

# Company Law

12/12/17 Update Summary

## COMMENTARY

*Companies Act (ch 1)*

The following commentary has been updated:

- [CA36.03].
- [CA37.02].
- [CA40.01].
- [CA131.01(10)(a)], [CA131.01(10)(b)] and [CA131.01(10)(e)].
- [CA209C.01].

## CASE COMMENTARY

## COMPANY LAW

*Cadre Investments Ltd v Activedocs Ltd* [2016] NZHC 1489: substantively successful application for declaration that preference shares remained in full force and effect: [CA47.09].

*ActiveDocs Ltd v Cadre Investments Ltd* [2017] NZCA 121: unsuccessful appeal concerning rights attached to preference shares – held as matter of interpretation conversion postponed until appellant could pay all accrued dividends – natural and ordinary meaning of rights of preference shareholders as to dividend meant payment of all accrued dividends accumulated at rate of 15 per cent per annum – ordinary meaning supported by commercial context and background reasonably understood by parties at time of contract including significant risk of investment – no error in High Court approach: [CA47.09].

*ActiveDocs Ltd v Cadre Investments Ltd* [2017] NZSC 91: unsuccessful application for leave to appeal to Supreme Court – case turned on interpretation of shareholders' resolution and short form prospectus – issue involved very particular and no question of public or general importance or commercial significance involved: [CA47.09].

*Burnside v Burnside* [2017] NZHC 595: successful application to remove trustees – successful counterclaim for transfer of shares – following the Court of Appeal's reasoning in *Ord v Calan Healthcare Properties Ltd* wording in constitution did not suggest "sold or transferred" meant to distinguish legal from beneficial ownership of shares – any concern about a third party's pre-emptive rights was not good reason to oppose the transfer of shares: [CA86.02].

*Needham v Samy Trustee Ltd* [2017] NZCA 117: unsuccessful appeal relating to transfer of shareholding under financing agreement: [CA91.04(10)].

## CORPORATE INSOLVENCY

*Advicewise People Ltd v Trends Publishing International Ltd* [2016] NZHC 2119: successful application to set aside a compromise of debt entered into under pt 14 Companies Act 1993 – the plaintiffs were four of the creditors who voted against the proposed compromise – the plaintiffs argued that the compromise should be set aside because of material irregularity and unfair

prejudice pursuant to s 232 Companies Act 1993 – the High Court held two approaches to the way in which "classes" of creditors determined: similarity of legal rights and similarity of interests – authorities under the former s 205 of the Companies Act 1993 preferred the broader "interests" approach – when considering the approach under pt 14, the more flexible, pragmatic and business oriented approach of New Zealand courts preferred – the court must be astute to ensure that the proponent's ability to control the process did not bring about a manipulation of majorities to achieve a result that best meets its own interests, or those of insiders: (1) insider creditors ought to have been put in a separate class because their interests were such that they could not properly consult with other creditors for a common purpose – plaintiffs prejudiced because if separate classes had been created the requisite majorities would not have been achieved; and (2) each of the plaintiffs was unfairly prejudiced by the decision to call only one meeting of creditors because there was no good commercial reason for including the insider creditors and, absent a credible explanation from the proponents, the court found that the decision to include the insider creditors was deliberate and designed to bring about the result the defendant desired – this manipulation amounted to abuse of process under s 232(3)(c) Companies Act 1993 – above finding meant that any other problems with the process either did not need to be determined or did not have a causal link to the outcome – Companies Act 1993 gave court a broad discretion to enable it to grant the most appropriate remedy – an order setting aside the compromise preferred option: [CA229.03] and [CA229.04].

*Trends Publishing International Ltd v Advicewise People Ltd* [2017] NZCA 365: unsuccessful appeal from order that creditors' compromise be set aside – Court of Appeal held (1) proponent of compromise bound to differentiate between classes if not to do so would be unfairly prejudicial to creditor or group of creditors – both legal rights and potentially competing economic interests and priorities to be taken into account in evaluating need for separate classes – persons who had irreconcilably different commercial goals should not be required to vote together; and (2) compromise unfairly prejudicial to respondents and court's intervention warranted: [CA229.03], [CA229.04] and [CA232.04].

*Re M Webster Holdings (NZ) Ltd* [2017] NZHC 297: successful without notice application for extension of convening period pursuant to s239AT(3) Companies Act 1993 – appropriate to extend convening period due to: (i) size and complexity of administration; (ii) sale of business best opportunity to maximise return to creditors; (iii) sale process would be complex and time consuming; and (iv) creditors and employees would not be prejudiced by extension as applicants meeting ongoing obligations from trading of business: [CA239AT.02].

*Newland Burling No 10 Ltd v JJ Niven Engineering Ltd* [2017] NZHC 1095: unsuccessful application for stay of liquidation proceedings pursuant to r 31.11 High Court Rules – plaintiff served statutory demand and defendant was unsuccessful in its application to set it aside – plaintiff applied to have defendant placed into liquidation and defendant filed appeal against previous judgment – issues were: (1) whether there was a serious question to be tried; and (2) where the balance of convenience lay – High Court held that (1) weighed in defendant's favour because decision subject of appeal was judge's own decision; and (2) overall interests of justice lay in plaintiff's favour – reasons included: in the public interest that defendant not be able to incur more debt in circumstances where it had admitted it could not pay existing debt, questionable that defendant could satisfy both requirements of the solvency test in s 2 Companies Act 1993, plaintiff entitled to the benefit of the decision made in its favour, and liquidation not inevitable: [CA241.01(3)].

*Commissioner of Inland Revenue (CIR) v Evaluation Consult (New Zealand) Ltd* [2017] NZHC 552: successful application to put company into liquidation – company had failed to comply with statutory demand – company applied for stay so it could repatriate some funds – court held that company had not shown any abuse of position, unfairness or undue pressure by CIR – stay application declined and company put into liquidation: [CA241.01(3)].

*Diamond Milk Formulas Ltd v T.K. (Hong Kong) Ltd (in rec)* [2017] NZHC 774: unsuccessful application for stay of liquidation pending appeal against decision declining leave to file out of time a defence to application for order placing defendant into liquidation: [CA241.01(3)] and [CA290.03].

*Fortune Technology Corporation Ltd v Commissioner of Inland Revenue* [2016] NZHC 2489: unsuccessful urgent application for stay of advertising of liquidation proceeding pursuant to r 31.11 of the High Court Rules and the inherent jurisdiction of the court: [CA241.01(3)].

*Campbell v Marble Point Winery Ltd* [2017] NZHC 1412: plaintiff (husband) successfully sought order placing defendant into liquidation – application opposed by shareholder (wife) – breakdown of marital relationship – court ordered the winding up of company on “just and equitable grounds” despite existence of concurrent Family Court proceedings: [CA241.03(4)].

*McKay Builders Ltd (in liq) v McKay* [2017] NZHC 934: defendants' unsuccessful application for leave to commence proceeding against company in liquidation – plaintiffs' causes of action against defendants included recovery of \$293,129 owed or alternatively recovery of distributions to shareholders or the setting aside of distributions that prejudice creditors – breach of duties owed by first defendant to company – breach of obligations to prepare and keep accurate accounting records and financial statements –

defendants claimed monies owed were employee wages not shareholder drawings: [CA248.03(2)].

*Commerce Commission v Appenture Marketing Ltd (in liq)* [2017] NZHC 1515: successful application by Commerce Commission for leave to continue prosecution against Appenture, that company having gone into liquidation – High Court held requirements of s 248 Companies Act 1993 had been made out – leave granted to continue with prosecution of Appenture: [CA248.03(2)].

*Morton-Jones v Rodney Management Ltd (in liq)* [2017] NZHC 125: unsuccessful application for order terminating liquidation of company (R) – s 250 Companies Act 1993 – liquidators for company (G) opposed application on basis that it was a remaining creditor of R – liquidators of G had lodged proof of claim with Official Assignee – contention for G that it was appropriate for Official Assignee to complete investigations on behalf of remaining creditor before any termination order made – court held that applicant had failed to satisfy it that there were sufficient grounds for exercise of court's discretion to terminate a liquidation order that was validly made – the Official Assignee had been granted the statutory role and had sufficient authority to investigate disputed debt issues – there was no reason to doubt Official Assignee would not carry out its role with the required diligence, objectivity, and independence – for court to re-establish R only for it to be sued over one disputed debt would absolve the Official Assignee of the statutory responsibilities placed on the office – it would turn inside-out the statutory regime which dealt with resolving disputes of debt for companies in liquidation – it was in the public interest that the integrity of this regime be upheld: [CA250.03].

*Adaptable Solutions Ltd v Toon* [2017] NZHC 753: successful application for leave to commence proceedings against respondent liquidator seeking order reversing or modifying decision partially rejecting applicant's proof of debt – s 284 Companies Act 1993: [CA284.02].

*Graham v Arena Capital Limited (in liq)* [2017] NZHC 973: liquidators of company successfully applied for directions under Companies Act 1993 in relation to distribution of assets in liquidation – directions that company's assets be treated as one common pool of assets for distribution to both general unsecured creditors and its investors – further that assets be distributed on pro rata pari passu basis under specific distribution methodology – proposed methodology unsuccessfully opposed by small number of investors: [CA284.06].

*Madsen-Ries v Greenhill* [2016] NZHC 3188: successful claim for compensation against director of liquidated company under s 301

Companies Act 1993 – court held that first defendant had breached s131(1) Companies Act 1993 and that second defendant deemed to surrender its general security under s305(9) Companies Act 1993: [CA284.06], [CA301.10(2)] and [CA305.05].

*McIntosh v Fisk* [2017] NZSC 78: unsuccessful appeal and cross appeal against order for repayment of monies to respondent liquidators – proceeding arose from collapse of group of companies run as Ponzi scheme – appeal to Supreme Court on approved questions: (1) whether order setting aside and for repayment of all or part of payment should have been made, (2) if so, whether order should have been made in relation to whole sum or difference between amount invested and amount paid – Supreme Court held (1) requirements of subpt 6 Property Law Act 2007 met – payment by Ross Asset Management (RAM) was "disposition" of "property", RAM was debtor and insolvent at time payment made and payment was with intent to prejudice creditor – wording of subpt6 more easily applied to orthodox creditor/debtor situation but present facts not outside scope of provision – investors as well as having beneficial interest in comingled trust funds were also creditors, (2) requirements for claim under the Companies Act 1993 also met – payment of money by company whether of company's own money or not was "transaction" within meaning of definition in s 292(3) Companies Act 1993 – transaction was insolvent transaction under s 292(2) Companies Act 1993 which enabled another to receive more than likely to receive in liquidation, (3) (majority, Glazebrook J dissenting) appellant provided value for initial payment of \$500,000 and had defence in respect of that sum under s 296(3)(c) and s 349(1) Companies Act 1993 – no basis for finding \$454,047 component of payment received was for value or valuable consideration – no sustainable basis for saying \$954,047 was real and substantial value for quantified antecedent debt of \$500,000, (4) appellant had not shown he changed position in reliance on validity of RAM payments, and (5) (by majority, Glazebrook J dissenting) appeal and cross appeal dismissed – payment of \$454,047.62 being difference between amount paid to appellant and \$500,000 he invested correctly set aside – directions as to determination of interest: [CA292.03(1)] and [CA296.03].

*Ebert Construction Ltd v Sanson* [2017] NZCA 239: successful appeal against decision setting aside pre-liquidation payments and transfer of apartment – order for payment of \$1,603,892 by appellant construction company to respondent liquidators with interest from date of liquidation: [CA292.03(5)].

*David Browne Contractors Ltd v Petterson* [2017] NZSC 116: unsuccessful appeal against order for repayment of monies pursuant to transactions set aside under s 294 Companies Act 1993 – discussion of courts' general discretion to deny liquidator a recovery and for court not to order payment if

to do so would cause unfairness to a creditor: [CA292.04(1)(b)] and [CA295.01(5)].

*ITM Investments (Waikato) Ltd (in liq) v Martin* [2017] NZHC 665: proceedings filed by liquidators to seek recovery of monies from former sole director and shareholder of company (M) – liquidators successfully claimed M had breached ss 131, 135 and 137 Companies Act 1993 – M was found not to have breached s 136 Companies Act 1993 – M ordered to pay compensation of \$166,087.04 under s 301 Companies Act 1993 as well as \$48,635 plus interest in relation to unpaid advances made by the company to a trust: [CA301.06(1)].

*Kiwi Best Realty Limited (in liq) v Kashkari* [2016] NZHC 2738: successful application for orders under s 301(1)(b) Companies Act 1993 that respondent director pay compensation for breach of duties under Companies Act 1993 – High Court held that respondent breached duty to act in good faith, not to trade recklessly and duty not to incur obligations without belief in reasonable grounds of performance – judgment in favour of plaintiffs for a sum representing total debt incurred by the company to IRD from specified date less 25 per cent of that amount due to IRD's delay in commencing liquidation proceedings and \$4,272 being respondent's overpayment of his current account: [CA301.10(4)].

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