Restructuring and Insolvency 2022/23

The year that was and what's to come

Russell McVeagh

18 February 2022

Court exercises discretion to grant examination orders

The Court of Appeal affirmed the High Court's exercise of its discretion to grant orders that a company director be examined in Court notwithstanding that director was involved (as defendant in one instance and as the director of a defendant company in the other) in separate legal proceedings that have been commenced by the liquidator.

24 February 2022

Ukraine invasion commences with tragic consequences

Whilst the world is counting the human costs of the shocking Ukraine invasion, on the other side of the world in New Zealand we are experiencing increasing costs of imports due to global supply shocks to energy, metals, wheat, maize and fertilisers, which is contributing to our rising domestic inflation. Additionally, in response to the conflict, New Zealand has imposed and enforced economic sanctions targeting specific people, companies, assets and services associated with Russia's invasion of Ukraine. Read more in our Watching Brief here.

12 May 2022

Restatement of the requirements for administrators exercising an equitable lien

The New South Wales Supreme Court holds that an administrator's equitable lien is claimable only where (a) the work was done and costs incurred were reasonable for the purpose of maintaining, preserving or realising the relevant property; and (b) the work was done and the costs incurred exclusively for those purposes. The case demonstrates the benefits of administrators endeavouring to put in place an arrangement for costs and expenses, including trading expenses, with secured creditors where there are unlikely to be sufficient assets subject to the administrator's statutory lien, and the risks if they do not do so.

16 June 2022

Receivers are entitled to retain a fund to defend allegations of breach of duty

The High Court has clarified that receivers are entitled to retain a fund out of secured property to protect themselves for both their remuneration and legal costs incurred in defending themselves against allegations of breach of duty. Receivers will generally have an indemnity out of, and lien securing the indemnity in respect of, secured property at least until the issue of liability has been determined.

27 September 2022

Deposit Takers Bill introduced into Parliament

The Deposit Takers Bill, which forms the third of the trilogy of Bills that have occurred as a result of the Government's review of the Reserve Bank of New Zealand Act 1989 that commenced in 2017, had its first reading on 27 September 2022. Key changes include the introduction of a Depositor Compensation Scheme (with an increased threshold of $100,000) and the strengthening of the supervisory and enforcement powers of the Reserve Bank of New Zealand (RBNZ) to allow it to act before deposit takers are in trouble. More information on the exposure draft of the Bill can be found here and from the RBNZ here. The Bill is expected to come into law after receiving Royal Assent in mid-to-late 2023.

28 September 2022

Australia commences corporate insolvency law review

The Federal Government announces an inquiry into the effectiveness of Australia's corporate insolvency laws, focussing on (amongst other things) recent and emerging trends in the use of corporate insolvency and related practices in Australia and the role of corporate insolvency practitioners and various government agencies. We expect that the outcomes of this review will be of interest to New Zealand regulators and practitioners alike given the similarities of the laws across both jurisdictions, the similarities in current economic conditions facing each country and the spotlight in New Zealand on directors' duties.

5 October 2022

Confirmation of the Sequana sliding scale creditors' duty in the UK

The United Kingdom Supreme Court confirms that directors of an insolvent or a near-insolvent company must consider the interests of creditors and adopt a sliding scale approach such that:

- once a company becomes financially insolvent (or is approaching insolvency), the directors are required to consider creditors' interests and balance those interests against shareholders' interests where the two conflict. The greater a company's financial distress, the greater the attention that must be paid to the position of creditors; and
- at the point where an insolvent liquidation or administration is inevitable, the interests of creditors become paramount and must be prioritised by the company's directors.

This decision is likely to be relevant to the duty of good faith and to act in the best interests of the company in section 131 of the NZ Companies Act 1993 and may become apparent shortly, after the Supreme Court of New Zealand heard submissions on the case as part of the Mainzeal proceedings, in the context of appeals regarding section 135 (reckless trading) and section 136 (duty in relation to obligations). Our observations on the *BTI 2014 LLC v Sequana and others* decision can be found here.

12 October 2022

Australia rejects set-off of voidable preference liability against separate debt to creditor

Australia's top court, the High Court of Australia, holds that a creditor does not have the benefit of set-off for a liability to repay an unfair (voidable) preference against a separate debt owed to it by the company in liquidation. The liability to repay the unfair preference does not arise until after any insolvency set-off occurs, and has a lack of mutuality with debts owed to the creditor.

18 October 2022

Australia moves towards NZ position in abolishing "peak indebtedness" approach to voidable transactions

The High Court of Australia holds that the "peak indebtedness rule" does not apply in Australia in respect of voidable transaction proceedings, such that an Australian liquidator can no longer choose the point of "peak indebtedness" when considering a series of transactions that make up a "running account" so as to maximise the value of the potential recovery in a voidable transaction application. This brings the Australian position broadly into line with the New Zealand position established by the Court of Appeal in *Timberworld Ltd v Levin*, and recognises that a creditor who continues to supply a company on a running account when potentially near insolvency likely benefits creditors as a whole.

11 November 2022

Are we in the midst of a Crypto-winter?

2022 saw significant disruption to technology industries, particularly crypto based exchanges, platforms and related funders. In the US, tech stocks fell more than 30% in 2022, significant lay-offs have been announced and regulators have turned their attention to these sectors across the Commonwealth. Notable collapses include FTX (a major cryptocurrency exchange platform) and crypto focussed lenders, Celsius and Genesis. Closer to home, receivers have been appointed to BNPL company Openpay, with further distress expected in that industry in 2023.

16 November 2022

Are they documents of the company or of the liquidator?

A liquidator obtains orders requiring a law firm instructed by his predecessor to carry out a privilege review of certain files it holds and to deliver up documents that relate to the business accounts or affairs of the companies in liquidation to the new liquidator. A liquidator can only claim legal privilege over documents relating to the liquidator's personal affairs, and law firms cannot assert a lien for unpaid fees for work carried out for the former liquidator as a basis not to hand over company documents to a new liquidator. This decision highlights the importance of correctly identifying the (often multiple) parties to the lawyer-client relationship in relation to insolvency instructions and the potential for advice provided to one practitioner to be available to their replacement.

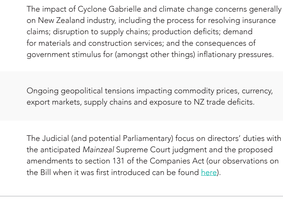
19 December 2022

UK Report on 2020 restructuring reforms

The UK Insolvency Service have published a report on the restructuring and insolvency legislative amendments that came into force in 2020 – known as "CIGA". CIGA implemented three new R&I measures (in addition to temporary COVID-19-related relief): a moratorium process providing at least 20 business days breathing space from certain enforcement action, restrictions on contractual provisions purporting to terminate contracts upon insolvency, and restructuring plans. The review concluded that the three permanent CIGA amendments have been largely successful. Of particular interest for the New Zealand market will be the growing use of the restructuring plan in the UK mid-market (which bears the greatest similarity to our market) and the recommendations to further streamline the restructuring plan process to make it more accessible (and affordable) for debtors.

31 December 2022

Rising distress? 2022 in statistics



Source: OCR (RBNZ), Inflation (Stats NZ), Liquidations (Companies Office).

Looking ahead in 2023

Implications of rising interest rates, inflationary pressures and central bank monetary policy for a variety of sectors in New Zealand and real economic growth.

Distressed/opportunistic M&A and debt trading opportunities in response to liquidity needs and demands for capital.

The impact of Cyclone Gabrielle and climate change concerns generally on New Zealand industry, including the process for resolving insurance claims; disruption to supply chains; production deficits; demand for materials and construction services; and the consequences of government stimulus for (amongst other things) inflationary pressures.

Ongoing geopolitical tensions impacting commodity prices, currency, export markets, supply chains and exposure to NZ trade deficits.

The Judicial (and potential Parliamentary) focus on directors' duties with the anticipated Mainzeal Supreme Court judgment and the proposed amendments to section 131 of the Companies Act (our observations on the Bill when it was first introduced can be found here).

Any questions? Talk to one of our experts

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