Insolvency and restructuring newsletter.

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Kia ora tatou

As we approach the half-way mark in 2025 and with the Budget just released, it is timely to reflect on the state of the domestic economy and what this might mean for the insolvency profession. The IRD started the year with an announcement that it was taking a harder line with tax defaulters that has been reflected in the number of liquidation applications that it has made. Separately, insolvency practitioner conduct is back in the news and the courts. After what can properly be described as an elephantine like gestation period the Insolvency Practitioners Regulation Act 2019 came into force progressively through to June 2021. Four years on from its coming into force we preview two matters that we expect will be closely watched by members of the profession and regulators.

Economic chaos or not?

On the plus side the primary sector is enjoying good news with Zespri announcing $5b in global sales and the dairy sector delivering high milk solid prices. Treasury's Budget forecast also includes that although New Zealand will be buffeted by the shock from shifting global trade policies, economic growth is forecast to gather pace this year, and a recovery is being helped by interest rate cuts. Those shifting trade policies referred to by Treasury are also contributing to significant fluctuations in world equity and bond markets. The ANZ April Business Outlook, by contrast, is less optimistic, noting that its survey results on business confidence fell for the third month in a row to 37 in May. A survey of small businesses across Asia by CPA Australia noted that among New Zealand businesses business sentiment remains pessimistic. New Zealand had the lowest percentage of businesses reporting growth in 2024, a trend expected to persist in 2025 and finally, small business confidence in New Zealand’s economic outlook is low.

Two Budget related announcements that will have impact across business sectors are the changes to the pay equity and KiwiSaver regimes. The Government has announced that the savings that it makes through its controversial changes to the pay equity regime will be re-allocated to tax incentives for businesses, boosts to health and education spending, and Crown funding for new gas fields. Changes to the regime extinguish claims by workers in social services such as education, healthcare and social work. A change to the employer contribution to KiwiSaver from 3% to 4% is likely to have an impact on future pay rises and the Retirement Commissioner is predicting that up to 20% of KiwiSaver members will be worse off through the reduction in the Government contribution and means testing for entitlement to that reduced contribution.

All things considered the outlook for the rest of the year appears pessimistic, despite dropping interest rates and a recent business friendly "growth" budget. Whether this will result in more business owners seeking advice from insolvency professional remains to be seen.

Fast and furious: IRD at "full throttle" chasing tax arrears

The Government has given the IRD a multi-million-dollar funding boost for investigatory work to enable it to recover what it estimates is about $800m in unpaid tax over the next four years. Some companies in tax arrears have already felt the consequences of the IRD going "full throttle" on compliance work, with a boost in IRD liquidation applications. Directors of defaulting companies are being encouraged to sell properties to meet company tax debts. One cannot help but wonder whether a loss of preferential status for tax debts might encourage the Commissioner to take action at an early stage, when defaults first occur, with the aim of rescuing companies and allowing them to return to positive trading.

Professional conduct back in the news and courts

We report on news of a professional conduct complaint against the former employee of convicted tax fraudster and former liquidator, Imran Kamal, involving allegations that Mr Jan fronted for Kamal carrying out liquidation work despite Kamal having been refused an insolvency practitioner's licence in 2022.

Associate Judge Dale Lester's judgment in the latest round in the ongoing dispute between the liquidators of the Ormiston Rise development and its financier has just been released. The financier took the liquidators to court alleging that they had failed to act independently and impartially, and that as a result they should be removed as liquidators. Matters were raised in support of that argument, including the stacking of a creditor vote, among other alleged breaches of both the Companies Act and the RITANZ Code of Conduct. The judge noted, for example, that one of the liquidators (who was a practising inhouse lawyer) was unable to articulate a legal basis for his decision to permit certain creditors of a contractor to vote at a creditors' meeting of the principal. The liquidators had denied any impropriety and maintained that the underlying issues were contestable.

In a judgment that catalogues a range of statutory and code of conduct breaches by the liquidator and his inhouse counsel, the Court has pragmatically left the liquidators in place subject to them accepting stringent supervisory conditions, failure to accept which will result in their removal. While each side may declare partial victory, in our view the imposition of those conditions and the order that the liquidators personally pay the financier's costs of the application is an indication of the Court's assessment of the conduct of the liquidation.

We hope you enjoy the first edition of our newsletter for 2025. Please get in touch if we can provide more information.

Ngā mihi nui

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

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

Scott Barker

Arena Alceon NZ Credit Partners, LLC (**Arena**) sought to remove Damien Grant and Adam Botterill as liquidators of Ormiston Rise Limited (**ORL**) and its subsidiary companies. Arena, which was both a secured creditor and a minority shareholder, claimed that Grant and Botterill had failed to act with the necessary independence and impartiality. The Court had to decide whether their conduct met the standards required under the Companies Act 1993 and the RITANZ Code of Conduct for insolvency practitioners.

The core of Arena's concern was that Grant and Botterill were overly influenced by one shareholder group (referred to as the Webber interests). The evidence showed that before and after their appointment, the liquidators worked closely with this group, gave them favourable advice on how to achieve their goals, and failed fully to disclose these connections in the statutory Disclosure of Interest forms (DIRRIs). Grant and Botterill also accepted or failed to review questionable creditor claims at key meetings - claims that were pushed by the same shareholder group, and which helped ensure Grant's appointment.

The Judge noted, for example, that Botterill, a lawyer, could not explain to the Court the jurisdictional basis under which a ROT creditor of a contractor to ORL, could be a creditor of ORL. Mr Francis' (the liquidators' expert witness) belated attempt to support Mr Botterill's position failed due to Mr Francis already having signed a joint experts' report to the Court agreeing that third party ROT creditors were not creditors of ORL.

The Judge found that Arena's concerns were justified and that there was a clear lack of both actual and apparent impartiality. He referred to well-established New Zealand case law, particularly *Mason v Lewis and Re Trafalgar Supply Co Ltd*, which requires liquidators to be, and to be seen to be, truly independent. The Judge said an informed, objective observer would conclude that Grant and Botterill appeared to favour the Webber interests over Arena and other stakeholders.

Significantly, the Court also found several statutory breaches and breaches of the RITANZ Code of Conduct. These included admitting non-bona fide creditors for voting, failing to treat Arena as a creditor entitled to vote at voluntary administration meetings despite its security, and not providing adequate interest statements or seeking the required information from company directors. The Judge was also critical of the level of fees charged. Many of the investigations and legal steps taken by the liquidators were unnecessary given the financial reality - the company's assets had already been sold by receivers, so little was left to be fought over. The liquidators' remuneration was found to be, in part, unreasonable and Arena was given leave to challenge the fees at the end of the liquidation.

The Judge was particularly critical of the evidence given by Grant, describing him as "*not a careful witness*" and noting that: "*The only concessions Mr Grant made was when he was faced with an unanswerable proposition. But short of being left with no option but to accept his non-compliance, he tended to fall back on an inability to recall.*"

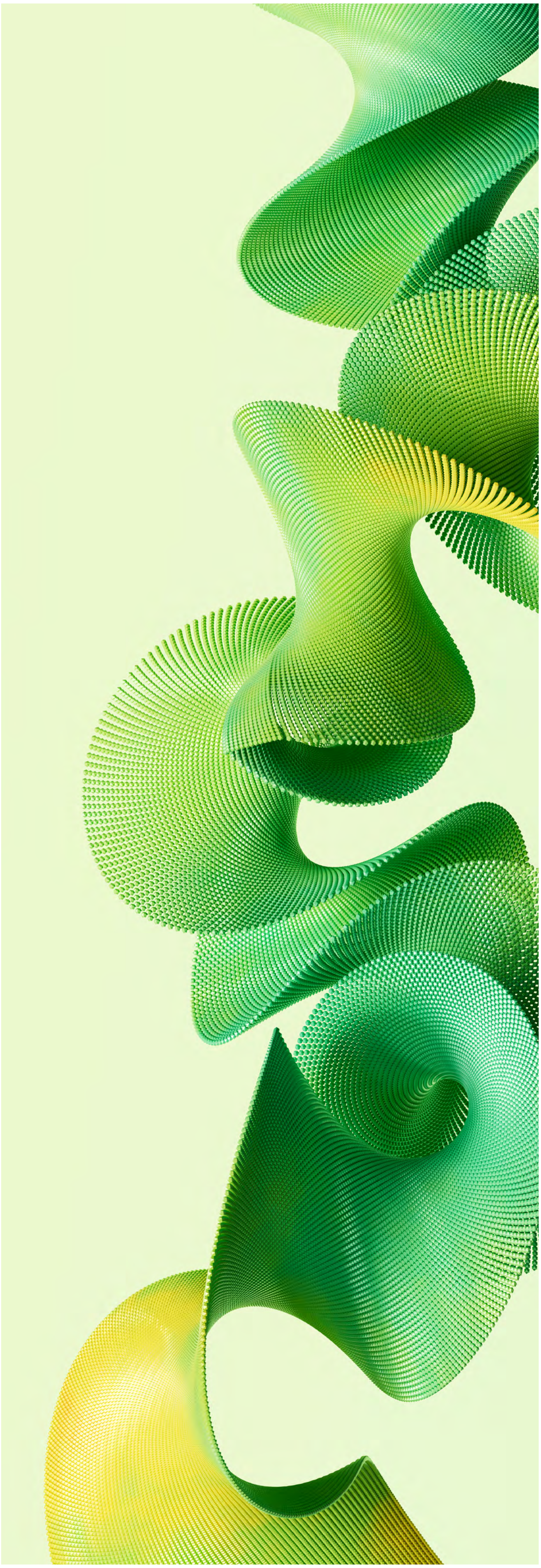
Another interesting aspect was the flawed process taken to appoint replacement liquidators. Grant tried to resign as sole liquidator and then appoint both himself and Botterill as joint liquidators under section 283 of the Companies Act. The Judge clarified that this is not allowed - a retiring liquidator cannot simply appoint more than one successor or appoint themselves as their own successor. However, for practical reasons and to avoid confusion, the Court regularised both Grant and Botterill as the current liquidators. Given existing case law on defective liquidator appointments, this was a result that could easily have gone the other way.

Despite these findings, the Court chose not to remove Grant and Botterill immediately. It recognised that an immediate removal could lead to delays and extra costs. Instead, the Court imposed conditions: for all litigation against Arena and the receivers, the liquidators must use external lawyers and senior barristers, seek and follow their advice, and go back to the Court if there is any uncertainty. They are also required to provide updated and proper DIRRIs and must ensure their time records and fee claims are complete and able to be challenged later. If Arena believes the fees remain disproportionate or unreasonable, it can still bring that dispute to Court at the end of the liquidation. Costs were awarded against the liquidators personally.

This case is a clear warning to insolvency practitioners: even if you believe you are acting fairly, the appearance of partiality can be just as damaging as actual bias. The decision confirms how critical independence and transparency are, both in substance and perception. It also acts as a reminder to be thorough with required disclosures, careful in admitting creditor claims with a proper legal foundation, and reasonable when setting and claiming fees and deciding which actions to undertake and when. The Court has showed it is willing to exercise its supervisory jurisdiction over liquidators when concerns are raised, but will balance that exercise with the need to keep insolvency processes running efficiently.

Given the importance of these issues to the profession, and to the parties to this liquidation, either side may seek to appeal this judgment.

A copy of the judgment is available here.



The power to obtain documents and information: how long is a liquidator's arm?

Jun Kim and Cora Morrison

Section 261 of the Companies Act 1993 (**Act**) contains one of the most useful tools in a liquidators' arsenal – the ability to require various categories of persons to deliver up documents and information relating to the company in liquidation.

It has long been recognised that the s 261 powers extend to overseas directors of the company – who, by accepting appointment as a director of a New Zealand incorporated company, submit themselves to New Zealand Law (*Grant v Pandey* [2013] NZHC 2844).

Recently, the Supreme Court has considered whether the extraterritorial effect of liquidators' s 261 powers extend to shareholders and creditors of the subject company in *Arena Alceon NZ Credit Partners, LLC v Grant* [2024] NZSC 166. The Supreme Court held that liquidators have the power to make demand for information and documents under s 261 to overseas persons, and the Court had the power to order overseas persons to comply. We briefly discuss below.

Background

Ormiston Rise Limited (**ORL**) and Ormiston Rise Development Limited (**ORDL**) were property developers of residential units in Auckland.

In late 2021, ORL and ORDL were placed into liquidation. The liquidators served notices under s 261 on a shareholder (Arena Alceon NZ Credit Partners, LLC (**Arena**)) and security trustee of a creditor (Quaestor Advisors, LLC (**Quaestor**)) outside New Zealand, requiring them to disclose information in relation to ORL and ORDL's operations. Arena and Questor challenged the notices on the basis that the liquidators' power under the Act did not have extraterritorial effect.

The High Court upheld the protest to jurisdiction, holding that the liquidators had not overcome the presumption against extraterritoriality of s 261 of the Act.

Court of Appeal

The Court of Appeal overturned the High Court's decision, reasoning that while s 261 of the Act does not expressly provide for extraterritorial application, it can be inferred as a matter of necessary implication.

The Court stated this broad application of the liquidators' power of enquiry was not without proper regulation, pointing at statutory avenues of lodging applications for the unjustified exercise of a liquidator's powers or for the review of their powers. In its view, these avenues coupled with the requirement for a sufficiently substantial connection adequately supported the extraterritorial reach of s 261.

Arena and Quaestor subsequently applied for leave to appeal to the Supreme Court.

Supreme Court

The Supreme Court restated the position as set out by the Court of Appeal, agreed that Arena and Quaestor had by their actions, based in New Zealand, created sufficient connection with the New Zealand jurisdiction and dismissed the application. In their consideration of whether to justify leave to appeal, the Court noted that a liquidator's power of enquiry is a matter of general and public importance.

Our views

As a general rule, domestic legislation does not operate extraterritorially especially when the matter at issue arises out of New Zealand and is governed by New Zealand law, even if the defendant is overseas. There are some minor exceptions to this general rule, usually created expressly by statute (see for instance, s 3(1) of the Fair Trading Act 1986 in limited circumstances) or as a matter of statutory interpretation together with principles of private international law (see for instance, the Consumer Guarantees Act 1993 and the decision of the Court of Appeal in *Body Corporate Number DPS 91535 v 3A Composites GmbH* [2023] NZCA 647).

How the decision of the Supreme Court is applied in practice will be interesting. There is nothing expressly drafted into s 261 of the Act that confers extraterritoriality, although it may be argued in response that when liquidators seek information and documents belonging to a New Zealand company – regardless of where the holder of that information is located, the law of the country of incorporation applies. However, we consider that the better remedy may be through the UNCITRAL Model Law on Cross-Border Insolvency, where available, and common law rules on cross-border insolvency and disclosure (*Norwich Pharmacal* jurisdiction), which would avoid tortuous arguments on the extra-territorial reach of domestic statues, and promote international comity. These options were discussed by the Privy Council in *Singularis Holdings Ltd v PwC (Bermuda)* [2015] 1 AC 1675. It is unclear why these options were not canvassed by our Supreme Court (or the lower courts).

A copy of this judgment is available here.

Victorian Supreme Court says statutory demand can be set aside based on offsetting claims rejected in adjudication process

Brooke Marriner

In *Re Duke Ventures Wellington Street Pty Ltd* the Victorian Supreme Court (equivalent level to the New Zealand High Court) set aside a statutory demand on the grounds that the applicant had a claim that offset the amount of the statutory demand, despite the fact that the offsetting claim had been rejected in a construction adjudication process.

Duke Ventures Wellington Street Pty Ltd (**Duke Ventures**), a developer, and Cobolt Constructions Pty Ltd (**Cobolt**), a builder, entered into a construction contract for an apartment building. Cobolt issued a progress payment claim under the construction contract and successfully applied for adjudication of its claim for $158,422.34. Cobolt then served a statutory demand on Duke Ventures for payment of the debt. Duke Ventures applied to set aside the statutory demand, on the ground that it had several claims against Cobolt that, combined, were far greater than the amount claimed in the statutory demand (rectification costs for defects; liquidated damages; and costs to complete the works). Duke Ventures had raised three of those claims in the adjudication process and they had been rejected.

Cobolt argued that only claims arising from "transactions separate from the one giving rise to the debt" could offset the debt claimed, given that claims relating to the transaction giving rise to the debt had been addressed in the adjudication process and had therefore been determined.

The Court rejected Cobolt's argument and found that the claims, for which Duke Ventures had filed evidence of, were sufficient to justify setting aside the statutory demand. That was on the basis that the threshold for establishing an offsetting claim was "a serious question to be tried" or "an issue deserving hearing", and that the following principles applied in relation to setting aside a statutory demand where the debt claimed relates to a payment adjudication:

"Where a debt arises by reason of an adjudication…:

a. a debtor may not rely on a 'genuine dispute' in relation to that debt;

b. a debtor may not rely on an offsetting claim to the extent allowance has been made for that claim in the adjudication;

c. a debtor may rely on an offsetting claim to the extent the claim was raised before the adjudicator but was rejected;

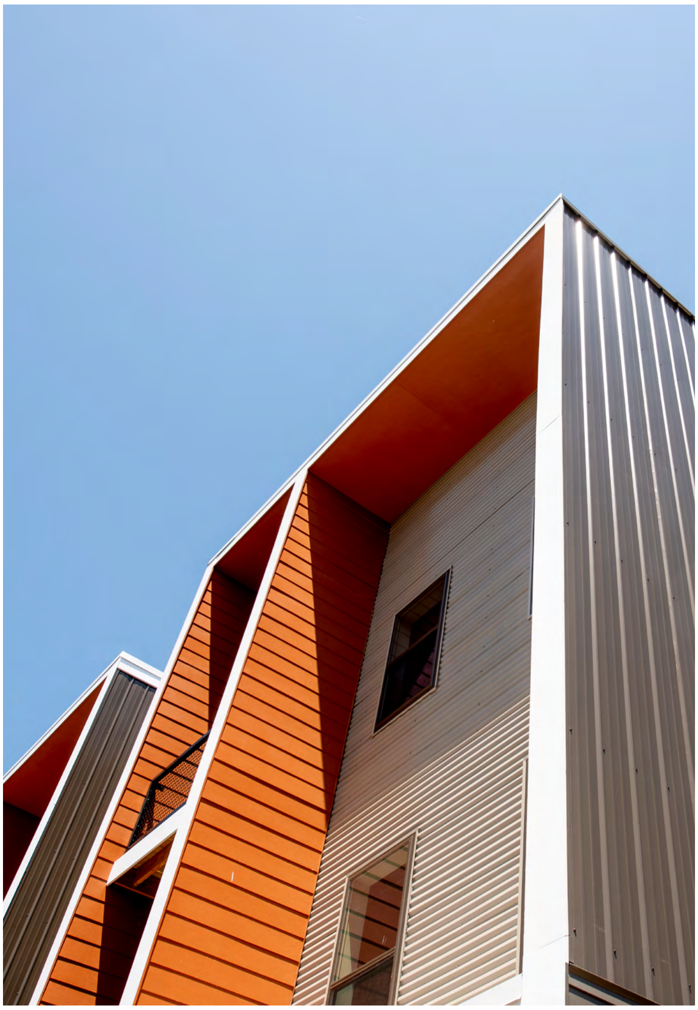
d. a debtor may rely on an offsetting claim that was not raised before the adjudicator;

e. a debtor may rely on an offsetting claim that arises from transactions separate to the one giving rise to the debt."

The Court found that Duke Ventures had provided a sufficient evidential basis to support its offsetting claims.

The Australian statutory provisions applicable to statutory demands and the grounds upon which they can be set aside are materially similar to the provisions in New Zealand under the Companies Act 1993 (sections 289-291). The *Re Duke Ventures* decision serves as a reminder that a statutory demand will be appropriate only in cases in which the respondent's liability to pay the debt can be easily established to the Court (and without extensive evidence). In circumstances where the respondent might have a reasonable argument in relation to set-off, counterclaim, or that the debt is not due and owing, then an ordinary court process will be more appropriate. A court is unlikely to deal with complex arguments as to liability or as to discounting offsetting claims in a liquidation proceeding.

A copy of this judgment is available here.



How broad acknowledgments can result in limitation periods restarting

Andrijana Milosavljevic

A bank obtained an approximately $65 million judgment against Mr Kerr and several of his associated entities for amounts outstanding under loan facilities. Unsurprisingly given the amount of the judgment, the decision was appealed to the Court of Appeal on a number of grounds. This update deals only with the limitation period portions of the extensive Court of Appeal judgment.

Under s 47(1)(a) of the Limitation Act 2010, if a claimant proves that, after the start date of the claim's primary limitation period, the defendant acknowledged to the claimant in writing a liability, the claimant is deemed to have a fresh claim, arising on the date of the acknowledgement. In simpler terms, acknowledging a debt in writing can restart the six year limitation period in respect that debt. The Court reminds us of the rationale behind the extension: it is in the public interest that a debtor who acknowledges their debt, and so induces their creditor not to have immediate resort to litigation, should not then be able to claim that the debt is statute-barred because the creditor held their hand.

The Court of Appeal considered whether Mr Kerr had an arguable limitation defence based on the capacity in which he made acknowledgements of liability to the bank during the primary limitation period. Mr Kerr denied that he made any admission personally, rather only on behalf of certain corporate entities that he controlled. The Court accepted that there was no express acknowledgement by Mr Kerr of his personal liability as guarantor, but that did not matter as no particular words were required, and an acknowledgement could be broad and informal provided that, judged objectively, the words used indicate an admission of liability to the claimant.

In this case, it was relevant that the other debtor corporate entities were all closely associated with Mr Kerr, who in his communications with the bank called them "my companies" and used language such as "my facilities", "we expect" and "we wish to make a proposal". Further, Mr Kerr was the only person in communication with the bank about the entities' defaults between 2011 until 2019 (when lawyers finally became involved), signing off his communications with his first name without any identifying corporate logos or email signatures. The Court of Appeal concluded that if Mr Kerr had intended to exclude himself from the ambit of the broad acknowledgements he made, such a limitation would have been made clear in his communications. It was not reasonably arguable that Mr Kerr acknowledged liability on behalf of the corporate obligors only, and the limitation period was restarted in respect of his personal liability as a guarantor (as well as the corporate entities). Kerr has sought leave to appeal to the Supreme Court, while applying to the High Court to set aside a bankruptcy notice.

Parties to loan agreements and guarantees should be mindful of the potential impact of their communications on limitation defences. A copy of this judgment is available here. The High Court judgment contains a useful summary of the case law on the re-starting of limitation periods, available here at [149].

United Kingdom Supreme Court confirms broad interpretation relating to transactions defrauding creditors

Thomas Carr

The United Kingdom Supreme Court confirmed that a broad interpretation should be taken of s 423 of the (UK) Insolvency Act 1986, which deals with transactions defrauding creditors (ie dispositions that prejudice creditors).

In *El-Husseiny and another v Invest Bank PSC* [2025] UKSC 4, the bank had previously obtained a judgment order against El-Husseiny and had identified properties previously owned by Marquee Holdings Limited, a company solely owned and controlled by El-Husseiny, to enforce this judgment against. The bank alleged that El-Husseiny had affected the transfer of these properties to his sons for zero consideration, for the purpose of prejudicing the bank's ability to enforce its judgment (as the value of El-Husseiny's shares had been significantly reduced).

The Supreme Court ruled that s 423 should be interpreted broadly, and applies not only to transactions entered into by the debtor personally, but also to transactions conducted through a company controlled by the debtor. This interpretation provided important clarity that creditors can continue to pursue claims even when complex corporate structures are used to shield assets that are the subject of enforcement. The Court emphasised that a narrow interpretation would undermine the policy purpose of s 423. If this was the intention of the legislature, it would be apparent in the drafting.

This decision did not address the *mens rea* element of s 423, which requires a plaintiff to prove that the intention of the debtor was to defraud creditors, and this remains (and likely will remain) a contentious issue in s 423 cases. In this instance, the High Court had previously determined that El-Husseiny did not intend to defraud creditors (and this issue was not on appeal in the Supreme Court). This issue has been considered at length in New Zealand in *Regal Castings Ltd v Lightbody* [2008] NZSC 87 [2009] 2 NZLR 433.

It remains to be seen what impact this decision will have in New Zealand. Part 6, subpart 6 of the Property Law Act 2007 (which sets out the general regime for setting aside dispositions that prejudice creditors) operates similarly to the United Kingdom regime. In particular, s 345 of the Property Law Act refers to "a disposition of property" (not limiting the section's application to dispositions by a debtor) and defines " disposition " broadly. The policy purposes of these two regimes are identical and it appears likely that a New Zealand Court would seek to apply *El-Husseiny* in an equivalent situation (particularly when the alternative would result in the unfair prejudicing of creditors).

A copy of this judgment is available here.

Successor trustee does not owe fiduciary duties to former trustee in respect of entitlement to be indemnified out of trust assets

Calina Tataru

The full bench of the High Court of Australia in *Naaman v Jaken Properties Australia Pty Limited* considered the question of whether a successor trustee owes a fiduciary obligation to a former trustee in respect of the former trustees' entitlement to be indemnified out of trust assets or the commensurate beneficial interests in the trust assets that the former trustee retains following replacement by the successor trustee. The majority of the court said no such fiduciary obligation exists, whereas the three justices in the minority found that a fiduciary obligation should arise.

The facts concerned a property transaction carried out by the aptly named Sly Fox Family Trust of which JPG was the former trustee and Jaken Properties Australia Pty Limited (**Jaken**) was the successor trustee.

The appellant, Naaman, was a judgment creditor of JPG and was subrogated to JPG's right to be indemnified out of the assets of the trust. Jaken, as the successor trustee, fraudulently and dishonestly stripped itself of assets that might otherwise have been available to satisfy JPG's indemnity. The Judge at first instance found that the actions of Jaken in stripping the successor trustee of assets were in breach of the fiduciary duty owed by Jaken to JPG. Jaken was assisted by third parties who were held to be amenable to orders for equitable compensation and to account to JPG. At a practical level, Jaken had no assets and the appellant's ability to bring a claim against the third parties who held assets was reliant on the finding of knowing assistance of a breach of fiduciary duty by Jaken.

Majority decision: fiduciary obligation not necessary

The majority found that there was no justification for superimposing a personal fiduciary obligation on the part of Jaken (as successor trustee) to JPG (as former trustee). JPG as the initial trustee was entitled to indemnification out of trust assets for the purposes of recouping expenditure or exonerating liabilities properly incurred by the trustee and had an equitable proprietary interest in the trust assets for this limited purpose. It was open to JPG to seek the Court's assistance to enforce this proprietary interest by way of an interim injunction or the appointment of a receiver.

The majority found it was unnecessary for JPG to show that Jaken owes any obligation to it in order to protect its right to be indemnified out of the assets and found that a person cannot come into a fiduciary relationship with another merely by holding property in which the other person has an equitable proprietary interest.

The facts of this case were insufficient to give rise to a fiduciary relationship although the majority decision acknowledged that the categories of fiduciary relationships are not closed.

As a result of the majority decision of the High Court, the third parties that assisted Jaken to remove assets from JPG's reach were not liable to the former trustee in equitable compensation and to account.

Minority decision: fiduciary obligation owed

The minority held that Jaken did owe a fiduciary duty to JPG. The existence of a fiduciary relationship arose because the former trustee had an existing right of exoneration out of the trust property, not merely a contingent right. The successor trustee assumed responsibility by accepting appointment to replace the former trustee and received trust property in circumstances where it was apparent that the former trustee had a right of exoneration out of trust assets for expenses and liabilities and in those circumstances the former trustee is entitled to expect that the successor trustee would act in its interests as well as those of the beneficiaries of that trust.

Lessons learned

In New Zealand, the trustees' right of indemnity out of trust assets for liabilities incurred in a trustee capacity is recognised in the Trusts Act 2019, or may be provided for in the trust deed or implied in equity. A former trustee may only have recourse to trust assets to satisfy the trustee's indemnity with the court's assistance to enforce the indemnity through an equitable lien over trust assets, which will take precedence over the interests of the beneficiaries in the trust assets.
In the event of the liquidation of a corporate trustee, the trustee's right of indemnity will pass to the liquidator (*Temple 88 Limited (in liq) v Hassine and Pruett* [2021] NZHC 2351). It is important for retiring trustees to ensure they are compensated for their liabilities and expenses incurred as trustees before retiring, otherwise they will need to seek the assistance of the Court. The New Zealand decisions have not considered a situation where the trust had been stripped of its assets, so the question of whether the successor trustees owe fiduciary duties to former trustees remains open in New Zealand.

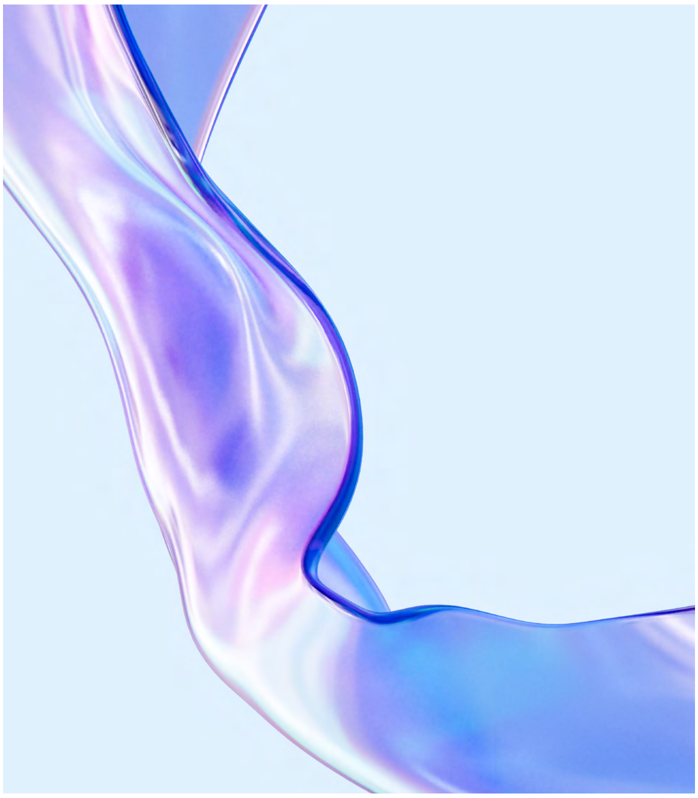
A copy of this judgment is available here.

Exercise of indemnity by liquidators in Satori Holdings Limited (in liquidation)

Hannah Jacobsen

In the recent High Court decision *McDonald and Ruscoe as liquidators of Satori Holdings Limited v Island Grace (Fiji) Limited (in receivership and liquidation)* [2024] NZHC 2675, the Court held that the liquidators of Santori Holdings Limited (*in liquidation*) (**Satori**) were entitled to exercise the right of indemnity as trustees of Satori Trust for payment of their fees and expenses. Satori's Trust was relevant to this proceeding as the liquidators' claimed a right of indemnity out of its assets for liabilities incurred in Satori's capacity as a trustee. The Court also confirmed the liquidators held a lien over Satori Trust's assets. This was an important element of this judgment given allegations that Satori was no longer a trustee, which would require the liquidators to obtain declarations prior to enforcement of any lien.

This judgment impacts the administration of insolvent trusts, confirming a liquidator has legal standing to claim indemnity from trust assets for liabilities incurred while acting within their duties as trustees. The decision was primarily made in reliance on s 81 of the Trusts Act 2019 (**Trusts Act**) and the principles outlined in *Camray Farms Ltd (in liq) v BL (Nature Sunshine) Trustee Ltd* [2019] NZHC 2536. These principles affirmed that the liquidators had the right to be reimbursed from the Satori Trust's assets for valid claims against the company in liquidation.



The Court analysed the circumstances and relevant contractual obligations under multiple joint venture agreements, among others, the Island Grace Joint Venture and the Vunabaka Joint Venture. The Court's conclusion was that the liabilities were appropriately incurred by Satori in its capacity as a trustee. This was a notable conclusion by the Court, extending to obligations arising from defaults in capital calls and related claims stipulated under a joint venture's provisions. The liquidators accepted that the Court will generally not make directions where the decision to be made is in truth a commercial decision for the liquidator. The Court here accepted that the relevant decision was not solely commercial in circumstances when Satori is a former trustee of Satori Trust.

The judgment also clarified that the right of indemnity includes an equitable lien over the trust's assets, which survives the change in trusteeship. This is an important determination as it retains the enforceability of the liquidators' indemnity rights despite the replacement of Satori as the trustee by another entity.

The conclusion of the High Court has meant that the liquidators can rely on their right of indemnification to liquidate the specified assets – notably, Satori's interests in the Vunabaka Bay Joint Venture. The proceeds were to be directed towards covering the liquidation costs, including the liquidators' fees and expenses, and to satisfy creditors' claims.

This judgment evidences the Court's stance on ensuring the equitable treatment of creditor claims while respecting the fiduciary duties imposed on trustees, even amidst challenging insolvency disputes.

A copy of this judgment is available here.

Convicted tax fraudster and 'former' liquidator back in the news and court

Scott Barker

Imran Kamal, who was convicted of tax fraud in 2013 and refused an insolvency practitioner's licence in 2022 by the Court of Appeal, is back in the news and in court. See our previous updates on Mr Kamal in our articles from September 2017, June 2016 and December 2015.

BusinessDesk reports that a company director who appointed a former employee of Kamal's, Mohammed Jan, as liquidator of his company had thought that Kamal was the liquidator (see article here). NZICA has apparently commenced an investigation into the complaint. Jan is reported to have told *BusinessDesk* that it would be inappropriate for him to comment on the complaint while it is subject to investigation. Jan was initially refused a licence by the regulator in 2021 (see decision here) but was subsequently granted a licence. *BusinessDesk* reports that the director stated that he first met Jan about a year into the liquidation and earlier dealings had been with Kamal and his company, Liquidation Management Limited. So far as the director was aware, Kamal had been doing all the work.

As the Court of Appeal noted in its 2021 refusal of Kamal's judicial review, there was evidence of an attempt by Kamal to 'warehouse' his liquidations practice with David Thomas of Tauranga (IP112) for a few months after the licensing regime came into force (see decision here). Thomas later experienced his own professional difficulties, pleading guilty in 2023 to charges by NZICA of negligence and incompetence in relation to his administration of five liquidations. This resulted in a censure, supervision of his practice and an order to pay over $38,000 in costs (see notice here).

In the meantime, Kamal and Liquidation Management are embroiled in ongoing attempts by Gautam Jindal to review remuneration charged by Kamal in 133 liquidations. In proceedings filed in 2021, Mr Jindal (a prolific litigant in person) has continued his efforts to pursue review in the face of stiff judicial headwinds. He has been ordered to pay $10,000 in security for costs and is seeking leave to appeal refusal of joinder of further parties (see decisions here and here). Jindal claims to have assignments of claims in two of the liquidations but otherwise has no connection to the 133 liquidations in question.

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