IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2018-404-001667
[2018] NZHC 2547

UNDER	Section 284 of the Companies Act 1993
IN THE MATTER OF	CBL INSURANCE LIMITED (IN LIQUIDATION)
IN THE MATTER OF	An application by KARE JOHNSTONE and ANDREW GRENFELL for directions in relation to the interim liquidation of CBL INSURANCE LIMITED (IN INTERIM LIQUIDATION)

Hearing:	24-25 September 2018
Appearances:	I J Thain and A E Murray for Interim Liquidators A S Ross QC and J E M Lethbridge for Elite Insurance N S Gedye QC for Reserve Bank R B Stewart QC, M Kersey and A J Nelder for LBC Holdings D M Salmon and J P Cundy for CBL Insurance J Anderson QC and J A MacGillivray for Alpha Insurance
Judgment:	28 September 2018
Reissued:	1 October 2018

JUDGMENT OF COURTNEY J

This judgment was delivered by Justice Courtney
on 28 September 2018 at 3.30 pm
pursuant to R 11.5 of the High Court Rules

Registrar / Deputy Registrar

Date……..

Introduction

[1] This is an application by the interim liquidators of CBL Insurance Ltd (CBLI) for directions under s 284 of the Companies Act 1993. They wish to enter into a compromise with CBLI's largest creditor, Elite Insurance Ltd (Elite) and seek a direction that they have the power to do so.

[2] The agreement that the Interim Liquidators have negotiated with Elite would extinguish CBLI's liabilities to Elite in return for a mixture of cash and non-cash assets (the commutation agreement). The Interim Liquidators say that the agreement would benefit all of CBLI's creditors, not just Elite. They wish to execute the commutation agreement now, even though the substantive liquidation application is to be heard in November 2018, only seven weeks away. It is said that if the agreement is not executed immediately the same terms are unlikely to be available again.

[3] As filed, the application sought a number of directions that would have seen the Court sanction the terms of the proposed agreement itself. However, Mr Thain, for the Interim Liquidators, acknowledged that the merits of the proposal were not a matter on which the Court could form a view. I am concerned only with the scope of the Interim Liquidators' powers; the exercise of those powers is a matter for the commercial judgment of the Interim Liquidators. The argument therefore proceeded on the basis that the only direction sought was one: "that the Interim Liquidators, acting on behalf of CBLI, have the power to enter into the transaction with Elite".

[4] The Reserve Bank of New Zealand (RBNZ), which is CBLI's regulator under the Insurance (Prudential Supervision) Act 2010 (IPSA), consents to the application.[1] There is, however, strenuous opposition from CBLI's second largest creditor, Alpha Insurance Ltd (Alpha), CBLI itself (acting through two of its directors) and CBLI's shareholder, LBC Holdings Ltd (in administration) (LBC). They say that the creditors as a whole would not be better off as a result of the commutation agreement and that the Interim Liquidators do not have the power to enter into it.

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1 The RBNZ's consent is not required under IPSA but is a term of the commutation agreement.

Confidentiality and access to court documents

[5] Both the liquidation application (CIV-2018-404-306) and the present directions application are subject to confidentiality orders made on 27 February and 9 August 2018 respectively. The confidentiality order in the present proceeding prohibits publication of confidential information submitted to the Court in relation to the application, save for the notice to creditors published on the McGrathNicol website, and prevents any search of the Court file except by application on three days' notice.

[6] A member of the media was present in court on the first day of the hearing and for a short time on the second day. There were conflicting views as to whether the confidentiality orders should be continued and the extent to which there should be publication of the evidence and argument relating to the application. Because of the limited time available, I directed that the confidentiality orders would continue for the duration of the hearing and permitted counsel to file submissions on the point later.

[7] The Interim Liquidators, CBLI and LBC seek (to varying degrees) to maintain confidentiality orders in relation to both access to the court file and publication of matters addressed during the hearing. RBNZ considers that the confidentiality orders should be lifted. Elite and Alpha are content to see the confidentiality orders lifted.

[8] The starting point, naturally, is the principle of open justice. In relation to access to the court file, the principle of open justice is accorded greater weight during the substantive hearing than either before or after.[2]

[9] In *Erceg v Erceg* the Supreme Court said, in relation to reporting on court proceedings:[3]

> … The principle means not only that judicial proceedings should be held in open court, accessible by the public, but also that media representatives should be free to provide fair and accurate report of what occurs in court. Given the reality that few members of the public will be able to attend particular hearing, the media carry an important responsibility in this respect …

[10] There can be no doubt that the present proceeding and the liquidation proceeding raise matters of considerable public interest. The potential failure of a

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2 Senior Courts (Access to Court Documents) Rules 2017, r 13(b).
3 *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310 at [2].

substantial insurer, which is subject to regulatory oversight by RBNZ, is a matter in which the public generally has an interest. It is also significant that there are a number of smaller creditors who have not participated in the proceedings to date but stand to be affected by them.

[11] The Interim Liquidators seek to maintain orders prohibiting the publication of confidential information, but acknowledge that a question arises as to what amounts to confidential information. They say that the only truly confidential information is that concerning the amount of the consideration provided for under the commutation agreement and the break-down of that consideration (particularly the cash component and the value ascribed to the various assets for the purposes of the agreement). They also consider that supporting schedules referring to the consideration or to the effect on creditors is confidential. The Interim Liquidators are concerned that publication of this information could prejudice the interests of both CBLI and its creditors in relation to future negotiations (whether or not the commutation agreement with Elite proceeds).

[12] CBLI does not consider that the Interim Liquidators' proposal as to how to demarcate confidential information from that which could be published is workable. It is concerned that there is extensive confidential material beyond that which the Interim Liquidators are concerned about, and also notes that evidence filed in the liquidation proceedings that is (and continues to be) suppressed was referred to in this application. That material includes serious allegations made against individuals within CBLI which are disputed and to which the individuals concerned have yet to respond.

[13] LBC's position is that it filed its evidence in this proceeding (and in the liquidation proceeding) on the basis of the confidentiality orders in place, and accordingly included information in reliance on those orders. In particular, it says that information contained in the evidence of Mr Gibson, Mr Christer and Mr Jones is commercially sensitive and includes information about the proposed Deed of Company Arrangement (DoCA) originally provided on a confidential and without prejudice basis. It seeks to maintain the confidentiality orders pending further consideration of this judgment, with a view to a redacted version of this judgment being published.

[14] Mr Gedye, for RBNZ, does not consider there to be any ongoing justification for the confidentiality order. He sees nothing in the commutation agreement that warrants confidentiality. He does not regard the draft Scheme of Arrangement and draft DoCA recently put forward as requiring confidentiality. He considers that the principle of open justice should prevail so that smaller creditors and the public may be apprised of the proceedings.

[15] My views are as follows. There is genuine public interest in the nature of the application for directions, the outcome and the reasons for that outcome. My decision does not contain much in the way of information that (in my view) could fairly be described as commercially sensitive. This judgment may be circulated only among counsel and parties until 12pm, Monday 1 October 2018. Counsel may file memoranda by 10 am on Monday 1 October 2018 advising of any redactions sought. I will determine the extent to which the decision should be redacted and the judgment (in redacted form if necessary) will be available for publication after 3 pm on 1 October 2018.

[16] I am, however, satisfied that much of the actuarial and financial analysis contained in the evidence is potentially commercially sensitive. This is particularly so, given that the liquidation application is soon to be determined and, in the event a liquidator is to be appointed, it would be undesirable to take any step now that may compromise his or her desired approach. I am also conscious that efforts are being made by all parties to find a way forward that will be to the benefit of creditors generally. Whether that ultimately takes the form of a scheme of arrangement or a DoCA, parties should have the freedom to negotiate frankly without the risk of commercially sensitive material finding its way into the public arena. The existing confidentiality orders will continue in relation to submissions made and material filed in this proceeding until the scheduled date of hearing of the liquidation application (or earlier by consent).

[17] Finally, and on a slightly different point, LBC seeks a variation of the confidentiality orders for the purposes of making information available to LBC's creditors, principally ANZ Bank New Zealand Ltd, Australia and New Zealand Banking Group Ltd, Industrial and Commercial Bank of China (NZ) Ltd and Bank of China (NZ) Ltd. Access is sought for the purposes of assisting those creditors to

consider a proposal for the restructuring of CBLI by way of a DoCA that would be conditional on any DoCA put in place in relation to CBLI.

[18] RBNZ consents to the access sought. The Interim Liquidators consent to access being provided to details of the Elite commutation proposal (including the NBS assignment) and balance sheet adjustments put into evidence by the Interim Liquidators and Finity. CBLI opposes access on the basis that LBC's creditors do not have a sufficiently direct interest in the subject matter of the proceeding to warrant access to the court file. I consider that there is a sufficiently close commercial interest to allow access to the material to which the Interim Liquidators consent. I order accordingly.

Jurisdiction

[19] The application is brought under s 284 of the Companies Act 1993 which empowers the Court to "give directions in relation to any matter arising in connection with the liquidation".[4] A liquidator who obtains and acts in accordance with such a direction is entitled to rely on having done so as a defence to a claim in relation to anything done or not done in accordance with the direction.[5] As noted at the outset, the Court will generally not make a direction where the decision to be made is, in truth, a commercial decision for the liquidator or interim liquidator.[6] Directions may be given even where the decision is a commercial one, where the liquidator is accused of acting unreasonably.[7]

[20] The general purpose of directions under s 284 is described in *Heath & Whale on Insolvency*:[8]

> The nature of a liquidator's duties means that, on occasion, difficult legal or commercial decisions may need to be made by him or her. On legal points, the liquidator is entitled to seek directions from the High Court under s 284(1)(a) of the Act. However, the court will rarely assist if purely

4 Companies Act 1993, s 284(1)(a).
5 Companies Act 1993, s 284(3).
6 *Finnigan v Butcher* [2012] NZHC 810 at [17]-[18]; *Re Spedley Securities Ltd (In Liq)* (1992) 10 ACLC 1742 (NSWSC) at 1744; *Re Ansett Australia Ltd (No 3)* [2002] FCA 90, (2002) 115 fcr 409 at [65].
7 *Re Addstone Pty Ltd (In Liq)* (1997) 25 ACSR 357 (FCA) at 363.
8 Paul Heath and Michael Whale *Heath & Whale on Insolvency* (loose-leaf ed. Lexis Nexis) at [22.1] and [22.8(e)], citing (among others) *Finnigan v Butcher*, above n 6 at [17]–[18]). See also *Ansett Australia Ltd (No 3)*, above n 6, at [65].

> commercial decisions are in issue; those are aspects with which the liquidator should deal.
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> …
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> … The courts have indicated that they will not make a commercial decision for the liquidator except where a liquidator's decision is criticised by creditors as being unreasonable or as evidence of bad faith.

[21] Mr Salmon, for CBLI, took the position that the direction now sought is not truly a direction but more in the nature of declaratory relief and could not be granted under s 284.[9] He acknowledged that a declaration of the type sought could be made under the Declaratory Judgments Act 1908, but would not attract the protection of s 284(3). In making this submission, he drew attention to the specific power at s 284(1)(g) to make a declaration as to the validity of a liquidator's appointment, suggesting that it indicated that it was the only type of declaration possible under s 284(1).

[22] I do not accept that the scope of "directions in relation to any matter arising in connection with the liquidation" as provided for in s 284(1)(a) is so narrow. In *Finnigan v Butcher*, for example, Associate Judge Bell dealt with an application for directions by liquidators that sought, among other things, declarations that the company was the registered proprietor and owner of a property (to the exclusion of the company's shareholders) and declarations that they were entitled to sell the property. The Associate Judge made those declarations along with other orders described as directions under one application brought under s 284.

[23] It does seem from the decision that there was no argument about whether a declaration could constitute a "direction" for the purposes of s 284. But in my view the Associate Judge was right to treat s 284(1)(a) as sufficiently wide to encompass the making of declarations of the kind being sought. I do not see the specific identification at s 284(1)(g) of declarations regarding the validity of a liquidator's appointment as precluding other directions that are declarative in nature being made under s 284(1)(a).

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9 A court can make a declaration under s 284(1)(g) but only as to whether or not the liquidator was validly appointed or validly assumed custody or control of the property.

[24] I note, too, that there have been other cases in which directions have been given that might, strictly, be regarded as declarative in nature. For example, in *Re North Coast Wood Panels Pty Ltd*, the Federal Court of Australia considered that the power to make directions about "a matter arising" in connection with the functions and powers of administrators under the Corporations Act 2001 permitted the Court to direct that administrators may properly and justifiably enter into an agreement to sell the company's business undertaking.[10]

[25] I accordingly proceed on the basis that the direction sought does fall within the scope of s 284(1)(a).

Some background

[26] Until early this year, CBLI operated as an insurer and reinsurer in New Zealand and in other jurisdictions. It was licensed in New Zealand and subject to oversight by RBNZ under IPSA. Only a very small proportion of CBLI's business was written in New Zealand, however. Its greatest exposure was as a reinsurer of risks written in overseas jurisdictions. A substantial portion of that business was the reinsurance of risks in the French construction industry underwritten by Elite, which is based in Gibraltar. That business is acknowledged to have a long "tail" of claims and it is expected that claims could continue to be made on CBLI for ten years or more.

[27] Elite is subject to regulation by the Gibraltar Financial Services Commission (GFSC). Following intervention by the GFSC, Elite ceased writing new business in 2017 and is now in run-off, having been acquired by another substantial insurance group, Armour Group Ltd. GFSC's intervention was prompted by concern that Elite had significantly under-reserved in relation to its French construction book. That concern led to inquiries by RBNZ into the level of CBLI's own reserving in respect of its exposure to Elite.

[28] On 23 February 2018, CBLI was placed in interim liquidation on RBNZ's application pending determination of the substantive liquidator application.[11] The grounds advanced to support the application for interim liquidation were that CBLI was in breach of its solvency margin under IPSA, that it had breached RBNZ's specific

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10 *Re North Coast Wood Panels Pty Ltd* [2011] FCA 776, (2011) 29 ACLC 11-049.
11 *Reserve Bank of New Zealand v CBL Insurance Ltd* [2018] NZHC 264.

directions not to make payments to offshore entities by making substantial payments of that sort, and that RBNZ considered that CBLI's assets were in jeopardy.

[29] Elite is CBLI's largest creditor by some margin, accounting for approximately 68 per cent of CBLI's claims liabilities. Alpha is the next largest creditor. The balance of CBLI's exposure is represented by claims liabilities to CBL Insurance Europe DAC (under administration) (CBLIE) and a number of smaller creditors, including policy bond and security holders in relation to unearned premium liability and outstanding claims liability and trade creditors.

[30] CBLI's ultimate exposure to Elite is, of course, unknown. Actuarial analysis has been undertaken on three different bases, one by PWC New Zealand prior to the interim liquidation and two by the specialist actuarial firm, Finity, following the interim liquidation. **This part of this paragraph is redacted and will be omitted from all copies of this decision other than the original on the Court file and the copy delivered to counsel.**

[31] The commutation agreement is based on the PWC NZ figure of $X and would see CBLI's liability to Elite removed from its balance sheet in exchange for consideration totalling $X. That figure is made up of cash of NZ$X with the balance in non-cash assets. **Part of this paragraph is redacted and those parts will be omitted from all copies of this decision, other than the original on the Court file and the copy delivered to counsel.** The latter include the assignment of CBLI's rights to Elite reinsurance receivables, the release of CBLI's rights in reinsurance collateral held by Elite, assignment of rights in relation to cash collateral held under agreements with US insurers, assignment of a loan to CBL Corporation Ltd and assignment of rights in respect of a deposit with the National Bank of Samoa (NBS). The value ascribed to some of the non-cash assets differs from the face value of the asset; there is debate about the true value or recoverability of them.

[32] There is said to be urgency to finalise the agreement because of the possibility that the consideration flowing to Elite would bring it back into a compliant position as regards its minimum capital requirements, thereby allowing it to conduct a solvent run-off. The Interim Liquidators are concerned that if the transaction does not

proceed, Elite may either be placed in liquidation or receive fresh funds from its new shareholder. They consider that a better deal is unlikely in either case.

[33] The Interim Liquidators, relying on the Finity analyses, consider that the remaining creditors will be in a better position as a result of removing the exposure to Elite than if Elite were to be treated in the same way as all other creditors. They say that not only are the Finity analyses more comprehensive and reliable, but the risk of CBLI's exposure increasing is already demonstrable by claims figures released over the past few months in relation to the Olimpia book of business. The Interim Liquidators are firmly of the view that fixing CBLI's liability now and extinguishing it through the commutation agreement will allow a much better outcome for remaining creditors.

[34] LBC and CBLI rely on an alternative analysis by one of the administrators of LBC, Brendon Gibson, who considers that the proposal is not in the best interests of the creditors as a whole and, in particular, that Alpha and the smaller creditors who do not hold collateral to secure their debts will be worse off. In addition, LBC and the directors of CBLI who are opposing the transaction say that a (DoCA) which has been proposed recently would produce a better result for all creditors.

[35] Significantly, all parties acknowledge that a commutation agreement with the three insurance creditors who are not secured (Elite, Alpha and CBLIE) is desirable. Within the last month, the administrators of LBC have put forward a DoCA that includes such a feature. From comments made during the hearing, it seems unlikely that the terms of this DoCA will be acceptable to (at least) the RBNZ, so as to avoid the impending liquidation application. However, there have also been negotiations between Elite and Alpha as to a possible Scheme of Arrangement, in the event that the present application does not succeed. That Scheme would involve the commutation of CBLI's liabilities to Elite and Alpha and CBLIE.

The powers of an interim liquidator in New Zealand

[36] The primary role of an interim (or provisional) liquidator has, historically, been to preserve the status quo pending the hearing of the liquidation application so that the

company's assets are available for distribution to the creditors by the liquidator.[12] It is common ground that the commutation agreement would take the Interim Liquidators beyond that relatively narrow scope. The question raised by this application is whether the role of an interim liquidator should continue to be regarded so narrowly in New Zealand.

[37] Section 246 of the Companies Act empowers the Court to appoint an interim liquidator if satisfied that it is necessary or expedient for the purpose of maintaining the value of the company's assets. The consequent rights and powers (unless limited by the Court) are those of a liquidator to the extent necessary or desirable to maintain the value of the company's assets. Section 246 relevantly states that:

> (1) If an application has been made to the court for an order that a company be put into liquidation, the court may, if it is satisfied that it is necessary or expedient for the purpose of maintaining the value of assets owned or managed by the company, appoint a named person, or an Official Assignee for a named district, as interim liquidator.
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> (2) Subject to subsection (3), an interim liquidator has the rights and powers of a liquidator to the extent necessary or desirable to maintain the value of assets owned or managed by the company.
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> (3) The court may limit the rights and powers of an interim liquidator in such manner as it thinks fit.
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> …

[38] Relevantly, the powers of a liquidator include the power to compromise a creditor's claim.[13] But, of course, that power can only be exercised by an interim liquidator for the statutory purpose of maintaining the value of the company's assets.

[39] The powers of the interim liquidator under s 246 are expressed more broadly under the Companies Act 1993 than under its predecessor. Under the Companies Act 1955, the powers conferred on a provisional liquidator were specific, to "take into his custody, or under his control, all the property and things in action to which the company is or appears to be entitled".[14] The cases decided under that provision are clear that the purpose and power of a provisional liquidator was to maintain the status quo. In *Re Chateau Hotels Ltd*, Roper J adopted Street J's observation in *Re Carapark*

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12 *Re Dry Docks Corporation of London* (1888) 39 Ch D 306.
13 Companies Act 1993, s 260(2) and sch 6(e).
14 Companies Act 1955, s 238.

Industries Pty Ltd that "… a provisional liquidator's primary duty is to preserve an existing status quo with the least possible harm to all concerned …".[15]

[40] The Interim Liquidators invited me to view the powers conferred by the Companies Act as more expansive and flexible than merely maintaining the status quo. I agree that the change in wording under s 246, with its broader objective of maintaining the value of the company's assets, signalled potentially more flexible powers. The Law Commission anticipated that the use of "value" clarified that the liquidator was not required to preserve assets if their value was declining.[16] It gave the example of a provisional liquidator who, confronted with perishable goods, would be entitled to sell the goods in order to preserve their value. But that was only an example and I do not think that the power to take steps to maintain the value of assets is necessarily limited to those circumstances. I respectfully disagree with Brown J's view in *Chesterfields Preschools Ltd v Commissioner of Inland Revenue*, that save in the case of "truly perishable property", interim liquidators would not have the power to dispose of a company's property.[17]

[41] Nevertheless, cases decided under s 246 have continued to treat the purpose and powers of an interim liquidator in a very similar way to how the powers conferred under the previous Act were treated. In *Elders Pastoral Holdings Ltd v New Zealand Ostriches Ltd*, Williams J described the task of the interim liquidator under s 246 as being "to preserve not enhance the existing position regarding the company's assets in an independent and neutral way".[18] Likewise, in *Shen v An Ying International Financial Ltd*, Heath J considered that the statutory objective of s 246(1) was "consistent with the need for an interim liquidator to preserve assets pending disposition of the liquidation proceedings".[19] Heath J considered that the three-stage test developed under the previous legislation for determining whether appointment of

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15 *Re Chateau Hotels Ltd* [1977] 1 NZLR 381 (SC) at 382, citing *Re Carapark Industries Pty Ltd* [1967] 1 NSWR 337 at 341.

16 Law Commission *Company Law Reform and Reinstatement* (NZLC R 9, 1989) at [663]. See also Paul Heath and Michael Whale, above n 8, at [20.12].

17 *Chesterfields Pre-schools Ltd v Commissioner of Inland Revenue* [2017] NZCA 624 at [12].

18 *Elders Pastoral Holdings Ltd v New Zealand Ostriches Ltd* HC Rotorua M2/99, 8 February 1999, citing *Re Chateau Hotels Ltd*, above n 15; *McCallum v Acoustical Materials Supplies Ltd* (1988) 8 NZCLC 261,556 at 261,559 and *Re Carapark Industries Pty Ltd*, above n 15, at 341.

19 *Shen v An Ying International Financial Ltd* HC Auckland CIV-2006-404-3088, 28 July 2006 at [12].

an interim liquidator was still appropriate.[20] That test requires the Court to be satisfied that the company's assets are in jeopardy, whether the status quo should be maintained and whether the interests of creditors are safeguarded.

[42] Mr Thain, however, argued that other cases, both here and overseas, demonstrate availability of a more flexible role for interim liquidators. He relied on *Goodson v Wingate Two Ltd*, in which Associate Judge Gendall (as he then was) made orders that, in addition to the statutory powers conferred, the interim liquidator was to have additional powers, including to sell a property owned by the company and, though he declined to direct the payment of part of the proceeds to one shareholder, nevertheless contemplated that the liquidator may be entitled to apply some "creative or what may appear to be unusual solution" to sustain the sale and purchase agreement.[21] But the circumstances were unusual; there was an existing sale and purchase agreement in respect of the property, the company was facing a mortgagee sale of the property and the prospective purchaser represented a joint venture associated with the interests of one of the shareholders who required a distribution from the sale proceeds to provide his share of the equity.

[43] The decision (clearly made in urgent circumstances) is of limited assistance. I do not accept that the Court can confer "additional powers" on an interim liquidator, given that s 246(3) only permits it to limit the statutory powers, not expand them. In any event, I do not see why the sale of the property by the interim liquidator in these circumstances should be regarded as exceptional; completing the sale of a property that is already subject to an agreement and in the face of a mortgagee sale for (apparently) market value can hardly be regarded as other than maintaining the value of that asset. This is the same point made by Bowen CJ in *Re Codisco Pty Ltd*:[22]

> Because [the interim liquidator] is appointed to preserve the assets and undertaking of the company pending the hearing of the petition to wind up, his task generally will be to preserve the existing position, to maintain the *status quo* … If he departs from this role, and seeks to exercise the powers which have been conferred upon him for other purposes, he risks the disapproval of the Court. The position is not that his power of sale … is different from that of a liquidator … it is that he may be unable to exercise it effectively to sell the assets and undertaking, by the Court's refusal to approve what he has done.

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20 *Robert Bryce & Co Ltd v Chicken & Food Distributors Ltd* (1990) 5 NZCLC 66,648 (HC).
21 *Goodson v Wingate Too Ltd* HC Wellington CIV-2008-485-1942, 11 September 2008 at [23].
22 *Re Codisco Pty Ltd* (1974) CLC 40-126 at 27,906 (NSWSC).

> However, cases arise where the only way to preserve the assets and undertaking of a company, or at least their value for creditors and contributories, may be to sell them quickly and to do so on terms. Where this is so, having the power to sell in this way, subject to the Court's approval, a provisional liquidator may exercise it, and the Court, if it thinks fit, may approve.
>
> Therefore, I reject the argument that a provisional liquidator lacks power to sell …

[44] There do not appear to have been any other New Zealand cases from which it could be inferred that the powers of an interim liquidator are to be regarded as wider and more flexible than they have been viewed previously.

[45] There are a number of English texts and authorities that indicate a more flexible approach to the role of the provisional liquidator in that jurisdiction. The learned authors of *Lightman & Moss on the Law of Administrators and Receivers of Companies* comment that "[t]he rescue culture now prevalent in insolvency has led to provisional liquidation being treated, where appropriate, in ways similar to administration".[23] Likewise, the learned authors of *Corporate Insolvency: Law and Practice*, after acknowledging that the objective of appointing a provisional liquidator is to protect the company and its creditors by preventing the assets of the company disappearing before the winding-up order has been made, comment (in a footnote) that "the power to appoint is stated in general terms and the modern tendency is not to restrict or confine its possible application".[24] This was a reference to the UK Insolvency Act 1986, s 135(4), which states that "[t]he provisional liquidator shall carry out such functions as the Court may confer on him".

[46] The English authorities must be approached keeping firmly in mind that provisional liquidators in England and Wales may have much wider powers conferred on them than those possible under New Zealand legislation. The cases on which Mr Thain relied (*Smith v UIC Insurance Co Ltd*,[25] *Daewoo Motor Co Ltd v Stormglaze*

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23 Gavin Lightman and others (eds) *Lightman and Moss on the Law of Administrators and Receivers of Companies* (6th ed, Sweet & Maxwell, London, 2017) at 2-052.

24 Edward Bailey and Hugo Groves: *Corporate Insolvency: Law and Practice* (5th ed, Lexis Nexis, Wellington, 2017) at fn 4, citing *Re Namco Ltd* [2003] EWHC 989 (Ch), [2003] 2 BCLC 78, [2003] BPIR 1170; *MHMH Ltd v Carwood Baxter Holdings Ltd* [2004] EWHC 3174 (Ch), [2006] 1 BCLC 279, [2005] BCC 536.

25 *Smith v UIC Insurance Co Ltd* [2001] BCC 11 (QB).

UK Ltd,[26] *Re Arm Asset Backed Securities SA*[27] and, in Hong Kong, *Re China Solar Energy Holdings Ltd*[28]) are all examples of that very different legislative basis.

[47] In *Smith* (decided in the context of an application for security for costs in which the issue was whether the rules on payment of liquidation expenses which applied to companies in liquidation should also apply to those to which provisional liquidators had been appointed) the Judge noted that the provisional liquidators had been:[29]

> … given very wide-ranging functions and powers, not only to get in the assets and deal with the affairs of the company in general terms but more particularly to prepare and propose a scheme of arrangement … for the approval of creditors and the ultimate approval of the court.

[48] In *Daewoo*, the Court was dealing with a situation in which provisional liquidators in England applied to transmit the proceeds of asset sales in England and Wales to a receiver appointed by the Korean Court. But the decision records that the provisional liquidators had been appointed "essentially to assist the Korean receiver" and, moreover, all of the creditors (including the three who would be disadvantaged by the transfer of funds) consented to the application.

[49] In *Re Arm Asset Backed Securities*, the Court acknowledged the practice of provisional liquidators being appointed in a wide variety of circumstances, including to deal with insolvent insurance companies as a precursor to schemes of arrangement. The Court considered that a provisional liquidator should be appointed because they would be better placed to advance a voluntary arrangement or scheme of arrangement for the orderly realisation of the company's assets and for resolving the issue of funds that had been frozen and for effecting the distribution of assets amongst creditors. Again, however, that was a situation where there was substantial support, from the company's regulator and from the directors of the company.

[50] In *Re China Solar Energy Holdings Ltd*, the provisional liquidator had been granted specific powers to facilitate a restructuring of the company. A shareholder applied unsuccessfully for the provisional liquidators to be discharged on the grounds that restructuring was not a legitimate function of provisional liquidation. Harris J

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26 *Daewoo Motor Co Ltd v Stormglaze UK Ltd* [2005] EWHC 2799 (Ch).
27 *Re Arm Asset Backed Securities SA* [2013] EWHC 3351 (Ch), [2014] BCC 252.
28 *Re China Solar Energy Holdings Ltd* [2018] HKCFI 555.
29 At 13.

expressed the view that in many circumstances restructuring would be consistent with the provisional liquidator's duty to preserve assets and therefore granting restructuring powers to provisional liquidators may be a corollary of the grounds for appointing provisional liquidators, rather than something antithetical to the grounds for appointing provisional liquidators.[30] But the case is not especially helpful because it is clear that specific powers were required and had been granted to the provisional liquidator to undertake such a course.

[51] In conclusion, whilst I accept that, in England and Wales, the appointment of provisional liquidators is now used to achieve broader objectives than the preservation of assets pending winding-up, that is only possible because of the discretion conferred on the court as to the terms on which appointment can be made. That is not the position in New Zealand. Interim liquidators in New Zealand can only be appointed for the purpose specified by s 246(1), namely maintaining the value of the company's assets, and they can only exercise their powers to that end.

[52] As discussed earlier, maintaining the value of a company's assets does not necessarily require maintaining the status quo. To the contrary, the status quo may very well be the cause of the declining value of an asset. In such cases there can be no objection to an interim liquidator selling the asset; the exchange of an asset of diminishing value for cash must, self-evidently, have the effect of maintaining its value as at the date of sale.

[53] Nor do I see that the compromise of a creditor's claim must, necessarily, fall outside the scope of an interim liquidator's power under s 246, though I reach that conclusion with considerable caution. It was argued that to do so would amount to a distribution of assets prior to liquidation, something that only a liquidator has the power to do. I do not accept this. An interim liquidator has the powers of a liquidator albeit they are constrained as to the purpose for which they can be used. One could envisage circumstances (perhaps rare) in which a creditor, for its own reasons, might be willing to compromise its claim on terms that genuinely represented a preservation of the company's assets for later distribution by the liquidator. But the compromise of

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30 At [27], citing *Re Union Accident Insurance Co Ltd* [1972] 1 All ER 1105 (Ch) at 1112.

one creditor's claim other than by agreement of the body of creditors or by a liquidator must surely be the exception.

[54] Against these conclusions, I turn to consider whether the power under s 246 would permit the Interim Liquidators to enter into the commutation agreement.

The Interim Liquidators' application

The terms of the Interim Liquidators' appointment

[55] It is relevant that the Interim Liquidators were appointed specifically on the grounds that CBLI's assets were at risk and that interim liquidation would ensure that the status quo would be maintained pending determination of the substantive application for liquidation. Mr Fiennes, the Head of Prudential Supervision at RBNZ, said in his affidavit in support of the application that:[31]

> CBLI's assets are in jeopardy …
>
> … Interim liquidators can take control of as many assets as possible and preserve them, pending the outcome of the substantive liquidation application …
>
> … The appointment of interim liquidators is necessary to maintain the status quo pending the determination of the liquidation application.
>
> …
>
> CBLI is insolvent in a balance sheet sense and appointment of interim liquidators will ensure that liabilities do not increase unavoidably pending the outcome of the liquidation application. This is because interim liquidators would effectively take the place of directors in controlling the affairs and assets of CBLI pending the determination of the liquidation application …

[56] Thus, the appointment was clearly intended to fulfil the conventional function of preserving the status quo. The order actually made and sealed was in terms that differed slightly from the wording of s 246(1); it recorded that the Interim Liquidators were to be appointed "with all powers and authorities as given to liquidators under the Companies Act 1993 (Act) that are necessary to maintain the assets of the defendant company". It omitted the words "the value of" immediately before "the assets". This went unnoticed at the hearing, no doubt because of the urgent circumstances in which the application was heard.

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[31] Affidavit of Toby Fiennes sworn 23 February 2018.

[57] Mr Salmon endeavoured to argue that this meant that the terms on which the Interim Liquidators had been appointed were in fact narrower than those provided by s 246(1), so that, effectively, the Court had limited the Interim Liquidators' powers under s 246(3). I do not accept that. Plainly, the omission of those words in the order reflected an oversight in the preparation of the application; there was no indication during the hearing (conducted on a Pickwick basis with CBLI represented) that the appointment was to be on terms other than provided for in s 246(1). In any event, I see no difference in the practical effect of the order as sealed from the wording of s 246(1); while the court may limit the rights and powers of an interim liquidator it cannot change the statutory purpose for which the powers are conferred, namely to maintain the value of assets.

Is execution of the commutation agreement within the powers of the Interim Liquidators?

[58] The Interim Liquidators say: the concept of maintaining the value of the company's assets under s 246 can relate to the company's net assets, not just to specific assets; the effect of the commutation agreement is to crystallise uncertain liabilities for a price that is in the lowest range that is likely to eventuate and the result will be that the company's net asset position will be preserved for the benefit of the remaining creditors; because CBLI had already signalled its intention to exit the French construction business, the settlement of its reinsurance obligations to Elite could fairly be described as being in the usual course of business.

[59] Several arguments were raised in opposition.[32] They can be summarised as follows. First, it would be unreasonable for an interim liquidator to proceed with the commutation agreement given that its effect would be to pay some 85 per cent of the company's cash to a single (albeit the largest) creditor, in circumstances when the impact on other creditors is unknown or, at least, disputed.

[60] Secondly, the fact that Elite is, itself, in distress, effectively rules out recovery of the money by a liquidator if the transaction were later impugned.

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[32] Counsels' submissions covered the merits of the Interim Liquidators' views regarding the financial effect of the commutation agreement on CBLI and its other creditors in some detail but, as previously indicated, this is not an aspect on which it is proper for me to express a view.

[61] Thirdly, there are statutory processes by which creditors' claims can be resolved and assets distributed in an orderly way which would be the more appropriate course.

[62] Fourthly, the fact that CBLI intended to terminate its involvement in underwriting French construction risks does not mean that this agreement is within the usual course of business.

[63] Fifthly, the agreement would not have the support of other creditors, either because they oppose the transaction or have not expressed a view. I note that, contrary to this argument, the Interim Liquidators filed a memorandum after the hearing attaching a letter on behalf of the liquidator of one of CBLI's largest trade creditors confirming its support for the commutation agreement. LBC objected to this being taken into account. I do take it into account because of its effect on the submission just noted, but its weight, coming after the hearing and without other parties being able to comment on it, is negligible.

[64] There is merit in all the points raised in opposition and, for the reasons that follow, I conclude that the commutation agreement is beyond the scope of the Interim Liquidators' powers. I start, first, with the general observation that the commutation agreement represents steps that would usually be the province of a liquidator rather than an interim liquidator. This is because, in reaching the agreement the interim liquidator has made an assessment of the value of Elite's likely claim on CBLI, whereas it would usually be for Elite to advance its claim in the context of a liquidation and for the liquidator to admit or reject it, either wholly or in part.[33] Because of Elite's circumstances, that decision is one that a liquidator would be unable to revisit. The agreement also compromises the debt, which would usually be a power exercised by a liquidator, particularly when it is opposed by other creditors.[34] The agreement results in the disposition of a number of the company's assets, including most of its cash, whereas it is generally for the liquidator to realise the company's assets for the benefit of all creditors.[35]

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33 Companies Act 1993, s 304(3).
34 Companies Act 1993, schedule 6(f).
35 Companies Act s 253.

[65] Although the Interim Liquidators do have the powers of a liquidator, they may only exercise those powers for the purpose of maintaining the value of the company's assets and, in my view, that is not the case here. The agreement is not intended to maintain the value of specific assets but, rather, to crystallise and eliminate CBLI's net liability to Elite. I acknowledge the view expressed by Plowman J in *Re Union Accident Insurance Co Ltd*, which Mr Thain relied on, that a reduction of the company's liabilities is the correlative of the protection of its assets.[36] However, that case concerned the straightforward position of a provisional liquidator closing branches of a business to reduce outgoings. There was no doubt that the company's liability position would be improved by doing so and the value of its assets thereby protected. But creditors were not affected. The company's assets were not divested. In comparison, the commutation agreement can only be achieved by divesting the CBLI of a significant proportion of its assets, including most of its cash.

[66] Moreover, although the Interim Liquidators have formed the view, on expert advice, that the commutation agreement will benefit the general body of creditors, the basis for that view is disputed, also on expert advice. Even treating the views of the directors and LBC with caution (given the directors' personal stake in the outcome and LBC's standing as shareholder rather than creditor), it is apparent from Mr Gibson's affidavit that there is genuine dispute over the effect of the commutation agreement.

[67] Finally, there are alternative courses of action in the form of a Scheme of Arrangement or a DoCA. An approach that is the product of consultation with all creditors would be the more usual solution.

[68] I am conscious of the Interim Liquidators' view that this agreement is likely to be the best available and there is urgency because of Elite's circumstances. Turning away from opportunities that are perceived in this way is not easily done. But I am satisfied that, looked at in the context of the surrounding circumstances and the statutory purpose by which the Interim Liquidators are constrained, execution of the commutation agreement is not within the powers conferred on them.

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[36] *Re Union Accident Insurance Co Ltd*, above n 30, at 1112.

Result

[69] The application for directions is dismissed.

[70] Save for publication of this decision in accordance with [15] above, the confidentiality orders in place in relation to access to the court file and to publication of material related to the hearing of the application for directions continue until the date set down for the hearing of the liquidation application or sooner by consent.

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P Courtney J

Addendum

[71] This judgment was published only to the parties and their counsel on 28 September 2018. Parties were invited to indicate whether they considered any part of the judgment ought to be redacted as being commercially sensitive.

[72] The Interim Liquidators advised that they considered the figures contained in [30] and [31] were commercially sensitive and should be redacted. LBC took a similar view. No other party filed a memorandum.

[73] I am satisfied that the figures contained at [30] and [31] are commercially sensitive and fall within the scope of the confidentiality orders that apply to this proceeding. The judgment will therefore be published with those parts redacted.