator, not each successor. While most of the plaintiffs could not rely on late knowledge because relevant facts were known within the companies during Mr Walker's tenure, the 100 Parties' section 301 claims survived via late knowledge.

6. **Settlement deed and abuse of process**: A 2020 deed between Mr Walker and Mr Henderson (and his associated interests) restrained further claims against Mr Walker, except reasonable amendments in an existing proceeding. The Court found several of the plaintiffs were "associated" with Mr Henderson and that pursuit of the new proceeding against Mr Walker was both a breach of the settlement deed and an abuse of process.

In December 2023, the Court had made an order requiring both sets of plaintiffs to give further discovery on the alleged association and funding link between Mr Henderson and Mr Whitley. This order would have captured a 2022 indemnity deed (**Indemnity Deed**), under which Mr Henderson agreed to indemnify Mr Whitley for liquidator costs and liabilities, included a promise to pay for his time, and was secured over Mr Henderson's Christchurch apartment. However, the Indemnity Deed had not been discovered as part of the discovery process and was produced mid trial after Mr Whitley disclosed its existence. On cross-examination, Mr Henderson claimed to have forgotten about the Indemnity Deed but Mr Whitley admitted it existed. Legal counsel Mr Moss (for the Whitley parties) drafted and negotiated the Indemnity Deed, while Mr Hucker (for the 100 Parties) reviewed draft terms at Mr Moss's request and was involved in the discovery process. Given the revelation, the defendants alleged misleading conduct and lack of independence and sought disqualification of Mr Moss and Mr Hucker. The Court (in a separate judgment [2025] NZHC 3487, available here) held disqualification is exceptional (reserved for truly egregious misconduct) and discovery deficiencies are ordinarily addressed by further discovery or professional disciplinary processes. It was reasonable for the defendants to have made the application, on the basis of their view that aspects of Mr Moss's submissions were potentially untrue or misleading, and further the Court was concerned Mr Hucker had not squarely explained his awareness of the Indemnity Deed at the time of discovery; but the Court declined to determine dishonesty in that procedural context.

Takeaways for New Zealand practitioners

There are several important lessons from this judgment:

- Robust pressure and commercial heat will not, without more, amount to undue influence when a litigation funder and a liquidator enter into an arrangement to bring a proceeding that ultimately results in all recoveries meeting the costs of the funder and liquidator
- In their dealings with funders, liquidators should document advice received, the options weighed (including directions), and the leverage used
- Section 284 of the Act is supervisory and is not to be used as a roundabout way to bring an action against a liquidator
- A replacement liquidator does not reset the limitation period for section 301 purposes.

See copy of the judgments here (substantive) and here (as to disqualification application).

Who's the Director? Trinco illustrates the perils of shadow governance

Shereen Lee

In *In the matter of Trinco (NSW) Pty Ltd (in liq),* the New South Wales Supreme Court confirmed that a person who, in substance, exercises ultimate managerial control over a company can be treated as a de facto director despite never having been formally appointed, and may be held personally liable for insolvent trading.

Background

Mr Azizi was not an appointed director of Trinco (NSW) Pty Ltd (**Trinco**), but was the sole director of another company, Trinity Constructions (Aust) Pty Ltd (**Trinity**). Trinco operated as a management company for Trinity – it did not generate revenue on its own, and was dependent on funding from Trinity to pay its subcontractors and suppliers. Ms Azizi (Mr Azizi's sister) was the sole director and shareholder of Trinco. From 1 July 2018, Trinco was insolvent and remained so until it was placed into liquidation on 9 December 2021.

The liquidator of Trinco sought to recover from Mr Azizi, as a debt due to Trinco, an amount equal to the amount of loss or damage incurred by creditors arising from insolvent trading by the company. The Court considered whether Mr Azizi was liable for insolvent trading under section 588M of the Corporations Act 2001 (Cth) (**Act**). The Court considered the following issues:

- Whether Mr Azizi was a de facto director of Trinco
- Whether there were reasonable grounds for suspecting that Trinco was insolvent from 1 July 2018
- Whether Mr Azizi failed to prevent Trinco from incurring the debts
- Whether the debts were wholly or partly unsecured when the loss or damage was suffered.

Mr Azizi was a de facto director

The Court was satisfied that Mr Azizi was the ultimate decision maker for Trinco. It was Mr Azizi who communicated with Trinco's creditors; made decisions about subcontractors and suppliers; and resolved critical problems for Trinco. While Ms Azizi was responsible for the day-to-day accounting activities, she did not have the responsibility for top level management decisions in Trinco. Ms Azizi had no say in who Trinco would contract with, nor how contractor issues were resolved. The Court observed that Trinco served Trinity and was always run to serve Trinity. Mr Azizi was responsible for operating Trinco as a vehicle to enable Trinity to run its projects.

There were reasonable grounds for suspecting Trinco was insolvent

The Court found that a person of ordinary competence would suspect that Trinco was insolvent. This is because Trinco had no assets, and its only real source of funds was supplied by Trinity. There were reasonable grounds for suspecting Trinco was insolvent when Trinity stopped supplying Trinco with sufficient funds to meet its debts.

Mr Azizi failed to prevent Trinco from incurring the debts

The Court considered whether a reasonable director in a like position would be aware there were grounds for suspecting Trinco was insolvent. This requires an objective assessment, with consideration of the director's special expertise or distribution of functions within the corporation.

By June 2018, Trinity was not making enough money to provide Trinco with funds to pay its subcontractors and suppliers. Mr Azizi, as the director of Trinity and the person ultimately in control of Trinco, had a responsibility to stop Trinco from incurring new debts. Instead, Mr Azizi tried to get more work for Trinity, such that payments from new projects were used to pay creditors on old projects.

Comment

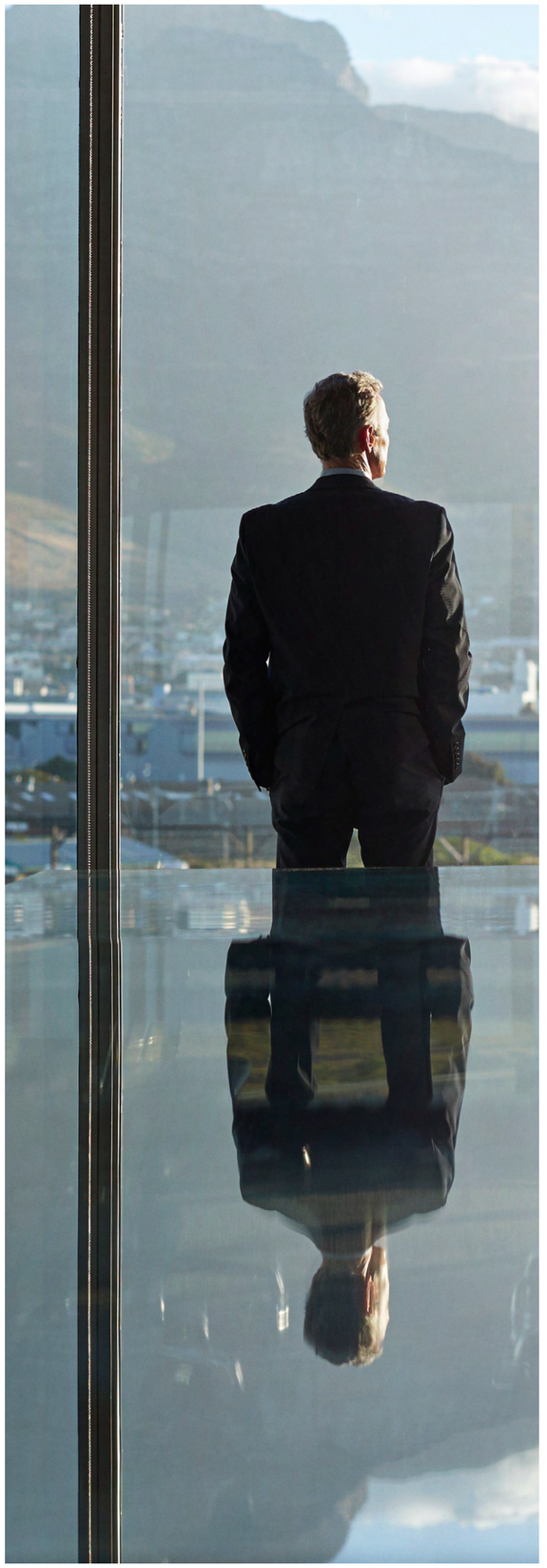
This is a cautionary tale for those who effectively control companies despite not being formally appointed as directors. A trading entity may be exposed to risk even if nominal governance is concentrated elsewhere. To minimise exposure to risk, it is important to document role boundaries, secure formal appointments and establish robust financial oversight and reporting practices.

In New Zealand, section 126(1) of the Companies Act 1993 (**Companies Act**) distinguishes between de facto and shadow directors – a shadow director is a person who directs or instructs the actions of an appointed director on the board of directors whereas a de facto director is a person who occupies the position of a director notwithstanding that he or she has not been validly appointed.[1]

A finding of de facto director requires clear evidence that the person was the sole person directing the affairs of the company.[2] Whether a shadow or de facto director, a person who controls the direction of the company will be subject to director duties.[3] Relevantly for New Zealand, several key duties in the Companies Act address the prevention of insolvent trading: section 135 prohibits reckless trading, section 136 concerns the duty not to agree to the company incurring obligations the company cannot perform when they fall due, and section 131 requires directors to act in good faith and in the best interests of the company — which includes having regard to the interests of all creditors when a company is near insolvent. Those exercising effective control of a company, even without formal title, should therefore be aware they may attract the same duties and potential personal liability as formally appointed directors.

See a copy of the decision here.

[1] Delegat v Norman [2012] NZHC 2358 at [26]
[2] Delegat v Norman [2012] NZHC 2358 at [32]
[3] He v Chen [2014] NZCA 153 at [28].



Director breached duties misapplying company assets – shareholder ratification unavailable

Aylish Waldron

The Supreme Court of Southern Australia recently determined the case of *Ex Nf Pty (in Liq) & Anor v Munneke & Ors* [2025] SASC 165, concerning the liquidation of NextFaze Pty Ltd (**NextFaze**), a mobile and web application development business. At all material times, Mr Munneke was the sole director and shareholder of NextFaze. His wife, Ms Zaccara, was the sole director and shareholder of two companies, 28 O'Connell Pty Ltd and 106 Ward Street Pty Ltd.

NextFaze was placed into liquidation, and the liquidators brought an originating application seeking declarations from the Court in relation to three transactions:

- The first was in 2014, when Mr Munneke used NextFaze's funds to purchase cryptocurrencies, including Bitcoin and Ethereum (**Cryptocurrency transaction**)
- The second was in 2015, when Mr Munneke used NextFaze funds, along with funds from an ANZ loan given to NextFaze, to purchase a property on O'Connell Street, now held by 28 O'Connell Pty Ltd (**O'Connell transaction**)
- The third was in 2018, when Mr Munneke sold some Ethereum to finance the purchase of property owned by 106 Ward Street Pty Ltd (**Ward Street transaction**).

Cryptocurrency transaction

In relation to the Cryptocurrency transaction, Mr Munneke claimed that he and Ms Zaccara had purchased the cryptocurrency as a family investment. While the cryptocurrency had been purchased using company funds, Mr Munneke contended that this had only been done for convenience as NextFaze's bank account was already linked to the relevant cryptocurrency trading platform. Mr Munneke contended that the use of these funds amounted to a small loan from NextFaze to him, which had since been repaid.

Despite this claim by Mr Munneke, the Court held that the Cryptocurrency Transaction was on its face a company transaction, and that the evidence available was consistent with the acquired cryptocurrency being treated as a company asset. This included findings that:

- Mr Munneke had not taken any steps to transfer the Bitcoin from the company operated account to his personal cryptocurrency wallet, despite having established his own wallet by February 2014
- Mr Munneke had not taken any steps to compensate NextFaze for the use of its funds to purchase the cryptocurrency
- Some of the cryptocurrency purchased in 2014 had been used by NextFaze to purchase another form of cryptocurrency for one of NextFaze's clients.

As such, the Court determined that the cryptocurrency purchased using company funds in 2014 was and remained the property of the company.

O'Connell transaction

The Court determined that, since 2015, NextFaze had only been able to continue to operate by failing to pay its tax and superannuation obligations. As such, at the time that the O'Connell transaction was contemplated in December of 2015, NextFaze's financial state was such that Mr Munneke should have been concerned for its solvency. In allowing the payment out of NextFaze's funds, and in allowing NextFaze to incur a liability under the loan from ANZ, Mr Munneke had breached his statutory and fiduciary duties.

Ward Street transaction

Similarly, the Court found that at the time of the Ward Street transaction, Mr Munneke should have been concerned for NextFaze's solvency. Further, the Ward Street property was purchased using proceeds of the sale of cryptocurrency which the Court considered to be the property of NextFaze. It was held that Mr Munneke breached his statutory and fiduciary duties by causing or allowing the company's funds to be used in the Ward Street transaction, and this was an unreasonable director-related transaction.

The Court undertook an extensive review of authorities on a range of issues, including:

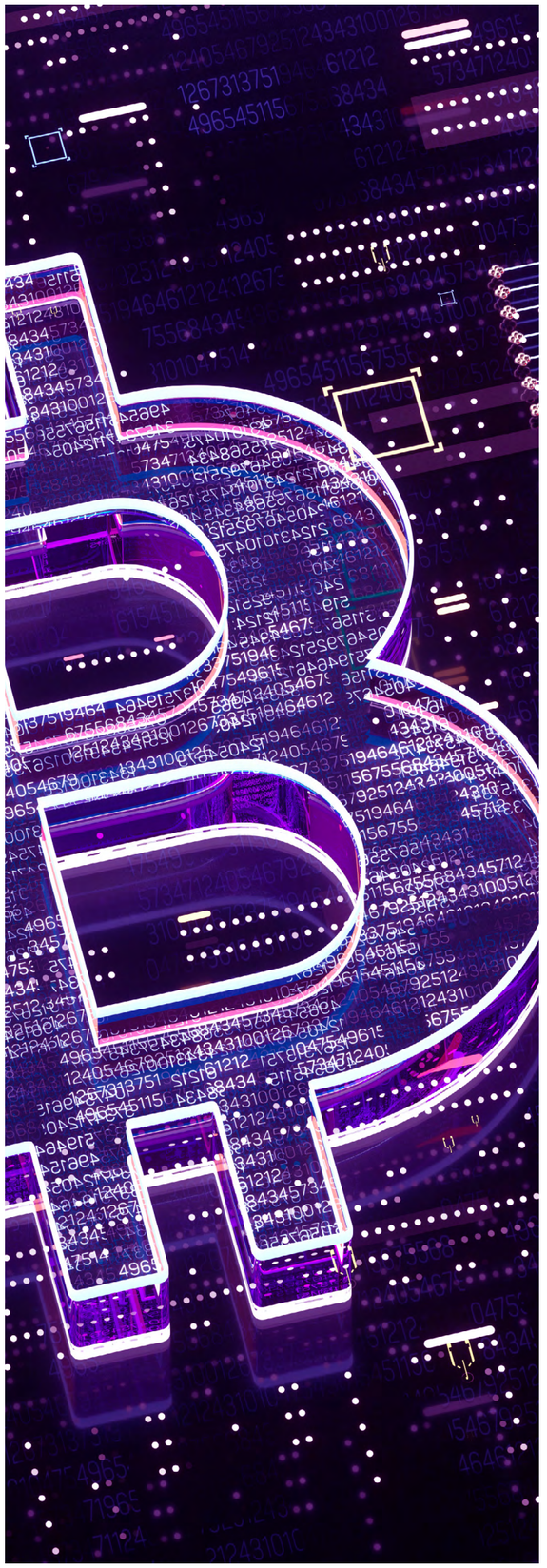
- The duty to take into account the interests of creditors
- When shareholders can ratify voidable actions of directors.

On the first of these issues the Court noted that: *"It is clear that the duty to take into account the interests of creditors is merely a restriction on the right of shareholders to ratify breaches of the duty owed to the company. [...] Where a company is insolvent or nearing insolvency, the creditors are to be seen as having a direct interest in the company and that interest cannot be overridden by the shareholders. [...] the result is that there is a duty of imperfect obligation owed to creditors, one which the creditors cannot enforce save to the extent that the company acts on its own motion or through a liquidator."*

New Zealand and UK courts have more recently adopted an approach similar to the Australian line of authorities on this point – see our August 2023 update on the *Mainzeal* judgment here.

On the second issue the Court held: *"ratification is irrelevant to claims for breach of the Corporations Act, i.e. conduct that amounts to an unreasonable director-related transaction or a breach of a statutory director's duty cannot be ratified. [...] Shareholders cannot belatedly ratify past misconduct after winding up."*

See a copy of the decision here.



The cost of complexity

Hugo Young

In our June update, we reported on the decision of the High Court in *Arena Alceon NZ Credit Partners, LLC v Grant* [2025] NZHC 1360. In that case the Court ruled in favour of the plaintiff, Arena Alceon NZ Credit Partners, LLC (**Arena**). It found that Damien Grant and Adam Botterill had, in their capacity as liquidators of Ormiston Rise Limited, failed to act independently or impartially, contravened multiple provisions of the Companies Act 1993 and breached of the RITANZ Code of Conduct. While the liquidators were ultimately not removed due to concerns around increased cost and delays, a cost order was made against them.

The more recent judgment addressed two outstanding cost issues. These were:

- The appropriateness of 2B scale costs and whether an uplift was justified
- The level of disbursements Arena was entitled to claim in relation to its expert witness costs.

On the scale costs issue, Arena sought costs on a 3B basis with a 50% uplift. Counsel for the liquidators argued that 2B costs were appropriate because there was "nothing particularly complex about the proceeding or hearing." Given that Judge Lester had already acknowledged the complexity of the case at first instance, the Court ultimately found, on the basis of complexity, that costs on a 3B basis with no uplift were appropriate. The three and a half day hearing produced a 280-paragraph judgment and both sides had three counsel each, including senior counsel. Additionally, the liquidators' conduct seems to have contributed to the judgment's length and complexity. The Court noted that they had refused to concede any of the alleged breaches of the Companies Act, even though they were *"evident essentially on the face of the record"*, something which *"struck"* Judge Lester when re-reading the judgment.

Regarding Arena's claim for disbursements, this case serves as a reminder on the importance of careful instruction of experts and limiting those instructions to questions of fact, not law. The liquidators took issue with the amount claimed by Arena for their expert witness, whose fee was $170,625.96 (excluding GST).

A review of the instructions given to the expert showed that on occasion, the expert was asked to provide an opinion on matters of law *"which were ultimately matters for [the Court] to determine"*. This resulted in the creation of a significant amount of *"carefully written and thorough"* evidence which was not strictly admissible. The Court ultimately decided that Arena was entitled to claim only $75,000 of the expert's fee, with the scope of the instruction being a significant factor in this decision.

See a copy of the decision here.

Difficulties in unwinding a post sale DOCA once commercial realities have crystallised

Ethan Lee

In *Rahman v Shephard* [2025] NZHC 3141, the High Court refused a group of driver-shareholders' (**Rahman Group**) application to set aside/terminate the Deed of Company Arrangement (**DOCA**) that sold Wellington Combined Taxis' (**WCT**) business, and provided for WCT's liquidation after the creditors were paid in full.

The decision follows the earlier procedural directions of Boldt J (in [2025] NZHC 1452) which allowed shareholders to vote alongside creditors at the watershed meeting, and endorses a practical/commercially focused application of Part 15A of the Companies Act 1993 (**Act**).

Liquidation notwithstanding settlement of all debt?

Two competing proposals were put at the watershed meeting:

1. The "ACT DOCA" (sell the taxi business to Auckland Cooperative Taxi, pay the creditors, and liquidate the company and distribute surplus to shareholders)
2. The "Refinance DOCA" (new board, $1.5m loan, keep trading).

The ACT DOCA was approved by a majority of shareholders, and subsequently by the creditors. The sale was completed, staff and contracts were novated to the purchaser, and hundreds of drivers signed new franchise agreements.

The Rahman Group (who supported the Refinance DOCA) then applied for orders setting aside/terminating the ACT DOCA on the basis that the company was no longer insolvent following the sale, and that what remained of the business could be returned to the shareholders rather than be wound up.

The Court dismissed the application, and found as follows:

- The purpose provision of part 15A of the Act does not require a company to continue in existence once its business has been sold because it was not viable. The wider purpose of the Act included regenerating and re-aggregating capital for productive purposes
- Part 15A of the Act is deliberately flexible, and a DOCA may properly include liquidation as the post sale mechanism
- The ACT DOCA reflected the majority shareholder view that a sale followed by liquidation was the preferred way to provide a return to creditors and shareholders
- The sale had already settled, employees and contracts had been moved, many drivers had already entered new arrangements, and third party reliance and costs had crystallised. Overturning the ACT DOCA would unfairly prejudice the majority of shareholders and innocent third parties.

Practical takeaways for practitioners

DOCAs are a formal part of a voluntary administration, and commonly understood as an alternative to liquidation. The key purpose of voluntary administration is to maximise the chances of a company continuing its existence. However, providing a better return for creditors and shareholders than would result from an immediate liquidation is also an important consideration. As seen above, bespoke DOCAs that include managed wind downs or staged distributions are permissible and will be respected where duly adopted.

See a copy of the decision here.

At the same time as this matter was heard the Court of Appeal heard an appeal by the Lookman Family Trust against a High Court decision dismissing a challenge to DOCA (*Jones v Williams* [2024] NZHC 891). We will report on that following issue of the judgment in that appeal.

Discussions from Supreme Court of Australia (set-off, priority and judicial advice): *Re Condev Construction Pty Ltd (in liquidation)*

Sanne Vitalis

The Supreme Court of Queensland's decision in *Re Condev Construction Pty Ltd (in liquidation)* [2025] QSC 173 addresses important questions about statutory set-off, circulating security interests, and priority employee entitlements in insolvency. The case arose from the voluntary liquidation of Condev Construction in March 2022. The liquidators sought judicial advice regarding the operation of statutory set-off under section 553C of the Corporations Act 2001 (Cth) and the treatment of funds held and remitted by Westpac Banking Corporation, Condev's long-term banker and secured creditor. The Commonwealth, having paid employee entitlements under the Fair Entitlements Guarantee (**FEG**) scheme, sought declarations to secure priority distributions under section 561 and to challenge Westpac's set-off rights.

Issues

The principal issues before the Court were:

- Whether section 553C permitted Westpac to set-off credit balances in Condev's accounts against Condev's debts to Westpac, including when those debts were secured
- How section 561 (priority for employee entitlements from circulating assets) interacts with section 553C, and when the preconditions for section 561 should be assessed
- Whether Westpac had notice of Condev's insolvency at the time of giving or receiving credit, which would preclude set-off under section 553C(2)
- Whether assets subject to a floating charge were held on trust for priority creditors, thereby displacing mutuality and set-off.

Decision

The Court held that section 553C has broad application, is self-executing, and applies even when one or more debts are secured. Set-off is determined by the parties' rights as at the commencement of winding up and is not altered by the Personal Property Securities Act 2009 (Cth). The Commonwealth's argument that section 553C does not apply to secured debts was rejected. The Court also dismissed the argument that assets subject to a floating charge are held on trust for priority creditors, confirming that a company in liquidation remains the beneficial owner of its assets and that the statutory regime alone governs distribution.

On section 561, the Court followed *Commonwealth v Tonks*, holding that employee creditors have priority from circulating assets only to the extent of a secured creditor's claim, and only when there is an actual contest. The "insufficiency" precondition and the existence of a relevant secured claim are to be assessed when the liquidator has sufficient information, not at the date of appointment. By the time the liquidators could make this assessment, there were no amounts owing to secured creditors from circulating assets and no contest with the Commonwealth's priority claim, so section 561 did not operate.

Regarding notice of insolvency, the Court found that actual notice of facts disclosing insolvency is required to preclude set-off under section 553C(2). Media reports and requests for contract variations did not amount to actual notice, given Westpac's knowledge of Condev's cash position and liquidity ratio. In this case, notice only arose after the relevant credits had occurred.

The Court gave the requested judicial advice, confirming the liquidators would be justified in not pursuing Westpac for pre-liquidation debts represented by credit balances and in not treating post-appointment payments as circulating security property. The Commonwealth's application was dismissed, and it was ordered to pay the costs of both the liquidators and Westpac.

Our thoughts

Re Condev is persuasive for New Zealand, but the analysis must be grounded in the New Zealand Companies Act 1993 and Personal Property Securities Act 1999 (**PPSA**). Statutory set-off in liquidation under section 310 operates broadly and automatically, and is generally available even when debts are secured, provided mutuality exists. Our PPSA does not ordinarily override statutory set-off, subject to mutuality and the facts. While there is no direct New Zealand equivalent to section 561, the timing approach – assessing priorities when the liquidator has sufficient information – aligns with New Zealand practice for determining whether assets are sufficient to meet preferential claims. New Zealand law also confirms that assets in liquidation are not held on trust for creditors – distribution is governed by statute. Notably, in New Zealand, under section 310(2) of our Companies Act, set-off is excluded if the creditor had reason to suspect insolvency at the relevant time; actual notice is not required.

See a copy of the decision here.

Australian Supreme Court clarifies charitable trust powers and insolvency risk for church property transactions

Zar Sinclair

A recent decision of the Supreme Court of Queensland, *Catalyst Townsville SPV No 1 Pty Ltd v The Presbyterian Church of Queensland (receivers and managers appointed); Catalyst Corinda SPV No 2 Pty Ltd v The Presbyterian Church of Queensland (receivers and managers appointed); The Presbyterian Church of Queensland (receivers and managers appointed) v Catalyst Carina SPV Pty Ltd & Anor* [2025] QSC 255, provides important guidance for parties involved in insolvency disputes concerning charitable and church property, with clear implications for New Zealand practitioners dealing with similar trust and insolvency issues.

Background and parties

The Presbyterian Church of Queensland in these proceedings is a letters patent corporation (**Corporation**) which is distinct from its associated unincorporated religious association by the same name (referred to as the **Church**).

The Corporation entered into various transactions and finance arrangements with the Catalyst entities for the development of aged care facilities in Queensland. The Corporation was ultimately unable to meet its repayment obligations and was placed into receivership. The Catalyst parties sought recovery of the debts and unpaid rent/outgoings, and the receivers (acting for the Corporation) raised a number of defences.

The Attorney-General of Queensland intervened to assist the Court on three issues:

- The existence and composition of any alleged charitable trusts
- Whether the transactions could be set aside as ultra vires, void or in breach of trust
- The remedies available to the Corporation (notably, remedies the Corporation could seek if trust/breach arguments succeeded).

Key issue – specific trust

The receivers (and the Attorney General in the alternative) argued that the Corporation held some land and assets as trustee of specific charitable purpose trusts (variously described in the pleadings), and that, if so, the Corporation lacked power to enter the Catalyst agreements or had breached its duties as trustee by entering into transactions that were "imprudent, hazardous and wholly unsuitable" for a charitable trust. The receivers also alleged unconscionable conduct by Catalyst in negotiating or pursuing claims. Catalyst argued the Corporation held property absolutely and could lawfully enter the transactions. The Court found that the Corporation held property on trust for the general charitable purposes of the Church and that its powers and duties were governed by the church's constitution and the relevant statutory framework. However, the Court held that the Corporation had acted in good faith, responsibly, and with the degree of caution expected of a trustee, and that the transactions were not imprudent or in breach of trust. The Court emphasised that the Corporation could acquire, use and dispose of land and property to pursue the Church's general charitable purposes and noted that use of property will not be in a breach of trust just because it is realised and the proceeds applied to serve the charitable purpose. Trust property does not need to result in a permanent or lasting outcome to fulfil a charitable purpose.

The Court rejected the existence of any special purpose trusts on the basis there was an *"absence of evidence"* of any intention to create specific trusts and because the way the Corporation dealt with the property was more consistent with a general charitable purpose.

The Court also found that the Catalyst parties did not fall outside societal norms of acceptable commercial behaviour. There was no exploitation, undue influence or unfair tactics. The Court commented that all of the Church's executives and boards were well-advised and understood the risks and terms of the transactions.

The Court found for Catalyst on the principal debt and lease claims (subject to interest and costs to be quantified) totalling over $31m.

Key takeaway

This judgment reinforces the need for commercial realism in insolvency and trust disputes involving charitable property. Trustees of church property must act in accordance with their constitutions and the trust's charitable purposes but are not prohibited from engaging in commercial transactions if properly authorised.

The decision provides a useful precedent for New Zealand practitioners navigating the intersection of trust law and insolvency in the charitable sector.

See a copy of the decision here.

The Court's supervisory jurisdiction in liquidation – reversing decisions made by a liquidator

Brooke Marriner

On 29 August 2025, the New Zealand High Court reversed a decision made by the liquidators of the Stanley Group companies to apply retentions held on statutory trust under the Construction Contracts Act 2002 (**Act**) to the liquidators' fees and remuneration. The application for reversal of the liquidators' decision was brought by the liquidation committee of several companies in the Stanley Group under section 284(1)(b) of the Companies Act 1993.

Section 284 relates to the Court's supervision of a liquidation and provides the Court with a broad supervisory jurisdiction of steps taken in a liquidation on the application of a liquidator, liquidation committee, or with leave of the Court a creditor, shareholder, other entitled person or director of the company in liquidation.

The Court will only reverse a liquidator's decision when there are elements of fraud, lack of good faith in exercising a discretion, or unreasonableness by the liquidator (ie acting in a way that no reasonable liquidator would have acted, or serious and obvious lapses in judgment). The Court will not interfere in purely commercial decisions.

The Stanley Group companies traded as construction companies. They engaged contractors and retained payments due to the subcontractors pursuant to the terms of the subcontracts. The Act provided that the companies were required to hold the retentions on statutory trust for the subcontractors. They did not do so.

The Stanley Group companies went into liquidation in 2019, owing approximately $12m to creditors. Their liquidators issued proceedings to recover the shortfall of the retentions from three directors of the companies. Those proceedings were settled in part, and settlement payments were made to the liquidators by two of the directors. The liquidators also recovered some retention payments owing to the Stanley Group companies under the head contracts.

The liquidators applied all of the settlement payments and the recovered retentions towards their remuneration and expenses incurred in the liquidation. The liquidation committee applied to the Court for reversal of the liquidators' decision and declaring that the settlement payments and recovered retentions are held on trust for the benefit of the subcontractors.

The Court held that when a company is put in liquidation and it holds more than one class of assets, the orthodox approach is to have separate pools – one for trust assets, and one of general assets available to creditors. The liquidators' costs of administering trust assets can be met from those assets. However, the liquidators formed the view that the funds recovered were general assets available for creditors and elected not to seek directions from the Court on that point. The Court found that the liquidators were incorrect on that point: the subcontractors were the beneficial owners of both the settlement payments and the recovered retentions. The Court accordingly reversed the liquidators' decision. However, there was insufficient evidence to determine the allocation of those funds to specific subcontractors, and that determination was deferred to a later hearing.

This case is an important reminder of the distinction between trust assets and general company assets in a liquidation and reinforces the importance of liquidators applying to the Court for direction in complex cases. It also reinforces the broad supervisory jurisdiction of the Court in a liquidation, and the willingness of the Court to intervene when necessary. Finally, although liquidation committees have typically taken on a more passive role in liquidations, it is interesting to see cases where liquidation committees engage in litigation using their powers under the Companies Act (for example, see the unsuccessful application brought by the liquidation committee of Ruapehu Alpine Lifts Ltd in *Gibson v Platt* [2024] NZHC 351 here).

The liquidators have appealed the High Court's judgment. Given the importance of the decision for priorities under the Companies Act, the retentions judgment has been stayed pending determination of the appeal.

The liquidators also applied for recusal of the Associate Judge who determined the retentions claim. The application was brought on the basis of evidence that the Associate Judge, prior to appointment to the High Court, had occasionally provided advice to some companies in the Stanley Group. The directors sued by the liquidators in the retentions proceeding were also directors of some or all of the companies that were the Associate Judge's prior clients.

The liquidators argued that the Court's decisions regarding the settlement payments may impact the quantum of the remaining claim in the retentions proceedings and lend support to the directors' defence. They also argued that it was possible that issues may arise relating to issues that the Associate Judge had previously advised on (and that the Associate Judge may be a person on whom a section 261 notice could be issued), and that all of the above gave rise to an appearance of bias.

The Associate Judge found that the matters he had acted on for Stanley Group were routine construction disputes, and no reason had been provided by the liquidators as to why that would require the liquidators to issue a section 261 notice. The recusal application was declined. The recusal judgment can be found here.

See a copy of the decision here.

High Court grants interim preservation orders to assist Australian trustee in bankruptcy

AI generated summary

In *Harrison v Roberts* [2025] NZHC 1327, the High Court of New Zealand granted interim relief to an Australian bankruptcy trustee to prevent dissipation of a New Zealand property belonging to the bankrupt, notwithstanding that formal recognition of the Australian proceeding under Schedule 1 of the Insolvency (Cross-border) Act 2006 (**ICBA**) had not yet been sought.

Background

- Ms Roberts was made bankrupt in Australia on 23 May 2024 and Mr Harrison was appointed trustee. Her statement of affairs identified an Auckland property in Mellons Bay (**Property**), described as co-owned with her ex-husband, although New Zealand title shows Ms Roberts as sole registered proprietor
- Australian Family Court consent orders contemplated sale of the Property and a 50/50 split of net proceeds after sale costs and mortgage discharge between Ms Roberts and her former husband
- The trustee attempted to lodge a caveat with Land Information New Zealand (LINZ) but was told he lacked a caveatable interest in the absence of recognition of his position in New Zealand. The Federal Court of Australia issued a letter of request seeking vesting and ancillary orders to enable realisation of the Property for creditors (debts totalling about AU$4.046m).
- The trustee commenced substantive proceedings in the High Court seeking recognition of his appointment, vesting orders, powers akin to the Official Assignee, examinations and ancillary relief, together with interim preservation orders. Ms Roberts opposed interim relief but offered an undertaking not to dispose of the Property and to allow a caveat over 50% of her interest.

Framework and approach

The Court noted that cross-border assistance is addressed in the ICBA. Schedule 1 substantially adopts the UNCITRAL Model Law and applies when assistance is sought in New Zealand by a foreign court or foreign representative in connection with a foreign proceeding.

Because no originating application for recognition under article 15 of the ICBA had been filed, the interim relief available under articles 19 and 21 of Schedule 1 was not engaged.

The Court nevertheless considered the broader ICBA framework, modified universalism and comity, and authorities favouring assistance to foreign representatives absent a compelling reason to refuse.

Residual discretion and inherent jurisdiction

The Court accepted that, because no recognition application under article 15 of Schedule 1 had been filed, the formal Model Law avenues for provisional and post recognition relief (articles 19 and 21) were not engaged. Nonetheless, the trustee invoked the language of article 21(1)(c) – which, after recognition, empowers the Court to suspend a debtor's right to transfer, encumber or otherwise dispose of assets – and the Judge treated section 8 of the ICBA as providing a residual discretion to act in aid of the Federal Court of Australia where the applicant is a *"foreign representative"* and the matter a *"foreign proceeding"*, even without recognition. Section 8(3) was read as permitting orders akin to those under article 21(1)(c) to prevent dissipation, noting that in a domestic bankruptcy assets would vest in the Official Assignee and preservation would be inherent in that regime. In the alternative, the Judge relied on the High Court's inherent jurisdiction to grant interim preservation orders necessary to prevent dissipation and to enable the effective administration of justice. This willingness to mirror article 21(1)(c) via section 8 and inherent jurisdiction is in our view controversial, particularly given the common law immovables rule and the absence of a compliant recognition application.

Orders

The Court made an interim order suspending the right to transfer, encumber or otherwise dispose of the Property. Leave was reserved to the trustee to apply for further urgent orders and to Ms Roberts to apply to rescind on three days' notice. The Court also timetabled the substantive proceeding.

Our comments

This judgment is notable – and potentially controversial – for the High Court's willingness to grant urgent interim relief in aid of a foreign bankruptcy trustee despite the absence of a compliant recognition application under article 15 of Schedule 1 ICBA. The Court relied on both section 8 of the ICBA and, in the alternative, its inherent jurisdiction to suspend dealings with the Property.

From a critical perspective, reliance on inherent jurisdiction here can be seen as curing a procedural failure by the applicant's advisers. That approach risks undermining the statutory recognition process, which was designed to provide documentary safeguards before Model Law-type relief is granted. More fundamentally, the common law "immovables" rule would ordinarily prevent a New Zealand court from giving effect to a foreign insolvency officeholder's claim to title in New Zealand land. It is open to question whether section 8 ICBA is sufficiently worded to displace that rule. On the flipside, the interim order in this case did not purport to vest title or otherwise alter proprietary interests; it merely restrained dealings. To some extent, that reduces the force of any immovables rule concerns at this stage.

While the Court's approach aligns with earlier instances where inherent jurisdiction was invoked in cross-border insolvency (for example, in *Bankruptcy of Stainton* [2024] NZHC 826, alongside statutory grounds), practitioners should be aware that the legal foundation for such orders is contestable and may be tested on appeal.

See a copy of the decision here.

The pecking order when companies wind up: Cayman Islands decision clarifies where shareholder misrepresentation ranks amongst other claims in liquidation

Sophie Parker

The Cayman Islands Court of Appeal recently delivered its judgment[4] on appeals against the decisions in *Re HQP Corporation Limited (in Official Liquidation)* (2023) and *Re Direct Lending Income Feeder Fund Ltd. (in Official Liquidation)* (2024). The appeals consider the treatment in liquidations of shareholder claims alleging that misrepresentation induced them to subscribe for company shares.

Section 49(g) of the Cayman Companies Act provides that no sum due to any member "in that person's character of a member, by way of dividends, profits or otherwise" is deemed a debt of the company in a case of competition with any creditor who is not a member. Such sums may instead be taken into account in the final adjustment of the rights of contributories among themselves. In practice, this subordinates member capacity claims (including claims that shareholders were induced to invest under a misrepresentation) to the claims of external unsecured creditors.

Court of Appeal

First, the Court considered whether the shareholder's misrepresentation claims can be admitted to proof in liquidation, or whether the House of Lords decision in *Houldsworth v City of Glasgow Bank* (1880) 5 App Cas 317 prevents such claims entirely. Second, the Court considered, if the misrepresentation claims are permissible, where they rank amongst competing claims, including those of external creditors.

The Court noted the *Houldsworth* principle is a long-established common law doctrine, which operated in the UK until its abolition by legislation in 1989. That principle provides that a shareholder who was induced by misrepresentation to subscribe for shares cannot, after the company has gone into liquidation, both retain the shares and prove in the winding up for damages for that misrepresentation.

The Court held the *Houldsworth* principle remains good law in the Cayman Islands, although refined its application – rather than completely barring misrepresentation claims, such claims must be postponed until all external creditors have received full payment.

On the second question, the Court held misrepresentation claimants and redemption creditors both bring claims in their capacity as members and therefore should be considered *pari passu*.

Our views

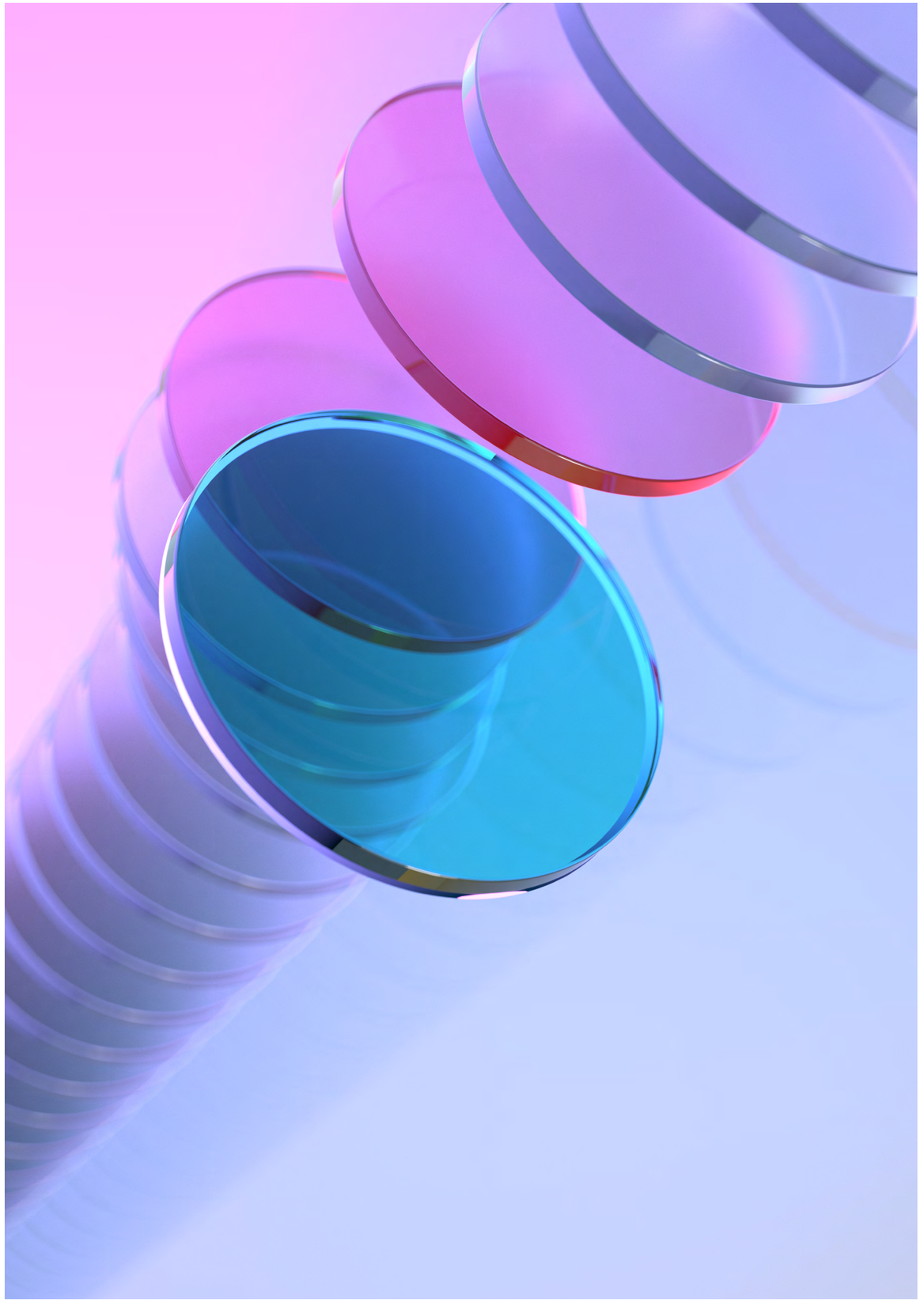
New Zealand does not have a statutory equivalent to section 49(g) restricting member capacity claims. Rather in our jurisdiction, shareholders are only paid out for their shares after all creditors have been paid in full. This means that while there is no formal "bar on proof" for shareholder claims, the economic effect is similar – creditors have first call on the company's assets.

Notably, while shareholder claims fall subordinate to those of unsecured external creditors, the Cayman decision illustrates that claims can be brought by duped shareholders without having to wait in queue behind redeeming shareholders, who also bring claims in their capacity as shareholder (member) creditors.

Shareholders who are concerned that they may have been induced to subscribe for shares by misrepresentation should seek advice promptly given the risk of liquidation on member claims. On the other hand, non-member creditors of companies at risk of going into liquidation risk their claims being diluted by rescinding shareholders or class actions.

See a copy of the decision here.

[4] [2025] CICA (Civ) 19



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

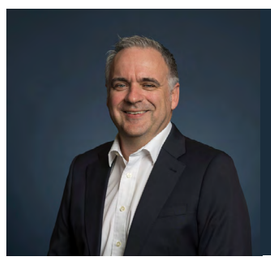
DDI • 64 3 371 3514
M • 64 21 655 604
jan.etwell
@buddlefindlay.com

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